TEXAS CITATION WRIT LARGE: "TYRANNY OF THE INCONSEQUENTIAL" OR CONSEQUENTIAL NECESSITY?

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He has presented at numerous *TexasBarCLE* and *UTCLE* courses, been interviewed by *Law360* and the *Texas Lawyer*, been recognized in the 13th edition of the *Greenbook*, and been published in the *Appellate Advocate*, *Houston Lawyer*, *Journal of the Texas Supreme Court Historical Society*, *Texas Bar Journal*, *Texas Lawbook*, *Texas Tech Administrative Law Journal*, *Texas Tech Law Review*, and *Texas Water Journal*. In turn, his articles have been cited by the Texas Supreme Court (*Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 n.47 (Tex. 2012)), Texas Thirteenth District Court of Appeals (*Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 239 n.8 (Tex. App.—Corpus Christi-Edinburg 2008, no pet.)), as well as by: (1) the *Arkansas*, *Arkansas at Little Rock*, *Baylor*, *B.Y.U.*, *Houston*, *Idaho*, *Louisiana*, *Minnesota*, *Texas*, *Texas A&M*, *Texas Tech*, *Denver Water*, *Vermont*, and *West Virginia Law Review*s; (2) the *Duke*, *St. Mary's*, *Texas Environmental*, *Texas Tech Administrative*, *Tulane Environmental*, and *Widener Law Journal*s; (3) the *Natural Resources*, *Oil & Gas Natural Resources & Energy Journal*; and (4) the *Environmental Law*, *Law & Business Review of the Americas*, *Greenbook: Texas Rules of Form*, *Michigan Journal of Law Reform*, and *Rocky Mountain Mineral Law Institute*.

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I. WHY SHOULD ANYONE CARE ABOUT CITATION?[1]

Most attorneys likely view citation as an arbitrary and somewhat silly skill learned out of necessity in law school, but quickly forgotten and discarded once the practical necessities of modern legal practice take hold of one's six-minute increments.

So silly, in fact, that University of Texas School of Law Professor Wayne Schiess has dubbed such strict adherence to proper citation form—particularly if it is clung to wholly apart from the underlying merits of the legal argument being made—the "tyranny of the inconsequential."[2]

And he's absolutely right. Yet accurate citation is also and almost paradoxically an essential persuasive arrow in a legal writer's quiver. Because here in Texas, incorrect citation can not only make you look intellectually fatuous—even when you're not—it can also result in the precedential denudation of an improperly cited case.

Consequently, accurate citation is something more than the pedant cherry atop an otherwise cogent legal argument, it is instead one of the buttressing foundations of establishing both an author's credibility to his audience as well as a basic demonstration of one's elemental understanding of persuasive writing.

II. THE TYRANNY OF PROPER CITATION[3]

> Mastering the arcana of citation forms . . . is not a productive use of judges' or law clerks' time. The purpose of citations is to assist researchers in identifying and finding the sources; a form of citation that will serve that

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[1] I would like to extend special thanks to the following colleagues, upon whose work I've ~~brazenly plagiarized~~ heavily relied: (1) University of Texas School of Law Professor Wayne Schiess; (2) Chad Baruch; and (3) Bradley Clark.

Incidentally, Bradley holds the distinct if dating honor of publishing the first (and late) Texas-centric legal blog—the *Texas Law Blog*—waaay back in the internet dark ages circa 2003.

[2] Wayne Schiess, *Citation Form: The Tyranny of the Inconsequential*, LEGALWRITING.NET BLOG BY WAYNE SCHIESS (Aug. 9, 2012), https://sites.utexas.edu/legalwriting/2012/08/09/citation-form-the-tyranny-of-the-inconsequential/ [hereinafter *Tyranny of the Inconsequential*].

[3] Not only this heading, but portions of this article's text are lifted wholesale from the defunct musings of an "itinerant shepherd with a penchant for blogging from the pasture," whose now-dated "vaguely legally-tinged ode[s] to arcana" may still be found at http://sophisticmiltonianserbonianblog.wordpress.com/.

> end is sufficient. In addition, the form of citation should be consistent to avoid the appearance of lack of craftsmanship and care.[4]

As Professor Schiess has observed: this statement from the *Judicial Writing Manual* is undoubtedly accurate, but does not reflect the reality of the scarlet hue that attaches to one marked by improper citation.[5]

Many lawyers, some judges, and most every law clerk "will judge you by your citation form, as inconsequential as it may be."[6] Often, a lawyer's legal prose may be the only hallmark by which court staff know an attorney, and the sole measure by which a lawyer is judged in the back halls of the courthouse.[7] In some instances, even courts resort to citational "benchslapping"[8] of one another.[9]

Of course, a legal writer must put forth a well-reasoned argument, but slovenly citation will invariably detract from the credibility otherwise established by compelling reasoning. Although good citation form may not—in and of itself—"win over many readers, poor form will assuredly put off those who prize accuracy."[10]

All too often, however, those who employ suspect citation tend to evidence similar diligence in their legal reasoning as well. Back many moons ago, when it was my job to read briefs submitted by others, it was a very rare occurrence indeed when a brief that jumped out at me as being offensively lax in its citation was inversely impressive for its thoughtful analysis. The converse was also true: rarely were briefs that shone with impeccable citation burdened by makeweight reasoning. Once you've lost credibility through incorrect citation, it's difficult to regain it through

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4 *Tyranny of the Inconsequential* (quoting FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL 24 (1991)).

5 *Id.*

6 *Id.*

7 Bradley B. Clark, *Yes, Judges Really Do Care About That! Lawyers' Most Common Citation Mistakes*, 3, State Bar of Tex. Prof. Dev. Program, Consumer and Commercial Law Course (2007) [hereinafter *Judges Really Do Care About That!*].

8 *See* Article III Groupie (aka David Lat), *Bench-Slapped!* Reinhardt v. O'Scannlain, UNDERNEATH THEIR ROBES (June 24, 2004), http://j.mp/10KEzDL (describing the derivation and origination of the term, "bench-slap"); *see also Benchslap*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "benchslap").

9 *See, e.g.*, *Thorne v. Jones*, 765 F.2d 1270, 1275 (5th Cir. 1985) (appending a "sic" notation to the U.S. Supreme Court's citation of *one of its own* prior cases, merely because the High Court adhered to its own style guide instead of the *Bluebook*); James W. Paulsen, *An Uninformed System of Citation*, 105 HARV. L. REV. 1780, 1784 (May 1992) (book review) [hereinafter *Uninformed System*].

10 Bryan A. Garner, *Foreword*, THE GREENBOOK: TEXAS RULES OF FORM xiv (Texas Law Review Ass'n ed., 14th ed. 2018).

unassailable logic. Ultimately, it is always best to try to avoid engendering snickering from one's legal reader.

That said, oftentimes which *Bluebook* or *Greenbook* rule (or combination thereof) exactly applies to a given citation is not always clear. I remain convinced that, as long as you appear to generally have a clue as to how to cite something (i.e., it "looks right"), no briefing or staff attorney will hold it against you if your attempt isn't strictly correct. They're substantively checking your cites for—and judging your credibility based upon—the accuracy with which you cite the material relied upon, not the running tally of *Bluebook*[11] or *Greenbook*[12] rules of which you may have technically run afoul.[13]

III. Citation Resources Upon Which to Rely

The two main resources one should consult for all citation guidance in Texas are the *Bluebook* and the *Greenbook*. Both have been the primary citation guides in

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[11] The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) [hereinafter Bluebook]. My references to the *Bluebook* throughout this article will be technically incorrect because I refuse to include a prefatory article in my references to a publication merely because it is included as part of its title.

[12] Texas Rules of Form: The Greenbook (Texas Law Review Ass'n ed., 14th ed. 2018) [hereinafter Greenbook]. *See supra* note 11 (explaining my obstinate refusal to include, "the," in my reference to either the *Bluebook* or the *Greenbook*).

[13] *See, e.g.*, Hon. Richard A. Posner, *The* Bluebook *Blues*, 120 Yale L.J. 850, 852 (2011) [hereinafter Bluebook *Blues*] (a "system of citation forms has basically two functions: to provide enough information about a reference to give the reader a general idea of its significance and whether it's worth looking up, and to enable the reader to find the reference if he decides that he does want to look it up").

circulation,[14] both nationally since 1926[15] and in Texas since 1966.[16] Also invaluable to legal writing in Texas is the *Manual on Usage and Style* (the "*MUS*").[17] Along

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[14] As the former Dean of my legal alma mater documented, legal citation has been traced to Roman antiquity in 71 A.D., and the earliest-known citation manual, the *Modus Legendi Abbreviaturas in Utroque Iure*, was first published around 1475. A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New Bluebook (Including Compendia of State and Federal Court Rules Concerning Citation Form*, 26 STETSON L. REV. 53, 58 n.13 (Fall 1996) [hereinafter *Un-Uniform System*] (citing Byron D. Cooper, *Anglo- American Legal Citation: Historical Development and Library Implications*, 75 L. LIBR. J. 3, 4, 20, 20 n.140 (1982)).

[15] The first edition of the *Bluebook* was printed in 1926. Fred R. Shapiro & Julie Graves Krishnaswami, *The Secret History of the* Bluebook, 100 MINN. L. REV. 1563, 1577, 1581–82 (April 2016) [hereinafter *Secret History*]; Bluebook *Blues*, 120 YALE L.J. at 854; *Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 57 n.10; *Uninformed System*, 105 HARV. L. REV. at 1782. However, the actual lineage of the *Bluebook*—specifically whether it originated at Yale in 1920 or Harvard six years later—has recently come into question. *See Secret History*, 100 MINN. L. REV. at 1569–84. The original precursor to the first edition of the *Bluebook* appears to be a single page contained in a blue-cladded, 1920 eight-page pamphlet used internally by the *Yale Law Journal*, which was authored in part by the son of famed comedian W.C. Fields. *Id.* at 1569, 1573–74. Two years later in 1922, the *Harvard Law Review* issued its own twenty-one-page internal writing guide, eight pages of which were devoted to citation. *Id.* at 1577; *Uninformed System*, 105 HARV. L. REV. at 1782, 1782 n.14.

Notably, the *Bluebook* was not actually blue until its sixth edition in 1939. *Secret History*, 100 MINN. L. REV. at 1582 n.67; Alan Strasser, Book Note, *Technical Due Process: ?*, 12 HARV. C.R.-C.L. L. REV. 507, 508 (1977) [hereinafter *Technical Due Process?*]. Instead, the first edition has been described as having been greenish in color (either "dark greenish-grey" or "muddy green"). *Secret History*, 100 MINN. L. REV. at 1582 n.67. The second through fifth editions were brown. *Id.*; *Technical Due Process?*, 12 HARV. C.R.-C.L. L. REV. at 508. Sometime between the appearance of the blue 6th edition in 1939, and the white-with-blue-trim-colored 11th edition was published in 1967, the moniker, "Bluebook," attached to the legal vernacular—but did not adhere to the official title until the publication of the 15th edition in 1991. *See Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 58–59; *compare* A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 6th ed. 1939), *with* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 15th ed. 1991).

