Untangling Unreliable Citations

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Abstract

Citations are the vernacular that the legal profession uses to communicate the precedents that underline our arguments and analysis. They are the building blocks of legal communications and legal arguments, and lawyers and judges need to be able to rely upon the accuracy of each other's citations to work in a stabilized democracy. Democratic stability is in jeopardy due to an erosion of norms from a variety of well-documented sources, most of which are well beyond the control of the average lawyer. But lawyers and judges can control the reliability of the authority we use in our own work product, and this Article urges legal advocates to increase our carefulness in these constantly changing times.

The idea of verifying the contents of sources before citing them sounds so simple. However, copying and pasting citations has become an accepted practice, and citations are becoming increasingly unreliable as a result. This was true before 2017, when a new citation known as "(cleaned up)" was introduced, and before 2023, when artificial intelligence technology began to rapidly influence the way legal professionals approach writing projects. Until these new developments are stabilized and trustworthy, lawyers must devote even more time to double-checking sources and citations.

This Article discusses the danger of simply relying upon another lawyer's paraphrased language, a danger that escalates as the way we obtain information and sources continues to shift. Through an in-depth look at a cautionary tale from Kansas, this Article illustrates how one judge used two words to create the myth of a higher standard for discovery that has been repeatedly—and incorrectly— applied to opponents of corporations in litigation. Because people are not checking the original sources for accuracy, Kansas now has a split in

* Assistant Professor, Mercer University School of Law. Special appreciation to all of the colleagues who gave comments and encouragement during the process of writing and editing this article, including Robert Brain, Joe Fore, Billie Jo Kaufmann, Ann Killenbeck, Amelia McGowan, Karen Sneddon, and Emily Zimmerman; also many thanks to all of the faculty who provided thoughts during the "cleaned up" discussion panel at the 2023 Southeastern Association of Law Schools Conference (SEALS) and the civil procedure discussion during the Association of Legal Writing Directors (ALWD) Scholars Workshop at the 2022 Western Legal Writing Conference. Gratitude also goes to the research assistance provided by University of Arkansas students Caitlin Robb, Jake Stringer and Ellen Womack. Sach Oliver and Ryan Scott of Bailey & Oliver in Rogers, Arkansas are the dedicated practitioners who brought attention to the increasingly combative nature of Rule 30(b)(6) depositions. And special additional gratitude to Em Wright who saved the portions of this article focused on painstaking specificity from being painfully boring.

the way it interprets a crucial rule, and that ambiguity could have been avoided with increased precision.

Until technology stabilizes, rules are updated, and norms are restored, this Article pleads for increased prudence when it comes to citation practices. It also promotes a return to simplicity: writers should actually read the case they are citing, and the case being cited there, and down the line. In addition to increasing the reliability of citations, this "back to the basics" approach also has the potential to increase the trust lawyers and judges have in each other and their work. And if the legal profession can restore some of the faith we have in each other, then perhaps some of the faith the public has lost in our profession and our courts might be restored as well.

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I. INTRODUCTION

Even before the recent avalanche of artificial-intelligence-based legal products, the modern American justice system was arguably being destabilized by the erosion and dilution of precedent.[1] The unreliability in the citations we use to help our legal system rely upon that eroded and diluted precedent. The United States

1. *See, e.g.*, *With Roe overturned, Legal precedent moves to centerstage*, ABA (June 24, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage [https://perma.cc/JY2X-KJHZ]; *see also* Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865 (2019) (analyzing the potential threat to stare decisis when courts confine cases to their facts, and how this practice emboldens judges to disregard precedent).

Supreme Court decisions in *Dobbs v. Jackson Women's Health Organization*[2] and *Shelby County v. Holder*[3] may get extensive coverage, but they are not the only recent examples of appellate opinions disrupting long-held precedent,[4] often while using negligent or misleading citations. Sometimes these opinions are buried in the tyranny of minutia of the modern information age or ignored because they are too complicated for the average reader (or reporter) to quickly understand.[5] But these often-overlooked examples can have large consequences in people's lives while simultaneously unraveling citizens' faith in the American justice system. Thus, the devil's work of killing our democracy is done in the darkness of inattention, often through an avalanche of tiny details.

This Article examines the increasing unreliability of citations in three parts, through the lens of three separate trends. All three of these trends have their own impact on the increasing distrust that members of the legal profession have in each other's citations and legal writing as a whole and thus contribute to the current distrust the public has in our legal system. Part I examines the rise in the use of "(cleaned up)" citations, a new citation form that began on social media and is now widely used by courts around the country in ways that go beyond the original proposal and intended impact. Part II looks at the way that judicial and practitioner negligence related to citing precedent can have a real impact on litigation, litigant's rights, and the application of the rules of civil procedure. Part III looks at unreliable citations through the intersection of the rise of artificial intelligence sources for legal research and the decrease in the availability of databases to practitioners. All three of these issues contribute to the decrease in reliability of citations in their own ways, and to the quagmire of issues that result. In this way, seemingly small citation issues create larger problems for the legal system and society as a whole, contributing to the exhausting tyranny of minutia that is modern life.

This Article also promotes a relatively primitive solution for increasing reliability in this age of unease and uncertainty: read the case your opponent is citing

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2. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); *see also* Nina Varsava, *Precedent, Reliance and Dobbs*, 136 HARV. L. REV. 1845, 1907 (2023) (joining the chorus of legal commentary on the United States Supreme Court's decision to ignore precedent in forming this famous majority opinion, which removed the right to certain medical procedures from American citizens).

3. Shelby Cnty. v. Holder, 570 U.S. 529 (2013); *see also* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2149–50 (2015) (adding to the multiple concerns from legal commentators that the majority opinion in this case will make it easier for states to dilute American citizens' right to vote in elections).

4. *See, e.g.*, Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 825 (2023) (exploring the tendency of Supreme Court justices to place personal beliefs over judicial precedent, especially in cases with wide-spread societal implications).

5. *See generally* Neil Weinstock Netanel, *Mandating Digital Platform Support for Quality Journalism*, 34 HARV. J. L. & TECH. 473, 482 (2021) (detailing the financial reasons why detailed journalism has declined dramatically in the past three decades even as many people get their news from Internet platforms because "[t]he platforms' overriding incentive is to keep their users engaged on the platform as long as possible in order to sell more micro-targeted advertising . . . not from presenting informative, quality journalism").

and then read the case that case is citing as well, and on down the line. Yes, it is extra work. And yes, hopefully, most of the time, you will find no issues. But sadly, you will also find multiple citations where language has been misquoted or twisted, or perhaps even made up, which has the disturbing potential to change the way the law is interpreted and applied in the future. By returning to an age when we take care in our citations and the days when members of the legal profession can rely on each other's assertions, perhaps we can increase the overall sanity of our profession.

II. (CLEANED UP) CITATIONS ARE A MESSY WARNING TO THE UNWARY

The recent trend of "(cleaned up)" citations increases the risk that the law will be misquoted, twisted, and misapplied. As explained below, "(cleaned up)" citations are actually quotations from court opinions that have been edited to suit the purposes of the writer without explaining what edits have been made. These quotations create a mess by removing vital information about what was changed from the original source in the quote.

The modern American legal system has been facing a dangerous erosion of integrity and public respect for at least a decade now,[6] and much of this relates to the tendency of judges and lawyers to allow their zeal for persuasive writing to overtake their duty of candor. But there is also an argument to be made that one of the reasons why our modern American legal system is vulnerable to corruption is because it is based on a vulnerable, flawed, and uniformly criticized citation system.[7]

Much has been written about the endless criticism[8] of *The Bluebook: A Uniform System of Citation*,[9] and many scholars have acknowledged that the modern edits to *The Bluebook* often do more harm than good to the profession's efforts to cite precedent and authority with clarity.[10] Attempts to supplement or

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6. *See, e.g.*, NAT'L CTR. FOR STATE CTS., STATE OF THE STATE COURTS (2022), https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf [https://perma.cc/M8E6-RVB9] (reporting poll data showing the steady decline in public trust related to the court system from 2012 to 2022).

7. *See, e.g.*, Alexa Chew, *Citation Literacy*, 70 ARK. L. REV. 869 (2018) (reminding readers that citations are a tool of communication and persuasion and lamenting the way they are often taught to law students, as it creates a life-long association between citations and drudgery); Darby Dickerson, *Reducing Citation Anxiety*, 11 SCRIBES J. LEGAL WRITING 85, 86 (2007) (admitting that "most people detest, fear, or at best barely tolerate" dealing with citation formats).

8. *See* Michael Bacchus, *Strung Out: Legal Citation, The Bluebook, and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 251–53 (2002) (giving the history of how *The Bluebook* came to become the dominant source for proper citation forms in American legal writing, and detailing the short-lived signal changes in the controversial sixteenth edition); David J.S. Ziff, *The Worst System of Citation Except for All the Others*, 66 J. LEGAL EDUC. 668, 669 (2017) (discussing the various criticisms of *The Bluebook* and concluding that it works "quite well" for its fundamental purpose in spite of all of its flaws).

9. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 15.8(c)(v), at 154 (Columbia L. Rev. Ass'n et. al. eds., 21st ed. 2020) [hereinafter THE BLUEBOOK].

10. *See, e.g.*, Ziff, *supra* note 8, at 1; *see also* A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving With the New Bluebook,* 26 STETSON L. REV. 53 (1996) (detailing some of the unhelpful changes editors have made to *The Bluebook* over the years); Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L.

replace *The Bluebook* have been met with resistance for reasons that are also well-chronicled.[11]

Amidst these debates, legal advocates sometimes lose sight of the fact that citations are a language in themselves.[12] A citation sentence communicates important information about the authority that supports an advocate's analysis and arguments, and when that authority is being communicated by a court or other rule-making body, it has the power to influence, shape, or even create new law. When the language model of a citation system is too complex, it almost encourages practitioners and scholars to deviate from the standard norms.

Language will always evolve when it ceases to be useful or reliable, or when a more useful alternative presents itself.[13] So modern citation deviations can be seen as vernacular—the type of linguistic evolutions that are often inevitable in changing and challenging times. Perhaps the best example of the vulnerability of the modern citation system[14] is the recent debate over "(cleaned up)" citations.

The "(cleaned up)" trend started on Twitter[15] in 2017, and the original vision was supposed to be a mere format change, a way "to avoid the clutter that quotations gather as they are successively requoted and altered from court opinion to court opinion."[16] As a tool for cosmetic alteration, "(cleaned up)" citations were quickly lauded as a great idea, but then the citation evolved into a tool for obscuring the origins of precedent, misstating the important minutia of the law, or both. This is because the "(cleaned up)" citation form is a messy way for advocates to

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Rev. 1343, 1344 (1986) ("FORM IS PRESCRIBED FOR THE SAKE OF FORM, NOT OF FUNCTION; . . . THE SUPERFICIAL DOMINATES THE SUBSTANTIVE. THE VACUITY AND TENDENTIOUSNESS OF SO MUCH LEGAL REASONING ARE CONCEALED BY THE AWESOME SCRUPULOUSNESS WITH WHICH A SET OF INTRICATE RULES THE FORM OF CITATIONS IS OBSERVED.").

11. *Compare* Daniel Stone, *Harvard-led Citation Cartel Rakes in Millions from Bluebook Manual Monopoly, Masks Profits*, SUBSTACK (June 9, 2022), https://danielstone.substack.com/p/legal-bluebook-profits-havard-yale-columbia-penn [https://perma.cc/W3TE-T3GQ], *with* Mystyc Metrik, *One Book, Two Books, Redbook, Bluebook,* THE ISSUE SPOTTER: CORNELL J. OF LAW & PUB. POLICY STUDENT BLOG (Dec. 27, 2011), http://jlpp.org/blogzine/one-book-two-books-redbook-bluebook/ [https://perma.cc/6TVN-9XGJ] (explaining some of the many alternatives to *The Bluebook* that have been created over the years).

12. *See generally* Chew, *supra* note 7.

13. *See generally* Ilia Markov, Kseniia Kharitonova & Elena L. Grigorenko, *Language: It's Origin and Ongoing Evolution*, 11 J. INTEL. 6 (2023), https://doi.org/10.3390/jintelligence11040061 [https://perma.cc/XMZ5-A9R4].

14. *See, e.g.*, Chew, *supra* note 7 and accompanying footnote text; Dickerson, *supra* note 7 and accompanying footnote text.

15. *See generally* Elizabeth Thornburg, *Twitter and the #So-CalledJudge*, 71 S.M.U. L. REV. 249, 254 (2018) (explaining the cultural dominance of Twitter in 2017 and noting the social media platform had over 328 million active users that year while processing an average of over 6,000 tweets per second); Willy Staley, *What Was Twitter, Anyway?*, N.Y. TIMES (Apr. 18, 2023), https://www.nytimes.com/2023/04/18/magazine/twitter-dying.html [https://perma.cc/S8TE-CKK2] (likening the state of Twitter in 2023 to the final hours of a really fun party, "a little emptier, though certainly not dead . . . . Eventually we'll scrape the plates, load the dishwasher and leave the pans to soak").

16. Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143, 153 (2017) (documenting "this essay began as a tweet" and thanking the online community of #AppellateTwitter for its support "which led first to a quick justification for the idea and eventually to this more formal proposal").

alter quotations, thus allowing lawyers to create the perfect precedential quotes for their current cause out of less-than-perfect sources of precedent.

"(Cleaned up)" quotations began appearing in court opinions in 2017,[17] when an attorney named Jack Metzler began advocating for the widespread adoption of "(cleaned up)" quotations on social media.[18] Metzler's initial proposal suggested "(cleaned up)" could be used as a tool for appellate lawyers to use in briefs. It was quickly adopted by appellate lawyers in the Twitter community, who recognized it as a potentially useful tool for appellate practice.[19]

Metzler then published a law review article explaining his proposal for using "(cleaned up)" citations as a way to increase the readability of the resulting work while also keeping readers focused on the substance of the writing.[20] While Metzler's original proposal advocated for "(cleaned up)" to be used by "all legal writers," the earliest fans of the citation form were largely from the smaller group of practitioners and academics who focus their efforts on appellate cases.[21]

The original proposal was also meant to confine the application of the "(cleaned up)" concept to the stylistic and grammatical aspects of a quotation and citation.[22] This citation innovation was not intended to be used to delete or disinform. Consider Metzler's descriptions of the purpose of "(cleaned up)," where he says, the new citation form signals to the reader that the author "has removed extraneous, non-substantive material like brackets, quotation marks, ellipses, footnote reference numbers, and internal citations," as well as changing capitalization.[23] The whole idea is to "affirmatively represent that the alterations were made solely to enhance readability and that the quotation otherwise *faithfully reproduces the quoted text*."[24]

Metzler even proposed two entirely new rules for *The Bluebook*,[25] which he envisioned would become part of Rule Five:[26]

> **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

17. *See infra* notes 42–43.

18. *See infra* notes 45–52.

19. *See id.*

20. *See* Metzler, *supra* note 16, at 153 ("I propose that all legal writers adopt the parenthetical (cleaned up) to avoid the clutter that quotations gather as they are successfully requoted from court opinion to court opinion, as well as the citation baggage that accumulates along the way.").

21. The original idea was published in the University of Arkansas at Little Rock's specialty journal, The Journal of Appellate Practice and Process. *See id.*

22. *See* Metzler, *supra* note 16, at 153–54.

23. *See id.* at 154.

24. *Id.* (emphasis added).

25. THE BLUEBOOK, *supra* note 9; *see also* Bacchus, *supra* note 8; Ziff, *supra* note 8, at 679.

26. *See* Metzler, *supra* note 16, at 154–55. Rule Five of *The Bluebook* explains the proper mechanisms for citing quotations. *See* THE BLUEBOOK, *supra* note 9, at Rule 5.2–5.3.

