# ASHLEY CABALLERO-DALTREY OUTLINES CHANGING LANDSCAPE OF CITATION IN ARIZONA ATTORNEY

April 1, 2022 | Publications

**What Are You Signaling? The Changing Landscape of Citation Culture**
Author: Ashley Caballero-Daltrey
Published by: State Bar of Arizona's *Arizona Attorney Magazine*
Issue: April 2022

For most attorneys, the *Bluebook* is nothing more than a hassle.[1] A lengthy citation guide that seems like a trap for the unwary, full of citations to cover anything and everything a person might cite. The Twentieth Edition of the Bluebook boasted a full 560 pages with a robust section on citation for international sources of law. Although the most recent edition, the Twenty-First Edition,[2] consumes fewer pages, it still contains lengthy and sometimes difficult-to-parse sections for citation, a far cry from the "tiny paper pamphlet" my dad insists he used (which, incidentally, turned out to be a 1989 edition of *University of Chicago Manual of Legal Citation*).

But the reality of the *Bluebook* – and citation in general – is that it has the power to signal our preferences and our biases. We convey importance through hierarchy; parentheticals tell us what information is important; and whether adherence to form can give way to practicality can shed light on our priorities.

This article discusses the changing landscape of citation from recent changes to the *Bluebook* to instances of the legal community "going rogue," examining what these changes are truly signaling to the audience.

***Bluebook* Rule 1.4 Order of Authorities**
Which is more important: federal courts or state courts? According to the Twentieth Edition Rule 1.4, federal courts. The seemingly innocuous Rule 1.4 explains how to order authorities within a signal, a simple question of organization. In the Twentieth Edition, this is a lengthy, multistep rule. First, you list constitutions (federal, and then state, and then foreign, and then documents from the U.N. and similar entities).[3] Second, you list statutes (in the same order; note, however, that federal rules of evidence and procedure are more important than state-codified statutes). Third are treaties and international agreements. Fourth come cases (federal, and then state, and then foreign, and then international – followed by a series of six additional categories of other materials. In the print edition, this singular rule takes up three entire pages.

At first blush, the organization is attractive. Here, a perfectly harmonized system has been created with each source given its own place. The *Bluebook* even allows for deviation: "If one authority or several authorities together are considerably more helpful or authoritative than the other authorities cited within a signal, they should precede the others." Otherwise, citation should follow the rule. If you are citing both the Arizona and federal Constitutions for a search and seizure issue, is one "considerably more helpful or authoritative"? Does the mere fact that you are appearing before an Arizona state court mean that the Arizona Constitution meets the exception to the rule? Or is the Arizona Constitution forever relegated to a second-tier position behind the federal Constitution? The same discussion plays out again and again across statutes, rules and cases. In every instance, this quite literally signals to the reader that the federal sources are more important. Within this hierarchy, even federal rules are given more weight that state statutes.

The Twenty-First Edition of the *Bluebook*, however, tells us something different: "Authorities should be ordered in a logical manner." The three-page hierarchy from the Twentieth Edition has become a three-paragraph explanation: (1) separate your authorities by semicolons; (2) group them logically with the most important ones first; (3) short cites are ordered as though cited in full. Which is more important, now? Whichever matters the most for what you're trying to explain – a simple, elegant solution. More than that, however, it removes the signaling that tells us how to view the courts in our federal system. No longer do the Federal Rules of Evidence come before state-codified statutes. The hierarchy is removed.

This may seem like pure semantics. Who is really paying attention to the order of authorities, besides law clerks and law review editors? But those clerks and editors shape the citations in opinions and prestigious articles. Those opinions and articles go on to be read by a greater audience, and the hierarchy that clerks and editors have grappled with is reinforced in subtle ways. Whether or not we think about it consciously, the hierarchy of sources becomes like second nature after all that we have read and written. It informs us of the "proper" way to order these statutes and courts. Although the change to Rule 1.4 cannot alleviate the myriad complications of our federalist system, at least it returns logic to citation and removes an (often impractical) artificial and imposed hierarchy.