[16] The original edition of the *Texas Rules of Form* was published in 1967. Telephone interview with Paul Goldman, Texas Law Review Association, Publications Office (Mar. 25, 2013); *see also* TEXAS RULES OF FORM ii (Texas Law Review Ass'n ed., 1st ed. 1966). The earliest recorded reference I can find to the *Greenbook* in either caselaw or the literature is a mention of the 1974 3d edition in the 1977 Corpus Christi Court of Appeals's case of *Cont'l Oil Co. v. Dobie*, 552 S.W.2d 183, 187 (Tex. App.—Corpus Christi 1977, writ ref'd n.r.e.).

Other notable Texas-centric citation guides include: (1) former Texas Supreme Court Chief Justice Joe Greenhill's 1964 *Texas Bar Journal* article laying out *Uniform Citations for Briefs*; (2) former Texas Attorney General Crawford Martin's 1967 *Uniform Citations for Opinions, Correspondence and Briefs* still on the shelves of the State Law Library; or (3) that institution's first Director, Marian Oldfather Boner's 1971 *Simplified Guide to Citation Forms*. Marian O. Boner, *Simplified Guide to Citation Forms* (Tarlton Law Library 1971) (it is my contention that Professor Boner has, to this day, one of the single coolest middle names ever placed on a Texas birth certificate); Hon. Crawford C. Martin, *Uniform Citations for Opinions, Correspondence and Briefs* (Office of the Attorney General 1967); Hon. Joe Greenhill, *Uniform Citations for Briefs: With Observations on the Meanings of the Stamps or Markings Used in Denying Writs of Error*, 27 TEX. B.J. 323 (May 1964).

these lines, Matthew Butterick's essential *Typography for Lawyers* is another source every Texas litigator should have in her collection.[18] Of note, Mr. Butterick has also released a free web-based typography guide at https://practicaltypography.com/ that largely if not identically tracks his typographical recommendations contained in his *Typography for Lawyers*.[19] Finally, for those whose practices include federal appellate litigation, I suggest as well Jack Metzler's twin tomes reprinting the U.S. Solicitor General's *Style Guide*[20] as well as the U.S. Supreme Court's previously-internal *Style Guide*.[21]

Quite useful to modern legal writers is the debut within the last half decade or so of an app[22] called ***rulebook***™ for which the *Bluebook*, the *Greenbook*, and the *MUS* have licensed their content.[23] The app contains all the material from the printed 20th edition of the *Bluebook*, as well as the 14th editions of both *Greenbook* and the *MUS* (including interim printings). For this reason, as well as for its mobile utility, I highly recommend practitioners explore using ***rulebook***™ in addition to the printed volumes.[24]

There exists another national citation guide, the *ALWD Citation Manual* (the "*ALWD*"), but, from my vantage point,[25] it is as widely seen in Texas as a Yeti.[26] In fact, I have yet to actually witness one opened or used either in classes or on my journal in law school, during my clerkship, or in private practice—***ever***. Therefore, I do not recommend becoming overly familiar with its mandates for use in Texas

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[17] THE MANUAL ON USAGE & STYLE (Texas Law Review Ass'n, ed., 14th ed. 2017) [hereinafter MUS].

[18] MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS (2d ed. 2015) [hereinafter TYPOGRAPHY FOR LAWYERS].

[19] MATTHEW BUTTERICK, PRACTICAL TYPOGRAPHY, https://practicaltypography.com/ (last visited Nov. 18, 2019).

[20] OFFICE OF THE SOLICITOR GENERAL, THE SOLICITOR GENERAL'S STYLE GUIDE (Jack Metzler ed., 3d ed. 2018).

[21] OFFICE OF THE REPORTER OF DECISIONS, THE SUPREME COURT OF THE UNITED STATES, THE SUPREME COURT'S STYLE GUIDE (Jack Metzler ed., 2016).

[22] If you have to refer to this footnote to discover what an "app" is, you probably won't find apps of any kind useful in your practice. *See, e.g.*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, "APP," https://en.wikipedia.org/wiki/App ("software designed to run on smartphones and other mobile devices").

[23] *See* BLUEBOOK at vi. Of note, the ***rulebook***™ app may only be available on apple devices. *See id.*

[24] For that matter, I also highly recommend the *Black's Law Dictionary* app, which contains material from the 10th edition. Surprisingly delightful is the app's feature of reducing the volume of any audio playing on your device when using the app.

[25] Which, admittedly, may be dated at this point.

[26] The mythical Himalayan man-beast—not the cooler.

practice. This is not a comment upon its substantive merits, which colleagues more learned than I assure are many,[27] but merely a comment upon perhaps the most efficient way to spend your billable six-minute increments boning up on citation form.

IV. All That's Wrong with the *Greenbook* and the Bluepages

One aspect of the debate regarding the efficacy of accurate legal citation that often goes unmentioned is that every major citation manual always seems to be changing—and often for no discernibly rational reason.

We've had ***twenty*** versions of the *Bluebook*,[28] and ***fourteen*** apiece for the *Greenbook*[29] and *MUS*.[30] Invariably, a new edition will emerge from both the Ivy-League and bovine catacombs every other year or so, often dramatically altering some long-practiced citation form with little if any convincing explanation for the revision. This is one of the primary reasons the Texas bar as a whole tends to look somewhat derisively—the more so the longer one has been in practice—at the utility of staying current with whatever the newest citation fad may be. No doubt in part due to advancing age, I am now beginning to fall prey to this worldview as well.

The periodic revision of citational dogma has now resulted in the wholly unnecessary and duplicative creation of two separate citation regimes—one for academic legal periodicals (the *Bluebook*'s whitepages) and one for everything else (the *Bluebook*'s bluepages).[31] Because one system is hypertrophic enough[32]—let alone ***two***—I prefer to treat justices, judges, and court staff like adults (or at the very least, like 2L law students) and refuse in practice to cite sources differently than I would to academia (apart from footnoting!).

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27 *See, e.g.*, *Judges Really Do Care About That!* at 4–5 (noting that the *ALWD* has now been adopted by some 72 law schools and the Eleventh Circuit); K.K. DuVivier, *The Scrivener: Modern Legal Writing: The Bluebook No. 18—"Thank God for competition . . . ,"* Colo. Law., Nov. 2005, at 112 [hereinafter *Bluebook No. 18*] (estimating the *ALWD*'s use by some 90 law schools); *see also* ALWD Guide to Legal Citation (Ass'n of Legal Writing Directors & Coleen M. Barger, 6th ed. 2017) (former Texas Tech University School of Law Dean Dickerson served as the principal author of the *ALWD* from the 1st edition in 2000 to the 4th edition in 2010).

28 Bluebook at iii.

29 Greenbook at iii.

30 MUS at i. Of note, the 2d edition of the *MUS* first appeared in 1967, the forward to which was penned by federal practice authority Charles Alan Wright. *Id.* at ix–x.

31 Bluebook at 3.

32 Bluebook *Blues*, 120 Yale L.J. at 851 (describing the cottage-industry dominated by the *Bluebook* as "hypertroph[ic] in the anthropological sense," because "[i]t is a monstrous growth, remote from the functional need for legal citation forms, that serves obscure needs of the legal culture and its student subculture").

A. How Yet *Another* Citation Regime Came to Be

Beginning in earnest with the advent and apparent growing popularity of the *ALWD*, as well as the publication of the 18th edition of the *Bluebook*, a wave of "practitioner"-friendly alternative citation forms began to circulate widely in legal-writing circles, each of which were aimed at establishing a different paradigm of citation directives for practitioners' legal documents (i.e., briefs, pleadings, memoranda, etc.).[33]

The infancy of this endeavor originated in 1981, when the 13th edition of the *Bluebook* first included, on the inside of the front and back covers, alternative "Basic Citation Forms" for "Briefs and Memoranda."[34] By the 15th edition in 1991, these alternative citation forms were expanded into 10 pages of "Practitioners' Notes."[35]

The publication of the 18th edition of the *Bluebook* in 2005 brought the alternative-citation movement to full flower, wherein the *Bluebook* expanded fourfold the former 10-page "Practitioners' Notes" into a 40-page section dubbed the "Bluepages".[36] In the current 20th edition, the Bluepages now span more than 50 pages, and the entire tome is ***560 pages*** long.[37]

B. Why Any of this Matters in Texas

The only reason why this exposition is remotely relevant to the art of modern-day citation is that, beginning with the 11th edition of the *Greenbook*, the student editors chose to revise the entirety of the *Greenbook*'s typographic conventions to comport not with the *Bluebook* itself but with its *Bluepages* instead.[38] The most recent edition of the *Greenbook* backs off this stance somewhat "for stylistic purposes," but nevertheless—since 2005—the entire *Greenbook* has largely been transformed into one big "Greenpages."[39]

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33 *Bluebook No. 18*, COLO. LAW., Nov. 2005, at 111–12.

34 *Id.* at 111. This quick-reference guide still exists in the 20th edition but is now reprinted on the inside back cover and facing page. BLUEBOOK at 562 (please note that page 562 doesn't actually exist as the facing page to the inside back cover of the *Bluebook* has no page designation, but the page facing the flip side of that page is 560—hence page 562).

35 *Bluebook No. 18*, COLO. LAW., Nov. 2005, at 111.

36 *Id.*; *see generally* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

37 BLUEBOOK at 3–56. Judge Posner expressed his desire to read all 511 pages in the 19th edition as approximating the famous dying words of Marlon Brando's iconic character from *Apocalypse Now*: "The horror … the horror …." Bluebook *Blues*, 120 YALE L.J. at 852 (quoting APOCALYPSE NOW (Zoetrope Studios 1979)).

38 TEXAS RULES OF FORM iv–v (Texas Law Review Ass'n ed., 11th ed. 2005).

39 *See* GREENBOOK at 1–2 ("Previous edition of *The Greenbook* insisted on this convention, but the fourteenth edition editors endorse using LARGE AND SMALL CAPITALS for stylistic purposes").

One can (and I do) easily enough ignore the existence of the *Bluepages* when citing a given source and still technically be "correct" under the strictures of the 20th edition of the *Bluebook*. Since 2005, however, if one does this here in Texas—citing a Texas source generally[40]—your citation form may be understood to be incorrect by an exacting legal reader.

