

Peter W. Martin
Jane M.G. Foster Professor of Law, Emeritus
Cornell Law School
6/17/2011

While the content of this paper has been shared with the other conveners of the July 19th meeting in Camden, I write only for myself. The proposals advanced here should not be attributed to the others. PWM

A Proposed Course of Action for universalcitation.org or Some Alternative Non-Commercial Entity

I. Introduction

It is 2011 not the mid-nineties. The environment has changed since the ABA and AALL first came out for public domain citation¹ in ways that: 1) increase the importance of widespread (let us say “universal”) adoption of public domain, medium neutral citation, 2) call for more than exhortation and persuasion directed at jurisdictions that have not yet taken the plunge, and 3) make uniformity of approach across US jurisdictions an unlikely, even an undesirable near term goal.

Let me begin with the third point. Several of the public domain citation adopters including the most recent, Arkansas and Illinois, have deviated from the recommended approach set out in the AALL guide.² While some of those deviations may appear to be based on trivial considerations, or even seem ill-advised, others reflect strong institutional factors (*e.g.*, Ohio’s centralizing opinion designation in the reporter’s office,³ the use in Illinois of a designator derived by the court from the docket number at the time an appeal is filed rather than assigned upon release of an opinion or order⁴). Computer-based case management systems offer ways of assigning unique designators that may not have been within the contemplation of those drafting the models of the mid-nineties. Furthermore, lawyers and judges in some jurisdictions with “non-uniform” public domain citation schemes have been using them for a very long time. Far more is to be gained by bringing public domain citation to bear on the decisions of the US Court of Appeals, the lower federal courts, the appellate courts of California, New York and other high profile states than by attempting to normalize existing public domain systems.

¹ See Peter W. Martin, *Neutral Citation, Court Web Sites, and Access to Authoritative Case Law*, 99 LAW. LIB. J. 329, ¶ 7 (2006).

² Arkansas’s rule, like Louisiana’s, calls for use of the page numbers within the official PDF file of an opinion for pinpoint cites, for its decisions do not contain paragraph numbers. See Peter W. Martin, *Abandoning Law Reports for Official Digital Case Law*, <http://ssrn.com/abstract=1743756> (2011). The *AALL Universal Citation Guide* (1st ed. 1999) is available online at <http://www.aallnet.org/Archived/Publications/AALL-Publications/universal-citation-guide.pdf>.

³ See Reporter of Decisions, Ohio Supreme Court, Revisions to the Manual of Citations 3-6 (July 12, 2002), available at http://www.supremecourt.ohio.gov/ROD/Rev_Manual_Cit_02.pdf.

⁴ See Ill. R. 23 (as amended May 31, 2011), available at http://www.state.il.us/court/SupremeCourt/Rules/Art_I/arti.htm#Rule23.

The rule change that rendered all “unpublished” US Court of Appeals decisions citable, which took effect in 2007, brought new urgency to the need for a federal system of non-proprietary citation. And with e-filed briefs and online legal commentary, a totally new dimension has emerged. Public domain citation is no longer simply a question of how a decision is identified on the printed page. Appellate courts in the US are adding electronic filing components to existing or new case management systems. One of the attractions of electronic briefs for lawyers, judges, and judicial clerks or assistants is that their citations can be linked to the cited authorities. As an Administrative Office of the US Courts publication noted prior to the ramping up of Court of Appeals e-filing: "Judges generally are excited about having attorneys file briefs that contain hyperlinks to citations. ... And through PACER (the Public Access to Court Electronic Records system) these briefs will be available to everyone."

A typical rule on electronic brief format insists that citations still be presented in conventional form but does nothing to dissuade the author from linking that conventional textual citation directly to a proprietary database. Indeed, one can foresee the day when lawyers might feel pressure to subscribe to the commercial service used by the court before which they practice so as to facilitate the linking of the citations in their submissions to a resource the judges can access with a click.

