

Rogue High Court Citation May Spark Legal Writing Changes

By **Carrie Garrison** (March 11, 2021)

On Feb. 25, Justice Clarence Thomas, writing for a unanimous U.S. Supreme Court in *Brownback v. King*,^[1] used the parenthetical "(cleaned up)" after a citation to denote the court's omission of quotations within quotations and the need for a quoting citation parenthetical, as dictated by Bluebook Rule 5.2.



Carrie Garrison

This decision represents a rare and unique innovation in the field of legal writing and a win for appellate lawyer Jack Metzler, who first proposed the citation^[2] in 2017 on #AppellateTwitter.

While seemingly mundane, the court's use of this citation format is significant, as it is the most notable change since the Supreme Court's first use of internet sources in 1996.^[3] Many lawyers are wondering if this could be just the beginning of some much hoped-for innovation in the legal writing world and beyond.

A Choice for Attorneys and Judges

As a result of the *Brownback* opinion's use of the "(cleaned up)" citation, attorneys and judges now face a choice: Follow the Bluebook or follow the Supreme Court in using this new parenthetical. There are factors to weigh on both sides.

Some attorneys may worry that using the "(cleaned up)" citation could affect their credibility, or lead the judges reading their briefs to question whether the attorneys are misattributing sources. Others may find, however, that the new citation provides enhanced readability, by weeding out the unimportant nonmaterial alterations and insertions within their quotations.^[4]

Lawyers may also find that the new parenthetical leads to greater efficiency, because ensuring conformity with the Bluebook requires additional time and costs clients money.

Similarly, judges will weigh the readability of their decisions against the accuracy and uniformity the Bluebook rules provide. Their decision regarding whether or not to use the "(cleaned up)" citation format may also depend on their particular judicial philosophy and whether they view their role as one to educate only the parties involved, lawyers generally or the public as a whole.^[5]

Some judges will have an easier choice if they inherently dislike the Bluebook. For instance, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit acknowledged that he finds the Bluebook to be "560 pages of rubbish."^[6] Relying on his own citation manual, Judge Posner advises attorneys to "burn all copies of the Bluebook" as it is "a terrible time waster," and advises his clerks instead to follow his self-made instructions on citation format, consisting of two pages in an office manual.^[7]

It is not surprising that some judges detest the Bluebook, as its rules compound the problems innate to the American common law tradition of jurisprudence. This tradition places value on borrowing from and building upon previous judicial rhetoric and, as such, lawyers commonly use many quotations within quotations in legal writing.

The Bluebook's rules dictate that such authority has to be cited with particular clarity, stating both the source of the quotation and a citation to the authority quoted, resulting in quotations within quotations.

This leads to correct — but messy-looking — briefs and motions, riddled with citations that seemingly serve no purpose other than to show the court that the Bluebook was followed and the research was thoroughly completed.

While several potential solutions to this problem have been around for some time, including the use of explanatory parentheticals such as "(citation and punctuation omitted)" or "(internal quotation marks and citations omitted),"^[8] Metzler proposed a commonsense solution to this problem with the citation "(cleaned up)."

Starting a grassroots movement on #AppellateTwitter, Metzler triggered a revolution with the following tweet: "I propose a new parenthetical for quotes that delete all messy quotation marks, brackets, ellipses, etc.: (cleaned up)."^[9]

This led to an article in the *Journal of Appellate Practice and Process*,^[10] further explaining the new citation and its benefits to lawyers and courts, providing enhanced readability.

This citation quickly caught on. Appellate lawyers readily endorsed^[11] the citation and a number of district and appellate judges were close to follow.^[12] But, frequently these endorsements featured a footnote reference explaining the new citation.

The Supreme Court omitted such an explanatory citation,^[13] providing clear endorsement of this commonsense citation for future courts to follow.

A Pivotal Moment for Future Innovations

This mini-revolution in legal citation begs the question of whether this is only the beginning of some larger shifts in the legal profession as a whole. The innate tension in legal writing between tradition, strict order and reflecting the spoken word will certainly become an emerging theme if this innovation is to create further change.

Perhaps this is only the beginning of a greater movement toward abolishing incomprehensible Latin in legal writing or endorsing "their" as a singular pronoun in recognition of the changing spoken word.

Another seismic shift, the COVID-19 pandemic, has forced the legal profession to modernize in unforeseen ways, and has states rethinking the bar exam, which has been a crucial rite of passage into the legal profession.