Nevertheless, the very existence of the Bluepages is nevertheless maddening because the entire reason for their promulgation grew out of the difficulty many practitioners had in complying with the use of small caps, italics, and other typeface accents that once—long, long ago—were difficult to apply. This is a kind way of saying that, when most word-processing was performed not on computers but on typewriters, italics and small caps were understandably problematic to use.[41] Hopefully, no one you know or practice with still prepares anything vaguely legal on any device without a power cord and a screen. Because the ease of applying these typefaces with any modern word-processing program has exponentially increased over the last 30 years, it is baffling why any legal writer would advocate for the use of typographic conventions more appropriate to the ***industrial***—instead of the ***digital***—age.[42]

I argue that, not only is the typeface variety long favored by the *Bluebook* not too terribly difficult to learn and employ effectively, it actually serves the purpose of citation in the first place, which is to aid the reader in their comprehension and evaluation of the authority you provide.

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[40] "Except as modified herein [the 12th edition of the *Greenbook*,] *The Bluebook* should be followed." THE GREENBOOK: TEXAS RULES OF FORM iv (Texas Law Review Ass'n ed., 12th ed. 2010) [hereinafter 12th GREENBOOK].

[41] TYPOGRAPHY FOR LAWYERS 42, 74, 77 (examining how many common typeface and formatting practices are holdovers from the typewriter-era).

[42] The *Bluepages* still list examples of case cites with underscored styles for goodness sake. *See e.g.*, BLUEBOOK at 4–14; TYPOGRAPHY FOR LAWYERS at 74. One might as well attach a ***buggy whip*** as an exhibit to the pleading you submit as deign to underscore a case style in public. *See* HON. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 136 (Thomson/West 2008) [hereinafter MAKING YOUR CASE] (quoting MARK P. PAINTER, THE LEGAL WRITER 35 (2002) ("I have seen firms spend hundreds of thousands of dollars on technology only to make their briefs and other documents look like they were typed on a 1940 Underwood ...."); *Judges Really Do Care About That!* at 6; TYPOGRAPHY FOR LAWYERS at 74 (explaining that underscoring is a holdover from the typewriter age, when the "only way to emphasize text was to back up the carriage and type underscores beneath" it); *see also* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, REQUIREMENTS AND SUGGESTIONS FOR TYPOGRAPHY IN BRIEFS AND OTHER PAPERS 5, *available at* http://www.ca7.uscourts.gov/forms/type.pdf (last visited Nov. 18, 2019) [hereinafter SEVENTH CIRCUIT TYPOGRAPHY] ("Use italics, not underlining, for case names and emphasis. Case names are not underlined in the United States Reports, the Solicitor General's briefs, or law reviews, for good reason. Underlining masks the descenders (the bottom parts of g, j, p, q, and y). This interferes with reading, because we recognize characters by shape. An underscore makes characters look more alike, which not only slows reading but also impairs comprehension.").

So, particularly now, it is all the more important to keenly adjudge your legal audience before deciding which citational route to take in the prose you submit for their review. Most if not every justice, judge, and attorney of somewhat-recent vintage will likely assume the practitioners' conventions followed by the *Greenbook* and the *Bluepages* are just flat-out wrong. However, younger lawyers and clerks especially—to whom most every judge I have ever known graciously and perhaps eagerly defer on matters of citation—may think your stubborn use of small caps and italics is not out-and-out incorrect per se, but perhaps just a sign of generational disconnect.

V. Basic Citation Forms

At the outset, I will admit that many of the citation conventions I use personally and may even try to convince you to similarly utilize are no longer strictly correct after the changes wrought by the 11th edition of the *Greenbook*. So, in such instances, I provide both my own preferred citation form as well as the most current and accurate form—and why I think it is rubbish. I also provide some reminders regarding common traps for certain cite forms.

In addition, this article is not intended to provide a comprehensive republication of every citation form included in the *Bluebook* and *Greenbook*. Instead, presented below is a quick cheat-sheet of some of the most commonly relied upon civil sources here in Texas.[43]

Finally, please also keep in mind that, no matter what practices are recommended in this article, in the *Bluebook*, the *Greenbook*, or any other citation manual for that matter, one should always investigate and follow whichever manual or whatever directives the local rules prescribe of the court in which your briefing is to be submitted.[44]

A. Constitutions

U.S. Const. amend. XIV;[45] and

Tex. Const. art. I, § 17(a).[46]

- But See -

The more common and pre-11th-edition-of-the-*Greenbook* form would be …

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[43] For a better compendium of such citation forms, I recommend perusing the inside front covers and facing pages of both the *Bluebook* and the *Greenbook*, which contain quick-reference guides of common citations. *See* Bluebook at i.

[44] *See* Making Your Case at 123.

[45] Bluebook R.11 at 118.

[46] Greenbook R.9.1 at 39.

TEX. CONST. art. I, § 17(a).[47]

B. Statutes

1. Federal

42 U.S.C. § 1983 (2012);[48] and

12 U.S.C.A. § 1426 (West 2010).[49]

- But See -

Technically, the United States Code is only printed every six years (2000, 2006, 2012, etc.), so the *Bluebook* requires citing to the U.S.C.A. for any provision enacted subsequent to the latest edition of the U.S. Code. This is silly and profoundly antiquated. Either the law is a part of the current U.S. Code or it's not. If you must include a date in your citation (& I don't recommend doing so unless it is relevant), include whichever year is the most recent during which the cited statute was in force:

42 U.S.C. § 1983; and

12 U.S.C. § 1426.

2. State

Tex. Water Code Ann. § 36.002(a) (West 2011).[50]

- But See -

You'll notice that the Texas Supreme Court rarely—if ever—uses "Ann.," "West," or dates in statute citations within its opinions. This is because the Court's[51] internal style guide directs judicial staff not to. The Court takes the view that Texas law is not proprietary, and therefore providing attribution to a commercial reprinting service in a citation is unnecessary and—dare I say—slightly unseemly. Regarding omitting dates from Texas statute cites, the Court's style guide instructs that dates should only be included if relevant to the analysis.

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47 TEXAS RULES OF FORM 37 (Texas Law Review Ass'n ed., 10th ed. 2003) [hereinafter 10th GREENBOOK].

48 BLUEBOOK R.12.1 at 120.

49 *Id.*

50 GREENBOOK R.10.2.1 at 46, App'x H at 116.

51 Fully cognizant that an article opining on correct citation should not itself appear to be ignorant of citational mandates, the author readily admits his provincial bias in insisting upon capitalizing references to the Texas Supreme Court and its Justices, even though such an upper-case honorarium is traditionally reserved only for references to the U.S. Supreme Court along with its Justices. *Contra* BLUEBOOK R.B8 at 9, R.7 at 92–93; MUS R.3.09 at 36.

Indeed, the original reason for including a reference either to "Vernon" (now "West") or "Supp." was to indicate to the reader which bound or loose-leaf volume to pull from the shelves in which to check the accuracy of a citation. Because virtually no one physically "shelf-checks" citations anymore, any substantive need for inclusion of this information has long since passed. If I need to cite a historical provision, I'll cite to a session law.[52]

I tend to agree with the Court (particularly when briefing before it), therefore I never include, "Ann.," "West," or a date when citing Texas statutes in any forum:

> TEX. WATER CODE § 36.002(a).[53]

C. Cases

1. Federal

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001);[54]

Am. Airlines, Inc. v. Sabre, Inc., 694 F.3d 539 (5th Cir. 2012);[55]

United States v. Santos-Guevara, 406 F. App'x 874 (5th Cir. 2010) (per curiam);[56] and

Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668 (S.D. Tex. 2001).[57]

Of note, if a U.S. Supreme Court opinion is published in the *U.S. Reports* ("U.S."), cite only to that reporter.[58] Do not include parallel citations to the *Supreme Court Reporter* ("S. Ct.") or the *United States Supreme Court Reports Lawyers' Edition* ("L. Ed.").[59] If the decision has not yet appeared in the *U.S.*, cite to the *S. Ct.*, and then to *L. Ed.*, in that order.[60]

The *Federal Appendix* ("F. App'x") is likely one of the clearest examples of an existential jurisprudential oxymoron. This is because it exists to publish every federal circuit appellate opinion that has not been designated for publication in the

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52 GREENBOOK R.10.3 at 49.

53 *See, e.g.*, 10th GREENBOOK at 40.

54 BLUEBOOK R.10 at 94, R.10.4 at 104, T.1.1 at 233.

55 *Id.* R.10 at 94, R.10.4 at 104, T.1.1 at 234.

56 *See id.* R.10.6.1(b) at 108, T.1.1 at 234.

57 *Id.* T.1.1 at 235.

58 *Id.* T.1.1 at 233.

59 *Id.*

60 *Id.*

Federal Reporter.[61] In other words, it ***publishes unpublished*** federal appellate opinions.

There is no space in the reporter abbreviation, "U.S.," but there is a space in both "S.•Ct." and "L.•Ed."[62] The same is true for circuit and district court reporters: "F.3d," but see "F.•App'x" and "F.•Supp.•2d."[63]

Finally, always be careful in the spacing applied to court abbreviations: "5th•Cir.," "D.C.•Cir.," "W.D.•Tex.," but see "S.D.N.Y."[64]

2. State

a. Texas Supreme Court

Texas A&M Univ.-Kingsville v. Moreno, No. 11-0469, 2013 WL 646380, at *1 (Tex. Feb. 22, 2013);[65]

Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012);[66]

In re *McAllen Med. Ctr., Inc.*, 275 S.W.3d 458 (Tex. 2008) (orig. proceeding);[67]

Houston & Tex. Cent. Ry. Co. v. East, 81 S.W. 279 (Tex. 1904);[68]

Lamar v. Houston (Tex. 1845), 65 TEX. L. REV. 382, 383 (Paulsen rep. 1986);[69] and

Rep. v. McCulloch, Dallam 357 (Tex. 1840).[70]

Between 1886 and July 1962, Texas Supreme Court cases were printed in both the *Southwestern Reporter* series and the *Texas Reports*.[71] Cases decided between 1846 and 1886 were only reported in the *Texas Reports*.[72] The most recent edition of the *Greenbook* abandons the previous requirement to include parallel citations to

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61 *F. App.*, BLACK'S LAW DICTIONARY (10th ed. 2014).

62 BLUEBOOK T.1.1 at 233.

63 *Id.* T.1.1 at 234.

64 *See id.* T.1.1 at 234–35.

65 GREENBOOK R.2.1.2 at 7–8.

66 *Id.* R.2.1.1 at 7.

67 *Id.* R.6.1 at 31.

68 *Id.* R.2.3.2 at 9.

69 *Id.* App'x A.2 at 99.

70 *Id.*

71 *Id.* R.2.2 & 2.3.2 at 9.