A textual public domain citation that is linked to a proprietary database loses much of its public domain quality. The page may show “2010 ND 124” but if the link code reads:

“<http://www.westlaw.com/find/default.wl?cite=2010+ND+124&FindType=F&ForceAction=Y&SV=Full&RS=ITK3.0&VR=1.0>”

or

“http://www.lexis.com/xlink?showcidslinks=on&ORIGINATION_CODE=00142&searchtype=get&search=2010%20ND%20124" target="_blank”

the electronic citation is proprietary.

I am convinced that the present situation opens a limited-time opportunity to establish a service that will facilitate public domain links, a service that builds upon and highlights textual public domain citation. This same action plan has the potential for removing the crutch of parallel National Reporter System citation in those public domain citation jurisdictions that continue to require it.

These considerations inform the proposed goals set out in the following section and the universal citation server concept sketched in section III. The final section, augmented by an appendix, summarizes current court rules on links in electronic briefs.

II. A Proposed Set of Goals

I propose that universalcitation.org or some other non-commercial entity embrace and seek funding together with in-kind assistance from interested commercial parties that will enable pursuit of the following aims and actions:

- Encourage US courts to adopt public domain citation through diverse means (*e.g.*, highlighting best practices and options illustrated by jurisdictions that have implemented public domain citation, offering consulting services to jurisdictions

contemplating public domain citation, putting in place a system of public domain citation that courts can simply adopt).

- Affirm rather than criticize, modify, or adjust jurisdictionally adopted public domain citation schemes no matter how far they deviate from the AALL model (in other words, accept that institutional factors including embedded practice, which in some jurisdictions has been in place for over a decade, make “uniformity” less important than “universality”).
- Apply a basic system of public domain citation to citable appellate decisions in jurisdictions that have not yet implemented one of their own.
- To the extent possible engage or assist in the retrospective application of public domain citation in some or all US jurisdictions.
- Create and maintain an online citation server that will:
 - Employ public domain citation in enabling users to access individual decisions on any of the major free and fee case law databases, and among commercial services privileging those that have cooperated in building and maintaining this public domain system.
 - Allow authors of electronically filed briefs and online commentary to link to cited case authority without limiting the reader to a specific database.

III. A Universal Citation Server for US Courts

A. What It Would Do

- Hold non-proprietary citations for all citable decisions of US appellate courts, together with the proprietary equivalents for those that have them (once they have them).
 - Generate non-proprietary, medium neutral citations for all citable decisions of those US appellate courts that do not themselves attach such citations to their decisions upon release.
 - Prospectively, those citations might be derived from data extracted from the decisions themselves and court case management systems.
 - Retrospectively, public domain citations ought to be drawn from public domain print citations where available and if the creator of one of proprietary citation systems can be persuaded to dedicate it to the public domain from that scheme in all other cases.
- Furnish authors of briefs, blogs, judicial opinions, and other forms of electronic commentary who submit citations in proprietary form with their parallel non-proprietary universal citations.
- Furnish the same authors with link text that will allow the readers of their texts to click on any non-proprietary universal citation and be taken to a “choice of source” screen.
 - Via that “choice of source” screen allow the reader of an electronic brief or commentary piece to retrieve the decision in question from any of the

following: the originating court's site, where possible, other important free sites, and all major commercial sites.

- Allow users following links to the server to select a single source for all case citations in a document or session so long as the source allows individual case retrieval by means of non-proprietary citations including those generated by universalcitation.org.
 - For an demonstration of how such a system might operate follow one of the links to a prior decision in a US Supreme Court opinion at the LII site – such as the link to *Association of Data Processing Service Organizations, Inc. v. Camp* , [397 U. S. 150](#) in *Bond v. United States*
 - <http://www.law.cornell.edu/supct-cgi/get-us-cite?397+150>
- Reinforce the role of public domain citation in the “choice of source” link system by delivering users each case’s universal citation along with its text, no matter what source the user selects.
- Privilege supporting and cooperating commercial sites in the “choice of source” screen and also by allowing users direct access to them for multiple cited cases, bypassing the “choice of source” step (see above).