***Bluebook* B6: Shorter Reporters**

Not every change to the *Bluebook* is so theoretical. There is one practical change that lawyers can take advantage of in Rule B6: Practitioners can close up abbreviations in reporter names. This means that "S. Ct." may become "S.Ct." and "F. Supp." may become "F.Supp."

Admittedly, this is a shortcut that many lawyers have probably been taking already, knowingly or unknowingly. The official rule, however, is that any abbreviations of more than two letters are not closed up with the single-letter abbreviation. The editors of the *Bluebook* responded to growing concerns that this increased word counts and offended local rules of citations in documents.[4]

Although the *Bluebook* may often be proscriptive, explaining to practitioners how citations ought to be written, the editors also (occasionally) pay attention to the needs of practitioners. What is useful for academia is not always useful for the reality of printing briefs, especially when word counters might be counting entirely different things depending on the software.5 This new change accommodates the reality of modern practice and allows for a brief reprieve from the formalistic regime of the *Bluebook's* rules.

***Bluebook* Rule 10.7.1(d) Slave Cases**

Nestled into the prior and subsequent history rule, 10.7, is a subsection new to the 2021 printing of the Twenty-First Edition of the *Bluebook*: 10.7.1(d) "Slave Cases." The rule provides: For cases involving an enslaved person as a party, use the parenthetical "(enslaved party)."

For cases involving an enslaved person as the subject of a property or other legal dispute but not named as a party to the suit, use the parenthetical "(enslaved person at issue)." For other cases involving enslaved persons, use an adequately descriptive parenthetical.

The *Bluebook* provides two examples of citations for this new parenthetical: "*Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV" and "*Wall v. Wall*, 30 Miss. 91 (1855) (enslaved person at issue)." The *Dred Scott* decision previously served as an example of a case superseded by constitutional amendment in the Twentieth edition's Rule 10.7.1(c)(iii).

This new rule is a big undertaking for the *Bluebook*. Its editors ask us to reconsider the way cases have been cited for hundreds of years. This change apparently came about in reaction to an article by Professor Justin Simard, who argues that the legal profession needs to acknowledge what he refers to as "the law of slavery."[6]

For some, this change may seem superfluous – everyone knows that Dred Scott was a slave case, so why should we suddenly be required to notate it? For others, the change is an affront, institutionalizing "cancel culture."[7] The *Bluebook*, following Professor Simard, asks us to confront that history and put it up front, in the citation, before any other explanatory history. It is an acknowledgment not just of our country's history with slavery, but our profession's history with it.

Consider the citation of *Wall v. Wall*. Unlike *Dred Scott*, which involved an enslaved party, Wall's parenthetical tells us "enslaved person at issue." This parenthetical reminds us of the way the law treated people as property. The issue in *Wall* was whether an instrument was a deed or a will. It had nothing to do with the notions of slavery, but the instrument concerned both real property and slaves. Like Rule 1.4's hierarchy, this citation tells us what is important. The *Bluebook's* new rule reminds us that this case involved people, and it asks us to put that history up front.

Professor Simard also points out in his article that these cases are of questionable legal authority after the Thirteenth Amendment, but that they are never flagged as questionable on Westlaw or LexisNexis.[8] He argues further that because these cases blur the categories of property and person, the legal reasoning is unclear.[9] Beyond that, the cases themselves may have been political and poorly reasoned and, as he explains, ask the courts to distinguish the "'good parts of slave law from the 'bad parts.'"[10] Ultimately, "All other things being equal, a case about enslaved people serves as poorer legal support than a case about property that is still recognized as property."[11]

The far more important harm that he addresses, however, is the dignitary harm.[12] By failing to acknowledge the history of these cases, judges, lawyers and authors give them power and authority they should not have.[13]

Acknowledging and addressing the continued role of the slave cases in legal precedent – such as through the *Bluebook's* new rule – is one way that lawyers can start to recognize the role that our profession played in that history.[14] Of course, the division in our country is well documented. But like Professor Simard's article, there is a growing trend of people in our profession attempting to find solutions and acknowledge the problems of the past. For example, *The Journal of Appellate*

