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Explanatory Parentheticals Can Pack a Persuasive Punch

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Explanatory Parentheticals Can Pack a Persuasive Punch

Eric P. Voigt*

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I. INTRODUCTION

A litigator’s goal is to persuade a court that the client’s position is right.¹ To persuade through the written word, a litigator should use each available tool—from employing syllogistic reasoning, to relying on binding authority, to leading with the strongest argument.² This Article focuses on one persuasive tool: the use of explanatory parentheticals when citing authority in motions and briefs. The explanatory parenthetical follows a citation and shows the relevance of the cited authority by providing substantive information about the authority.³

The parenthetical is a powerful tool of persuasion in a litigator’s arsenal.⁴ Indeed, judges and top advocates want explanatory parentheticals to accompany citations in motions and briefs.⁵ Justice Ruth Bader Ginsburg has stated that a “first-rate brief” contains citations with “parenthetical explanations.”⁶ According to other federal appellate judges, parentheticals are an effective device to take motions or briefs to the next level.⁷ Since the 1940s, top advocates have said “a great brief ‘furnishes parenthetical explanations to show the relevance of the citation.’”⁸ Today’s best litigators and legal writers use parentheticals to

1. See RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 244 (2d ed. 2003).

2. See *id.* (“Every conceivable device should be used to promote the quick understanding . . . of the most important points and issues raised.”) (internal quotation marks omitted).

3. This Article does not discuss other types of parentheticals, such as weight of authority parentheticals. The following example is the type of parentheticals addressed in this Article:

Petrovski v. Fed. Express Corp., 240 F. Supp. 2d 685, 686, 691 (N.D. Ohio 2002) (denying summary judgment for defendant on tortious interference claim because evidence existed that defendant acted improperly).

4. See Aldisert, *supra* note 1, at 263–64.

5. See, e.g., Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999).

6. *Id.* (stating that a good appellate brief “doesn’t cite cases without offering the reader a clue why they are there” but “furnishes parenthetical explanations to show the relevance of the citation”).

7. See, e.g., ALDISERT, *supra* note 1, at 263–64 (recommending the use of parentheticals with citations in briefs); Stanley F. Birch, Jr., *Appellate Practice “Helpful Hints,”* 4 GA. B.J. 60, 60–61 (1998) (advocating the use of an explanatory parenthetical to present a novel argument); Leonard I. Garth, *How to Appeal to an Appellate Judge*, 21 LITIG. 20, 24 (1994) (“The single, easiest way to make a good brief better is by the judicious use of parentheticals following case citations.”); see also RUGGERO J. ALDISERT, OPINION WRITING 145 (3d ed. 2012) (encouraging judges to use parentheticals because they “achieve[] the objective of concise opinion writing”).

8. ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION’S TOP ADVOCATES 130 (2011)

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persuade.⁹ In fact, Chief Justice John Roberts often included parentheticals in his appellate briefs.¹⁰ Judges and top advocates prefer explanatory parentheticals for several reasons: parentheticals make writing clear and concise and establish an advocate's credibility.¹¹

Despite the persuasive power of parentheticals, advocates use them too rarely or not at all. By not having parentheticals, a motion or brief would discuss too many cases in the text. Judges do not want a book report on multiple cases and do not want to review lengthy summaries of multiple authorities.¹² As stated by one prominent judge, "few things [are] more boring than . . . page after page of case discussion[s]."¹³ By the end of the case discussions, the reader thinks, "who cares?"¹⁴ And without parentheticals, a motion or brief would have the additional problem of containing too many citations where their relevance to the stated propositions is unclear.¹⁵ If an advocate fails to show the relevance of cited authorities, he implies that the authorities were not carefully reviewed.¹⁶

Parenthetical explanations, however, inform a court *why* the authority is cited and *how* the authority supports the proposition, thus bolstering the persuasive punch of an advocacy piece.¹⁷ Part II of this Article demonstrates how effective parentheticals can transform mediocre works into ones that are clear and concise and explains how parentheticals can establish and maintain an advocate's credibility. Part III shows why the text preceding a parenthetical and the purpose of a parenthetical are important factors in determining the substance of the parenthetical. Part IV sets forth seven guidelines for drafting explanatory

(quoting John Davis, who argued 140 cases before the United States Supreme Court).