72 *Id.* R.2.3.1 at 9, App'x A.1 at 98.

both reporters for cases reprinted in each.[73] In keeping with the sage advice of Judge Posner that citations should generally serve only two functions—to enable the reader to: (1) find the reference; and (2) determine whether it's worth looking up[74]—I favor following the modern *Greenbook* convention of omitting the duplicative *Texas Reports* citation where a case is also reported in the *Southwestern Reporter*.

Only two eras in the Texas Supreme Court's history bear mention because of their effect on the precedential weight accorded the decisions rendered during those times. Accordingly, opinions issued during Reconstruction (dubbed the "Military Court") from 1867–70 (30 Tex. 375 to 33 Tex. 584) are not precedential because the Court operated without constitutional authority during that time.[75] In turn, opinions issued by the so-called "Semicolon Court" that sat from 1870–73 (33 Tex. 585 through 39 Tex.), while technically precedential, are often not accorded jurisprudential respect because of the juridic pall that hung over that Court.[76] Notably, because the Texas judiciary operated under a constitution during the Civil War, and the U.S. Supreme Court held just three years after the Civil War ended that Texas "did not cease to be a State, nor her citizens to be citizens of the Union" during the conflict, the author does not recommend the automatic relegation of decisions rendered by the "Confederate Court" between 1861–65 (26 Tex. through 27 Tex.) to merely persuasive status.[77]

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[73] *Compare, e.g.*, 12th GREENBOOK at 9, *with* 10th GREENBOOK at 8.

[74] Bluebook *Blues*, 120 YALE L.J. at 852.

[75] GREENBOOK App'x A.1 at 98; Jim Paulsen & James Hambleton, *Confederates & Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era*, 51 TEX. B.J. 916, 920 (Oct. 1988) [hereinafter *Confederates & Carpetbaggers*]; *see also Peck v. City of San Antonio*, 51 Tex. 490, 492 (1879) (adopting Chief Justice George Moore's majority opinion explaining that, because the Military Court was installed "by virtue of military appointment" instead of "by virtue of the [Texas] Constitution," the decisions of that Court are not authoritative); Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 92 (Winter 2007) [hereinafter *Citation Writ Large*].

[76] *See Confederates & Carpetbaggers*, 51 TEX. B.J. at 919–20; *see also Citation Writ Large*, 20 APP. ADVOC. at 92–93. The infamous decision of Ex Parte *Rodriguez*, 39 Tex. 706, 773–76 (1873) led to the Court's unfortunate nickname. *Confederates & Carpetbaggers*, 51 TEX. B.J. at 919–20. The decision was prompted by an original habeas corpus proceeding brought by a jailed voter who was arrested for voting twice in the gubernatorial election. *See* Robert W. Higgason, *A History of Texas Appellate Courts: Preserving Rights of Appeal Through Adaptations to Growth, Part 1 of 2: Courts of Last Resort*, 39 HOUS. LAW. 20, 23 (Apr. 2002) The makeweight reputation of the Semicolon Court springs from its invalidation of an entire statewide election on the basis of the ***placement of a semicolon*** in article 3, section 6 of the Constitution of 1869,26 and the resulting impression amongst the bar that the "whole case . *Confederates & Carpetbaggers*, 51 TEX. B.J. at 919; Hon. James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 285 (1959); *see* TEX. CONST. OF 1869, art. III, § 6, *reprinted in* 7 H.P.N. Gammel, *The Laws of Texas 1822–97*, at 393, 399 (Austin, Gammel Book Co. 1898).

[77] *Texas v. White*, 74 U.S. 700, 726 (1868), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476, 496 (1885) (holding that "the ordinance of secession, adopted by the convention and

Although the *Greenbook* directs practitioners to note all dispositions by the U.S. Supreme Court save for cert denials over two years old, I recommend against needlessly adding this citational baggage unless relevant.[78]

Of note, an authored Texas Supreme Court opinion technically carries the same precedential weight as does a petition-refused intermediate appellate court case, or an adopted or approved opinion of the Texas Commission of Appeals, or even a Texas Supreme Court per curiam opinion. But even though they may have the same precedential import, one would never intentionally cite to a Texas Supreme Court per-curiam opinion for a given point of law if the same issue is addressed in an authored opinion from the Court. This is because per-curiam opinions: (1) have traditionally been used primarily as error-correction vehicles; and (2) frequently merely parrot the seminal holding from an authored opinion.[79] Therefore, whenever possible, cite to an authored Court opinion in place of a per curiam one.

b. Texas courts of appeals

Tex. S. Rentals, Inc. v. Gomez, 267 S.W.3d 228 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.);[80]

In re *Ruiz*, 16 S.W.3d 921 (Tex. App.—Waco 2000, orig. proceeding);[81]

Upton v. Brown, 960 S.W.2d 808 (Tex. App.—El Paso 1997, no pet.) (rendered Sept. 4, 1997);[82]

Holguin v. Ysleta Del Sur Pueblo, 954 S.W.2d 843 (Tex. App.—El Paso 1997, writ denied) (rendered Aug. 28, 1997);[83] and

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ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null").

It may also be noted that George W. Paschal, who also served as the Texas Supreme Court's official reporter from 1866–69 for volumes 28–31 of the *Texas Reports*, also represented Texas before the U.S. Supreme Court in *White*. *See White*, 74 U.S. at 717; Robert B. Gilbreath, *Slaves, Reconstruction, and The Supreme Court of Texas*, APP. ADVOC., Fall 2006, at 9; Robert B. Gilbreath, *The Supreme Court of Texas and the Emancipation Cases*, 69 TEX. B.J. 946, 953 n.16 (Nov. 2006).

78 *See* GREENBOOK R.2.3.2 at 9.

79 *See Citation Writ Large*, 20 APP. ADVOC. at 93–94; Hon. Robert H. Pemberton, *One Year Under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court Proceedings*, State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course ch. B, B-18 (1998); *compare*, *e.g.*, *Tooke v. City of Mexia*, 197 S.W.3d 325, 328 (Tex. 2006), *with Satterfield & Pontikes Const., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390, 391 (Tex. 2006) (per curiam) (hinging its holding on the "reasons explained in" *Tooke*).

80 GREENBOOK at R.4.1.1 at 14–15, R.4.3.1 at 20, R.4.4.1 at 22.

81 *Id.* R.6.2.1 at 32.

82 *Id.* R.4.4.2 at 23.

83 *Id.*

Bd. of Adjustment v. Rich, 328 S.W.2d 798 (Tex. App.—Fort Worth 1959, writ ref'd).[84]

Always be sure to doublecheck 1997 intermediate appellate court opinions to determine whether they were issued before or after September 1, 1997—if issued ***before*** September 1st, the subsequent history notation should reference the application for "writ" of error, but if issued ***on or after*** September 1st, the subsequent history notation should reference the "pet." for review.[85]

Because Texas's intermediate appellate courts had no criminal jurisdiction from 1911 to August 31, 1981, prior editions of the *Greenbook* recommended citing intermediate appellate decisions rendered before Aug. 31, 1981 with the court prefix, "Tex. Civ. App.," in place of the modern, "Tex. App."[86] With the current 14th edition, however, the *Greenbook* has rightly abandoned this distinction.[87]

Any intermediate appellate court opinion issued before January 1, 2003 that was also affirmatively designated, "do not publish," has no precedential value but may be cited with the parenthetical notation, "(not designated for publication)."[88] Consequently, if a court of appeals mistakenly affixes a "do not publish" designation to a case after January 1, 2003, it has no impact whatever on the case's precedential value.[89]

In order to be able to determine whether the notations, "no pet." or "no pet. h." are appropriate, you must investigate whether: (1) a petition for review has been filed; (2) a motion for rehearing or en banc review is still pending; or (3) forty-five days have elapsed since the appellate court's judgment or the court's ruling on a motion for rehearing or en banc review.[90] It may even be necessary to check the website of a given court of appeals or that of the Texas Supreme Court to determine if a motion for rehearing has been filed or a motion to extend time has been filed.

The *Bluebook* contains abbreviations for both Dallas ("Dall.") and Houston ("Hous.").[91] But the *Greenbook* directs attorneys to avoid using these abbreviations, however, in Texas intermediate appellate citations.[92]

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84 *Id.* R.4.2.1 at 18–19.

85 *Id.* R.4.4.1–.2 at 22–23.

86 *See id.* R.4.2.1 at 18–19.

87 *Id.*

88 TEX. R. APP. P. 47.7(b).

89 *Id.* at 47.2(c), 47.7(b).

90 *See* TEX. R. APP. P. 53.7(a); GREENBOOK R.4.4.1 at 22, App'x D at 108.

91 BLUEBOOK T.10.1 at 503.

92 GREENBOOK R.4.3.1–.2 at 20.

Also, keep in mind that memorandum opinions are reserved for cases raising only settled issues, but not ones altering, criticizing, or modifying existing rules important to the jurisprudence of the state.[93] To this end, memorandum opinions are "intended primarily ***for the parties*** who already know the background facts and procedural history."[94] Consequently, they are not even binding authority ***on their own courts***.[95] So, on balance, cite to a published opinion if at all possible instead of an unpublished, memorandum one.

c. Texas trial courts

State v. Auguillard, No. 139002101010 (338 Dist. Ct., Harris Cty., Tex. Oct. 21, 2013);[96] and

Batra v. Waggoner, No. 002-02559-2012 (Collin Cty. Ct. at Law No. 2, Tex. Oct. 21, 2013).[97]

Notably, Table T6 in the *Bluebook* abbreviates "county" to "cty." but the *Greenbook* abbreviates "county" to "co."[98] . Accordingly, I recommend using the *Bluebook* abbreviation in trial court cites, as employed above.

D. Rules

1. Federal

FED. R. APP. P. 28.1(c)(1);[99]

FED. R. CIV. P. 56(c)(1)(A);[100] and

FED. R. EVID. 402.[101]

2. State

Tex. R. App. P. 9.4(i)(2)(D);[102]

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93 TEX. R. APP. P. 47.4.

94 *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 681 (Tex. 2006) (emphasis added).

95 TEX. R. APP. P. 47.4 (memorandum opinions reserved for cases raising only settled issues, but not ones altering, criticizing, or modifying existing rules important to the jurisprudence of the state).

96 *See* GREENBOOK R.7.1 at 35.

97 *Id.*

98 *Compare* BLUEBOOK T.6 at 496, *with* GREENBOOK R.7.1 at 35.