For years there has been a growing movement against use of Latin phrases in legal writing.^[14] Noting attorneys' misconceptions that using Latin will impress the court, studies have shown that judges dislike legalese^[15] and find that it makes legal writing incomprehensible, confusing and less persuasive than writing in plain English.

While a break in the tradition of Latin language in the legal profession would certainly be a dramatic shift, it would perhaps be less groundbreaking than the court's deviation from the Bluebook.

A progressive development in spoken language has developed "their" as a singular pronoun,^[16] reflecting the concept of gender fluidity and nonbinary gender recognition.

This relatively recent change in the spoken word, as a result of social changes, will likely take years to catch on in the legal writing world.[17]

But the court's endorsement of a commonsense citation indicates that perhaps legal writing and citation should mirror vernacular changes as they happen in society.

The pandemic has sparked a movement to end the bar exam[18] and allow students with Juris Doctor degrees from an accredited institution to become fully fledged attorneys, commonly referred to as granting diploma privilege.[19]

Citing unprecedented conditions and the scant empirical evidence supporting the exam's purpose to weed out unfit potential lawyers, the diploma privilege movement gained steam as states fought to update the exam to fit the new circumstances through remote testing systems.[20]

This too became a kind of grassroots movement on Twitter, championing the hashtag #DiplomaPrivilege4All. While the bar examiners in most states have decided to continue with remote testing, even beyond the time period required by the pandemic,[21] the court's recent and unexpected use of an arguably rogue legal citation may leave the legal profession as a whole more receptive to other innovations.

While a deviation from the Bluebook at one point seemed unbelievable, the Supreme Court's break from tradition and order represents an exciting shift in the legal world.

Justice Thomas seems to be urging the legal writing world to follow former Justice Louis Brandeis' advice, who observed at an arbitration proceeding "most of the things worth doing in the world had been declared impossible before they were done." [22]

Carrie Garrison is an associate at Porter Wright Morris & Arthur LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.supremecourt.gov/opinions/20pdf/19-546_7mip.pdf.

[2] <https://reason.com/volokh/2018/07/24/new-twist-on-legal-citations-the-cleaned/>.

[3] <https://www.jstor.org/stable/27977305?seq=1>.

[4] <https://teliosteaches.com/blog/twitter-shakes-bluebook-case-cleaned-quotations>.

[5] <https://www.nytimes.com/2021/01/12/us/supreme-court-taylor-swift.html> (showing Justice Kagan citing to a easily-understandable nominal damages case involving Taylor Swift arguably to educate the public on the reasoning of the case and the issues involved).

[6] https://www.abajournal.com/news/article/want_to_even_out_lawyer_quality_and_end_contingent_fees_adapt_a_uniform_pay.

[7] Id.

[8] <https://www.law.cornell.edu/citation/6-100>.

[9] Jack Metzler,
@SCOTUSPlaces <https://twitter.com/SCOTUSPlaces/status/842223292752760832>.

[10] <https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1405&context=appellatepracticeprocess>.

[11] <https://www.lawprose.org/lawprose-lesson-303-cleaned-up-quotations-and-citations/>.

[12] See **McKinley v. Meier**, 456 F. Supp. 3d 673, 679 (E.D. Pa. 2020); **United States v. Reyes**, 866 F.3d 316, 321 (5th Cir. 2017).

[13] https://www.supremecourt.gov/opinions/20pdf/19-546_7mip.pdf.

[14] <http://therecord.flabarappellate.org/2016/01/the-use-of-latin-words-or-phrases-in-legal-writing/>.

[15] <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1493&context=llr>.

[16] <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they>.

[17] https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1049&context=law_facpub_op.

[18] <https://www.washingtonpost.com/education/2020/07/13/why-this-pandemic-is-good-time-stop-forcing-prospective-lawyers-take-bar-exams/>.

[19] <https://www.abajournal.com/web/article/jurisdictions-with-covid-related-diploma-privilege-going-back-to-bar-exam-admissions>.

[20] <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/#:~:text=The%20Pennsylvania%20Board%20of%20Law,rescheduled%20to%20September%209%2D10>.

[21] <https://www.law.com/2021/02/03/ncbe-unveils-online-bar-exam-option-for-july-2021/#:~:text=The%20online%20bar%20exam%20is,test%20in%20person%20or%20online>.

[22] Adam Cohen, Review: In 'Louis D. Brandeis: American Prophet,' Moral Vision and a True Believer's Zeal, N.Y. Times, Jun. 15, 2016. (June 15, 2016) (cleaned up). <https://www.nytimes.com/2016/06/16/books/review-in-louis-d-brandeis-american-prophet-moral-vision-and-a-true-believers-zeal.html>.