9. See *id.* at 134–41 (providing many examples of the nation's top advocates using explanatory parentheticals in federal appellate briefs).

10. See, e.g., Brief for Petitioner at 10–26, *TraFFix Devices, Inc. v. Mkt. Displays, Inc.*, 532 U.S. 23 (2001) (No. 99-1571), 2000 WL 35796342 (citing many authorities with parenthetical explanations).

11. See *infra* Part II (discussing these concepts in detail).

12. See Franklin S. Schwerin, *Judges' Advice to Lawyers*, CBA REC. (Chicago Bar Association), April 1996, at 22 (stating that advocates should "not undertake a long explanation of each case") (quoting United States District Judge David H. Coar).

13. Gerald Lebovits, *Write the Cites Right—Part I*, 76 N.Y. ST. B.A. J. 64, 60 (2004) (internal quotation marks omitted).

14. *Id.*

15. See *Hysong v. Encore Energy Partners LP*, No. 11-781, 2011 WL 5509100, at *4 (D. Del. Nov. 10, 2011) (criticizing plaintiff for listing citations "without bothering to append explanatory parentheticals to help explain their relevance"); Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences & Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141, 148, 152 (2002) (surveying thirty-four California judges and staff attorneys and finding that string cites lacking parentheticals were "unhelpful" to the judges).

16. See Karen J. Sneddon & David Hricik, *Using Citations Effectively*, 13 GA. BAR J. 84, 85 (2007).

17. See Mortimer Levitan, *Confidential Chat on the Craft of Briefing*, 4 J. APP. PRAC. & PROCESS 305, 310 (2002) ("The secret ambition of every brief should be to spare the judge the necessity of engaging in any work, mental or physical."); Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 SCRIBES J. LEGAL WRITING 1, 25 (2001–02) ("[T]he purpose of a citation should be explained.") (quoting Chief Justice E. Norman Veasey of the Supreme Court of Delaware).

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parentheticals for authorities cited in various persuasive writings, including motions to dismiss, motions for summary judgment, and trial and appellate briefs. In Part V, the Article explains specific ways to incorporate parentheticals into motions and briefs when citing cases and statutes, such as proving a rule that was synthesized from several authorities and factually distinguishing adverse cases.

This Article contains many examples of good and weak parentheticals, which are taken from motions and briefs drafted by this author and other litigators. The examples are based on real statutes and cases so that you can analyze the authorities to determine how the parentheticals were drafted.¹⁸

II. EXPLANATORY PARENTHETICALS PERSUADE JUDGES

To maximize the persuasiveness of a motion or brief, it must be clear, concise, and written by a credible advocate.¹⁹ As explained below, the explanatory parenthetical—if drafted and incorporated effectively—will help the advocate achieve those goals.

A. Effective Parentheticals Make Persuasive Writing Clear and Concise

Federal and state judges are persuaded by clear and concise writing and distracted by writing that rambles or contains convoluted arguments.²⁰ In a survey of over 300 federal judges about persuasive writing, most judges responded that the “best briefs” and best writings are clear and concise.²¹ Other judges have echoed those comments, directing litigators to be “clear and concise” in their writing.²² Judges from the Third and Eleventh Circuits have criticized briefs for

18. The parenthetical explanations discussed in this Article can follow citations that are placed in either a footnote or the text of a persuasive work.

19. See RUGGERO J. ALDISERT, *OPINION WRITING* 224, 225 (2d ed. 2009) (stating that the “indispensable requirements of brief writing in particular and legal writing in general” are accuracy, brevity, and clarity).

20. E.g., Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257, 261, 264 (2002).

21. See *id.* (surveying 355 sitting federal judges from the circuit and district courts about legal writing, and explaining that judges highly ranked the need to be “concise” and “clear” in legal writing); *id.* at 278–79 (“Although the judges’ responses to each question vary widely, there is a strong, recurring, and unmistakable cry for conciseness and clarity.”); Judge Stephen J. Dwyer et al., *How to Write, Edit, and Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 422 (2008) (“A good brief is focused, concise, and persuasive.”).