99 BLUEBOOK R.12.9.3 at 130.

100 *Id.*

101 *Id.*

102 GREENBOOK R.13.2.1 at 63.

Tex. R. Civ. P. 91a.2;[103] and

Tex. R. Evid. 902(10)(c).[104]

- But See -

The more common and pre-11th-edition-of-the-*Greenbook* form would be …

TEX. R. APP. P. 9.4(i)(2)(D);[105]

TEX. R. CIV. P. 91a.2;[106] and

TEX. R. EVID. 902(10)(c).[107]

E. Attorney General Opinions

Tex. Att'y Gen. Op. No. GA-0002 (2002).[108]

F. Legislative Materials

Act of May 30, 1993, 73d Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350;[109]

Tex. S.B. 1, 75th Leg., R.S. (1997);[110] and

Senate Res. Ctr., Bill Analysis, Tex. S.B. 332, 82d Leg., R.S. (2011);[111]

G. Texas Administrative Code

4 Tex. Admin. Code § 9.12 (2008) (Tex. Dep't of Agric., Seed Sampling Procedures).[112]

- But See -

The more common and pre-11th-edition-of-the-*Greenbook* form would be …

4 TEX. ADMIN. CODE § 9.12 (2008).[113]

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103 *Id.* R.13.1.1 at 61.

104 *Id.* R.13.3 at 64.

105 10th GREENBOOK at 58.

106 *Id.* at 55.

107 *Id.* at 58–59.

108 GREENBOOK at 73.

109 *Id.* at 49–51.

110 *Id.* at 66–67.

111 *See id.* at 68.

112 *Id.* R.15.1.1 at 77.

113 10th GREENBOOK at 68.

In looking back through my briefing in which I cite to the Administrative Code, I find that I rarely—if ever—include in my citations obligatory parentheticals noting the agency that promulgated the rule at issue, as well as the rule's official title. Invariably, the agency and rule in dispute are already identified from the context of the argument in which they are cited. Therefore, I recommend citing to the Administrative Code the same as one would to any other Texas code—including small caps!

H. Common Secondary Sources

1. Legal periodicals

James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305 (Dec. 1986);[114]

Jim Paulsen & James Hambleton, *Whatever Happened to 1845? The Missing Decisions of the Texas Supreme Court*, 48 TEX. B.J. 830 (July 1985).[115]

2. CLE presentations

Chad Baruch, *The Blue Book: Why it Matters and How it Has Changed, or … How I Learned to Stop Stressing About Citations and Sleep at Night*, State Bar of Tex. Prof. Dev. Program, State Bar College 14th Annual Summer School, ch. 10 (2012).[116]

3. Restatements

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 3 (1995).[117]

4. Books

JAMES L. HALEY, THE TEXAS SUPREME COURT: A NARRATIVE HISTORY, 1836–1986, 20–21 (2013);[118]

HON. JACK POPE, COMMON LAW JUDGE, 160–61 (Marilyn P. Duncan, ed. 2014);[119] and

Texas Rules of Form: The Greenbook 18.1.1 (Texas Law Review Ass'n ed., 14th ed. 2018).[120]

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114 BLUEBOOK R.16.4 at 162.

115 *Id.*

116 GREENBOOK R.19.2 at 96.

117 BLUEBOOK R.12.9.4 at 131–32.

118 *Id.* R.15 at 149–50.

119 *Id.* R.15.2 at 151.

120 GREENBOOK R.18.1.1 at 93.

- But See -

The more common and pre-11th-edition-of-the-*Greenbook* form would be …

> TEXAS RULES OF FORM: THE GREENBOOK 18.1.1 (Texas Law Review Ass'n ed., 14th ed. 2018).[121]

5. Newspapers

Chad Swiatecki, *For Those About to Rock, Austin Entrepreneur Has You Covered*, AUSTIN BUS. J., Dec. 5, 2014, at 14.[122]

6. Social-media posts

Hon. Don. R. Willett (@JusticeWillet), TWITTER, (Dec. 19, 2017, 7:57 PM), https://twitter.com/JusticeWillett/status/943299243548213248;[123]

State Bar of Texas (@statebaroftexas), Instagram, https://www.instagram.com/p/B4C1tQUJVKP/ (last visited Nov. 18, 2019).[124]

7. Blog posts

David Lat, *Legal Citation of the Day: Pointy Ears Under a Ten-Gallon Hat?*, ABOVE THE LAW (Oct. 27, 2010, 3:02 PM), http://abovethelaw.com/2010/10/legal-citation-of-the-day-pointy-ears-under-a-ten-gallon-hat/.[125]

8. *Texas Pattern Jury Charge* volumes

Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 116.1 (2018).[126]

9. Nonconsecutively-paginated magazines

Sunny Sone, *Heroes Welcomed: Honor Flight Takes Off for Surviving Veterans of Pearl Harbor*, AUSTIN MONTHLY, Dec. 2014, at 28.[127]

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121 10th GREENBOOK at 82.

122 BLUEBOOK R.16.6 at 163.

123 *Id*. R.18.1 at 179, R.18.2.2 at 182

124 *Ibid.*

125 *Id* R.18.1 at 179, R.18.2.1–.2 at 181–82.

126 GREENBOOK R.18.4 at 95.

127 BLUEBOOK at R.16.5 at 163.

VI. Precedential Order of Citation

Now we come to the only part of any examination of Texas citation practice to which you should really listen—subsequent history. Everything else is no doubt important aesthetically and tactically, but failing to correctly note the subsequent history of a Texas case can precedentially neuter the cited material.

Depressingly, as frightfully corpulent as the subsequent-history notation system is in Texas, it is actually much worse than most fear. Because of the complexity inherent in our court system as it has developed, it has been the natural tendency of the Texas bar to simplify our citational approach so that no lawyer need be conversant in decades of legal arcana in order to simply cite a case. But this urge to streamline our citation may have had the unintended effect of reducing our collective comprehension of what is truly precedential in Texas in the first place.

Unfortunately, to fully explore this topic takes much more time and print than is afforded here, so for a much more thorough examination, please see *Citation Writ Large*, 20 App. Advoc. 89, *cited in Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 239 n.8 (Tex. App.—Corpus Christi–Edinburg 2008, no pet.), and Andrew T. Solomon, *Practitioners Beware: Under Amended Trap 47, "Unpublished" Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 40 St. Mary's L.J 693, 702 n.34 (2009). For additional quick and easy reference, please consult Rules 4.4.1 and 4.4.2, as well as Appendices D & E in the *Greenbook* for an abbreviated discussion of the various subsequent history notations used in Texas.[128]

Of course, regardless of precedential weight, nearly any source can be persuasive to a future justice, panel, or court—regardless of its inherent precedential authority.[129]

VII. Common and Not-So Common Tips, Tricks & Traps

Some of the following are citational mandates you must follow pursuant to the strictures of the *Bluebook* and/or *Greenbook*, while others are my own persnickety preferences that have evolved over the years, which I urge you to consider adopting.

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[128] Greenbook R.4.4.1–.2 at 22–23, App'x D–E at 105–11.

[129] *Confederates & Carpetbaggers*, 51 Tex. B.J. at 916, 918–19; *see also Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 162 n.21 (Tex. 2010) (Willett, J., concurring, joined by Lehrmann, J.) (citing Star Trek II: The Wrath of Khan (Paramount Pictures 1982)); *see also* Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, App. Advoc., Spring 2006, at 11–15 (cataloguing the persuasive impact dissents from denial of review at the Texas Supreme Court have had on subsequent majority opinions).

A. Texas Appellate Courts

1. Texas Supreme Court

You can say the Court acted in many different ways, but do not say it that it ever "found" something, when really just referring to its holding. Technically, the Court can't "find" anything, because it is constitutionally-barred from adjudging facts.[130] This is a minor nit, but jurisdictionally important and one that certain Court staff notice.

2. Texas intermediate courts of appeals

a. Subsequent history

I may be the only person left in Texas who still feels so, but I find it both quicker and easier to look up subsequent history of cases using Thomson Reuters's dearly departed annual *Texas Subsequent History Table*,[131] instead of logging onto either Westlaw or Lexis, retrieving a case, and then clicking on the subsequent history link.

B. Texas Legislative Materials

If the session law being cited has no formal name (i.e., the "Tanning Facility Regulation Act"), then note the date of enactment in the citation ("Act of May 29, 1993").[132] One of the most common citation mistakes that befall practitioners is affixing the proper date of enactment to a session law. The date of enactment of a session law is the "final relevant legislative action on the bill …, not the date of executive approval."[133] Typically, this date is the day upon which the remaining legislative body (House or Senate) approved the final version of the measure. The easiest way to investigate not only pertinent dates of legislative action, but bill text, and a host of other information is by visiting the *Texas Legislature Online* website, which provides a search feature going back to the 71st Regular Legislative Session in 1989.[134] Of note, the Texas Legislative Reference Library maintains its own website, which provides legislative search function going back to the 12th Regular Legislative Session in 1871.[135]

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130 TEX. CONST. art. V, § 6.

131 THOMSON REUTERS, 2014 TEXAS SUBSEQUENT HISTORY TABLE (West 2012).

132 GREENBOOK R.10.3.1 at 49–50.

133 *Id.* R.10.3.1 at 50.

134 *See* TEXAS LEGISLATURE ONLINE, http://www.capitol.state.tx.us/ (last visited Nov. 18, 2019).

135 *See* LEGISLATIVE REFERENCE LIBRARY OF TEXAS, ADVANCED SEARCH, https://lrl.texas.gov/legis/billSearch/advancedsearch.cfm (last visited Nov. 18, 2019).

C. Internet-Specific Tips

- URL[136] citations are long and awkward, and make the spacing of a particular citation sentence either in text or in a footnote disjointed. There is a way in text to manually wrap URL address to the next line using a hard-return, and yet still preserve the link itself. Specifically, simultaneously depress the "Ctrl + Shift + Enter" keys at any point in the URL address you deem will best fit the remaining space on a given line (i.e., "eyeball" it). Oftentimes, it takes a bit of trial and error to find just the right wrapping point. Once you do split the URL address, then both the spacing after the line above and the spacing the new line below need to be adjusted to "0," because the default will include unwanted spacing between the two lines. *See* Part V(H)(6), *supra*, for an example of this type of text-wrapping. Of note, however, this functionality in MS Word works only in text, but not in footnotes.
- Because of the unwieldly length of most URL addresses, consider using a URL-shortening service like Bit.ly (https://bitly.com/).
- For most internet citations, no parenthetical indicating the date of the user's last visit should be used.[137] Instead, one should only use such a date parenthetical if the web content itself is undated.[138] This level of date attribution is only meant to denote that the website existed as cited on the date last visited, but offers no guarantee of its content or even its permanence going forward.
- Because of the inherent impermanence both of the content and location of internet website resources, citing them is fraught with difficulty both substantively and procedurally. Always consider first and foremost whether an internet resource is the most persuasive and authoritative for a given point. Often it is not. But that dynamic is admittedly changing. To logistically assist with the impermanence of internet resources, consider using an archive service, which will affix both a permanent URL as well as preserve the website's content and links (presumably for as long as the provider is a going business concern). The archiving service I recommend is Evernote (https://evernote.com/), which is particularly user-friendly,

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136 "URL" is short for "uniform resource locator," and is a term that denotes, in essence, a website's address. *See, e.g.*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, "UNIFORM RESOURCE LOCATOR," https://en.wikipedia.org/wiki/URL (last visited Nov. 18, 2019) (a "Uniform Resource Locator (URL), colloquially termed a web address, is a reference to a web resource that specifies its location on a computer network and a mechanism for retrieving it"). For example, the URL for Google is: http://www.google.com/.