B. Underlying Aims

- Provide a means for authors of briefs, blogs, and other forms of electronic commentary to link to cited case authority without embedding a proprietary citation in the link text or limiting the link follower to a single service.
- Create incentive for case law sites both fee and free to enable citation by public domain citation.
- Remove any need for public domain citation adopting jurisdictions to require parallel citation to proprietary reporters, while furnishing parallel citations to those who by virtue of court rule or practice norms feel compelled to include them in their references.
- Render visible to judges and lawyers the disutility of proprietary book-based citation.
- Encourage commercial sites to assist in creating and sustaining the system, including importantly the retrospective application of public domain citation, by privileging cooperating services over others.

IV. Current Rules Governing Links in Electronic Briefs

Some court rules laying down the procedures and format for the electronic filing of briefs say nothing about the inclusion of external links.⁵ A few can be read as forbidding them.⁶ The dominant approach among appellate courts addressing the issue is represented by Oregon's rule, which reads as follows:

Rule 16.50 HYPERLINKS

(1) An eFiled document may contain one or more hyperlinks to other parts of the same document or hyperlinks to a location outside of the document that contains a source document for a citation. The functioning of a hyperlink reference is not guaranteed. The appellate courts neither endorse nor accept responsibility for any product, organization, or content at any hyperlinked site.

(2) A hyperlink to cited authority does not replace standard citation format. The complete citation must be included within the text of the document. Neither a hyperlink, nor any site to which it refers, shall be considered part of the record. A hyperlink is simply a convenient mechanism for accessing material cited in an eFiled document.⁷

Wisconsin's official electronic filing guidance is the only I've found that explicitly deals with the risks attendant on links to proprietary legal research services. It provides:

Electronic briefs may be enhanced with internal links (such as a table of contents with links to locations in the brief) or external links (links to websites containing the text of cases or statutes cited in the brief). External links in an electronic brief shall not require a password for access to the case or statute. No enhancement to an electronic brief shall alter the text of the brief.⁸

⁵ See, e.g., Del. Sup. Ct. R. 10.1, 10.2, 11(c); Mich. Ct. App., Electronic Filing and Service Guidelines.

⁶ See, e.g., Nev. R. 5(d) ("Each filed document must be self-contained, with links only to other documents filed simultaneously or already in the court record."); Va. Sup. Ct. 1:17(d)(10) ("Hyperlinks between two portions of a filed document or between two or more documents filed in the same case, are permissible, but hyperlinks to other documents, or to external websites, are prohibited.").

⁷ Ore. App. Proc. R. 16.50. Similar language appears in the policy manuals or local rules of most of the US Circuit Courts of Appeals (see Appendix) and the Wyoming Supreme Court's Electronic Filing, Policies and Procedures Manual.

⁸ Comment to Wis. Stat. §§ (Rule) 809.19 (12) and 809.19 (13), 2009 WI 4.

Appendix –

US Circuit Rules or Guidance on Hyperlinks in Electronically Filed Briefs

First

ADMINISTRATIVE ORDER REGARDING
CASE MANAGEMENT/ELECTRONIC CASE FILES SYSTEM (“CM/ECF”)
RULES GOVERNING ELECTRONIC FILING

Rule 13 – Hyperlinks

Electronically filed documents may contain hyperlinks except as stated herein.

Hyperlinks may not be used to link to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material in a document. The court accepts no responsibility for the availability or functionality of any hyperlink, and does not endorse any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked.

Second

Local Appellate Rule 25.1 Case Management/Electronic Case Filing (CM/ECF)

(i) Hyperlinks. A document filed under this rule may contain hyperlinks to (i) other portions of the same document or to other documents filed on appeal; (ii) documents filed in the lower court or agency from which the record on appeal is generated; and (iii) statutes, rules, regulations, and opinions. A hyperlink to a cited authority does not replace standard citation format.

Third

Local Appellate Rule 113.13 Hyperlinks

(a) Electronically filed documents may contain the following types of hyperlinks:

- (1) Hyperlinks to other portions of the same document; and
- (2) Hyperlinks to a location on the Internet or PACER, e.g. the appendix, that contains a source document for a citation. If hyperlinks are used in the brief, counsel must also include immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix.