> need not be cited parenthetically; and the 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 Rule 5.2 and 5.3.
>
> **Cleaning up intermediary case citations.** In addition to the alterations described in [the previous rule], 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 quote 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 the language quoted from the third case according to Rule 5.2 and 5.3.[27]

Although a new version of *The Bluebook* was published in 2020,[28] that edition declined to adopt Metzler's proposed rules for "(cleaned up)" citations.[29] Nor were Metzler's proposals included in the *ALWD Guide to Legal Citation*.[30] A brief discussion of the growing popularity of "(cleaned up)" appears in *The Indigo Book*[31] and in the Fifth Edition of Bryan Garner's *The Redbook*,[32] but those sources do not adopt a formal rule either.

The reluctance to adopt the rule is understandable because the very nature of "(cleaned up)" makes it inappropriate for non-appellate advocates. When courts change or "clean up" a quote from a previous court, this can result in unintended changes to the way the law is read and applied going forward. When courts use "(cleaned up)," they risk accidentally changing the underlying language and the law.

Appellate practice is different from trial practice,[33] and the nature of appellate practice makes it a good match for "(cleaned up)" citations. Appellate courts often have more time to spend on each case and more resources than the typical

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27. *See* Metzler, *supra* note 16, at 154–55. This version of a proposed rule for "cleaned up" citations does not address what happens when the omitted source is one that is traditionally given more weight than the two sources that are bookended in the original text. This is a situation that happens fairly often due to the rhythms of the language of citation and the exact situation that occurred in the first time the United States Supreme Court used a "cleaned up" citation. *See infra* notes 53–57.

28. *See* THE BLUEBOOK, *supra* note 9.

29. *See, e.g.*, Ashley Caballero-Daltrey, *What Are You Signaling? The Changing Landscape of Citation Culture*, JD SUPRA (Apr. 5, 2022), https://www.jdsupra.com/legalnews/what-are-you-signaling-the-changing-3927983/ [https://perma.cc/32C3-HXQR] (noting that "cleaned up" is increasing in popularity in spite of being excluded from *The Bluebook*).

30. Carolyn Williams, ALWD GUIDE TO LEGAL CITATIONS (7th ed. 2021).

31. *See* THE INDIGO BOOK: A MANUAL OF LEGAL CITATION 27 (Christopher Sprigman & Jennifer Romig et al. eds., Public.Resource.Org 2d ed. 2021).

32. BRYAN GARNER, GARNER'S THE REDBOOK: A MANUAL ON LEGAL STYLE (5th ed. 2023).

33. *See, e.g.*, Daniel J. Knudsen, *Institutional Stress and the Federal District Courts: Judicial Emergencies, Vertical Norms, and Pretrial Dismissals*, 2014 UTAH L. REV. 187, 189 (2014) ("Federal district judges rule multiple times in the course of a lawsuit on numerous motions that affect the outcome. They also engage in fact finding more often than the federal circuit-court judges.").

local trial court. Appellate courts also have the skilled personnel to apply to the detailed task of verifying the claims of the advocates who appear in front of them and checking their citations for reliability and accuracy.[34] The higher the appellate court, the more likely the judges have careful law clerks who can help them research issues and clarify any questions or ambiguities that may arise.[35] These law clerks are usually former members of a law review and have at least two years of experience in ensuring the reliability of citations.[36] Appellate practice also has different timelines and deadlines, making it more likely that the clerks, judges, and lawyers involved will have the time to become familiar with the issues and precedent before rendering a decision. Thus, in the appellate context, a "(cleaned up)" citation seems like a great idea, and perhaps even a beacon of hope for attorneys who would rather focus on ensuring the clarity of their ideas than the minutia of the punctuation marks within their nested citations. But "(cleaned up)" is not appropriate for all advocates.

Many trial courts lack the research resources and personnel that are found at the appellate level. Trial courts do not have these types of resources, particularly state trial courts and local county jurisdictions. Even federal district courts move faster than appellate courts and do not have the clerks or the timetables of the appellate judiciary.[37] There is even less time and even fewer resources at the state and county trial court level, where a judge may have a local law clerk for a few hours a week every few months.[38] These jurisdictions and their stretched-thin judges are not a good match for "(cleaned up)" citations, especially in these early days when the citation itself lacks firm boundaries and does not have an official definition.

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34. *See, e.g.*, JEAN-CLAUDE ANDRE & SARAH ERICKSON ANDRE, FED. APPEALS JURISDICTION & PRACTICE § 1:5 (2023) (explaining that the trial court setting is one where issues move quicker and judges have less time for consideration than at the appellate court level: "Many issues in the trial court arise suddenly, shift form and focus, and require impromptu argument and resolution. On appeal, the issues are largely static, the record is complete, and the advocate usually has the luxury of time for research, reflection and refinement of the arguments.").

35. Much scholarship has been written on the subject of law clerks in federal courts. *See, e.g.*, Todd C. Peppers, Michael W. Giles & Bridget Tainer-Perkins, *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALBANY L. REV. 623, 629–32 (2008) (performing a literature review on the subject of federal clerks); J. Daniel Mahoney, *Law Clerks: For Better or For Worse?*, 54 BROOKLYN L. REV. 321, 328 (1988) (weighing in on the subject from the perspective of a circuit court justice). *But see* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1674–75 (2020) (arguing that the increase in the quantity of clerks and the corresponding increase in citations has not led to the expected increase in quality of opinions or citations).

36. Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1360 (discussing the enormous effort that law review members spend on checking each citation in each published article).

37. *See* ANDRE & ANDRE, *supra* note 34; *see also* WILLIAM F. SHUGHART II & GOKHAN R. KARAHAN, STUDY OF THE DETERMINANTS OF CASE GROWTH IN U.S. FEDERAL DISTRICT COURTS, Pub. No. 204010 (2003).

38. Douglas L. Molde, *In These Times*, VT. BAR J., Winter 2008/2009, at 5 ("These are difficult times. Legal services programs are facing extensive budget cuts which threaten programs and staff. The judiciary has had to close our courts for a portion of each week and is anticipating more drastic economics-based cuts.").

In the interests of creating reliable citations, it would be beneficial if we could stop the "(cleaned up)" trend all together, and also create a cleaner, simpler Rule 5 in *The Bluebook*. Given the proliferation of the use of "(cleaned up)" citations described in the subsequent paragraphs, however, that seems unlikely. So, any future suggested rules for the formal adaptation of "(cleaned up)" citations will need to address how to cite a citation that has been "(cleaned up)" in the previous opinion. As Metzler himself explained in his original published proposal, quotations that layer upon other quotations are the central issue that led to the creation of "(cleaned up)" in the first place.[39] Thus, it is logical to expect that these quotations will continue to proliferate, and the references will continue to stack on to themselves in the proliferation of quotations. As more quotations build on opinions with "(cleaned up)" quotations, ambiguity follows.[40] Until a rule is adopted by a resource that is widely accepted within the legal writing community, then this new citation will only create more ambiguity and unreliability.

"(Cleaned up)" has leaped forward in popularity and controversy with exponential speed in the years since Metzler first tweeted his proposal. Metzler made his tweet on March 15, 2017,[41] and the citation form appeared in a federal court opinion before the end of the month.[42] Metzler's law review article containing his proposed rules for *The Bluebook* appeared later in 2017, and "(cleaned up)" appeared in fifty-eight court opinions throughout that first year.[43]

The number of federal court opinions using "(cleaned up)" increased to 839 in 2018,[44] a quick acceptance for the traditionally change-resistant world of legal writing. In 2019, the number of court opinions using "(cleaned up)" was even higher: 1,792.[45] By 2021 this "mini-revolution in legal citation"[46] appeared in over 4,000 court opinions.[47] The following chart is based on original research and illustrates the growth in popularity of "(cleaned up)":[48]

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39. *See* Metzler, *supra* note 16.

40. *See, e.g.*, Lars Noah, *An Inventory of Mathematical Blunders in Applying the Loss-of-a-Chance Doctrine*, 24 REV. LITIG. 369, 383 (2005) ("Over time, these errors propagate and become more difficult to correct.").

41. *See* Metzler, *supra* note 16, at 143.

42. Wolz v. Auto-Club Prop. Cas. Ins. Co., 2017 U.S. Dist. LEXIS 50094 (W.D. Ky. 2017).

43. Number based on original research on file with the author.

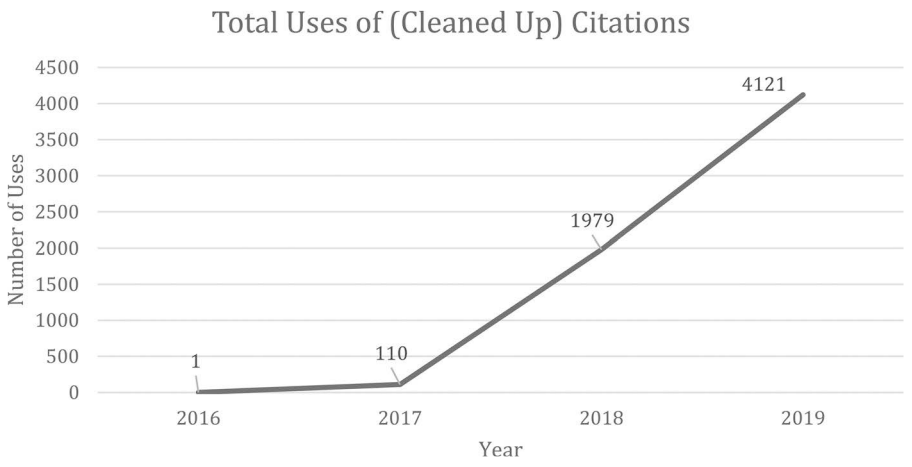
44. Number based on original research on file with the author.

45. *Id.*

46. *See* Debra Cassens Weiss, *Justice Thomas goes rogue on the Bluebook with 'cleaned up' citation—to the delight of appellate lawyers*, ABA JOURNAL: DAILY NEWS, abajournal.com/news/article/justice-thomas-goes-rogue-on-the-bluebook-with-cleaned-up-citation-to-the-delight-of-appellate-lawyers (Mar. 15, 2021) [https://perma.cc/NMU6-TXD8] (citing Carrie Garrison, *Rogue High Court Citation May Spark Legal Writing Changes*, LAW360 (March 11, 2021), https://www.law360.com/articles/1362962/rogue-high-court-citation-may-spark-legal-writing-changes [https://perma.cc/3RRP-3KSH]).

47. Number based on original research on file with the author.

48. Data gleaned over several months during 2022–2023; original chart on file with the author.



Like the mythical Pandora's Box,[49] the application of "(cleaned up)" was quickly pushed beyond the original intended implications. "(Cleaned up)" citations are now being used in the swiftly flowing litigation waters of federal district courts, and even more disturbingly, in county and city courts around the nation. These courts usually do not have the staff, the time, nor the resources[50] to check all of an attorney's "(cleaned up)" citations; much less all of the "(cleaned up)" citations in another judge's precedent. This issue is amplified because "(cleaned up)" citations are being used for more than simply removing brackets and ellipses from quotes: they are being used to remove some helpful information altogether.[51] This is a situation set up for abuse, and indeed abuse is already happening.

One of the most famous uses of "(cleaned up)" occurred in 2021 when United States Supreme Court Justice Clarence Thomas used the new parenthetical form to transform a distinction into a definition[52] in his *Brownback v. King* opinion.[53] Interestingly in the context of this Article, Justice Thomas was arguing that

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49. *See, e.g.*, William Hansen, *Can Interpretations of the Pandora Myth Tell Us Something About Ourselves*, OUPBLOG (Sept. 27, 2021), https://blog.oup.com/2021/09/can-interpretations-of-the-pandora-myth-tell-us-something-about-ourselves/ [https://perma.cc/ULD3-L9GE] (explaining the origins of the Pandora myth and pondering how some of the conflicting interpretations of its meaning reflect on society as a whole). The reference to Pandora and her mythical container is very popular with legal scholars and judges, and the word Pandora appears in hundreds of law review articles and judicial opinions. *See* original research on file with the author.

50. *See generally* Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, 143(3) DAEDALUS 96, 97 (2014).

51. *See infra* notes 52–59, 89.

52. Katrina Robinson, *Teaching Law Students Not to Make a Mess of (cleaned up)*, 34 SECOND DRAFT 1, 3 (2021) (citing Brownback v. King, 141 S. Ct. 740, 748 (2021) ("Notably, Justice Thomas used (cleaned up) to transform a distinction into a definition.")).

53. *See, e.g.*, Weiss, *supra* note 46; *see also* Robinson, *supra* note 52.

Supreme Court justices are not completely bound by precedent when he used "(cleaned up)" to cite the 2001 case of *Semtek International v. Lockheed Martin Corporation*.[54] *Brownback* was a police brutality case, and Thomas was arguing that a man who had been beaten by officers did not have the right to sue under the Federal Tort Claims Act because his case would have failed "on the merits."[55] While the direct quote that Thomas used can be sourced[56] and is thus defensible, *Semtek* was part of a lengthy series of cases related to the *Erie* doctrine,[57] and the "(cleaned up)" citation left out the type of important nuances in the recitation of precedent that the American public expects from a jurist operation at the highest level of the American legal system. Thus, returning to the thesis of this Article, a current lawyer working through these precedents would be ill-served by relying on Thomas' writing alone.[58] A dive into the actual source of the quotation would find a wealth of citations that could provide substantive sources for opposing opinions.[59] This is yet another example of how lawyers are doing a disservice to themselves and their clients by simply relying on someone else's citations and not reading the source materials themselves, and a "(cleaned up)" citation is a strong warning that additional investigation is necessary.

As the popularity of "(cleaned up)" citations has risen, so has their use in federal court opinions:

54. Brownback v. King, 141 S. Ct. 740, 748 (2021) (citing Semtek Int'l v. Lockheed Martin Corp., 531 U.S. 497, 501–02 (2001)).

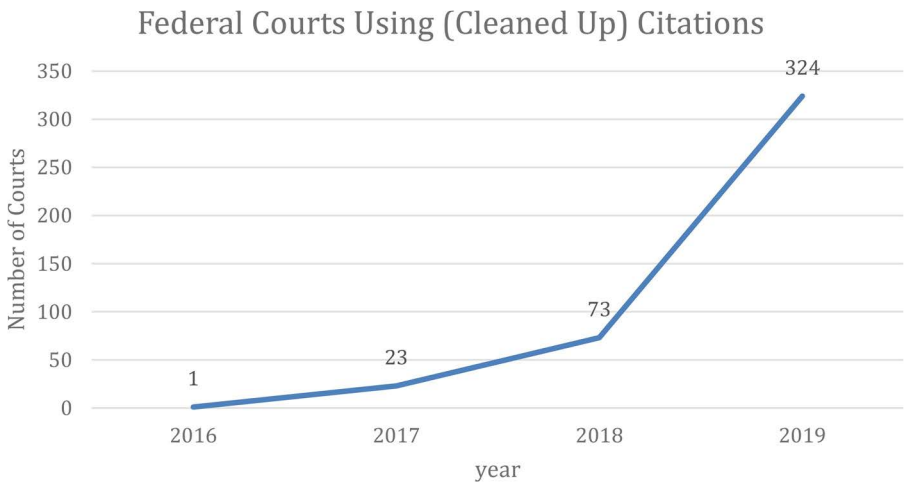
55. *See id.*

56. Scott Moise, *Dear Scrivener*, S.C. LAW. 60 (2021) (comparing Justice Thomas' quotation and "(cleaned up)" citation with the original source).

57. *See* Diane P. Wood, *Back to the Basics of Erie*, 18 LEWIS & CLARKE L. REV. 673 (2014) (offering her perspective on the *Erie* doctrine as chief justice of the United States Court of Appeals for the Seventh Circuit and giving a helpful basic breakdown of related concepts).