*Practice and Process* recently published a special issue discussing how judges might help mitigate the division in our country. In a discussion of incarceration of communities of color and the LGBTQ community, Judge Joshua D. Wayser, of the Los Angeles County Superior Court, explains, "We committed reversible error as a system by not recognizing and addressing the issue. Continuing without recognition of that error, and without consideration of how it happened and what it all means, puts our treasured system at risk."[15] California Court of Appeal Justice Therese M. Stewart also discusses the power of language in the midst of this debate and writes, "The language we use in our opinions (and in public writing and speaking) can project partiality or worse, partisanship and ideology. Our words can, in the alternative, project openness, an ability to listen, and a nonpartisan and impartial state of mind."[16] Though both authors were writing from a judicial perspective to other judges, their articles reminds us of the power of language. Even seemingly minor changes – like whether to include a parenthetical – can begin to change the way we discuss our history and shape our perspective.

**(cleaned up)**

The last notable citation change isn't actually a *Bluebook* rule, but it is a growing trend. The parenthetical "(cleaned up)" appears to stem from a 2017 tweet by appellate attorney Jack Metzler (@SCOTUSPlaces) who suggested use of the phrase to omit "messy quotation marks, brackets, ellipses, etc."[17] He then wrote an entire article explaining how to use it, including a proposed rule for the Bluebook editors, which has not yet been Certified Specialist adopted.[18] At the time of his article, several courts had already begun to use the citation.[19] In February 2021, it was used in a United States Supreme Court opinion by Justice Thomas in *Brownback v. King*.[20] Later that year, the Arizona Supreme Court followed this example in *State v. Porter*.[21]

So how do you use (cleaned up)? Metzler explains: Using *(cleaned up)* is simple. To quote language from an opinion that includes a quotation from another opinion, simply enclose the words of the quotation itself within a single set of double quotation marks, leaving out brackets, ellipses, internal quotation marks and citations, and footnote reference numbers. Capitalize the first letter of the quotation if it begins your sentence; make it lower case if it does not. Cite the source of the quotation as if the words were original to the court you're citing, and add *(cleaned up)* to the citation.[22]

His proposed rule lays this out in more formal terms and even provides for citations of intermediary sources, that is, when the cited case quotes a second case quoting a third case.[23] Not only does this rule make citations easier to read, it also cuts down on the word count of briefs—something the *Bluebook* has already acknowledged is an issue for practitioners with its change to B6.

Although we may not have an official rule for (cleaned up) in the current edition of the Bluebook, its use by both the United States and Arizona Supreme Courts signals a change in the way we cite cases. It also shows a trend away from the formalities of the Bluebook, creating a more accessible structure for readers and writers alike.

**Conclusion**

Citation is part of our daily lives in this profession, and especially so for appellate attorneys and judges. At times it may seem that citation is almost exactly the same as it ever was, aside from the lengthy (and, to some, superfluous) pages added to the *Bluebook*.[24] But as we've seen, citation changes in subtle ways to reflect – or to proscribe – values to our culture. Maybe it's time to think a little more critically about what we are signaling.