Hyperlinks may not be used to link to sealed or restricted documents.

(b) Hyperlinks to cited authority or documents may not replace standard citation format. Complete citations to paper documents if available must be included in the text of the filed document. If a cited reference is available on the internet only, a complete citation to the internet must be included in addition to the hyperlink. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document. The court accepts no responsibility for, and does not endorse, product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

(c) Hyperlinks do not replace paper copies of the appendix. Four paper copies of the appendix must be filed in accordance with L.A.R. 30.1.

Source: Model Local Rules

Cross-References: L.A.R. 28 and 30

Comments:

Hyperlinks are a connection from one point of electronic data to another. Because hyperlinks might be to sites outside the control of the court, the court cannot take responsibility for the viability of those links, nor does it take responsibility for the content of any linked site. Because hyperlinks are not considered part of the record, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the content of the filed document.

Hyperlinks are a convenient means of accessing material cited in electronic documents. Any electronically filed document that contains a hyperlink must also contain the standard citation to the same material. This requirement ensures that anyone working with a printed version of the document has the necessary citation, and that subsequent failure of a hyperlink will not preclude finding the cited material.

Just as the complete text of a document cited in a brief or other filing in support of a legal proposition, unless specifically quoted, is not considered part of the brief, the hyperlink and the site to which it refers are not considered part of the brief. Thus, they will not be considered part of the court's record.

Fourth

ADMINISTRATIVE ORDER 08-01

CASE MANAGEMENT/ELECTRONIC CASE FILING SYSTEM

Rule 13 – Hyperlinks

(a) Electronically filed documents may contain the following types of hyperlinks:

(i) Hyperlinks to other portions of the same document or to other documents filed on appeal;

(ii) Hyperlinks to documents filed in the lower court that are part of the record on appeal; and

(iii) Hyperlinks to statutes, rules, regulations, and opinions.

(b) Hyperlinks do not replace citations to the appendix, record, or legal authority. Documents must contain standard citations in support of statements of fact or points of law, in addition to any hyperlink. Hyperlinks are simply mechanisms for accessing material cited in a filed document and are not considered part of the appellate record. The Court accepts no responsibility for the availability or functionality of any hyperlink and does not endorse any organization, product, or content at any hyperlinked site.

Fifth

Local Appellate Rule

25.2.14 Hyperlinks. Electronically filed documents may contain the following types of hyperlinks:

Hyperlinks to other portions of the same document;

Hyperlinks to PACER that contains a source document for a citation;

Hyperlinks to documents already filed in any CM/ECF database;

Hyperlinks between documents that will be filed together at the same time;

Hyperlinks that the clerk may approve in the future as technology advances.

Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document. The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

Sixth

SIXTH CIRCUIT GUIDE TO ELECTRONIC FILING

[No provision dealing with hyperlinks]

Seventh

ELECTRONIC CASE FILING PROCEDURES

(m) Hyperlinks

(1) Electronically filed documents may contain the following types of hyperlinks:

(A) Hyperlinks to other portions of the same document; and

(B) Hyperlinks to a location on the Internet that contains a source document for a citation.

(2) Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document.

(3) The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

Eighth

Local Appellate Rule 25A

[No provision dealing with hyperlinks]

Local Rule 8010A. Briefs

(a) Briefs. All briefs shall identify all citations to the record by either (1) a hyperlink to the docket entry, page, and line or (2) the docket number, page, and line.

Ninth

Local Appellate Rule 25-5. Electronic Filing

Appendix on Electronic Filing

Rule 11. - Hyperlinks

(a) Electronically-filed documents may contain hyperlinks.

(b) Hyperlinks do not replace citations to the appendix, record, or legal authority. Documents must contain standard citations in support of statements of fact or points of law, in addition to any hyperlink. Hyperlinks are simply mechanisms for accessing material cited in a filed document and are not considered part of the appellate record. The Court accepts no responsibility for the availability or functionality of any hyperlink and does not endorse any organization, product, or content at any hyperlinked site.