58. *See, e.g.*, Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707 (2006); Thomas Sciacca, *Has the Supreme Court Sacrificed Stare Decisis to Clarify Res Judicata? An "On the Merits" Evaluation of Federal Common Law Jurisprudence After Semtek*, 23 PACE L. REV. 313 (2002).

59. *See, e.g.*, Alan M. Trammell, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent, (and How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249 (2014); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *&* Gasperini, 46 U. KAN. L. REV. 751, 768–75 (1998).



Some courts have even shown a particular fondness for this citation format, using it over and over again—sometimes even within the same opinion. For example, in 2019, the Court of Appeals of Utah used "(cleaned up)" over thirty times in the opinion of *State v. Heath*,[60] and over twenty times in the opinions of *State v. Squires*,[61] *Martin v. Kristensen*,[62] and *State v. Escobar-Florez*.[63] In 2018, the Court of Appeals of Maryland used "(cleaned up)" eighteen times in the opinions of *Ford v. State*[64] and *Ademuliyi v. Md. St. Bd. of Elections*.[65] There are many other examples of courts using "(cleaned up)" citations ten or more times in a single opinion.[66] Here is a list of some of the courts who used "(cleaned up)" citations in multiple cases since its introduction into the legal vernacular:

United States Court of Appeals for the Fourth Circuit[67]

United States Court of Appeals for the Fifth Circuit[68]

United States Court of Appeals for the Sixth Circuit[69]

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60. State v. Health, 453 P.3d 955 (Utah Ct. App. 2019).
61. State v. Squires, 446 P.3d 581 (Utah Ct. App. 2019).
62. Martin v. Kristensen, 450 P.3d 66 (Utah Ct. App. 2019).
63. State v. Escobar-Florez, 450 P.3d 98 (Utah Ct. App. 2019).
64. Ford v. State, 197 A.3d 1090 (Md. 2018).
65. Ademulivi v. Md. St. Bd. of Elections, 181 A.3d 716 (Md. 2018).
66. Original research on file with the author.
67. The United States Court of Appeals for the Fourth Circuit used "(cleaned up)" in at least fifteen cases in 2019. The original research for the data cited in Notes 67–84 of this Article is on file with the author.
68. The United States Court of Appeals for the Fifth Circuit used "(cleaned up)" in at least one hundred and fifteen cases in 2018 and 2019. *See supra* note 67.
69. The United States Court of Appeals for the Sixth Circuit used "(cleaned up)" in at least thirty-five cases in 2018 and 2019. *See supra* note 67.

United States Court of Appeals for the Seventh Circuit[70]

United States Court of Appeals for the Eighth Circuit[71]

United States District Court for the District of Columbia[72]

United States District Court for the Central District of California[73]

United States District Court for the District of Delaware[74]

United States District Court for the Southern District of Florida[75]

United States District Court for the Northern District of Illinois[76]

United States District Court for the District of Minnesota[77]

United States District Court for the District of New Jersey[78]

United States District Court for the District of South Dakota[79]

United States District Court for the Western District of Texas[80]

Court of Appeals of Maryland[81]

Court of Appeals of Michigan[82]

Court of Appeals of Utah[83]

Court of Special Appeals of Maryland[84]

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70. The United States Court of Appeals for the Seventh Circuit used "(cleaned up)" in at least fifteen cases in 2018 and 2019. *See supra* note 67.

71. The United States Court of Appeals for the Eighth Circuit used "(cleaned up)" in at least one hundred forty cases in 2018 and 2019. *See supra* note 67.

72. The United States District Court for the District of Columbia used "(cleaned up)" in at least one hundred twenty-five cases in 2018 and 2019. *See supra* note 67.

73. The United States District Court for the Central District of California used "(cleaned up)" in at least sixty-five cases in 2018 and 2019. *See supra* note 67.

74. The United States District Court for the District of Delaware used "(cleaned up)" in at least thirty-nine cases in 2019. *See supra* note 67.

75. The United States District Court for the Southern District of Florida used "(cleaned up)" in at least twenty-five cases in 2018 and 2019. *See supra* note 67.

76. The United States District Court for the Northern District of Illinois used "(cleaned up)" in at least fifty cases in 2018 and 2019. *See supra* note 67.

77. The United States District Court for the District of Minnesota used "(cleaned up)" in at least eighty-five cases in 2018 and 2019, with the vast majority of the case citations occurring in 2019. *See supra* note 67.

78. The United States District Court for the District of New Jersey used "(cleaned up)" in at least fifteen cases in 2018. *See supra* note 67.

79. The United States District Court for the District of South Dakota used "(cleaned up)" in at least forty cases in 2018 and 2019. *See supra* note 67.

80. The United States District Court for the Western District of Texas used "(cleaned up)" in at least fifteen cases in 2018 and 2019. *See supra* note 67.

81. The Court of Appeals of Maryland used "(cleaned up)" in at least sixty cases in 2018 and 2019. *See supra* note 67.

82. The Court of Appeals of Michigan used "(cleaned up)" in at least sixty-five cases in 2018 and 2019. *See supra* note 67.

83. The Court of Appeals of Utah used "(cleaned up)" in at least sixty cases in 2018 and 2019. *See supra* note 67.

84. The Court of Special Appeals of Maryland used "(cleaned up)" in at least one hundred fifty cases in 2018 and 2019. *See supra* note 67.

It is also worth noting that when courts use "(cleaned up)" citations, even for the first time, they usually do not explain what they think a "(cleaned up)" citation is or why they are using it.[85] Given that there is not an official source for the boundaries of how to use a "(cleaned up)" citation, this lack of explanation from courts only adds to the ambiguities surrounding the use of "(cleaned up)" citations. Only a handful of court opinions explained "(cleaned up)" when it first became popular in 2017,[86] and that number has not proportionally risen in the years since.[87] This lack of explanation is slightly less common at the federal circuit court level, and the courts that explained "(cleaned up)" citations when they first used it usually gave a citation to Metzler's article.[88]

The growing issue with "(cleaned up)" is not the use of this citation or the aesthetically pleasing pages that often result from the "(cleaned up)" process. The problem is that when courts are using "(cleaned up)" citations in this volume, at this level, the resulting jurisprudence makes it more difficult for future legal readers and writers to trace the original precedents that form the basis for the resulting court opinions.[89] As noted earlier, there is no actual rule yet for the boundaries of using "(cleaned up)"[90] which leads to a natural ambiguity in the application of this already ambiguous citation. Hopefully, most litigants and courts are not using "(cleaned up)" as an opportunity to alter the meaning and interpretation of the original source and precedent. Regardless, using "(cleaned up)" makes it harder for the reader to trace the origins and use them for future reference.[91] These types of gaps will become inevitably more problematic as future cleanings become

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85. Out of the fifty-eight opinions that used "(cleaned up)" in 2017, less than five gave an explanation for the new citation by referring to Metzler's original article on "(cleaned up)" in the *Journal of Appellate Practice and Process*. Four of the opinions were published by the Maryland Court of Special Appeals, which developed a strong fondness for "(cleaned up)" citations. *See supra* note 84. And even that court used "(cleaned up)" at least twice before providing an explanation. *Compare* Office of Admin. Hearings v. RoadRunner Title Pawn LLC, 2017 Md. App. LEXIS 1077 (2017), *and* Dominguez v. Rawlings, 2017 Md. App. LEXIS 1171 (2017), *with* Sang Ho Na v. Gillespie, 234 Md. App. 742 (2017) ("Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.").

86. *See, e.g.*, Lopez v. NAC Mktg. Co., 707 Fed. Appx. 492 (2017) (showing the first use of "(cleaned up)" by the Ninth Circuit Court of Appeals with no accompanying explanation); *see also* Cadena Com. USA Corp. v. Tex. Alcoholic Bev. Comm'n, 518 S.W.3d 318 (2017) (showing the first use of "(cleaned up)" by Texas Supreme Court, also without explanation).

87. Original research on file with the author.

88. *See, e.g.*, United States v. Reyes, 866 F.3d 316 (2017).

89. *See, e.g.*, Noah, *supra* note 40.

90. *See supra* notes 25–32 and accompanying text.

91. *See, e.g.*, Sara Wolff, *Happy 40th Birthday UMC! Onward!*, MAINE LAW (Aug. 11, 2022), https://mainelaw.maine.edu/faculty/happy-40th-birthday-umc-onward/ [https://perma.cc/8893-284F] (explaining that evolutions in the language of citations is expected, but pondering whether the ease of using "(cleaned up)" may be sacrificing accuracy and credibility because the citation "produces more questions than answers: What was 'cleaned up;' should it have been 'cleaned up;' was anything lost that the legal reader might want to know about; something that might signal something of value to the reader about the weight given the cited material or its provenance?").

more like scrubbings, with layers of "(cleaned up)" citation references layering upon themselves to create citations that act more like unwelcome soap scum. The inevitable disturbing level of opacity will likely delete any of the original clarity and create citations that obscure the vital origins of the relevant legal thoughts.

At least one court has made note of the potential for "(cleaned up)" citations to do more harm than good. In 2021, the United States Court of Appeals for the Eleventh Circuit chastised the defendant in *Callahan v. United Network for Organ Sharing* for using "(cleaned up)" in a way that manipulated the meaning of the original citation.[92] "A (cleaned up) parenthetical has limited utility at most," wrote Judge Britt C. Grant. "And whatever utility that innovation may have will vanish entirely if it used to obscure relevant information."[93]

"(Cleaned up)" citations may promise increased simplicity, but that simplicity comes at the potential expense of accuracy.[94] Thus, a prudent legal reader will treat a "(cleaned up)" citation as a signal that extra attention and careful reading should be applied to those citations. A prudent legal writer will understand that they are signaling to their reader to add extra scrutiny to this source, which suggests that the time reportedly saved by using "(cleaned up)" may be false advertising. If this new citation form actually creates *more* work, does it offer increased simplicity after all? This ambiguity in usefulness combines with the inherent riskiness to accuracy to make it clear that writers use "(cleaned up)" quotations at the risk of making a mess.

III. AN IN-DEPTH EXAMPLE FROM MODERN PRACTICE: THE MYTH THAT FRCP 30(B)(6) REQUIRES "PAINSTAKING SPECIFICITY"

Even before the rise of "(cleaned up)" citations, judges and legal advocates were taking language out of context to create their arguments and citing to unpublished cases that were not easily verified as related precedent. In this Part, we look at the implications of not checking your citations through an important example. By tracing a line of cases from Kansas that has had a long-term impact on litigation involving corporations and other types of organizations, we can see that simply trusting a citation in these cases is doing a disservice to clients and cases.

When it comes to litigation, many of those tiny, yet influential, details are centered around the rules of civil and criminal procedure. While the average citizen may not be aware of the existence of the rules of civil procedure, lawyers and

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92. Callahan v. United Network for Organ Sharing, 17 F.4th 1356, 1362 (11th Cir. 2021).

93. *See id.* (chastising the defendant for omitting relevant text from the *cf.* portion of a relevant quotation); *see also* Ira P. Robbins, *Semiotics, Analogical Reasoning, and the cf. Citation: Getting Our Signals Uncrossed*, 48 DUKE L.J. 1043 (1999) (explaining that the history of the *cf.* citation is confusing and complicated, and the citation is somewhat disfavored among judges as a result).

94. Robinson, *supra* note 52, at 1, 5 (stating that "(cleaned up) offers simplicity at the expense of accuracy" and noting that this citation should be a sign to a legal reader that extra "detective work" is needed, so it may not save anyone any time after all).

judges know they are vitally important to the practice of law.[95] The basis for much of modern civil procedure is the Federal Rules of Civil Procedure, an inarguably influential,[96] if slightly antiquated,[97] collection of rules that govern how cases move through most courts around the United States. As trials have become increasingly rare,[98] discovery practice has become increasingly important,[99] and the rules that govern pre-trial litigation have become dizzyingly complex.

Discovery is almost always painful, but modern organizational discovery is frequently excruciating.[100] The discovery process in litigation is based on the rules of civil procedure and is vitally important because this is how lawyers discover evidence of wrongdoing, strategic defenses, or both.[101] However, modern discovery is increasingly expensive—largely because of the games lawyers play with the existing rules of civil procedure,[102] which are made more complicated because the current civil procedure rules were developed for a different era in the

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95. *See, e.g.*, Katrin Marquez, *Are Unpublished Opinions Inconsistent With the Right of Access?*, YALE L. SCH.: MFIA CASE DISCLOSED (Nov. 19, 2018), https://law.yale.edu/mfia/case-disclosed/are-unpublished-opinions-inconsistent-right-access [https://perma.cc/AF66-63H9] ("By the end of their first week in law school, law students have all learned at least one thing: the Federal Rules of Civil Procedure ('FRCP') are very important. The FRCP lay out the structure through which civil cases are litigated in the federal court system.").

96. *See, e.g.*, Stephen C. Yeazell, *The Misunderstood Consequences of the Modern Civil Process,* 1994 WIS. L. REV. 631, 632 n.1 (1994) (noting that over thirty-five states have adopted the Federal Rules of Civil Procedure for their trial courts, and the majority of the rest of the states allow the citation of federal interpretations of their rules of civil procedure when the rules are "the same or substantially similar").

97. *See, e.g.*, J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y. L. REV. 1713, 1716 (2013) (arguing that the Federal Rules of Civil Procedure should be revamped because "the drafters of the Federal Rules placed the mechanisms for robust merits adjudication at the end of the litigation process, [so] those mechanisms are largely unavailable to influence settlement outcomes in a world without trials"); *see also* Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287 (2010) ("Over the past three decades, many courts and commentators have expressed concern about federal civil litigation. One hears frequent complaints about the high costs of discovery, strategic abuse of the litigation process, huge case backlogs, litigation delays, and frivolous suits.").

98. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts, Does It Matter?*, JUDICATURE (2017) ("While trial remains theoretically possible in every case, the reality is quite different. Trials occur rarely, typically only in the most intractable disputes.").

99. *See generally* Erica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the "Genius of American Corporate Law,"* 63 EMORY L.J. 1383, 1412 (2014) (explaining the increasingly important role that the threat of discovery plays in corporate decision-making processes and noting that the power of Rule 30(b)(6) "cannot be overstated.").

100. *See* Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception,* 87 DENV. U. L. REV. 513, 515 (2010) ("Judges and litigants now routinely describe modern discovery as a 'morass,' 'nightmare,' 'quagmire,' 'monstrosity' and 'fiasco'") (citing PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., 2007 WL 2687670, at *1, 8, 12 (N.D.N.Y. Sept. 7, 2007)); INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS, AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. B-1–B-2 (2008), http://www.du.edu/legalinstitute/pubs/Interim%20Report%20Final%20for%20web1.pdf [https://perma.cc/4HRM-E2NC].

101. Alexandra D. Lahav, *A Proposal to End Discovery Abuse*, 71 VAND. L. REV. 2037, 2045 (2018).

102. *See generally id.*

practice of law.[103] The rules were largely developed with the end goal of trial in mind,[104] and thus, they presume that each litigant is heading towards a courtroom where a judge will have the opportunity to resolve any discovery disputes.[105] But almost no one goes to trial anymore, and the modern legal practitioner gathers evidence for trial in theory while often displaying this evidence outside the courtroom at a mediation, arbitration, or settlement instead.[106]

As many experienced lawyers will explain, these rules can be your best friend or your worst enemy and are largely responsible for the drastic increase in litigation expenses for all parties involved.[107] The attorney who understands the most procedure is also the attorney who likely has the most victories,[108] or as one of my early legal mentors once told me: "Often, the number of zeros in the check will be dependent on the nuances of the rules of procedure."