22. See ALDISERT, *supra* note 1, at 240–49 (surveying federal and state appellate judges who consistently stated that briefs should be clear and concise); see generally Garner, *supra* note 17, at 2–4 (surveying over fifty federal and state judges and finding that substantially all of them preferred clarity and brevity); Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, TEX. J. BUS. L. 593, 596 (2009) (“The best way to lose [an] audience is to write the brief long and cluttered”) (quoting Justice Ruth Bader Ginsburg of the United States Supreme Court).

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being too long and convoluted.²³ Justice Antonin Scalia bluntly said: “[I]t isn’t the judges’ job to piece the elements together from a wordy and confusing brief or argument.”²⁴ One Third Circuit Judge sarcastically expressed his frustration with rambling briefs: “If brevity were not important, we would not have called briefs ‘briefs’ in the first place.”²⁵ In another survey, federal and state judges stated that Plain English writing is more persuasive than legalese because it is clear, easy to understand, and succinct.²⁶ Additionally, experts on legal writing agree that clarity and conciseness are necessary elements of persuasion.²⁷

The explanatory parenthetical plays a pivotal role in making a persuasive work clear and concise. A well-written parenthetical explains the relationship between the stated proposition and the cited authority and proves to the court that the cited authority supports the stated proposition.²⁸ It also focuses the court on the portions of the cited authority that are relevant to a rule or argument—and does so in limited space.²⁹ Thus, the parenthetical bolsters the persuasiveness of the arguments and preempts a judge’s questions, “What does this rule mean?” and “Does the cited case really stand for the stated proposition?” Two good examples of such parentheticals are listed below.

Good Example: Disciplinary procedures in an employment handbook do not alter an employer’s right to terminate at-will employment for “no cause at all.” *See Trostle v. Combs*, 104 S.W.3d 206, 211–12 (Tex. Ct. App. 2003) (affirming summary judgment for employer on claim for breach of employment contract, even though the employer’s handbook “establish[ed] methods for demoting or firing employees”).

23. See Ruggero J. Aldisert, *Symposium: Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 651 (2006); Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 CUMB. L. REV. 1, 5 (1998–1999) (“Most lawyers write too much. More often than not, they try to convey too much information and cover too many issues.”).

24. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 23 (2008).

25. Garth, *supra* note 7, at 24, 66.

26. See Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 J. LEGAL WRITING INST. 183, 199–204 (2010) (surveying almost 150 trial and appellate judges about the persuasiveness of two writing samples and finding “that the Plain English sample was more persuasive because of the succinctness of the argument”).

27. See, e.g., J. ALEXANDER TANFORD & LAYNE S. KEELE, *THE PRETRIAL PROCESS* 330 (2d ed. 2013) (directing litigators to “[u]se simple, plain English rather than Latin phrases or pompous words” in their motions); Joi T. Montiel, *Your Appellate Brief: An Obstacle Course for the Court or a Clear Pathway to Your Conclusion*, 73 ALA. LAWYER 345, 349 (2012) (“To provide the judge a clear pathway to the legally correct conclusion, your brief must be well-organized, clear and concise.”); Stephanie A. Vaughan, *Persuasion Is An Art . . . But It Is Also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 651 (2009) (“Perhaps the advocate’s first consideration is that for writing to be persuasive, it must be clear and well organized.”); Bryan A. Garner, *Plain Language: Ten Tips for Writing at Your Law Firm*, 85 MICH. B. J. 60, 61 (2006) (“Verbosity will make your writing sag. Never pad, and learn to delete every extra word.”).

28. Eric Voigt, *Writing Tips to Make New Lawyers Shine*, 12 TORTSOURCE 8 (2010).

29. *Id.*

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Good Example: A criminal indictment must identify the false statement with sufficient particularity. *See United States v. Fried*, 450 F. Supp. 90, 93 (S.D.N.Y. 1978) (dismissing an indictment that failed “to state precisely what in the allegedly felonious paper is claimed to have been false”).³⁰

The parenthetical makes writing clear and concise for another reason: it encourages clear thinking. One well-known scholar has stated: “Clear thinking becomes clear writing; one can’t exist without the other.”³¹ To draft a parenthetical, the advocate must read a cited case, think about it, and understand its rules and reasoning. Drafting a parenthetical that illustrates the application of a rule, for instance, requires the writer to understand why a court held a certain way and to describe the case to an unfamiliar reader in a short amount of space. Without a parenthetical, however, an advocate can simply copy and paste a quote without understanding—or even reading—the cited authority.