137 BLUEBOOK R.18.2.2 at 184.

138 *Id.*; *Judges Really Do Care About That!* at 9.

offers a useful mobile app, and incorporates a Google Chrome extension called "Web Clipper."

- So, it is now technically possible to address both the typographical difficulty of inserting large URLs into text, as well as the impermanence of the URL itself and its content. Combining the use of, say for example, a bit.ly-shortened URL with an Evernote web clipping should negate both issues. Although perhaps a useful way to cite any internet resource, I would recommend only going to the trouble using both archive and URL-shortener services when the cited source is inherently subject to user editing—such as *Wikipedia*.[139] Remember, however, to always test your links after creating them to be sure they send your reader where you have told them they're going!
- Can I cite Wikipedia? This question was posed and thoroughly examined by outstanding Houston appellate lawyer Robert Dubose in 2011.[140] The answer is a resounding … ***maybe***.[141] Incredibly, as of 2011, some 550 judicial opinions have cited to *Wikipedia*.[142] And, although its content is both user-generated[143] and user-manipulated, *Wikipedia* is surprisingly and durably accurate as well.[144] However, obvious substantive risks in relying upon *Wikipedia* as a source in briefing include the potential for litigants to manipulate online entries and for other material inaccuracies to occur.[145]

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[139] *See* R. Jason Richards, *Courting Wikipedia*, 44 TRIAL 62, 63 (April 2008).

[140] Robert Dubose, *Can I Cite* Wikipedia*? Legal and Ethical Considerations for Appellate Lawyers Citing Facts Outside the Record in the Age of the Internet*, State Bar of Tex. Prof. Dev. Program, 25th Annual Advanced Civil Appellate Practice Course (2011).

[141] *Id.* at 1, 8.

[142] *Id.* at 1.

[143] Other common websites that rely on user-generated content include: Facebook, YouTube, *Urban Dictionary*, and Yelp. *Id.* at 4.

[144] *Id.* A study by *PC Pro* magazine in 2007 found that errors intentionally inserted into ten different *Wikipedia* pages, ranging from "obvious" to "deftly subtle," were corrected by the *Wikipedia* community in ***under an hour***. *Id.*

[145] *Id.*

D. Substantive Citation Usage Tips

1. Persuasive strategy before courts

- "Describe and cite authorities with scrupulous accuracy."[146] Avoid the appearance of misdirection and distortion at all costs or your credibility will be quickly forfeit.[147]
- "Cite authorities sparingly."[148] Envision citing authority lightly and illustratively, akin to "'pictures in a book,'" rather than making one's reasoning the "'servant of his authorities.'"[149]
- Quote authorities even less than you cite them.[150] Do not merely assemble or compile someone else's thoughts and work.[151] Instead, the best way to show a court your reasoning is in your own words.[152]
- The proper use of signals is paramount in establishing one's credibility to the reader.[153] Study *Bluebook* Rule 1.2 to avoid giving your reader the impression that what may have been an inadvertent mistake was, in fact, aimed at recasting the import of cited authority in one's favor.[154]
- One of the quickest and most certain ways not only to damage your credibility before a court and its staff, but to annoy them as well is to fail to pincite (i.e., including specific page numbers where the proposition being cited is found) your sources.[155] Neglecting to do so gives the impression to the reader that the author was either lazy or inept—neither of which make for very persuasive writing.

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146 MAKING YOUR CASE at 123.

147 *Id.*

148 *Id.* at 125.

149 *Id.* at 126 (quoting HOWARD C. WESTWOOD, BRIEF WRITING (1935), *in* ADVOCACY AND THE KING'S ENGLISH 563, 565 (George Rossman ed., 1960)).

150 *Id.* at 127.

151 Scott P. Stolley, *Writing on Writing: Quotation Disease*, HEADNOTES, July 2011, at 10.

152 *Id.*

153 MAKING YOUR CASE at 123.

154 *See* BLUEBOOK R.1.2 at 58–60.

155 *Id.* R.32.2 at 72; *Judges Really Do Care About That!* at 6.

2. Parenthetical usage

- Generally, it is always a good idea to include a short parenthetical letting your reader know why you have cited a case, particularly if the relevance of the case is not overtly clear.[156] Formally, the use of parentheticals is "strongly recommended" with the use of "*cf.*," "*compare*," "*but cf.*," and "encouraged" with "*see also*" signals.[157] That said, brief word limits are pesky things, so including an explanatory parenthetical may not always be feasible. In such instances, see if the sentence can be reworked to substantively function as a parenthetical may have.
- One of the signals of which I have grown quite fond is "*compare.*"[158] If space is not at a premium, I find comparing two sources to be far more compelling and illustrative than just a "*see*" cite with a parenthetical. This is particularly true when casting a statement in an opponent's brief against the governing law on the topic.
- Also remember that, while not mentioned in the *Bluebook*, "*ibid.*" is a useful signal still favored by the U.S. Supreme Court. It may be used where the previous citation was to more than one source and all equally apply to the next citation in the document.[159]
- Three characteristics of well-crafted parentheticals are that the parenthetical must: (1) tell the reader why you are citing the source if it's not clear from the preceding sentence; (2) show the reader where the case fits into the theme or focus of the piece as a whole; and (3) do so in a clear and concise manner.[160]
- Deftly combining these three elements should produce a parenthetical that: (1) is a "participle parenthetical," which

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156 BLUEBOOK R.1.5 at 64.

157 *Id.* R.1.2 at 59.

158 *Id.*

159 OFFICE OF THE REPORTER OF DECISIONS, THE SUPREME COURT OF THE UNITED STATES, THE SUPREME COURT'S STYLE GUIDE § 1.42 at I-40–42.(Jack Metzler ed., 2016).

160 Nicholas Wagoner, *Tips for Writing Better Parentheticals – Part 2*, LEGAL SKILLS PROF BLOG (Jan. 29, 2012), https://lawprofessors.typepad.com/legal_skills/2012/01/tips-for-writing-better-parentheticals-part-2.html (citing ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES (Oxford Univ. Press 2011)).

begins with an "-ing word"; and (2) consists of a single-sentence quotation.[161]

- Conversely, poorly drafted parentheticals generally contain two hallmarks: (1) unnecessary length; and (2) duplication of and mere echoing of the text to which the citation is affixed.[162] Specifically, verbose parentheticals can "turn fluid prose into a choppy mess."[163] In order to remedy this, think of parentheticals as a Twitter post—i.e., 280 characters or less.[164]

- Always denote any procedural information specific to the handling of the case cited—(per curiam),[165] (orig. proceeding),[166] (not designated for publication),[167] (op. on reh'g), or (mem. op.),[168] etc. To this end, please note that "orig. proceeding" is only used in a parenthetical for Texas Supreme Court decisions, but is included within the court and date parenthetical for intermediate appellate decisions.[169]

- All subsequent-history explanatory phrases ("*aff'g*", "*aff'd*," "*rev'd*," "*rev'g*", etc.) are italicized and should be offset from the case it modifies by a comma, in addition to whatever succeeding comma structure is indicated in *Bluebook* T8.[170]

- Closely tied to the preceding tip is the oft-confused difference between, "(citing ...." or "(quoting ...." and ", *cited in* ...." or ", *quoted in* ...."[171] The present-tense form, un-italicized and contained within a parenthetical, is used to refer to another

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161 *Id.*

162 Nicholas Wagoner, *Guest Blogger Nick Wagoner on "Common Parenthetical Pitfalls,"* LEGAL SKILLS PROF BLOG (Jan. 19, 2012), https://lawprofessors.typepad.com/legal_skills/2012/01/guest-blogger-nick-wagoner-on-common-parenthetical-pitfalls.html.

163 *Id.*

164 *Id.*

165 *See* TEX. R. APP. P. 47.2(a), 59.1; BLUEBOOK R.10.6.1(b) at 108; GREENBOOK R.4.1.2(a) at 16.

166 *See* GREENBOOK R.6.1 at 31.

167 TEX. R. APP. P. 47.7(b); GREENBOOK R.4.1.2(c) at 17.

168 *See* TEX. R. APP. P. 47.2(a), 47.4; BLUEBOOK R.10.6.1(b) at 108; GREENBOOK R.4.1.2(a) at 16.

169 *Compare* Part V(C)(2)(a), *supra*, *with* Part V(C)(2)(b), *supra*.

170 BLUEBOOK R.10.7.1 at 109–10, T.8 at 500–01

171 *Id.* R.1.6(c) at 66, R.1.2.1(e) at 69.

source whose content is being referenced in the cited source.[172] The past-tense form, italicized and preceded by a non-italics comma is used to indicate that the cited source is referenced in another source.[173] Also be sure to remember to add in an additional close-parens after the referenced source's date parenthetical in any "quoting" or "citing" parenthetical ("(citing … (1967))").

- At times, parentheticals can stack up at the tail end of a citation. In those instances, generally organize the order of parentheticals as follows: (1) weight-of-authority parentheticals; (2) "quoting" or "citing" parentheticals; and (3) explanatory parentheticals.[174] For example: "*X v. Y* (court date) [hereinafter *Z*] (en banc) (Lastname, J., concurring) (per curiam) (emphasis added) (citations omitted) (quoting *W*), *rev'g U.*"[175]

E. Typographical Tips

- Only one space after any punctuation—including after sentences![176] I understand the typographic outrage this pronouncement may evoke—I used to be an avowed "two-spacer" myself. My argument was that having two spaces after a sentence helped more effortlessly orient one's eye to the sentence structure on a given page. While I still think that's nominally true, I find now that I do indeed prefer one space to two, and that the text flows much better without the extra space. Plus, doublespacing is another "'quaint, Victorian habit'" from the typewriter era that has no place in digital drafting and publication.[177]

- Simultaneously depress "Ctrl + Shift + Space bar" to insert a nonbreaking space.[178] Nonbreaking spaces should be used

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172 *Id.* R.1.2.1(e) at 69

173 *Id.* R.1.6(c) at 66.

174 *Id.* R.1.5(b) at 65, R.10.6.3 at 108.

175 *Ibid.*

176 TYPOGRAPHY FOR LAWYERS at 41–44; *see* Matthew Butterick, *One Space Between Sentences: Always One—Never Two*, PRACTICAL TYPOGRAPHY, https://practicaltypography.com/one-space-between-sentences.html (last visited Nov. 18, 2019) [hereinafter *Always One—Never Two*]; *see also* SEVENTH CIRCUIT TYPOGRAPHY at 5.