One of the discovery rules that tends to influence a lot of zeros in checks is Federal Rule of Civil Procedure[109] Rule 30(b)(6),[110] a tactical tool of "great power"[111] that allows a litigant to depose an organization. The reason for the nexus of dollars and depositions regarding Rule 30(b)(6) is that these recorded conversations bind the organization as a whole in most jurisdictions, and, in the process, sometimes reveal the type of systematic organizational negligence (or worse, malicious intent) that can unlock larger damages, increase settlement demands, and influence overall verdicts.[112] With stakes this high, it is understandable

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103. Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery,* 64 S.C. L. REV. 495, 496–500 (2020) (discussing widespread discontent with the modern discovery system and recent serious, if unsuccessful, attempts at reform).

104. *See id.* at 501–02 (explaining how the decline in trial practice is changing the purpose of litigation: "Unsurprisingly, in a world without trials, about half of the respondents thought that discovery was more useful in developing information for summary judgment or assessing the value of a case for settlement than for attempting to grasp the other party's claims and defenses for a trial that is unlikely ever to happen.").

105. *Id.* at 504 (discussing the modern reality that pre-trial practice is increasingly adversarial because there likely will not be a trial, which is a pragmatic "disconnect" from the rules of civil procedure since the rules were created with the trial in mind).

106. *See id.*

107. *See* Glover, *supra* note 97, at n. 72 (explaining that defendants often use the rules to "financially exhaust their opponents in the initial discovery stages of a complex case long before ever reaching the point at which discovery of key material information becomes imminent and inevitable").

108. *See generally* Andrew S. Pollis, *Busting Up the Pre-Trial Industry*, 85 FORDHAM L. REV. 2097, 2097–98 (2017) (discussing the increasingly complex Federal Rules of Civil Procedure and their impact on the modern practice of law).

109. This article focuses on the nuances of Federal Rule of Civil Procedure 30(b)(6), but it is anticipated to have larger applicability. When a state rule of civil procedure is the "same or substantively similar" to the accompanying Federal Rule of Civil Procedure, then the state court will consider arguments that include federal court interpretations of the rule in question. *See, e.g.*, Yeazell, *supra* note 96, at n.1.

110. For an explanation of Rule 30(b)(6), its purposes and its common uses, see *infra* Part III.A.

111. Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge & Contentions: Rethinking Rule 30(b)(6) and Alternate Mechanisms*, 50 ALA. L. REV. 651, 653 (1999) ("the tactical use of Rule 30(b)(6) against entities has become recognized as a tool of great power").

112. *See id.* at 653 (discussing the modern tactical use of Rule 30(b)(6) as a "Trojan Horse" weapon against corporations, where litigants hope to force the corporate witness to "synthesize all the facts and issues in case" or provide a smoking gun of evidence).

why litigation surrounding Rule 30(b)(6) has become something of a cottage industry, with some lawyers using unreliable precedents to argue that the notice language for these depositions must go well beyond the requirements of the actual Federal Rule. This Article explains some of the reasons why we arrived at this divide in understanding, why it matters, and ultimately argues for a return to adherence to the actual rule while musing that we might perhaps see a return to a bit of sanity in corporate litigation as a result.

This Article also posits that some of the faith that the general public has lost in our courts[113] and our profession might be regained with a return to a reverence for reliable citations. Especially in these chaotic early days when artificial intelligence is being implemented as a practice assistant before the information it provides is reliable, double-checking every cited source is a necessity. And in an age when so many people feel lost and uncertain that their efforts make an impact, every lawyer can defend our democracy by using reliable citations. Because the little things really do make a big difference.

A. BRIEF OVERVIEW OF FRCP 30(B)(6)

In these modern times, when corporations are also people, the rules of civil procedure for federal courts and most states also allow corporations to speak for themselves. They do this through human representatives who testify under Federal Rule of Civil Procedure 30(b)(c), and the litigation around this has become an expensive cottage industry.

Federal Rule of Civil Procedure 30(b)(6)[114] gives a party who is in litigation with a corporate entity the right to depose the organization itself.[115] The general purpose of a Rule 30(b)(6) deposition is to "permit the examining party to discover the organization's position via a witness designated by the organization to testify on its behalf."[116] To do this, the rule requires the organization to be served

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113. *See, e.g.*, Janet Berry, *Maintaining and Improving the Public's Trust in the Judiciary*, 46 No. 2 JUDGE'S J. 1 (2007) ("Absent a strong mutual understanding between the courts and the media, public confidence in the entire system erodes, and democracy as we know it is imperiled."). Admittedly, even with the current concerns about the public's eroding trust in the judiciary, the public's displeasure with the courts is not a new concept. *Compare* Mark Sherman & Emily Swanson, *Trust in Supreme Court Fell to Lowest Point in Fifty Years After Abortion Decision, Poll Shows,* APNEWS (May 17, 2023), https://www.apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1 [https://perma.cc/294G-5UMG], *with* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018) (describing the historical connection between public discontent with the United States Supreme Court's decisions and various lawmaker's attempts to challenge or weaken the Court's authority).

114. While this article discusses the federal version, most state rules of civil procedure have rules that are very similar or identical. When the state version of a rule of civil procedure is identical to the federal version, most state courts will accept authorities interpreting that rule as persuasive evidence. *See, e.g.*, Yeazell, *supra* note 96.

115. FED. R. CIV. P. 30(b)(6). This is an additional right that adds to the right of litigants to depose employees of an organization and other fact witnesses. These other rights are addressed in other places within the rules of civil procedure.

116. *See, e.g.*, Rosenruist-Gestao E Servicos LDA v. Virgin Enters., Ltd., 511 F.3d 437, 440 n. 2 (4th Cir. 2007); *see also* Nat'l R.R. Passenger Corp. v. Cimarron Crossing Feeders LLC, 2017 W.L. 4770702, at *7 (D.

with notice of the subjects to be discussed at the deposition, and requires those subjects be described with "reasonable particularity:"

> ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena,[117] a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency,[118] or other entity and must describe with **reasonable particularity** the matters for examination. The named organization **must** designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination.[119] A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[120]

Kan. Dec. 29, 2017) (denying Amtrak's motion for a protective order and allowing questions that "specifically ask for the railroad's positions . . . positions that may or may not be the same as its expert opinions"). This opinion is one of at least three federal court opinions in this case related to the parties extended disputes over 30(b)(6) depositions. *See also* 2017 WL 4770702 (D. Kan. Oct. 19, 2017); 2017 WL 5970848 (D. Kan. Dec. 1, 2017).

117. *See, e.g.*, STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 820 (2011 ed.) ("If the corporation or organization is not a party, then one must issue a subpoena to compel attendance. If the corporation or organization is a party, a notice of deposition is sufficient.").

118. Over the years, many governments and government agencies have attempted to argue they are immune to the obligations of Rule 30(b)(6), but this has largely been unsuccessful. *See, e.g.*, S.E.C. v. Kramer, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (explaining that Rule 30(b)(6) applies to government agencies, and those agencies are not entitled to special exemptions nor special limitations on the scope of discovery); *see also* McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 79 (D.D.C. 1999) (ruling that Iran had been properly served with a Rule 30(b)(6) deposition notice); Great Socialist People's Libyan Arab Jamahiriya v. Moski, 683 F.Supp.2d 1, 11–13 (D.D.C. 2010) (explaining that the diplomatic immunity enjoyed by ambassadors to the United States may not absolve them from their litigation obligations under Rule 30(b)(6), and the government itself is never absolved; in that case the question was not whether the government could be deposed but whether the ambassador himself would need to sit for the deposition).

119. The "confer in good faith" language was added in the most recent revision to Rule 30(b)(6), which became effective December 1, 2020. *See, e.g.*, Letter from John G. Roberts, Chief Justice of the U.S. Supreme Court, to Hon. Nancy Pelosi, Speaker of the House of Representatives & Hon. Mike Pence, President of the Senate (Apr. 20, 2020) (available at https://www.federalrulesofcivilprocedure.org/latest-updates/) [https://perma.cc/6453-SRFT] (explaining the update had been adopted by the U.S. Supreme Court, and including the original report recommending the amendment from Committee on Rules of Practice and Procedure to the Judicial Conference of the United States). There was much discussion about this rule during the amendment process. *See, e.g.*, Gregory L. Schuck, John I. Southerland, William T. Thompson & Kellianne Campbell Barkley, *Stop the Madness: Making Reasonable Amendments to Rule 30(b)(6) Once and For All*, 42 AM. J. TRIAL ADVOC. 269, 270 (2019).

120. FED. R. CIV. P. 30(b)(6) (emphasis added).

Rule 30(b)(6) was added to the Federal Rules of Civil Procedure in 1970.[121] Before this addition, organizations would often engage in a practice called "bandying" in which corporate officers would often claim they had no knowledge of the deposition subject and then insist someone else was the proper deponent.[122] This cost litigants significant time, resources, and money and often yielded few results: "In many cases this led to a wasteful charade in which the deposing party attempted to guess the appropriate person to provide the information sought and the entity remained silent as to the identity of persons who could actually provide useful testimony."[123] Thus, the rule was revised to allow organizations to choose the person to testify on their behalf, and require the opposing party to provide advance notice of the topics so that the representative could prepare accordingly.[124] The rationale for the rule was that it would solve the bandying problem, and the new obligation was similar to the existing rules of discovery, so, therefore, would not create a significant burden.[125]

The modern application of the rule understands that many corporate entities are large and complex, so the person giving testimony may not have direct knowledge of the topics they will need to testify about.[126] Rule 30(b)(6) also gives the organization the right to receive advanced notice of what questions will be asked

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121. *See*, *e.g.*, 7 MOORE'S FEDERAL PRACTICE § 30.25 (Matthew Bender ed., 3d. ed.) ("Prior to the 1970 amendments to Rule 30, a party seeking to take the deposition of a corporation, partnership, association, government agency or other entity was required to identify the official to be deposed on behalf of the organization."). Most states have adopted the right to depose an organization using identical, or similar, language to Federal Rule of Civil Procedure 30(b)(6) into their state rules of civil procedure in the years that followed. *See id.*

122. *See id.* (citing FED. R. CIV. P. 30(b)(6) advisory committee note explaining that the 1970 rule revisions were designed to reduce the difficulty of identifying the correct person to depose, and to reduce the practice of bandying); *see also* Memory Integrity, LLC v. Intel Corp., 308 F.R.D. 656, 660 (D. Or. 2015) (explaining that Rule 30(b)(6) was enacted to curb use of technique known as "'bandying,' in which each witness in turn disclaims knowledge of facts that are known to other persons in the organization"); Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 278, 285 (D. Neb. 1989) (chastising defendant and its counsel for evasiveness during a corporate representative deposition, and holding they were liable for plaintiff's fees and costs among other sanctions).

123. *See* MOORE'S FEDERAL PRACTICE, *supra* note 121; *see also* M. Minnette Massey, *Depositions of Corporations: Problems and Solutions – Fed. R. Civ. P. 30(b)(6)*, 1986 ARIZ. ST. L.J. 81, 82–85 (1986) (describing many of the challenges encountered by litigants who were attempting to depose a corporate representative before the 1970 amendments to Rule 30).

124. *See* MOORE'S FEDERAL PRACTICE, *supra* note 121 ("One court explained that an overbroad Rule 30(b)(6) notice subjects the responding party to an impossible task. To avoid liability, the noticed party must designate persons knowledgeable in the areas of inquiry listed in the notice. When the responding party cannot identify the outer limits of the area of inquiry noticed, compliant designation is not feasible.") (citing Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000)).

125. *See, e.g., Memory Integrity LLC*, 308 F.R.D. 656, 660 (quoting Fed. R. Civ. P. 30, Advisory Committee Notes (1970 Amendments)) (explaining that "[t]he Advisory Committee observed that the burden placed by this rule on a party required to produce a witness or witnesses 'is not essentially different from that of answering interrogatories under Rule 33 . . . .'").

126. *See, e.g.*, Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge and Contentions: Rethinking Rule 30(b)(6) and Alternative Mechanisms*, 50 ALA. L. REV. 651, 654–55 (1999).

during this deposition.[127] This is known as a Rule 30(b)(6) notice, and it can be in the form of a written notice but is most commonly issued as a formal subpoena.[128] Federal Rule of Civil Procedure 30(b)(6) also states that a party in litigation with an organization has a right to depose the organization itself, in addition to other witnesses; [129] the organization then has a right to designate the person (or persons) that will testify on its behalf.

The Rule uses the phrase "the organization must designate"[130] because litigants have a right to depose a corporate representative if the opponent litigant wishes to take that deposition.[131] It is not optional. While it has become common practice for organizational counsel to attempt to prevent or mitigate a Rule 30(b)(6) deposition, this is usually gamesmanship that will simply delay the inevitable:

> The Federal Rules of Civil Procedure do not permit a party served with a 30(b)(6) deposition notice or subpoena to request "to elect to supply the answers in a written response to an interrogatory" in response to a Rule 30(b)6 deposition notice or subpoena request. Because of its nature, the deposition process provides a means to obtain more complete information and is, therefore, favored.[132]

An organization cannot dodge the deposition by referring the opposing party to previous discovery or other documents.[133] Courts have been clear that "[w]ritten discovery is not a substitute for a Rule 30(b)(6) deposition."[134] Nor can a corporation evade its 30(b)(6) duty by claiming it does not have a qualified witness: "[b]ecause Rule 30(b)(6) explicitly requires a company have persons testify on its behalf as to all matters reasonably available to it . . . the Rule implicitly requires

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127. FED. R. CIV. P. 30(b)(6) ("In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with *reasonable particularity* the matters for examination." (emphasis added)).

128. *See id.*

129. *See, e.g.*, Progress Bulk Carriers v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc., 939 F. Supp. 2d 422, 430 (S.D.N.Y. 2013) (explaining that using a subpoena to instigate a 30(b)(6) deposition does not preclude a litigant from also deposing employees as individuals under Rule 30(b)(1)).

130. *See* FED. R. CIV. P. 30(b)(6) (emphasis added).

131. *See, e.g.*, S.E.C. v. Merkin, 283 F.R.D. 689, 694 (S.D. Fla. 2012) (explaining that "just like any party litigating in federal court, Merkin has the right to take a 30(b)(6) deposition from the SEC").

132. Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co., 251 F.R.D. 534, 539 (D. Nev. 2008) (citing Marker v. Union Fidelity Life Ins., 125 F.R.D. 121, 126 (M.D.N.C. 1989)); *see also* United States v. Stabl Inc., 2018 WL 3758204, at *4 (D. Neb. Aug. 8, 2018) (citing Murphy v. Kmart Corp., 255 F.R.D. 497, 507 (D. S.D. 2009)) (explaining that 30(b)(6) depositions allow litigants to procure more complete information than written discovery, and proclaiming that "[p]roducing documents and responding to written discovery is not a substitute for providing a thoroughly educated Rule 30(b)(6) deponent").

133. *See, e.g.*, *Murphy*, 255 F.R.D. at 507 ("Kmart has objected to almost every subject . . . on the ground that such information is duplicative and unduly burdensome as it has already been produced in other forms or is available elsewhere. If the court were to adopt Kmart's position, then few Rule 30(b)(6) depositions would ever take place.")