In addition, using parentheticals to prove or illustrate rules shortens a motion or brief but does not diminish its persuasiveness. The parenthetical enables litigators to explain how rules apply to a set of facts without having to fully describe each case in the text. For example, say a lawyer found a case for the established rule that a defendant must act improperly to be liable for a claim of tortious interference. Some attorneys would discuss the case in the text to illustrate that rule.

Weak Example: To be liable, a defendant must act improperly. *Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 858 (Ohio 1999). In *Fred Siegel*, the defendant resigned from plaintiff’s law firm to work as an associate at a competitor firm. The plaintiff presented evidence that the former associate used its trade secrets in soliciting plaintiff’s clients, including using plaintiff’s client list. *Id.* at 857, 861. *Fred Siegel* reversed the grant of summary judgment for plaintiff because evidence existed that the former associate misappropriated plaintiff’s trade secrets. *Id.* at 861.

But a parenthetical would have saved space without sacrificing persuasiveness because it would focus the reader only on the relevant portions of the case to illustrate the rule on improper conduct.

30. *See* GUBERMAN, *supra* note 8, at 140 (providing a similar example from a brief filed in *United States v. Nicholas*).

31. WILLIAM ZINSSER, ON WRITING WELL, 30TH ANNIVERSARY EDITION: THE CLASSIC GUIDE TO WRITING NONFICTION 8 (7th ed. 2006); *see also* Laurie A. Lewis, *The Stellar Parenthetical Illustration: A Tool to Open Doors in a Tight Job Market*, 19 PERSPECTIVES TEACHING LEGAL RES. & WRITING 35, 40 (2010) (“Without clear thinking, there can be no clear legal analysis.”).

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Good Example: To be liable, a defendant must act improperly. *Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 859, 861 (Ohio 1999) (concluding that evidence that defendant used his former law firm’s trade secrets was sufficient to show improper conduct at the summary judgment stage).

In short, judges agree that a motion or brief should be clear and concise to be persuasive. It should have clear rules and clear arguments that are stated without any superfluous detail. The parenthetical is one important tool that helps litigators write clearly and concisely.

B. Effective Parentheticals Establish an Advocate’s Credibility

In addition to making writing clear and concise, parentheticals help persuade a court by establishing and maintaining an advocate’s credibility. Credibility is the ability to “inspire confidence and trust in an audience.”³² Litigators can inspire trust in their audience (the court) in many ways: accurately representing the facts and law, stating the precise holdings of cases, addressing adverse authority, raising only the strongest arguments, and not overstating the arguments.³³

Credibility is a necessary element of persuasion;³⁴ it should be established immediately in a motion or brief because a reader’s initial impressions are difficult to change.³⁵ The persuasiveness of an argument is strongly correlated with the credibility of the advocate asserting it.³⁶ As an advocate’s credibility

32. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 127 (3d ed. 2013).

33. See Warren W. Harris, *Advice from Appellate Judges on Brief Writing*, *APPELLATE PRACTICE NEWSLETTER* (Int’l Ass’n of Defense Counsel), Feb. 2007, at 5–6 (discussing comments from appellate judges on how attorneys establish credibility); SCALIA & GARNER, *supra* note 24, at 14 (“So err, if you must, on the side of understatement, and flee hyperbole.”); Dwyer et al., *supra* note 21, at 421 (“If you force [judges] to trudge through a host of unpersuasive arguments, you lose credibility and they lose interest.”); Judge Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 *UCLA L. REV.* 431, 436 (1987) (“If, under the guise of aggressive advocacy, you misuse a case or fail to discuss an unfavorable holding, you lose credibility.”).