---

1. *See, e.g.,* Hon. Richard A. Posner, *What Is Obviously Wrong With The Federal Judiciary, Yet Eminently Curable Part I*, 19 Green Bag 2D 187, 193–94 (2016) ("[T]he first thing to do is burn all copies of the *Bluebook*, in its latest edition 560 pages of rubbish, a terrible time waster for law clerks employed by judges who insist as many do that the citations in their opinions conform to the *Bluebook*; also for students at the Yale Law School who aspire to be selected for the staff of the *Yale Law Journal* – they must pass a five-hour exam on the *Bluebook*. Yet no serious reader pays attention to citation format; all the reader cares about is that the citation enable him or her to find the cited materials.").
2. Note that the *Bluebook* has two versions of the Twenty-First Edition, the 2020 and 2021 printing. Some of the changes discussed here are new to the 2021 printing.
3. Incidentally, the new edition clarifies that you may capitalize the Arizona Constitution and its parts in a textual sentence, something clear in the Twentieth Edition's examples but not its text. *Compare* Rule 8 (21st ed.) *with* Rule 8 (20th ed.).
4. The Bluebook: A Uniform System of Citation, Preface (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020); *see also How Many Words is a Citation?* Citing Legally (Sept. 25, 2020), https://citeblog.access-to-law.com/?p=1048.
5. How Many Words is a Citation? supra note 4.
6. Justin Simard, *Citing Slavery*, 72 Stanford L. Rev. 79 (2020); see also Citing Slavery Project, www.citingslavery.org/court_cases (last visited Feb. 16, 2022) (Professor Simard's project documenting slave cases and their citations).
7. See, e.g., Josh Blackman, Cancellation by Citation, The Volokh Conspiracy (Oct. 30, 2020), https://reason.com/volokh/2020/10/30/cancellation-bycitation/, stating: I think the upshot of this regime is that scholars will simply stop citing articles with a (slavery) parenthetical. Given today's culture, why would any professor willingly litter his or her footnote with the mark of original sin? Asking a research assistant to shepardize a (slavery) case could itself be a traumatic act. And this outcome will not be limited to legal scholarship. Progressive law clerks can now insist that judges should stop citing (slavery) cases. … And junior associates will refuse to embrace (slavery) cases. Partners will have to give in.

8. Simard, supra note 6 at 81.
9. *Id.* at 107-08.
10. *Id*. at 109.
11. *Id.*
12. *Id.* at 109-113.
13. *Id.* at 112.
14. *Id.* at 125.
15. Hon. Joshua D. Wayser, *An LGBTQ Jurist's Perspective on the Crisis in the Justice Sy*stem, 21 J. App. Prac. & Process 456, 470 (2021).
16. Hon. Therese M. Stewart, *Judicial Words Matter*, 21 J. App. Prac. & Process 433, 433 (2021).
17. See Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 144, 144 n.* (2017).
18. See generally *id.*
19. *Id.* at 160–61.
20. 141 S. Ct. 740, 748 (2021).
21. 251 Ariz. 293, 300 ¶ 18 (2021).
22. Metzler, *supra* note 17 at 155.
23. *Id.* at 154-55. The proposed text of Metzler's rule is: Cleaning Up Quotations
    (a) Cleaning up. When language quoted from a court decision contains material quoted from an earlier decision, the quotation may, for readability, be stripped of internal quotation marks, brackets, ellipses, internal citations, and footnote reference numbers; the original sources of quotations within the quotation need not be cited parenthetically; and capitalization may be changed without brackets. Indicate these changes parenthetically with (cleaned up). Other than the changes specified, the text of the quotation after it has been cleaned up should match the text used in the opinion cited. If the quotation is altered further, indicate the changes or omissions according to Rules 5.2 and 5.3.
    (b) Cleaning up intermediary case citations. In addition to the alterations described in Rule 5.4(a), when a quoted passage quotes a second case quoting a third case, the citation to the middle case may be omitted to show that the first court quoted the third. To indicate this change, retain the quotation marks around the material quoted from the third case and any alterations that were made to the quotation, and insert (cleaned up) before the "quoting" parenthetical citation to the third case. Indicate any alterations that were made to language quoted from the third case according to Rules 5.2 and 5.3.
24. *Compare Bluebook Rule 10* (21st Ed.) (citation of cases) *with The University of Chicago Manual of Legal Citation Rule 4.2* (1989 ed.) (citation of cases). The format is the same: [case name], [reporter volume] [reporter name] [first page of case], [specific page] ([court name, decision year]).

DOWNLOAD ARTICLE PDF
DOWNLOAD ARIZONA ATTORNEY MAGAZINE

Ashley Caballero-Daltrey is a member of the firm's appellate team where she represents clients in federal and state appellate matters and dispositive motions.

adaltrey@jshfirm.com | 602.263.4489 | jshfirm.com/adaltrey