134. *See* Parker v. United States, 2020 WL 729211, at *17 (D. Neb. Feb. 13, 2020) (quoting CitiMortgage, Inc. v. Chicago Bancorp, Inc., 2013 WL 3946116, at *1 (E.D. Mo. July 31, 2013)).

persons to review all matters known or reasonably available to [the corporation] in preparation for the 30(b)(6) deposition."[135]

The 30(b)(6) designee is not giving his or her personal opinion. Rather, the designee is presenting the organization's "position on the topic."[136] In a 30(b)(6) deposition there is "no distinction between the corporate representative and the organization."[137] Moreover, the designee must not only testify about facts within the entity's knowledge but also its subjective beliefs and opinions. The entity must not simply provide facts, it must also provide its interpretation of documents and events through the testimony of the designee.[138]

Courts have been clear that the Rule 30(b)(6) witness is obligated to represent the corporation in binding testimony, and "[t]his extends not only to facts, but also to subjective beliefs and opinions."[139] The testimony given by the designee is binding and the organization will be held accountable for the designee's words as the case progresses.[140]

Because the person being deposed is giving the official opinion of the organization, these depositions carry tremendous importance in the course of litigation. The 30(b)(6) witness often gives testimony that is the basis for motions for summary judgment, motions for punitive damages, and other types of pivotal moments that can change the course of a case.[141] This is one of the reasons why a Rule 30(b)(6) notice is something that becomes the center of its own wave of motions.

Companies served with a Rule 30(b)(6) notice "have a duty to make a conscientious, good-faith effort to designate knowledgeable persons of Rule 30(b)(6) depositions and prepare them to fully and unevasively answer questions about the designated subject matter."[142] This preparation includes preparing the designated witness(es) "by having them review prior fact witness deposition testimony as well as documents and deposition exhibits."[143] Unlike other depositions, personal

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135. *E.g.*, Sprint Commc'ns Co. L.P. v. Theglobe.com, Inc., 236 F.R.D. 524, 528 (D. Kan. 2006).

136. Hyde v. Stanley Tools, 107 F. Supp. 2d 992, 992–93 (E.D. La. 2000) (citing United States v. Taylor, 166 F.R.D. 356, 361, *aff'd*, 166 F.R.D. 367 (M.D.N.C. 1996)).

137. *See id.*

138. Brazos River Auth. v. GE Ionics, Inc., 469 F.3d. 416, 433 (5th Cir. 2006).

139. Estate of Thompson v. Kawasaki Heavy Indus., 291 F.R.D. 297, 303 (N.D. Iowa 2013) (citing Lapenna v. Upjohn Co., 110 F.R.D. 15, 25 (E.D. Pa. 1986) and 4 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FED. PRAC. 26.56[3], at 142–43 (2d. ed. 1984)).

140. *See, e.g.*, Starlight v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999) (holding a corporation has a duty under Rule 30(b)(6) to provide someone who is knowledgeable in order to provide "binding answers on behalf of the corporation").

141. *See, e.g.*, Richard J. Moore & Paul V. Lagarde, *Handling the Apex Deposition Request*, 57 FDCC QUARTERLY 153 (2007) (explaining some of the additional pressures to settle a case that can occur after a corporate representative deposition goes poorly for defense counsel).

142. *See id.* at 639 (citing Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995)).

143. *See* U.S. v. Taylor, 166 F.R.D. 356, 362 (M.D. N.C. 1996); *see also* Kelly Tenille Crouse, *An Unreasonable Scope: The Need for Clarity in Rule 30(b)6 Depositions*, 49 U. LOUISVILLE L. REV. 133 (2010) (discussing different courts' approaches to the question of whether preparations for Rule 30(b)(6) depositions constitute protected "work product").

knowledge of the subject matter is irrelevant[144]—it is the organization's knowledge that is being sought, and the organization's binding testimony that is of value.[145] This is one of the primary reasons why the rule places the responsibility on the organization to choose the person or persons who will be deposed, and also allows for sanctions if the deponent cannot or will not answer questions on the day of the deposition: "the purpose underlying Rule 30(b)(6) would be frustrated [if] a corporate party produces a witness who is unable . . . or unwilling to provide the necessary factual information on the entity's behalf."[146]

Because corporate representative depositions carry so much weight, and because these depositions can have vast implications on a case, there tends to be much litigation and negotiation around the parameters of these types of discovery depositions.[147] Oftentimes, this litigation takes the form of attorneys for the organization asking the court for one or more protective orders,[148] hoping to limit the scope of questioning during the deposition or even seeking to eliminate the deposition completely.[149] On very rare occasions, a court has allowed parties to limit questioning to interrogatories and avoid their Rule 30(b)(6) testimonial obligations; however, these rare occurrences have usually involved highly complex

144. *See* Memory Integrity, LLC v. Intel Corp., 308 F.R.D. 656, 661 (D. Or. 2015) (citing Covad Commc'ns Co. v. Revonet, Inc., 267 F.R.D. 14, 25 (D.D.C. 2010)) (quoting Nutramax Labs, Inc. v. Twin Labs, Inc., 183 F.R.D. 458, 469 (D. Md. 1998) ("The testimony of [30(b)(6)] witnesses also is not limited to matters within their personal knowledge, but extends to matters known or reasonably available to the party designating the witness.")).

145. *See* Memory Integrity LLC v. Intel Corp., 308 F.R.D. 656, 661 (D. Or. 2015) (citing McCormick-Morgan, Inc. v. Teledyne Indus., Inc., 134 F.R.D. 275, 286–88 (N.D. Cal. 1991) (holding that it is only when a topic Rule 30(b)(6) notice requests testimony so granular that "no human being . . . could reliably and completely set forth [the] material" then the court may grant parties permission to testify through interrogatories), *overruled on other grounds by* 765 F.Supp. 611 (N.D. Cal. 1991)); *see also* A.I. Credit Corp v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001) (citing Indus. Hard Chrome Ltd. V. Hetran, Inc., 92 F.Supp.2d. 82, 94 (N.D. Ill. 2000) ("testimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes")).

146. Memory Integrity LLC v. Intel Corp., 308 F.R.D. 656, 661 (quoting Black Horse Lane Assoc. L.P. v. Dow Chem. Corp., 228 F.3d 275, 304 (3d Cir. 2000)).

147. *See* Andrew S. Pollis, *Busting Up the Pre-Trial Industry*, 85 FORDHAM L. REV. 2097–98 (2017) (explaining why motion practice and discovery litigation have become increasingly complex as trials have become increasingly rare, because each party is trying "to make litigation as painful and expensive as possible for each other so that settlement becomes the better option. Yet there is a second omnipresent objective: maximization of fees for lawyers who charge their clients by the hour . . . it is the worst kept secret in the legal industry.").

148. *See generally* 8A FED. PRAC. & PROC. CIV. § 2035 (3d. ed.). Motions for protective orders and reply briefs are made under Federal Rule of Civil Procedure 26. *See, e.g.*, Reply in Support of Dealership Plaintiffs' Motion for Protective Order, *In re:* Automotive Parts Antitrust Litigation, 2015 WL 13686885 (E.D. Mich. Dec. 23, 2015).

149. *See, e.g.*, General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (requiring a moving party "to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact, as distinguished from stereotypes and conclusory statements"); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) ("Good cause is established on the showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.").

scientific matters, or circumstances when additional questions have been presented late in the litigation process after a deposition has already taken place.[150]

One tactic organizations use when they attempt to evade their Rule 30(b)(6) duties is claiming that everything is attorney-client privilege. This has been tried many times, and courts have acknowledged some nuances could give rise to some confusion[151] because, unlike other depositions where someone is testifying about their personal knowledge and understanding, a 30(b)(6) witness is usually testifying about knowledge that has often been gathered and prepared by their legal counsel. However, courts are also clear that this does not qualify for blanket attorney-client privilege: "There is simply nothing wrong with asking for facts from a deponent, even though those facts may have been communicated to the deponent by deponent's counsel."[152]

Yet another practice attorneys sometimes use is claiming that no one is left at the organization who is qualified or capable of giving Rule 30(b)(6) deposition testimony. It is common to find that an organization no longer employs individuals with first-hand knowledge of information related to litigation, or those who are still employed there have fuzzy memories of past events.[153] None of these circumstances relieves the organization of their deposition obligations under Rule 30(b)(6).[154] For example, in the North Carolina case of *United States v. Taylor*, multiple corporate defendants tried to avoid liability for environmental violations that took place over several decades.[155] Even though the court recognized that the events in question took place years ago, and almost all of the issues involved acts by a subsidiary organization that had long been sold, the court held the organization was still required to prepare for and participate in a Rule 30(b)(6) deposition.[156] The court sympathized with the challenge of finding individuals with knowledge given that many of them were deceased, but "these problems do not relieve an organization from preparing a 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources."[157] The disputed events in *Taylor* took place between 1959 to 1981, and the deposition was proposed for 1995. But as the Court explained, "[t]he Court

150. *See, e.g.*, McCormick-Morgan, Inc. v. Teledyne Indus., Inc., 134 F.R.D. 275 (N.D. Cal. 1991) (ruling that a non-lawyer corporate representative could not be expected to testify without the written assistance of counsel because "patent cases turn particularly on a conceptually dense dynamic between physical objects, words in claims, and principles of law"); United States v. Taylor, 166 F.R.D. 356, 362–63 (M.D.N.C. 1996) (explaining that the shift to interrogatories in complex questions is best made on a case-by-case basis and noting "contention interrogatories of limited scope are proper towards the end of discovery").

151. *See generally* Crouse, *supra* note 143.

152. Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267, 280 (D. Neb. 1989).

153. *See, e.g.*, Taylor, 166 F.R.D. at 362.

154. *See id.* at 361.

155. *See id.* at 359 (explaining the case involved multiple defendants who were being accused of long-term violations of CERCLA, also known as the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601–75).

156. *See id.* at 362.

157. *See id.* at 361.

understands that preparing for a Rule 30(b)(6) deposition can be burdensome. However, this is merely the result of the concomitant obligation from the privilege of being able to use the corporate form in order to conduct business."[158]

While the *Taylor* court does allow for the possibility that an organization may be able to plead lack of memory, the ruling makes it clear that the mere passage of time or change in personnel is not enough to successfully use this excuse.[159] Just as importantly, the *Taylor* court explains that if an organization states it has no knowledge or memory of a subject or fact in a Rule 30(b)(6) deposition, then the organization will likely be barred from using any evidence related to that inquiry as a defense or claim at trial.[160] Finally, the *Taylor* court concluded that courts should be vigilant in enforcing the preparation requirements for Rule 30(b)(6) "in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a halfhearted inquiry before the deposition but a thorough and vigorous one before trial."[161]

When the moving party is seeking to thwart its opponent's discovery efforts as much as possible,[162] then it will often move for a blanket protective order.[163] Simply moving for any type of protective order in advance of a deposition does not excuse a litigant from attending the deposition. [164] Blanket protective orders

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158. *See id.* at 362.

159. *See id.* at 361 (citing Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 76 (D. Neb. 1995)); *see also* United States v. Mass. Indus. Fin. Agency, 162 F.R.D. 410, 412 (D. Mass. 1995).

While the Rule 30(b)(6) deposition of a corporation and an individual are similar, there is one factor which can distinguish them. An individual's personal memory is no more extensive than his or her life. However, a corporation has a life beyond that of mortals. Moreover, it can discharge its 'memory,' i.e. employees, and they can voluntarily separate themselves from the corporation. Consequently, it is not uncommon to have a situation, as in the instant case, where a corporation indicates that it no longer employs individuals who have memory of a distant event or that such individuals are deceased. These problems do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.

Dravo Corp., 164 F.R.D. at 76.

160. *See Taylor*, 166 F.R.D. at 362–63, 365.

161. *See id.* at 362.

162. *See, e.g.*, Glover, *supra* note 97, at n.72 (quoting an interview with a defense attorney who explained that "the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly solo practitioners" and "to paraphrase General Patton, the way we won these cases was not by spending all of [our client's] money, but by making that other son of a bitch spend all of his").

163. *See* 8A FED. PRAC. & PROC. CIV. § 2035 (3d. ed.) ("Whether use of protective orders is expanding is uncertain. At least one district judge believes protective order practice has increased: 'Protective orders are, obviously, an ever–expanding feature of modern litigation. They have multiplied to the extent that the [c]ourt, itself, has incorporated a model order into its [l]ocal [r]ules.'") (citing *In re* Mirapex Prod. Liab. Litig., 246 F.R.D. 668, 672–73 (D. Minn. 2007)).

164. Some lawyers wrongly assume that simply filing a motion for protective order excuses them from attending scheduled depositions, but they assume this at their peril: a lawyer is wise to remember that only a court can provide such remedies. *See, e.g.*, Pioche Mines Consul., Inc. v. Dolman, 333 F.2d 257, 269 (9th Cir. 1964) ("Counsel's view seems to be that a party need not appear if a motion under [Federal] Rule 30(b)(6) is on file, even though it has not been acted upon. . . . But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains.").

are often litigated but not often granted simply because the barrier for a blanket protection order is high. As the Third Circuit explained, it is not enough to make "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning" as broad allegations will not be enough to secure the strong protections of a blanket protective order.[165]

By far the most common protest to Rule 30(b)(6) depositions is to complain that the subjects described in the required notice are too vague or too broad, and when the opposing counsel breaks down the topics in detail, it can result in complaints to the judge that the topics are too numerous.[166] The number of questions is not in itself proof of overreach, as explained by judicial analysis in litigation involving multiple Internet dating services:

> [t]he majority of the [134] topics focus on closely related, technical aspects of the operation of Match.com, Tinder, and OkCupid. Those topics, although numerous, do not encompass wide-ranging fields of inquiry . . . even though those separately listed topics are numerous, the number of those topics is not, by itself, abusive.[167]

Instead, the question often rests on the particularity or specificity of the wording in the notice itself, which is the subject of the next Part.

This Article does not delve into the many ways that litigants can fight about Rule 30(b)(6) depositions outside of the notice. One of the most popular disputes is whether the party who is conducting the deposition is bound by the topics in the notice.[168] If a litigant wants to fight with the opposing counsel about Rule 30 (b)(6) depositions, there are plenty of details to squabble about.[169]

B. HOW ONE KANSAS JUDGE USED TWO WORDS TO CREATE A MYTH

This brings us to the primary example this Article uses to illustrate the dangers of simply using a citation without reading the rooted language. The actual language of Federal Rule of Civil Procedure 30(b)(6) says that the requesting party must describe the subjects of the upcoming deposition with "reasonable particularity"[170] and the Kansas Code of Civil Procedure uses those two words as

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165. *See, e.g.*, Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1121 (3d. Cir. 1986).

166. *See, e.g.*, *infra* Section II.B; *see also* British Telecomms. PLC v. IAC/InterActiveCorp, 813 F. App'x. 584 (Fed. Cir. 2020) (analyzing a simultaneous argument from an Internet company that opposing counsel's Rule 30(b)(6) request was both overly broad and lacking particularity yet also too detailed and burdensome).

167. *See* British Telecomms, 813 F. App'x. at 588–89 (rejecting a request for a protective order on this issue).

168. *See, e.g.*, Kelly Tenille Crouse, *An Unreasonable Scope: The Need for Clarity in Federal Rule 30(b)(6) Depositions*, 49 U. LOUISVILLE L. REV. 133, 142 (2010) (explaining some of the leading cases at the time regarding the issue of whether the party taking the deposition is limited to the subjects in the notice).

169. *See generally id.*

170. *See* BAICKER-MCKEE ET AL., *supra* note 117.

well.[171] However, there is a growing myth, perpetuated by attorneys and courts, that the applicable standard is actually "painstaking specificity," and the citations used to support that myth almost all lead back to one case from Kansas: *Sprint Communications Co. v. Theglobe.com, Inc*.[172]

The *Sprint* case involved a recalled federal magistrate judge[173] who was overseeing a case where Sprint Communications was represented by his former law partners.[174] Although the Sprint lawyers did not raise the notice of deposition as an issue,[175] Judge David Waxse analyzed it anyway.[176] By taking two words from an earlier opinion out of context in his analysis language, Judge Waxse created a monster: a highly-criticized and non-existent new standard for discovery that is being cited over and over again to argue the federal rule has changed and that parties seeking to depose an organization must meet a higher standard.[177]

The *Sprint* case was a complicated and technical patent dispute, and the attorneys for Sprint were trying to argue that Sprint should be released from its Rule 30(b)(6) obligations because the only people knowledgeable enough to testify

171. 4 KAN. L. & PRAC., CODE OF CIV. PROC. ANNO. § 60-230 (5th ed. 2022) ("In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency or other entity and must describe with reasonable particularity the matters for examination.").