34. See Ginsburg, *supra* note 5, at 568 (“Above all, a good brief is trustworthy.”).

35. See Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 *OR. L. REV.* 305, 307, 310 (2010) (discussing psychological studies on persuasion and explaining that subsequent information that “contradicts the [initial] impression” is often unconsciously discounted by the reader).

36. See Vaughan, *supra* note 27, at 650 (explaining that persuasive writing must be “anchored in the facts and law so that the advocate exemplifies credibility”); Mark DeForrest, *Introducing Persuasive Legal Argument via the Letter from a Birmingham City Jail*, 15 *J. LEGAL WRITING INST.* 109, 124 (2009) (“Persuasive arguments . . . are based on human character and credibility.”); Michael Frost, *Ethos, Pathos and Legal Audience*, 99 *DICK. L. REV.* 85, 104 (1994–95) (“[P]ersuasive discourse depends . . . on the advocate’s character and credibility.”).

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diminishes, a court is more likely to treat the arguments as “suspect.”³⁷ But as an advocate’s credibility increases, a court is more likely to adopt the arguments.³⁸ For instance, if the relevant rule could have several logical interpretations or applications, then a court will likely consider the credibility of the advocate in deciding the issue.³⁹

Explanatory parentheticals play a significant role in establishing a litigator’s credibility: they show an advocate’s intelligence and command of the law, thus inspiring trust in the arguments.⁴⁰ For instance, explaining the holding and reasoning of a case in just a few lines in a parenthetical requires strong analytical skills.⁴¹ And stating the holding and reasoning of a case in a parenthetical conveys to a judge that the advocate fully understands the case and how it relates to the stated rule.⁴² As a result, the judge is unlikely to question the rule or the advocate’s analysis of the case. Without parentheticals, however, a judge may question the validity of the rule—and the intelligence of the advocate. A judge would likely wonder whether the following rules are holdings or dicta from the cited cases or overstated paraphrases of the rules.

Weak Example 1: The exclusionary rule applies only to evidence that is unlawfully seized by the police; it does not apply to actions by other government officials, such as court employees and magistrates. *See Arizona v. Evans*, 514 U.S. 1, 4–5, 15–16 (1995); *United States v. Leon*, 468 U.S. 897, 925–26 (1984).

Weak Example 2: Based on exigent circumstances, an officer may retrieve clothing from the home of a partially-clothed defendant. *See United States v. Gwinn*, 219 F.3d 326, 333–34 (4th Cir. 2000).

37. *See* SCALIA & GARNER, *supra* note 24, at 14 (explaining that an advocate “suffers a grave loss of credibility” by having any intentional or careless inaccuracy in a brief); Dwyer et al., *supra* note 23, at 426 (explaining that “you lose credibility” by misusing a case or ignoring an adverse holding) (internal quotation marks omitted).

38. *See* MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 13 (2d ed. 2008) (stating that courts are “more receptive” to arguments by credible advocates).

39. *Id.* at 123–24.

40. *Cf.* SCALIA & GARNER, *supra* note 24, at 123 (stating that advocates want to inform a court that they are “knowledgeable and even [an] expert” on the legal issues); SMITH, *supra* note 32, at 124, 126 (discussing the importance of an advocate’s perceived intelligence in persuasive writing and explaining that an advocate is perceived as credible when a judge has “specific knowledge of the aspects of an advocate’s character that indicate credibility”).

41. *See* Lewis, *supra* note 31, at 40 (stating that a writer must “think and reason clearly” to craft a parenthetical illustration).

42. *Cf.* SMITH, *supra* note 32, at 153, 162–63 (explaining that a credible advocate “has comprehensive knowledge of the [relevant] information” and the ability to present “strong and effective legal analysis in the document itself”).

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But citing those cases with parenthetical explanations would have provided the judge with the necessary information about the cases, thus demonstrating the advocate's command of the law.

Good Example 1: The exclusionary rule applies only to evidence that is unlawfully seized by the police; it does not apply to actions by other government officials, such as court employees and magistrates. *See Arizona v. Evans*, 514 U.S. 1, 4–5, 15–16 (1995) (refusing to apply the exclusionary rule where the court clerk should have quashed the arrest warrant); *United States v. Leon*, 468 U.S. 897, 925–26 (1984) (concluding that the exclusionary rule should not apply to magistrate's error in issuing search warrant because error was made in good faith).