177 *See* TYPOGRAPHY FOR LAWYERS at 41, 43 (quoting Robert Bringhurst, The Elements of Typographic Style 29 (4th ed. 2013)); *Always One—Never Two* (citing JAMES FELICI, THE COMPLETE MANUAL OF TYPOGRAPHY 80 (2002)).

178 TYPOGRAPHY FOR LAWYERS at 61–62.

between section symbols and section numbers ("§ 1983"), as well as with paragraph symbols ("¶ 9"), chapter designations ("ch. 3"), and the like.[179] I also prefer to use nonbreaking spaces between "Tex." and the year in Texas Supreme Court citations ("Tex. 2012"), with reporter cites ("1 S.W.3d 75"), and between any two-word procedural phrase—"per curiam," "pet. denied," "en banc," "orig. proceeding," "mem. op.," etc. My practice is the same for "Tex. App." notations within a citation, for Texas and federal rule citations ("TEX. R. EVID. 902") and in short-cites between "at" and the pincite ("1 S.W.3d at 75"). I also consistently use nonbreaking spaces to ensure that numbered-list numerals stay on the same line as the text they introduce ("this list: (1) stays together; because (2) of nonbreaking spaces"). Basically, my preference is to never strand a procedural descriptor or a source numeral so that the reader has to search for the remainder of the citation. One other advantage generally in using a nonbreaking space is that it will reduce the amount of space between the two linked characters when text is fully justified.

- Both the *Bluebook* and *MUS* posit that an ellipses is seven characters long ("•.•.•.•") and expressly direct practitioners not to use a shorter version containing only five characters ("•…•").[180] I am at a loss to divine what citational calamity would befall the legal community if ellipses were uniformly trimmed by two characters (mere spaces no less!), so I never use the longer version in my writing to any audience. I recommend the same practice for end-of-sentence ellipses as well ("•….•"). Of note, I also recommend inserting a nonbreaking space between the end of the quoted material and the beginning of the ellipses so that the ellipses stays with the quoted text.[181]

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[179] *See id.*

[180] BLUEBOOK R.5.3 at 85; MUS R.1.10 at 6. The MS Word character for the 3-dot ellipsis can be created by holding down the "Alt" key and typing "0133" (even though the *Bluebook* and *MUS* explicitly counsels against its use). TYPOGRAPHY FOR LAWYERS, at 52; Matthew Butterick, *Ellipses: Avoid Using Periods and Spaces*, PRACTICAL TYPOGRAPHY, https://practicaltypography.com/ellipses.html (last visited Nov. 18, 2019) [hereinafter *Ellipses*]. Noted legal typography expert, Matthew Butterick, advises that simply typing three or four periods together is too short, and following the *Bluebook* and *MUS* rule of including spaces between each period is too long. TYPOGRAPHY FOR LAWYERS at 52; *Ellipses*. If you insist on inserting actual spaces between the periods, do so only with nonbreaking spaces so that the ellipses itself remains intact. TYPOGRAPHY FOR LAWYERS at 53; *Ellipses*.

[181] *See* TYPOGRAPHY FOR LAWYERS at 52–53; *Ellipses*.

- The differing applications of "em" and "en" dashes[182]—not to mention hyphens—are often confusing. En dashes should always be used when denoting a range of values ("1–6"),[183] and em dashes are uniformly used in Texas intermediate appellate citations to denote which court of appeals issued the opinion ("Tex. App.—Austin").[184] Em dashes are also utilized to set off words, phrases, or short sentences that clarify or elaborate on the preceding text.[185]
- While there is some debate what precise role an em dash should play in one's writing (whether it interchangeably replaces a colon, semicolon, or parentheses;[186] or whether it operates as a stronger alternative to a comma, but weaker than a colon, semicolon, or parentheses[187]), it is generally underused in legal writing.[188] Typically, I use em dashes when I want to emphasize a point visually more so than could be done with just a comma, or if the preceding passage is already replete with commas and adding more would only disorientate the reader.
- Usually, em dashes are used to set off a phrase or an aside, which requires em dashes on either end of the passage. However, em dashes can also be used effectively to highlight a parting thought at the end of a sentence, in which case only a preceding em dash is needed. One trap to be wary of, however, is beginning or ending a thought within a sentence with an em dash, but using a comma or semicolon on the other end of the offset aside.

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[182] Interestingly, the terms, "em" and "en" don't, in fact, refer to the horizontal distance above an "m" as compared to an "n." TYPOGRAPHY FOR LAWYERS at 46; Matthew Butterick, *Hyphens and Dashes: Use Them, Don't Confuse Them*, PRACTICAL TYPOGRAPHY, https://practicaltypography.com/hyphens-and-dashes.html (last visited Nov. 18, 2019) [hereinafter *Dashes*]. In practice, however, the em dash is usually about as wide as a capital H, while the en dash is roughly half as wide. TYPOGRAPHY FOR LAWYERS at 46; *Dashes.* The em and en dash are actually yet more artifacts of the typesetting age, where an "em" was a typographical unit of measurement spanning the vertical distance from the top of a piece of type to the bottom. TYPOGRAPHY FOR LAWYERS at 47; *Dashes.* In turn, an "en" measured half that distance. *Ibid.* In modern digital fonts, however, both em and en dashes run narrower than they did historically. *Ibid.*

[183] TYPOGRAPHY FOR LAWYERS at 47; MUS R.1.28(a) at 14.

[184] *See* GREENBOOK R.4.1.1 at 14–15.

[185] MUS R.1.27 at 13–14; TYPOGRAPHY FOR LAWYERS at 47; *Dashes*.

[186] MUS R.1.27 at 13–14.

[187] TYPOGRAPHY FOR LAWYERS at 47; *Dashes*.

[188] *Ibid*.

- Italicize a comma within a signal phrase, but not after: "*see, e.g.*,".[189]
- In Texas legal writing, the serial or "Oxford" comma (to which it is sometimes referred) is favored ("x, y, and z").[190]
- Traditionally, numbered lists were to be preceded by a colon, the numbers encased in parentheses, and each discrete item separated by a semicolon ("the list: (1) blah; (2) blaher; and (3) blahest"). The newest edition of the *MUS* now counsels that, in contrast to previous editions, numbered lists should follow this format (1) no colon, and (2) only commas to separate thoughts.[191] Either due to old age or stubbornness (perhaps both), I prefer and employ the former approach.
- When citing sections and paragraphs, use the "§" and "¶" symbols.[192] A common trap to avoid is to remember when pinciting to either, do not precede them with "at" ("*Id.* § 7" & "MOORE ET AL., *supra* n.5, ¶ 56.07").[193]
- Spell out "section" in text, and reserve the use of the "§" symbol for use in citation sentences. That said, the current edition of the *MUS* has reversed course on this issue and now allows section symbols in text.[194]
- Use curly quotation marks and apostrophes, not straight ones.[195] The only reason the straight version of these marks exist is due to the mechanical constraints of typewriters when the physical space on metal typesets was limited.[196]

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189 BLUEBOOK R.1.2 at 58.

190 MUS R.1.16 at 8.

191 *Id.* R.1.15 at 8.

192 BLUEBOOK R.3.3 at 75.

193 *Id.*

194 MUS R.2.07 at 29.

195 TYPOGRAPHY FOR LAWYERS at 38–39; Matthew Butterick, *Straight and Curly Quotes: Always Use Curly Quotes*, PRACTICAL TYPOGRAPHY, https://practicaltypography.com/straight-and-curly-quotes.html (last visited Nov. 18, 2014) [hereinafter *Curly Quotes*]; *see* SEVENTH CIRCUIT TYPOGRAPHY at 5.

196 TYPOGRAPHY FOR LAWYERS at 39; *Curly Quotes.*

F. Foot*note* or Foot*not*?

- In persuasive writing to a court, avoid putting substantive arguments in footnotes.[197] That said, while the cogent and streamlined argument should remain in the text, the footnotes can be useful in laying out potentially helpful elaboration, addressing the opposing side's weaker arguments, or even addressing arguments likely to occur to the judge or the judge's staff.[198]

- Academic writing is another matter. As this article exemplifies (for better or worse), I revel in the substantive footnote when confined to a legal periodical. To my mind, it is often far more interesting to read the footnotes of some articles (where the meat of the exposition tends to be) than the text itself.

- Historically, there has been little consensus among the bench and bar regarding whether or not to employ citational footnotes in persuasive writing.[199] However, the tide of opinion now appears to be turning against the citational footnote,[200] in no small part due to the advent of e-briefing. Now, both in Texas appellate courts and in the Fifth Circuit and other federal circuits, the vast majority of justices and judges are reading e-briefs on mobile devices like laptops or tablets.[201] Particularly on these smaller screens, scrolling back and forth between body and footnote text is jarring and annoying, as several Texas Supreme Court Justices have publically confirmed at numerous bar presentations.[202]

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197 MAKING YOUR CASE at 129–30.

198 *Id.* at 131.

199 *See, e.g.*, *id.* at 132–35 (Professor Bryan Garner and U.S. Supreme Court Justice Antonin Scalia disagreeing regarding the efficacy of footnoting in briefing).

200 *Compare* Bryan A. Garner, *Numerical Pollution: Textual Citations Make Legal Writing Onerous, for Lawyers and Nonlawyers Alike*, 100 A.B.A. J. 22 (Feb. 2014) (advocating for the expanded use of citational footnotes), *with* Wayne Schiess & Elana Einhorn, *Bouncing and E-Bouncing: The End of the Citational Footnote*, 26 APP. ADVOC. 409 (Spring 2014) [hereinafter *Bouncing*]; Raymond Ward, *The Never Ending Debate Over Citational Footnotes*, THE (NEW) LEGAL WRITER, (Feb. 7, 2014), https://raymondpward.typepad.com/newlegalwriter/2014/02/footnotes.html [hereinafter *Never Ending Debate*]; Jason Steed, *Rejecting the Guru's Advice*; LEGAL SOLUTIONS BLOG: PRACTICE OF LAW (Jan. 29, 2014), https://blog.legalsolutions.thomsonreuters.com/practice-of-law/rejecting-gurus-advice/ [hereinafter *Rejecting Advice*]; Rich Phillips, *The Great Foonote Debate (A Response to Bryan Garner)*, TEXAS APPELLATE WATCH (Jan. 28, 2014), https://www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html [hereinafter *Great Debate*].

201 *Bouncing*, 26 APP. ADVOC. at 411–12; *Never Ending Debate*; *Great Debate*.