172. Sprint Commc'ns Co. L.P. v. Theglobe.com, Inc., 236 F.R.D. 524 (D. Kan. 2006); *cf.* Espy v. Mformation Techs. Inc., 2010 WL 1488555 (D. Kan. 2010) ("Even in Kansas the 'painstaking specificity' standard has not received uniform approval and for good reason. It is made from whole cloth and has no basis in the Rule.").

173. A "recalled" judge is usually a judge who agrees to continue to serve even though he or she is technically retired. *See* 28 U.S.C. § 375 (2022); *see also* FMJA IN MEMORIAM 2022-2023, FMJA HISTORY & ARCHIVES COMM. (July 11, 2023) ("After a 35-year career, Judge Waxse was appointed as Magistrate Judge in 1999 where he served until his retirement in 2013. He was on recall status until 2017."). A magistrate judge is a judicial officer of a federal district court who has been appointed by the judges themselves. Federal district court judges may delegate the power to conduct trials and make rulings to magistrate judges. *See generally* MAGISTRATE JUDGES DIVISION OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES MAGISTRATE JUDGES, 1–3 (2002).

174. Judge Waxse was a former partner at Shook, Hardy and Bacon, LLP. Shook represented Sprint in this litigation. *Compare* Sprint, 236 F.R.D. at 526 (stating attorneys Adam P. Seitz and Eric A. Buresh of Shook, Hardy and Bacon represented plaintiff Sprint Communications, and attorney Basil Trent Webb of Shook, Hardy and Bacon represented plaintiff Sprint Communications as well as one of the counter defendants) *with* Judge David Waxse, LEGAL TALK NETWORK (Sept. 24, 2022), http://legaltalknetwork.com/guests/judge-david-waxse [https://perma.cc/BYK8-AWS2] ("Prior to his appointment as a Magistrate Judge in 1999, he was a partner at Shook, Hardy & Bacon"); *see also* ERIC E. BENSEN & REBECCA K. MYERS, BENSEN & MYERS ON LITIGATION MANAGEMENT § III.A.2 (2010) (describing Judge Waxse as "one of the most proactive Judges in the Federal Courts concerning e-discovery issues").

175. *Sprint Communications* was a complicated, multi-litigant patent litigation suit that went on for years after this 2006 opinion. *See, e.g.*, Sprint Commc'ns v. Comcast Cable Commc'ns, Inc., 2014 WL 5089402, at *1 (D. Kan. Oct. 9, 2014) (explaining the order was part of a series of suits brought by Sprint against various defendants for patent infringement).

176. *See* Sprint, 236 F.R.D. at 527 ("Although counsel likely is familiar with the purpose of a Rule 30(b)(6) deposition, the Court commences its analysis with a brief overview of the unique function served by such a specialized form of deposition.").

177. *See, e.g.*, *infra* notes 183–184, 189–190 and accompanying text.

were the patent attorneys working on the case.[178] While Judge David Waxse denied this novel argument, he did go beyond the pleadings to analyze the notice itself and offer Rule 30(b)(6) notice analysis:

> [T]o allow the rule to effectively function, the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issue in dispute. Then, as noted above, the responding party "must make a conscious good-faith endeavor to designate to persons having knowledge of the matters sought by [the interrogator] as to the relevant subject matters." Once notified as to the reasonably particularized areas of inquiry, the corporation then "must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.[179]

Judge Waxse cited the source for the "painstaking specificity" language as *Prokosch v. Catalina Lighting, Inc*., a Minnesota case where the judge used "painstaking specificity" while chastising a recalcitrant defendant.[180] Unlike the court in *Sprint,* the *Prokosch* court was focused on manipulative actions by the defendant, so the "painstaking specificity" language was part of an analysis emphasizing the reciprocal intentions of Rule 30(b)(6) and shaming the defendant for not upholding their part of their obligations under the federal rules.[181] So while *Prokosch* was the first opinion to use the words "painstaking specificity," Judge Waxse's *Sprint* opinion was the first record of using these words in a way that could be cited to create increased obligations for litigants. These cases have been cited quite a bit, both by lawyers seeking to perpetuate the myth that there is a new standard and those who are unwittingly aiding their cause.

As subsequent judges have pointed out, words like "painstaking specificity" or "painstaking particularity" create a heightened standard that puts additional burdens on the party seeking the deposition that goes beyond what the actual rule requires.[182] But this has not stopped lawyers from proclaiming this higher

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178. *See Sprint*, 236 F.R.D. at 526–27 ("Sprint filed a motion for protective order seeking to prohibit deposition on grounds that the employee inventor died; thus, the only potential corporate designees with knowledge of the subjects listed [in the notice] are former, present in-house Sprint attorneys, or both, each of which have extensive involvement in the present litigation").

179. *See id*. at 528.

180. *See id*.; Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 633, 637–38 (D. Minn. 2000). The judge in *Prokosch* was highly irritated at the defendant halogen lighting company, chastising them for misleading the plaintiff numerous times throughout the discovery process: "We find it flatly implausible that a company . . . that has been the subject of several products claims, involving a good with which it is associated, would not maintain documentation concerning any such claims, or have ready access to such documentation." Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 637 (D. Minn. 2000). The judge also threatened to sanction the defendant due to misbehavior during their Rule 30(b)(6) deposition because the representative "was both unprepared and unresponsive to Plaintiff's questioning." *Id*. at 639.

181. *See id*. at 638.

182. *See, e.g*., Murphy v. Kmart Corp., 255 F.R.D. 497, 505–06 (D.S.D. 2009) (explaining why painstaking specificity creates a higher burden for litigants than reasonable particularity, and that a careful reading of

standard exists, sometimes without any clarification that "reasonable particularity" is the language in the actual federal rule.[183] In some cases, these lawyers have successfully persuaded courts that the "painstaking specificity" language from *Sprint* creates an increased layer of obligation on parties wishing to take a corporate representative deposition.[184] Just as worrisome, in the modern days of legal research, the "painstaking specificity" language has become a Westlaw headnote that reads as if the federal standard has changed as well.[185]

Both *Sprint* and *Prokosch* have come under criticism for applying a standard that does not exist. For example, when the defendants in *Junk v. Terminix International Company Limited Partners* tried to use *Prokosch* and *Sprint* to convince the court to apply the "painstaking specificity" standard, the court let the litigants know they would not be persuaded:

> DAS cites to two reported opinions which say that "the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned . . .." This should not be taken too literally. **The standard in the rule is a straightforward one of "reasonable particularity," nothing more**. In this Court's experience many disputes over Rule 30 (b)(6) notices are occasioned by over-specificity in atomizing the matter for examination into needless detail.[186]

Additional criticism occurred in *Rivas v. Greyhound Lines, Inc*.[187] when Greyhound attempted to persuade the court that "painstaking specificity" was required notice language:

> Though Greyhound Defendants argue that a reasonably particular topic for examination must be stated with 'painstaking specificity,' no court within the Fifth Circuit has adopted that standard. Further, a careful examination of the cases using that standard show that its purpose is merely to require that a deposing party enable the corporation to adequately prepare.[188]

Prokosch shows "no evidence that the court intended to supplant the 'reasonable particularity' standard clearly articulated in Rule 30(b)(6)"). *But see* Christine Rheinhard & Dylan Farmer, 30(b)(b): The Procedural and Ethical Idiosyncrasies of Federal Corporate Representative Depositions, Presentation at The Thirtieth Annual Labor and Employment Law Institute (Aug. 23–24, 2019) (noting that even though the conflict between these cases creates a frustrating ambiguity, it sometimes makes no difference in practice because discovery disputes are often handled on a case-by-case basis).

183. *See, e.g*., Bradley C. Nahrstadt, *Preparing a Witness: Rule 30(b)(6) Depositions in an ESI World*, IN-HOUSE DEFENSE QUARTERLY, Winter 2015.

184. *See, e.g*., Memory Integrity, LLC v. Intel Corp., 308 F.R.D. 656, 661 (D. Or. 2015) (quoting *Sprint*); Adidas Am., Inc. v. TRB Acquisitions LLC, 324 F.R.D. 389, 395 (D. Or. 2017) (quoting *Sprint*).

185. *See, e.g.,* Memory Integrity, 308 F.R.D. at 661 (quoting *Sprint*) ("'[T]o allow the rule governing the deposition of a corporate representative to effectively function, the requesting party must take care to designate, *with painstaking specificity*, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute.'").

186. *See* Junk v. Terminix Intern. Co. Ltd. Partnership, 594 F.Supp.2d 1062, 1068 n.2 (S.D. Iowa 2008) (emphasis added).

187. Rivas v. Greyhound Lines, Inc., 2015 WL 13710122 (W.D. Tex. 2015).

188. *See id*. at *4.

And yet, despite ample evidence that *Sprint* and *Prokosch* are simply using language that can explain the rule, the "painstaking specificity" language continues to be cited as if the rule has changed. While some judges have reasonably applied the "painstakingly specific" language as it was originally intended, as a tool to help judges bring evasive litigants into compliance with the Federal Rules and the wishes of the bench,[189] others have adopted the standard itself. For example, in April 2023, United States Magistrate Judge Robert M. Illman of the United States District Court of the Northern District of California wrote "[t]he painstaking specificity standard described in *Prokosch* has been adopted by many courts in this Circuit."[190] However, there was not a new painstaking specificity standard in *Prokosch*, as described in detail above. Only one of the four cases cited by Judge Illman claimed the standard had been changed;[191] two of the four cases simply discussed the rule and its reciprocal obligations in the same manner as *Prokosch*,[192] and one of the cases cited focused on a different federal rule of civil procedure and did not mention Rule 30(b)(6) at all.[193] Nonetheless, the descriptive language of *Prokosch* is still being described in a United States District Court opinion as a new standard, where it will no doubt be quoted by more lawyers going forward. Hopefully, at least some of those lawyers find this law review Article, or better yet, go back and read *Prokosch* for themselves.

All of this confusion started with attorneys and judges who cited the *Sprint* opinion without reading the original source—or perhaps, in some cases, cited *Sprint* while knowing that they were stretching the standard beyond its original intent. Thus, the *Sprint* opinion and its progeny are great examples of why attorneys should trace citations back to the source because sometimes the source does not say what the citation is claiming at all. And sometimes, even better, lawyers

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189. *See, e.g.*, British Telecomms. PLC v. IAC/InterActiveCorp, No. 18-366-WCB, 2020 WL 1043974, at *2 (D. Del. Mar. 04, 2020) ("Rule 30(b)(6) requires that a deposition notice under the rule must describe the matters for examination 'with reasonable particularity.' Courts have strictly enforced that requirement, sometimes characterizing the 'reasonable particularity' requirement as mandating that the topics be designated 'with painstaking specificity.'"); *see also* Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1057 n.5 (7th Cir. 2000) (citing the *Prokosch* language as an elaboration on the original rule's language but not claiming the standard has been changed).

190. Batiste v. City of Richmond, 2023 WL 2951538 (N.D. Cal. Apr. 14, 2023) (citing Tumbling v. Merced Irrigation Dist., 2009 U.S. Dist. LEXIS 122468, at *4–5 (E.D. Cal. Dec. 15, 2009) (lacking any discussion of Rule 30(b)(6) at all)); Littlefield v. NutriBullet, L.L.C., 2017 U.S. Dist. LEXIS 222836, at *21 (C.D. Cal. Nov. 3, 2017) (citing *Prokosch* as originally intended, and using the "painstaking specificity" language along with the "reasonable particularity" standard to describe mutual obligations); Goodman v. Walmart Inc., 2020 U.S. Dist. LEXIS 116881, at *3–5 (D. Nev. July 2, 2020) (describing the applicable federal rule without mentioning the actual standard of reasonable particularity at all); Willy v. Sherwin-Williams Co., 2022 U.S. Dist. LEXIS 88454, at *7 (D. Or. May 17, 2022) (emphasizing the reciprocal nature of the obligations of the parties under Rule 30(b)(6) and using the painstaking language along with the actual standard in an intelligent discussion of the federal rule).

191. *See Goodman,* 2020 U.S. Dist. LEXIS 116881.

192. *See Willy,* 2022 U.S. Dist. LEXIS 88454; *Littlefield*, 2017 U.S. Dist. LEXIS 222836.

193. *See Batiste,* 2023 WL 2951538.

can find that the actual law fully contradicts the cited meaning in a way that works to the benefit of their client or cause.

IV. A PLEA FOR SANITY AND WARNINGS FOR THE FUTURE

The concerns about unreliable citations become even stronger when looked at in the context of the rapid technological changes that have engulfed the legal profession over the past three decades, and the even larger tidal wave of technological changes that are coming with the integration of advanced artificial technology into the legal research and writing process. This Part looks at unreliable citations through the intersection of the rise of artificial intelligence sources for legal research and the decrease in availability of affordable legal research information for practitioners.

Even before artificial intelligence took over the conversation[194] about the future of legal writing[195] and the practice of law,[196] this century was always going to be a period of breathtaking change for lawyers, judges, and society as a whole. As one legal commentator explained in 2017, before artificial intelligence became the subject of daily conversation: "The next twenty years are likely to see greater transformation in how the American (and world) legal professions are organized and ply their services than was true for any comparable period in history."[197] When massive technological changes occur, lawyers often feel the profession has two choices: impede the inevitable changes, or adapt ourselves and the applicable portions of the profession to these new developments.[198]

This Article advocates for calm in the face of inevitable uncertainty. Although lawyers have a reputation for being slow to embrace change, the recent history of

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194. *See, e.g.*, John L. Tripoli, *The Not-So-Quiet Revolution: AI and the Practice of Law*, 45 PA. L. 26 (2023) ("Artificial intelligence, or AI, is everywhere. Most of us are encountering AI daily, if not hourly . . . . AI in the practice of law has also expanded and continues to grow with the potential to revolutionize the way legal services are provided").

195. *See generally* Steven R. Smith, *The Fourth Industrial Revolution and Legal Education*, 29 GA. ST. U. L. REV. 337 (2023) (discussing the impact of artificial intelligence on the practice of law and the way future lawyers are trained for the practice of law while they are in law school).

196. *See, e.g.*, Tripoli, *supra* note 194; *see also* Jason Moberly Caruso, *The Ethics of Artificial Intelligence in Legal Practice*, 65 ORANGE CO. LAW. 61 (2023) ("If you are worried about artificial intelligence (AI) invading the practice of law someday, fear no longer: our robot friends are already a core part of virtually every practice, and this will only increase in the coming years."); *see also* Jan Levine, *Forward: Artificial Intelligence: Thinking About Law, Law Practice, and Legal Education,* 58 DUQ. L. REV. 1 (2020) (describing a 2020 legal conference contemplating these impacts on the profession and the resulting scholarly works).

197. *See* Michael Thomas Murphy, *Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers*, 25 GEO. MASON L. REV. 36 (2017). *Compare* Eugene Volohk, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1138 (2019) *with* Andrew C. Michaels, *Artificial Intelligence, Legal Change, and Separation of Powers*, 88 U. CIN. L. REV. 1083 (2020) (debating whether artificial intelligence should be given judicial decision-making powers in the future).