Good Example 2: Based on exigent circumstances, an officer may retrieve clothing from the home of a partially-clothed defendant. *See United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000) (holding that the officer was justified in entering the defendant's home to obtain shoes and a shirt for him to protect him from a "substantial risk of injury").

Including parentheticals with citations bolsters an advocate's credibility for two additional reasons. First, judges, like other readers, tend to trust specifics over generalities. The more specific information provided about a case, the more likely the judge will trust the information. A judge would be unlikely to question the discussion of the cited case in the second example below because it contains specific facts about the case (the added facts are italicized).

Example 1: Like the defendant here, the defendant in *Smith* was at risk of sustaining serious injury on the way to the patrol car. The defendant in *Smith* was not wearing shoes and had to walk on a path for a long distance. And that path was littered with debris.

Example 2: Like the defendant here, the defendant in *Smith* was at risk of sustaining serious injury on the way to the patrol car. The defendant in *Smith* was not wearing shoes and had to walk on a *dirt* path for *150 yards*. And that path was littered with *broken glass, pieces of metal, and tree limbs*.

A parenthetical is often the most appropriate location to include specific information about the cited authority. The specific information will increase the judge's confidence in the citation.

Second, parentheticals that contain substantive details about the cited authority decrease the likelihood that a litigator will misrepresent the authority. Before drafting an effective parenthetical, a litigator must read, analyze, and understand the cited authority. As a result, the likelihood that the litigator will

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misrepresent the authority diminishes. Each accurate representation of a rule and citation builds credibility.⁴³ On the other hand, just one inaccurate citation may result in the judge treating the remaining citations as “suspect.”⁴⁴

In summary, parenthetical explanations help advocates write clearly and concisely, and they help advocates build and maintain credibility. The result is a motion or brief that persuades.

III. THE GOVERNING PRINCIPLE THAT DETERMINES THE SUBSTANCE OF AN EXPLANATORY PARENTHETICAL

Before drafting the content of a parenthetical, an advocate must first answer this threshold question: should a parenthetical explanation follow the citation? The citation needs no parenthetical when the rule or argument is sufficiently explained in the sentence preceding the citation. Additionally, a parenthetical is unnecessary for well-known rules, such as the standard for a motion for summary judgment. On the other hand, a full discussion of the authority might be necessary. The more significant the authority and the more complex the issue, the more likely the authority should be fully described in the text of a motion or brief rather than a parenthetical.⁴⁵ For instance, authority that is binding on a contested and significant issue should be explained in the text and not a parenthetical.⁴⁶

Once you have decided that a parenthetical explanation is necessary, you should follow one governing principle: the substance of a parenthetical depends on the text preceding the cited authority and the purpose for including the parenthetical. Although the purpose of a parenthetical is an important factor, the text preceding the parenthetical is the most important factor that determines the substance of a parenthetical.

The preceding text determines whether a parenthetical should contain a complete sentence, one or two clauses, a short phrase, or one word.⁴⁷ It also

43. See ALDISERT, *supra* note 1, at 283–84 (“You build credibility by fairly characterizing the law and the facts.”) (quoting Chief Justice Mary J. Mullarkey of the Supreme Court of Colorado).

44. SCALIA & GARNER, *supra* note 24, at 124; *see also* Garner, *supra* note 17, at 10 (“If authorities are inaccurately described, the judge will lose confidence in the reliability of the brief and its author; if the judge reads on at all, she will do so with a skeptical eye.”) (quoting Justice Ruth Bader Ginsburg of the Supreme Court of the United States); Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client’s to the Judge’s Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 1001 (“If you are caught misstating the record, everything you write thereafter will be viewed with suspicion.”).

45. See MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 109 (3d ed. 2010) (“The more significant an authority case is, . . . the more detail you need to provide *in your argument*.”) (emphasis in original).

46. See Randall H. Warner, *Cites for Sore Eyes: Case Law Analysis That Works*, 41 ARIZ. ATTORNEY 18, 20 (2004) (“For example, if the rule you are citing is really important and somewhat debatable, you should probably go into some detail about the case law that supports it.”).