202 *See Bouncing*, 26 APP. ADVOC. at 411; *Never Ending Debate*; *Great Debate.*

Moreover, these same justices and judges prefer hyperlinked citations, and as at least one commentator has noted, "readers of hyperlinked text want the hyperlinks as close as possible to the material supported by the hyperlink."[203]

- My preference has traditionally been to favor citational footnotes generally because they allow the bulk of the citation baggage to be stored below, out of sight. If your reader really wants to investigate, it's there waiting for them, but they are not forced to leap over large swaths of referential real estate if they do not. Ultimately, though, the only audience that matters in persuasive writing is your reader, so their preferences should dictate your citation practice. In other words, when in Rome, cite like a Roman!

G. Requisite Abbreviations

- Case styles should be properly abbreviated in footnotes.[204] In doing so, one should consult several abbreviation tables in the *Bluebook*, including: T.6 (general and common abbreviations),[205] T.7 (court names),[206] T.9 (legislative abbreviations),[207] T.10 (geographical terms—including U.S. states and select cities),[208] T11 (judicial abbreviations),[209] T.12 (months (only June & July are not abbreviated),[210] T.13.1 (institutions),[211] T.13.2 (common words),[212] T.14 (publishing terms),[213] T.15 (services),[214] and T.16 (subdivisions).[215]

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[203] *Never Ending Debate.*

[204] BLUEBOOK R.10.2.1–.2 at 96–102.

[205] *Id.* T.6 at 496–98.

[206] *Id.* T.7 at 498–500.

[207] *Id.* T.9 at 501–02.

[208] T.10.1 lists abbreviations for U.S. states as well as select territories and cities (including Dallas ("Dall.") and Houston ("Hous."). *Id.* T.10.1 at 502–03. T.10.2 & T.10.3 lists abbreviations for foreign countries and regions. *Id.* T.10.2–.3 at 503–09.

[209] *Id.* T.11 at 509.

[210] *Id.* T.12 at 510.

[211] *Id.* T.13.1 at 511–13.

[212] *Id.* T.13.2 at 513–17.

[213] *Id.* T.14 at 517–18.

[214] *Id.* T.15 at 518–22.

[215] *Id.* T.16 at 522–23.

- Of note, the 20th edition of the *Bluebook* now includes an abbreviation for "County"—"Cty."[216]
- Common abbreviated terms that are often confused in citations are "*L.*" for "*Law*" versus "*Law.*" for "*Lawyer*."[217] In addition, "*Law Review*" is abbreviated to "*L. Rev.*" but "*Law Journal*" is abbreviated to "*L.J.*"[218]
- Although there seems to be some aversion among some in the bar to doing so, in case styles within a footnote abbreviate every word for which exists an abbreviated form—including the first word.[219]
- When case styles are referenced in text, as opposed to footnotes, only the following terms may and ought to be abbreviated: "Ass'n," Co.," "Corp.," "Inc.," "Ltd.," and "No."[220]
- Abbreviations for all the Texas subject-matter codes are found in Appendix H.1 of the *Greenbook*.[221]

H. Remaining Odds & Ends

- The *MUS* provides an invaluable appendix containing ten pages of commonly-misused words and explanations and addressing the proper usage of each—including "that" versus "which," "because" versus "since," and "who" versus "whom."[222]
- The *MUS* also contains a very useful listing of which foreign words and phrases should be italicized and which should not ("de novo" versus "*mens rea*").[223]
- When you precede a contingent phrase with "that," it must be bookended by commas ("that, because [x], [y] occurred"; "that, although [x], [y] occurred"; "that, if [x], then [y]"; "that, while [x], [y] is nonetheless true"; "that, under [x], [y] governs").
- Sometimes it just gets monotonous to always state that a court "held" something. So here are some other suggestions you can

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216 *Id.* T.6 at 496.

217 *Id.* T.13.2 at 515.

218 *Id.*

219 *Id.* R.10.2.2 at 102.

220 *Id.* R.10.2.1 at 98.

221 GREENBOOK App'x H.1 at 116.

222 MUS App'x at 68–76.

223 *Id.* R.4.09 at 46–47.

use to describe the action taken by a court: acknowledged, adapted, allowed, analyzed, approved, clarified, concluded, confirmed, corrected, decided, declared, decreed, determined, developed, elaborated, evaluated, expanded, explained, implemented, instructed, interpreted, justified, limited, maintained, noted, observed, ordered, opined, professed, pronounced, proposed, propounded, reasoned, recited, reinforced, reported, revealed, reviewed, revised, ruled, simplified, solved, stated, streamlined, supported, surmised, and utilized.

- Despite the fact that no self-respecting attorney would ever phonetically utter it in court, "pleaded" has somehow become the preferred past-tense of "pled" in written materials.[224] If it sounds too ridiculous to say, it must also be too ridiculous to write.[225] Despite being labeled as the minority usage, recent polls and studies have found both lawyers and courts prefer "pled."[226] In addition, favoring "plead" as the past-tense form is confusing since it shares the same spelling as the present-tense form.[227] Indeed, Gen. George S. Patton didn't "leaded" the Third Army to victory at the Battle of the Bulge—he "led" them.[228] Undoubtedly, if it's good enough for Patton and the Free World, it's certainly good enough for legal prose!
- Although this rule is rarely, if ever, consistently followed, periods and commas should be placed within quotation marks, question marks and exclamation points should be placed within quotation marks only if in the original quoted text, and colons and semicolons should be placed outside the quotation marks.[229] This is the "American" style of quotation punctuation, and because it is so confusing, few rarely comply with it. There is another, simpler system—the "British" style—which at least one Chief Justice on the Texas Supreme Court strongly favors. The British

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[224] *See Plead*, BLACK'S LAW DICTIONARY (10th ed. 2014); MUS at 76; John Chandler & Brian Boone, *War of the Words: Pleaded vs. Pled*, LTN: LAW TECHNOLOGY NEWS (Jan. 16, 2013) (now archived on *Lexis/Nexis*®) [hereinafter *War of the Words*].

[225] *See War of the Words*.

[226] *Id*

[227] *See id.*

[228] *See, e.g.*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, "GEORGE S. PATTON: BATTLE OF THE BULGE," https://en.wikipedia.org/wiki/George_S._Patton#Battle_of_the_Bulge (last visited Nov. 18, 2019).

[229] MUS R.1.08 at 5.

style directs a practitioner to only include that punctuation which originally appears in the material being quoted.[230]

- Do not insert spaces between subparts of statutes or rules: ("§ 22.001(a)(6)," not "§ 22.001 (a)•(6)").
- When citing to footnotes, do not insert a space between the "n." abbreviation and the footnote number ("n.4" not "n.•4").[231]
- When using multiple signals in a citation sentence, signals of different types (supportive, comparative, contradictory, or background) cannot be separated merely by a semicolon, but must instead be placed in different citation sentences ("*See* X; *see also* Y. *But see* Z").[232]
- As goofy as it undoubtedly looks, the correct possessive form for an action by a given court of appeals is "court of appeals's." This is because there is only entity—the singular court—carrying out the action.[233] To avoid this awkward construction, I usually try to rework the phrase from "court of appeals's holding" to "the holding of the court of appeals."
- The same is true for "Texas." Always add "'s" to possessive forms of Texas ("Texas's").[234]
- When two or more words combine to modify a noun as an adjectival phrase, combine the words with a hyphen ("long-range plan").[235] But never hyphenate a proper noun ("Royal Memorial Stadium field").[236]
- Do not hyphenate a two-word adjectival phrase if the first word is the adverb, "very," or any other adverb ending in "ly" ("very large shipment" or "heavily laden ship")[237]
- But do hyphenate an adjectival phrase that begins with "well" ("well-established facts").[238]

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230 *See,. e.g.*, THE NEW FOWLER'S MODERN ENGLISH USAGE 646 (3rd ed. 1996).

231 BLUEBOOK R.3.2(b) at 73.

232 *Id.* R.1.3 at 60.

233 MUS R.1.01 at 1.

234 *Id.* And really, is there any other form of Texas than a possessive one?

235 *Id.* R.1.30(a) at 16.

236 *Id.*

237 *Id.* R.1.30(c) at 18.

238 *Id.*

I. A Few Recommendations

- If you are one of the afflicted few who actually enjoy seeking out and perusing footnotes, have you ever been frustrated by the seeming inability to find the note anchor in the text because it's so small it just blends into the overall print milieu? So, what I propose (and what I've utilized throughout this article) is making the note anchor in text one size larger and bold. Here, I've used 12-point font in text, but the note anchors are in bold, 13-point font. Similarly, while the footnote text itself is 10 point, I've made the note references 12 point and bold as well. There's no *real* manual that endorses this approach, but I submit it for your consideration nonetheless.
- Whenever I cite to legal periodicals where one of the authors is a judge or justice, I've taken to noting this by inserting "Hon." before their name in the citation. Apart from judges and justices having earned their title, I cannot help but think that noting the author of a given point of law is or was a jurisprudential ninja may wind up being fractionally more persuasive.
- When citing to legal periodicals, I prefer to include both a season or month (if noted), along with the year, in the date parenthetical. This is not required by the *Bluebook* but takes up little space and provides an added contour to the context of the citation itself.
- The final citation convention I employ is one I feel strongly about and hope to convince you to utilize as well. When short-citing a legal periodical, the *Bluebook* directs authors to use the author's last name, along with a *supra* notation back to the footnote in which the source was first cited, as well as the page number referenced ("Posner, *supra* note 13, at 852").[239] This is asinine—not to mention profoundly unhelpful to the reader. It forces one's audience to either physically flip back through the preceding pages or scroll upwards until the original footnote is located before the merit of the source can even be weighed. Instead, I recommend (and have used throughout herein) using a "hereinafter" notation after every secondary source you cite more than once, picking whichever approximation of the title is most likely to remind the reader of the source itself. In a subsequent short-cite, use the chosen moniker for the source and include a short-form of the periodical citation akin to how case short-cites are treated. So,

[239] BLUEBOOK R.16.9 at 170.

Posner, *supra* note 13, at 852

becomes:

Bluebook *Blues*, 120 YALE L.J. at 852.

Hopefully, this approach allows the reader to recall the source itself before they look it up, as well as enables them to copy the cite directly to their nearest electronic search engine. This convention may also be used for in-text citation as well. I leave it you to decide whether this short-cite form for a legal periodical actually has more utility than a *supra* cite, but my vote is with the former.

VIII. GOING FORWARD

Let me be clear that, at the end of the day, I recommend you utilize whatever citational, grammatical, and typographical strategy you deem best given your audience and your own preferences. Citation, although girded by long and sometimes fervently held dogma, still remains more art than science. Remember that perhaps your primary aim as a legal writer is to avoid appearing uninformed so as to best persuade your reader. Earnest but not slavish attention to citational detail will likely accomplish this goal (or at least not detract from it), and assist in persuading your audience.