198. *See generally* Murphy, *supra* note 197; *see also* CFTC v. McDonnell, 287 F.Supp.3d 213 (E.D.N.Y. 2018) (discussing the rapidly changing world of legal finance in the early ages of artificial intelligence and explaining that "emerging financial technologies are taking us into a new chapter of economic history . . . they are transforming the world around us").

the profession shows that lawyers must understand that the only thing certain in life is change.[199] The profession looks radically different today than it did ten years ago, twenty years ago, or twenty years before that. And there is every reason to believe the profession will look radically different ten to twenty years from now.[200]

Lawyers have also been anticipating the death of their profession due to technology for decades, with every new development seen as a threat to the usefulness of the legal profession.[201] The development and implementation of artificial intelligence, and particularly generative character transformers such as ChatGPT, brought even more warnings about the looming end to the modern practice of law.[202] This Article does not tackle whether the profession will adopt artificial intelligence technologies, or whether the impact that artificial intelligence will have on the profession will be good or ill because the reality is that for most of us, that is a question far beyond our control. Instead, this author advises professionals to be even more careful with their work product in these uncertain and ever-changing times. The technology lawyers rely on may be changing, but the ethical obligations we hold remain—including the ethical obligation to use accurate citations.[203]

Concerns about the accuracy of citations from artificial intelligence sources are more than mere minutia from legal writing professors and anxiety from Luddite lawyers. There is a widely reported phenomenon in which artificial intelligence programs create new information that has no basis in fact.[204] The scientists and philosophers who study these artificial intelligence-based programs call these incidents "hallucinations."[205] It is an interesting term because hallucinations in

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199. *See generally* Benjamin Alarie, Anthony Niblett & Albert H. Yoon, *Law in the Future*, 66 U. TORONTO L.J. 423 (2016) (predicting the forthcoming technological revolution will radically change every aspect of the law).

200. *See generally* Michael Simon, Alvin F. Lindsay, Loly Sosa & Paige Comparato, *Lola v. Skadden and the Automation of the Legal Profession*, 20 YALE J.L. & TECH. 234 (2018).

201. *See generally id.* at 249–50 (explaining various predictions of legal "Armageddon" going back to the 1950s that did not pass, and why artificial intelligence is different).

202. *See* Steve Lohr, *A.I. is Coming for Lawyers, Again*, N.Y. TIMES (Apr. 10, 2023), https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html [https://perma.cc/82F5-2ARW] (describing some of the many fears about artificial intelligence and its impact on the legal profession).

203. *See* Opinion and Order on Sanctions at *1, Mata v. Avianca, Inc., 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023) (explaining that "Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.").

204. *See, e.g.*, Cade Metz, *How Smart Are the Robots Getting?*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/technology/chatbots-turing-test.html [https://perma.cc/Q8K8-RF26] ("Certainly, these bots will change the world. But the onus is on you to be wary of what these systems say and do, to edit what they give you, to approach everything you see online with skepticism. Researchers know how to give these systems a wide range of skills, but they do not yet know how to give them reason or common sense or sense of truth. That still lies with you.").

205. *See* Adam Kravitz, *ChatGPT and the Future of Corporate Legal Work: Insights and Hallucinations*, FORDHAM L. NEWS (Mar. 25, 2023), https://news.law.fordham.edu/jcfl/2023/03/25/chatgpt-and-the-future-of-corporate-legal-work-insights-and-hallucinations/ [https://perma.cc/X3XW-T87M] ("One issue with Chat

humans are caused by a plethora of causes,[206] and some medical historians have argued that human hallucinations are a source of knowledge in themselves.[207] When some humans hallucinate, they are aware this is a trick of the mind,[208] while others fully believe the experiences their brains are experiencing are real: even if the sights, sounds, smells, and other senses do not exist in reality, their brains perceive these stimulations as a real part of the environment.[209] Most of the time, this is a temporary state that only exists until the brain can right itself—eventually, the drug causing the hallucinations wears off, perhaps, or some other stimulus realigns the brain's perceptions so that they are more in line with "reality."[210] With artificial intelligence, the program usually relies on corrections from programmers, or from the public.[211] This has potentially huge implications as artificial intelligence use becomes commonplace in the legal world, where the users are trained advocates pitted against each other in a battle over being "right" about issues that may have wide-ranging consequences for the law and public policy. What will happen when software that is trained to be persuaded comes into contact with millions of trained persuasive writers with competitive personalities, many of whom like to win at any cost? No one knows the answer. And as we move forward into a new world of legal practice based on research from artificial intelligence sources, no one knows what will happen when an artificial intelligence program extrapolates an attorney's arguments into hallucinations—much less what will happen when an artificial intelligence program comes to sincerely believe that one of these new hallucinations is real.

[GPT] . . . is that it 'sometimes writes plausible-sounding but incorrect or nonsensical answers,' referred to as AI hallucinations."); *see also* Lyndsey M. Wajert, *AI "Hallucinations" Can Inflict Real-World Pain*, NAT. L. REV. (June 13, 2023) (reporting on the first defamation suit against ChatGPT and its parent company, OpenAI, which was filed after the program gave false information about the parties involved in a different federal lawsuit).

206. *See generally* Suprakash Chaudhury, *Hallucinations: Clinical Aspects and Management*, 19 INDUS. PSYCH. J. 5 (2010) (describing an array of disorders associated with and treatments for human hallucinations).

207. *See generally* Jose Carlos Bouso, Genis Ona, Maja Kohek, Rafael dos Santos, Jaime Hallak, Miguel Alcázar-Córcoles & Joan Obiols-Llandrich, *Hallucinations and Hallucinogens: Psychopathology or Wisdom?*, 47 CULTURE, MED. & PSYCHIATRY 576, 579 (2023) (proposing that hallucinations can be associated with sometimes psychopathological but also with functional and beneficial outcomes to humans).

208. *See* Sebastian Ocklenburg, *Hallucinations are Far More Common Than Most People Think*, PSYCH. TODAY (Dec. 31, 2022), https://www.psychologytoday.com/us/blog/the-asymmetric-brain/202212/new-research-shows-how-common-hallucinations-really-are [https://perma.cc/SM9R-SKBH].

209. *See, e.g.*, Diogo Telles-Correia, Ana Lúcia Moreira & João Gonçalves, *Hallucinations and Related Concepts: Their Conceptual Background*, 6 FRONTIERS PSYCH. 1, (2015) (explaining there is a difference between human hallucinations that manifest from a person's imagination and human hallucinations that are related to specific senses).

210. *See* Chaudhury, *supra* note 206.

211. *See, e.g.*, Lance Whitney, *That's Not Right: How to Tell ChatGPT When It's Wrong,* PCMAG (May 15, 2023), https://www.pcmag.com/how-to/thats-not-right-how-to-tell-chatgpt-when-its-wrong [https://perma.cc/G8XD-SL4X] (explaining methods for correcting errors and hallucinations within ChatGPT and other artificial intelligence character generation programs).

In the summer of 2023, there was a well-documented saga[212] in which a lawyer relied on citations from ChatGPT,[213] only to be bench-slapped[214] by the trial judge when his opposing counsel discovered that the cases that were cited did not exist. The lawyer was officially sanctioned with a $5,000 fine[215] and unofficially sanctioned with public shaming.[216] The dialogue from the hearing on this issue gives an interesting insight into the lawyer's reasoning for relying on these cases: "My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up."[217]

This quote indicates that the problem was not simply due to an artificial intelligence system hallucinating cases that were not real, but the problem was also rooted in the increasing problem of lawyers lacking access to reliable information. Adding to the issue of unreliable citations is the issue of unequal access to information, which is alluded to in the earlier discussion of the unreliability of artificial intelligence.[218] Even before the launch of artificial intelligence products into the for-profit legal information landscape, the current reality is that every judge, law firm, and citizen does not have access to the same sources of information, and this

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212. *See, e.g.*, Bob Van Voris, *Phony ChatGPT Brief Leads to $5,000 Fine for New York Lawyers*, BLOOMBERG (June 22, 2023), https://bloomberg.com/news/articles/2023-06-02/chatgpt-phony-legal-filing-case-gets-lawyers-a-5000-fine-for-ny-lawyers/377052# [https://perma.cc/DEC9-JG36]; *see also* Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html [https://perma.cc/7ABK-FLMZ] (joking about how a lawyer could submit a ten-page brief with a "half dozen" made up citations, and quoting New York University law professor Stephen Gillers as warning lawyers to be cautious with artificial intelligence chat programs because: "You cannot just take the output and cut and paste it into your court filings.").

213. David T. Laton, In re: the Estate of Bupp: *A Cautionary Tale of AI As Research Tool*, PENN. LAW., July–Aug. 2023, at 18 (detailing the false procedural history and holdings in the *Bupp* case before explaining that *Bupp* did not exist because this is one of the false citations created by ChatGPT; the author noted that the language, look and feel of the *Bupp* description was startlingly realistic and convincing).

214. *See*, *e.g.*, Joseph Mastrosimone, *Benchslaps*, 2017 UTAH L. REV. 331, 333 (2017) (documenting the rise of public shaming by judges who attempt to "enforce ethical and procedural norms through so-called 'benchslaps,' where the judge, often in a way that is superficially humorous, calls out attorney misconduct in a written order or opinion").

215. *See* Van Voris, *supra* note 212.

216. *See, e.g.*, Benjamin Weiser & Nate Schweber, *The ChatGPT Lawyer Explains Himself*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html [https://perma.cc/2XAW-7LKD] (reporting the lawyer was "grilled" for two-hours in a New York federal court and felt "embarrassed, humiliated and deeply remorseful."); Roy Strom, *Fake ChatGPT Cases Cost Lawyers $5000 Plus Embarrassment*, BLOOMBERG LAW (June 22, 2023), https://news.bloomberglaw.com/business-and-practice/fake-chatgpt-cases-costs-lawyers-5-000-plus-embarrassment [https://perma.cc/QS2B-3VXG] ("The embarrassment from the widespread news coverage of the case, coupled with the fines, should be enough to deter the lawyers from again falling prey to ChatGPT's hallucinations, according to legal ethics experts.").

217. Opinion and Order on Sanctions, *supra* note 203, at 6.

218. *See* Lyle Moran, *Issues Beyond ChatGPT Use Were at Play in Fake Cases Scandal*, LEGALDIVE (June 12, 2023), https://www.legaldive.com/news/chatgpt-fake-legal-cases-sanctions-generativeai-steven-schwartz-open-ai/652731 [https://perma.cc/C2Q7-BPSL].

means that searches for precedent can bring up different results.[219] Beyond the competing information platforms of Westlaw, LexisNexis, FastCase, and others, there are the issues of gatekeeping subscription sources[220] within those platforms which means not all advocates have access to the same information even when they are subscribing to the same resource.[221] This unequal access issue flows from the chasm of ambiguity related to the practice of citing unpublished opinions,[222] something that is a relatively recent development in the practice of law.[223] Unpublished opinions can contain great information, but they can also create confusion when advocates use citations that are specific to one platform. A citation with a Westlaw indicator will not be easily locatable by a judge or practitioner who only has access to Lexis, and vice-versa. These citations will be even more complicated to a citizen or practitioner who only has access to FastCase, Google, or others. This Article does not seek to reanalyze the long-running debate about citing unpublished opinions, or the social justice implications of injecting capitalistic concerns into the legal information market. This Article keeps its argument to its primary thesis of a warning to be careful since unitarily cited unpublished opinions are not portable or reliable to people without the same subscription, and this practice adds to the unreliability crisis in the modern practice of law.

Hopefully, anyone who learns about the long, excruciating, and internationally reported public hearing that resulted from the *Mata* lawyer's reliance on unverified citations uses that information as a strong motivation to take the advice in this Article seriously. Much of that attorney's humiliation could have been avoided if he had verified the information in the citations and then communicated with candor to the court.[224]

Another embarrassing example of an attorney's reliance on generative artificial intelligence dominated the headlines in late 2023, when two lawyers did not check the cases provided to them by Google Bard.[225] Google Bard functions

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219. *See generally* Olufunmilayo Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797 (2006) (explaining some of the access issues created by the for-profit legal information market).

220. For-profit legal information platforms such as Westlaw and Lexis are widely regarded as extremely expensive, and the subscription levels are quite complicated.

221. These widening fractures of understanding are not helping with the increasing credibility problem the court is experiencing with the public. *See, e.g.*, NAT'L CTR. FOR STATE CTS., *supra* note 6.

222. *See, e.g.*, Patrick J. Schlitz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1433 (2005) (explaining some of the various controversies surrounding the intense debate over whether to allow citation to unpublished opinions); *see also* Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 976 (2008) (discussing the ongoing controversy from an access-to-justice perspective).

223. *See generally* Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 6 J. APP. PRAC. & PROCESS 349 (2004) (documenting the state of local, federal court rules twenty years ago regarding the permissibility of citing to unpublished opinions).

224. Opinion and Order on Sanctions, *supra* note 203, at 6.

225. Benjamin Weiser & Jonah E. Bromwich, *Michael Cohen Used Artificial Intelligence in Feeding Lawyer Bogus Cases*, N.Y. TIMES (Dec. 29, 2023), https://www.nytimes.com/2023/12/29/nyregion/michael-cohen-ai-fake-cases.html [https://perma.cc/VM5Y-WN8A]; *see also* Nate Raymond, *Ex-Trump Fixer Michael*

similarly to ChatGPT.[226] The attorney doing the research in that case was also the criminal litigant,[227] and when he provided research to the attorney representing him she relied upon those cases without checking to make sure they were good law.[228] Once again, the cases did not exist and negative consequences ensued.[229]

While these lawyers' misplaced trust in artificial intelligence was a subject of morbid fascination in the media,[230] the reality is that many lawyers probably thought, "on a bad day that could have been me." Unfortunately, the increasing demands of practice, general speed of work life, and rapidly shifting access to costly online platforms[231] means that lawyers sometimes *do* cite cases they have not read themselves, and they were doing this long before the introduction of artificial intelligence. Should they do it? Emphatically, no. But it does happen.

As Chief Justice Tom Parker of the Alabama Supreme Court noted, "it is easy to be lulled into complacency by the power of [artificial intelligence] and forget that the 'universal search box' does not have access to the universe of legal information."[232] Chief Justice Parker also cautioned attorneys against relying on one single source or tool: "No single method, industry practice, or tool defines the outer limit of the source types that may inform attorneys' arguments and help them fulfill their obligations of effective advocacy and candor to the court."[233]

Cohen Says AI Created Fake Cases in Court Filing, REUTERS (Dec. 29, 2023), https://www.reuters.com/legal/ex-trump-fixer-michael-cohen-says-ai-created-fake-cases-court-filing-2023-12-29/ [https://perma.cc/V2D2-HWX4].

226. Margaret Osborne, *Google Launches AI Chatbot – How Does It Compare to ChatGPT and Bing?*, SMITHSONIAN MAG. (Mar. 23. 2023), https://www.smithsonianmag.com/smart-news/google-launches-ai-chatbot-how-does-it-compare-to-chatgpt-and-bing-180981871/ [https://perma.cc/TW92-ZU7K].

227. *See, e.g.*, Larry Neumeister, *Michael Cohen Ends Prison Term After Trump-Related Crimes,* ASSOCIATED PRESS (Nov. 22, 2021), https://apnews.com/article/donald-trump-crime-new-york-manhattan-campaigns-3a0413202e80ab99c9f6377f97d07c04 [https://perma.cc/U8LF-879P].

228. *See* Weiser & Bromwich, *supra* note 225.