(c) Hyperlinks to district court documents are optional. However, parties must include the documents themselves in the excerpts of record, attachment, or exhibit. Instructions on creating hyperlinks can be found in the "CM/ECF" section of the Court's website in the ECF User Guide.

Tenth

CM/ECF User's Manual

II. POLICIES AND PROCEDURES FOR FILING VIA ECF

O. Commercial URLs

You may not be able to upload a PDF to ECF if the PDF contains an active link to a commercial URL. Please prepare accordingly. In addition, do not include links to other PDFs in your pleadings, unless the second/subsequent PDF[s] is/are attached to the docket or found elsewhere on PACER (including on a district court docket). Please note in this regard that you will need to copy the PACER link in order to have the hyperlink work correctly.

Eleventh

Local Appellate Rule 31-5 Electronic Briefs

(a) Internet Upload. An electronic brief shall be provided by uploading the brief to the court's Web site at www.ca11.uscourts.gov. Prior to uploading the first brief, the uploading party will be provided instructions by the clerk. Appendices may be included in the electronic brief, but are not required to be included. Hypertext links or bookmarks to cases, statutes and other reference materials available on the Internet are authorized. The certificate of service shall indicate the date of service of the brief in paper format.

DC

ECF-10. Hyperlinks

(A) Electronically filed documents may contain the following types of hyperlinks:

- . Hyperlinks to other portions of the same document or to other documents filed in the case;
- . Hyperlinks to documents that are part of the record on appeal or the record on review or enforcement of an agency order;
- . Hyperlinks to authorities cited in the document.

(B) Hyperlinks do not replace standard citations to authority and parts of the record; standard citations must be provided in addition to any hyperlink. Hyperlinks are simply mechanisms for accessing material cited in a filed document and are not considered part of this court's record. The court accepts no responsibility for the availability or functionality of any hyperlink and does not endorse any product, organization, or content at any hyperlinked site.

Federal

Circuit R. 32

(e) Filing Corresponding Brief on Compact Disc. In addition to the filing of a paper brief, a party may file a corresponding brief contained on a compact disc -- read only memory (CD-ROM), subject to the following requirements.

(1) *Consent; Motion.* Within 14 days of docketing an appeal, a party intending to file a corresponding brief must ascertain whether any other party consents or objects. If the other parties consent, the filing party must promptly file with the court notice of intent to file a corresponding brief. If any other party does not consent, the party seeking to file a corresponding brief must promptly file a motion for leave with the court. If no response is filed within 7 days, the clerk will grant the motion for leave to file a corresponding brief. The court will deny a motion for leave to file a corresponding brief only if an opposing party demonstrates substantial prejudice.

(2) *Content.* A corresponding brief must be identical in content to the paper brief. A corresponding brief may provide hypertext links to the complete versions of material that was part of the record below. Hypertext links to other material must be confined to materials such as cases, statutes, treatises, law review articles,

and similar authorities. A corresponding brief must be self-contained and static.

(3) *Statement Concerning Instructions and Viruses.* A corresponding brief must be accompanied by a statement, preferably within or attached to the packaging, that:

(A) sets forth the instructions for viewing the brief and the minimum equipment required for viewing; and

(B) verifies the absence of computer viruses and lists the software used to ensure that the brief is virus-free.

(4) *Time for Filing.* A corresponding brief, if any, must be filed no later than the time for filing the joint appendix.

(5) *Filing and Service.* Except for the time of filing, a corresponding brief must be filed and served in the same manner and the same number of copies as the paper brief.

(6) *Single CD-ROM.* All parties to an appeal who intend to file a corresponding CD-ROM brief are encouraged to cooperate in placing all such briefs on a single CD-ROM.

(7) *Table of Contents.* Parties filing a corresponding brief are encouraged to include a table of contents with links to all of the items required in a joint appendix under Federal Rule of Appellate Procedure 30 and Federal Circuit Rule 30 and to all other parts of the record contained on the corresponding brief.

(8) *Labeling.* A label with the caption of the case, the number of the case, and the types of briefs included on the CD-ROM must be included on both the packaging and the CD-ROM.