229. *See id.*

230. *See* Weiser & Schweber, *supra* note 216 (quoting a legal commentator who said the case had "reverberated throughout the entire legal profession" and describing the scene of the hearing where the lawyer was fined as "crammed with close to [seventy] people who included lawyers, law students, law clerks and professors . . . . There were gasps, giggles and sighs. Spectators grimaced, darted their eyes around, chewed on pens."). It is worth noting that the presiding judge seemed to feel this shame was well deserved, as he found the lawyer and his firm operated in "bad faith" and increased his error by not admitting his mistake immediately:

> But if the matter had ended with Respondents coming clean about their actions shortly after they received defendant's March 15 brief questioning the existence of the cases, or after the reviewed the Court's Orders of April 11 and 12 requiring production of the cases, the record would look quite different. Instead, the individual Respondents doubled down and did not begin to dribble out the truth until May 25, after the Court issued an Order to Show Cause why one of the individual Respondents ought not be sanctioned.

See Opinion and Order on Sanctions, *supra* note 203, at *2.

231. *See* Moran, *supra* note 218 (explaining the lawyer in the *Mata* case did not have access to Westlaw or Lexis because they were more costly, and instead relied on free web resources or lower cost options such as FastCase).

232. Casey v. Beeker, 321 So. 3d 662, 671 (Ala. 2020) (Parker, J., concurring).

233. *See id.*

It was only two decades ago that lawyers were adjusting to using online sources instead of printed books for legal research. Just like now, articles were published wondering if the availability of online research would be the death knell of the legal profession[234] or the end of reliability in legal citations.[235] While rapid changes did occur, they did not always happen in the way that many people predicted, although the predictions that citations may become increasingly unreliable over time have come to pass.[236]

Similarly, there is no predicting which of the seemingly endless speculations about life after artificial intelligence will come true. If the past is any indication, then some of the most pervasive and influential aspects of modern life that we will rely on in twenty years have yet to be invented. Hopefully, reality, however flawed, will remain the bedrock of these programs, and the current artificial intelligence hallucinations will become a quirky historical anecdote. Hopefully, the practice of law will actually improve for judges, lawyers, and clients. But until these technologies stabilize and the information provided becomes more reliable, judges and lawyers are advised to use extra caution and skepticism.[237]

In 2023, Thompson Reuters, LexisNexis, and other investors who understand the legal space began pouring resources into the development and stabilization of technology for lawyers that is based on artificial intelligence.[238] At the same time, clients are eager for lawyers and firms to embrace the promise of increased efficiency with artificial intelligence, with dreams of lowered legal bills dancing in

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234. *See, e.g.*, Simon et al., *supra* note 200.

235. *See, e.g.*, Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 L. LIBR. J. 27, 27 (2002) (explaining "the dangerous use of citations to Web sources in law review articles" because "law review citations suffer from 'link rot' because Web pages disappear or URLs change" and "after four years, only 30% still work"); Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996 – 2010)*, 15 YALE J. L. & TECH. 273 (2013) (using data to show that even citations in United States Supreme Court cases are not immune to "link rot").

236. *See generally* Jonathan Zittrain, Kendra Albert & Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link & Reference Rot in Legal Citations*, 127 HARV. L. REV. F. 176 (2014) (arguing that the impermanent nature of URLs creates a vulnerability in the integrity of electronic sources used in scholarship); *see also* Jake Rapp & Katherine Honecker, *Best Practices for Citing Content to Avoid Link Rot*, ABA PRACTICE POINTS, AM. BAR ASS'N (July 23, 2019), https://www.americanbar.org/groups/litigation/committees/consumer/practice/2019/best-practices-for-citing-online-content-and-avoiding-link-rot/ [https://perma.cc/W9AS-CFGW] (explaining online content can disappear at any minute and suggesting numerous best practices law reviews and other publishers can use to prevent this issue).

237. For example, this author asked ChatGPT to describe a "(cleaned up)" citation since that is the subject of Part I of this article. The program responded that "(cleaned up)" citations are citations that have been "edited or formatted in a way that presents the essential information in a clear and consistent manner, while removing any details or clutter" and suggested a good way to accomplish this would be to remove all pinpoint citations in the future. Pinpoint citations are generally considered essential components of reliable citations and removing them would create a whole new morass of unreliability issues and potential citation inaccuracies. A copy of this dialogue is on file with the author.

238. *See, e.g.*, Matt Reynolds, *LexisNexis Introduces New Generative Artificial Intelligence Program*, A.B.A. J. (May 5, 2023), https://www.abajournal.com/web/article/lexisnexis-announces-new-generative-ai-platform-lexis-ai [https://perma.cc/L9TY-Q8Q7] (discussing Lexis' new artificial intelligence platform and some of the other technology competitors are using in this new and developing aspect of the legal research industry).

their eyes.[239] Some people have also started to ponder a world in which trustworthy artificial intelligence programs might help overworked law review editors find promising submissions for publication.[240] Other legal scholars have been updating their work and including wording to incorporate the presumed inevitability of artificial intelligence.[241] Given the stakes involved and the constant rapid improvements in artificial intelligence technology, the concerns with artificial intelligence and the way its hallucinations lead to false citations will likely be fixed sooner rather than later. Until then, and probably well afterward, smart lawyers should approach their advocacy with increased skepticism.

The technology underlying these products is also evolving so quickly it is hard to keep up with the rapid pace of developments.[242] The legal profession as a whole has traditionally been infamously resistant to understanding the way technology works, but we do know we cannot quite trust these sources at this time.[243] But it was not too long ago that the profession was wringing its hands over the dangers and diluted skills that would come from switching our legal research sources from books to databases and citing sources found on the Internet.[244] As the infrastructure of the Internet stabilized and the world switched to publishing

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239. *See, e.g.*, Lyle Moran, *54% of In-House Legal Professionals Support Generative A.I. Usage*, LEGALDIVE (June 30, 2023), http://www.legaldive.com/news/thompson-reuters-generative-ai-legal-use-cases-legal-corporate-tax/654455 [https://perma.cc/CZW4-JMFN] (citing a new report from Thompson Reuters, the company that owns Westlaw and that has invested heavily in legal artificial intelligence products).

240. *See generally* Brenda M. Simon, *Using Artificial Intelligence in the Law Review Submissions Process*, 56 U. CAL. DAVIS L. REV. 347 (2020) (analyzing the promise and potential perils of integrating artificial intelligence into the law review publication process and pointing out that it could be a huge benefit for law students but, depending on the programming, might only deepen the biases that are already present in legal academia which could have a negative impact on the American legal system).

241. *See, e.g.*, ROGER S. HAYDOCK, FUNDAMENTALS OF LITIG. PRAC. § 27.25 (2023 ed.) ("Software writing and editing programs can also be useful when composing a brief, from simple spell checking to grammatical suggestions to composition advice. When using an artificial intelligence resource for composition, it's necessary to confirm its reliability and accuracy.").

242. *See* Pablo Arredondo, *GPT-4 Passes the Bar Exam: What That Means for Artificial Intelligence Tools in the Legal Profession*, SLS BLOGS: LEGAL AGGREGATE (April 19, 2023), https://law.stanford.edu/2023/04/19/gpt4-passes-the-bar-exam-what-that-means-for-artificial-intelligence-tools-in-the-legal-industry [https://perma.cc/VL5A-PQ8K] (using the bar exam as an example of how quickly artificial intelligence technology is evolving: "while GPT-3.5 failed the bar, scoring roughly in the bottom 10th percentile, GPT-4 not only passed but approached 90th percentile. These gains are driven by the scale of the underlying models more than any fine-tuning for law.").

243. *See, e.g.*, Sara Merken, *Wary Courts Confront AI Pitfalls as 2024 Promises More Disruption,* REUTERS (Dec. 28, 2023), https://www.reuters.com/legal/transactional/wary-courts-confront-ai-pitfalls-2024-promises-2023-12-27/ [https://perma.cc/P3FA-2F9F] ("Generative artificial intelligence technology made its mark on the world in 2023 . . . . U.S. judges grappled with the use of evolving A.I. tools in their courtrooms, particularly after lawyers made headlines for submitting legal briefs with fictitious case citations that were generated by tools like Open AI's ChatGPT.").

244. *See, e.g.*, Rumsey, *supra* note 235 and accompanying footnote text (explaining "after four years, only 30% [of links] still work"); Liebler & Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996 – 2010)*, 15 YALE J. L. & TECH. 273 (2013) (using data to show that even citations in United States Supreme Court cases are not immune to "link rot").

online to save costs, the profession also switched to accepting Internet sources.[245] Similarly, as artificial intelligence technology stabilizes, the use of this type of product as an assistive device will likely become widely accepted as well.

Additionally, as with "(cleaned up)" citations, the use of artificial intelligence technology in legal writing needs to be indicated with a special citation. That citation is needed to indicate the actual source of the information or thought, and it is also needed to signal to prudent lawyers and judges that they must examine certain passages and sources with additional scrutiny.

Not being able to trust your opposing counsel is a wise mindset as old as the practice of law itself, but over time, many lawyers have found themselves trusting their opponent's citations even as they fight against their arguments. Even judges have found themselves in a position where, due to the constraints of time and budget, they have to rely on the citations and assertions of the attorneys appearing before them. Common sense says it should not be that way, and that relying on others' citations and arguments is an error to be avoided whenever possible—especially when those citations and arguments come from an advocate with interests that differ from one's own.

Given the dual constraints on access and time, many lawyers and judges simply copy and paste other citations without reading the sources.[246] This is frowned upon, of course, but it has become something of an open secret, something people acknowledge with a wink and a nudge and a bashful smile: the increasingly common practice of legal professionals copying long strings of citations into another document without reading any of the original sources.[247] Lawyers at every level do it,[248] judges do it,[249] and even some law professors

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245. The Twenty-First edition of THE BLUEBOOK, *supra* note 9, contains numerous rules for citing to online sources. *Compare, e.g.*, *id.* at Ch. 18 ("The Internet, Electronic Media, and Other Nonprint Resources") *with* R. 17.2.4 ("E-mail Correspondence and Listserv Postings") *and* R. 17.5 ("Electronic Databases and Online Sources").

246. Jordan Rothman, *Lawyers Can Innocently Cite to Nonexistent Authorities*, ABOVE THE LAW (Dec. 22, 2023), https://abovethelaw.com/2023/12/lawyers-can-innocently-cite-to-nonexistent-authorities [https://perma.cc/J4QM-4TZC] ("From my own experience, lawyers can get tripped up if they copy citations from work that other people prepared.").

247. *See generally* Eugene Volokh, *Law Reviews, The Internet, and Preventing and Correcting Errors*, 116 YALE L.J. F. (Sept. 6, 2006), https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors [https://perma.cc/GF7C-GM3X] (acknowledging that everyone knows that they should read the original source that is cited in the citations themselves, but not everyone does: "busy users of an article are naturally tempted to cut corners by relying on indirect accounts of original sources").

248. *See, e.g.*, Holly Barker, *'Plagiarism' Common in Brief Writing, But When is It Too Much?*, BLOOMBERG LAW (Oct. 25, 2022), https://news.bloomberglaw.com/litigation/plagiarism-common-in-brief-writing-but-when-is-it-too-much [https://perma.cc/R6A4-59YQ] (acknowledging that lawyers often borrow citations from other lawyers, especially lawyers within the same firm, as a "generally accepted practice," but warning that even borrowing your own previous work can lead to sanctions if a lawyer does not take the time to ensure the information is updated, accurate, and relevant).

249. For a more optimistic view on judges and lawyers, see Aaron S. Kirshenfeld & Alexa Z. Chew, *Citation Stickiness, Computer-Assisted Legal Research, and the Universe of Thinkable Thoughts*, 19 LEGAL COMM. & RHETORIC 1 (2022) (citing new data that indicates that citation stickiness has increased in the digital era in spite of some earlier predictions to the contrary).

do it.[250] American jurisprudence is suffering as a result, as we are seeing more and more examples of cases being cited to show a foundation for legal principles that were not in the original document.

Sometimes this type of opacity in sources is intentional, motivated by darker forces than simple lack of time, laziness, or lack of access to the original document. Misquoting and misrepresenting precedent is supposed to be forbidden under the basic ethical principles of the legal profession. Lawyers are taught the importance of candor to the court, candor to their clients, and candor to each other, especially when it comes to easily verified facts about the law and language from judicial opinions.[251] And when judges misquote precedent or mislead to justify their decisions, it is especially worrisome because their misquotes tend to have rippling consequences.

Thus, the modern lawyer needs to view their opposing counsel's arguments and citations with healthy skepticism—especially when you know they may have come from an artificial intelligence source.[252] A wise lawyer will even view their *own* sources and citations with skepticism in these rapidly evolving times. All citations are based on information, and that information is only as reliable as the humans who research it, cite it, and verify it. Or, in the modern era, that information is only as reliable as the humans who create the technology that makes that information available and train the technology to learn and relay that information to others. All of these sources have always been fallible, but in these rapidly evolving and increasingly unstable times, more skepticism is needed to forge confidently into the constantly changing waters of legal writing.

This Article promotes a relatively simple solution in this age of unease and uncertainty: read the case your opponent is citing, and then read the case that that case is citing as well, and on down the line.[253] Yes, it is extra work. And yes, hopefully, most of the time you will find no issues. But sadly, you will also find

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250. This author has given presentations based on this paper at seven law schools as of the publication of this paper and has received many confessions from members of the legal academy about copying and pasting citations.

251. *See, e.g.*, Kathryn A. Sampson, *Disclosing and Confronting Adverse Authority*: *Materials Prepared for Twenty-First Century Advocacy Skills at the University of Arkansas School of Law* (Sept. 25, 1998), http://omnilearn.net/ethics/pdfs/disclosing_adverse_legal_authority.pdf [https://perma.cc/352Z-J2MM].

252. *See, e.g.*, Hannah Rozear & Sarah Park, *ChatGPT and Fake Citations*, DUKE U. LIB. BLOG (Mar. 9, 2023), https://blogs.library.duke.edu/blog/2023/03/09/chatgpt-and-fake-citations [https://perma.cc/YZ7Z-5VGL] (explaining ChatGPT's tendency to make up citations to scholarly sources, and noting that while "[t]hese citations may sound legitimate and scholarly, but they are not real. . . . If you try to find these sources through Google or the library—you will turn up NOTHING.").

253. *See, e.g.*, Metzler, *supra* note 16:

> Judges and lawyers use a lot of quotations in their writing [because] our common-law tradition places a great value on what courts have said in the past. . . . So it often turns out that the best quotation for a proposition is one in which a judge has quoted some other judge. Not only that, there's a pretty good chance that second judge was quoting still another judge. You see where this is going.

multiple citations where language has been misquoted or twisted, or perhaps even made up.

CONCLUSION

Between citation manipulations, precedent erosions, and an avalanche of new and potentially unreliable technology, these are tough times for careful lawyers and judges. Hopefully, with time, new technologies will stabilize, lawyers will start behaving better, and trust in the legal profession and courts will return. But until that time, the legal profession needs to take the issue of unreliable citations seriously. There are large mistakes, and large implications, that come from overlooking the basic practice of checking sources for accuracy.

Until the time when we can start trusting citations again, smart lawyers should view all citations with skepticism, even—unfortunately—those that come from the bench or from within their own law firms. This increased skepticism must be especially strong when the writer has used a "(cleaned up)" citation, or when the research is coming from a source with opposing or unknown motivations or research resources. The profession has seen an alarming increase in the distrust that the general public has for the judiciary and our profession over the past two decades, and the profession will not regain the public's confidence or our professional prestige by ignoring the basics of our business.

Everyone in the profession can do their part by strengthening the accuracy of their advocacy, and by investigating the accuracy of each other's citations. Additionally, the profession needs to develop a standardized way to indicate that work has been developed with the assistance of artificial intelligence technology so that prudent lawyers know to examine those passages and sources with an even higher degree of scrutiny.

In the meantime, citations should be read with the discerning eye of an observant, cozy, mystery detective, and sources should be investigated accordingly. The legal profession should proceed warily into this next chapter of technological development and with an increased investigative zeal toward verifying the accuracy of cited sources.