47. *Cf.* BEAZLEY, *supra* note 45, at 108 (stating that a short phrase in a parenthetical is effective only if the “surrounding text—usually the text before the citation—supplies sufficient context”).

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determines whether a parenthetical should have a full or partial quotation, the procedural posture and outcome of a case, the holding and reasoning of a case, or only the facts of a case. Moreover, both the preceding text and the substance of a parenthetical must provide enough detail so that a judge will understand the cited authority without having to read the actual case or statute.⁴⁸

A few specific examples will illustrate the relationship between the preceding text and the parenthetical. If the preceding text provides the outcome and reasoning of a case, the parenthetical may include only the relevant facts (Example 1 below).⁴⁹ But if the preceding text lacks those details, the parenthetical may contain the outcome, relevant facts, and reasoning of the case (Example 2 below).

Good Example 1: The Supreme Court has stricken several gender-based classifications when those classifications were based on “overbroad generalizations about the different capabilities of men and women.” *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) (single-sex military schools); *J.E.B. v. T.B.*, 511 U.S. 127, 138–40 (1994) (gender-based peremptory challenges in jury selection).⁵⁰

Good Example 2: The state may not discriminate based on gender stereotypes. *See J.E.B. v. T.B.*, 511 U.S. 127, 138–40 (1994) (striking down sex-based peremptory challenges in jury selection and “categorically” rejecting broad assumptions about capabilities of men and women).⁵¹

To further illustrate, if the preceding text states that a court has concluded or determined something, the parenthetical may specify what the court did and at what stage of litigation it did the action (Example 3 below).⁵² If, however, the preceding text provides those details, the parenthetical should contain different information, such as the reasoning of a case (Example 4 below).

Good Example 3: This Court has concluded that common law tort claims based on the misappropriation of trade secrets are preempted by the trade secrets act. *See United Magazine Co. v. Murdoch Magazines*

48. Cf. SMITH, *supra* note 32, at 58, 60 (explaining that a parenthetical illustration for a case should not refer to the parties by their proper names or other facts that would “require reading the case to be understood”).

49. *See id.* at 59–60.

50. *See* BEAZLEY, *supra* note 45, at 108 (setting forth similar parenthetical and preceding text).

51. *See id.* (setting forth similar parenthetical but not providing the preceding text).

52. If you are citing a case to support an argument and the outcome of the case is not favorable to that argument, then the parenthetical should not indicate the outcome but should provide other information, such as a favorable quotation. But you may indicate an unfavorable outcome in a parenthetical when using it to counter adverse authority. *See infra* Part V.F.

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Distribution, Inc., 146 F. Supp. 2d 385, 409–10, 416 (S.D.N.Y. 2001) (granting motion to dismiss claim for unfair competition).

Good Example 4: This Court has dismissed a claim for unfair competition under Rule 12(b)(6) because it was preempted by the trade secrets act. *United Magazine Co. v. Murdoch Magazines Distribution, Inc.*, 146 F. Supp. 2d 385, 409–10 (S.D.N.Y. 2001) (reasoning that the allegations underlying the unfair competition claim were “substantially the same” as those underlying the claim under the trade secrets statute).

When an advocate fails to consider the text preceding a parenthetical explanation, a judge may not understand the substance of the parenthetical. The short phrases in the parentheticals below do not make sense because the preceding text provides no context.

Weak Example: This Court should dismiss the claim for negligent infliction of emotional distress. *Schrage v. Hatzlacha Cab Corp.*, 788 N.Y.S.2d 4, 5 (App. Div. 2004) (negligent destruction of dog); *Fowler v. Ticonderoga*, 516 N.Y.S.2d 368, 369–70 (App. Div. 1987) (malicious killing of dog).

But those short phrases would have been sufficient had the preceding text provided the necessary context.

Good Example: Damages for emotional distress are not recoverable for the negligent or intentional killing of a pet. *Schrage v. Hatzlacha Cab Corp.*, 788 N.Y.S.2d 4, 5 (App. Div. 2004) (negligent destruction of dog); *Fowler v. Ticonderoga*, 516 N.Y.S.2d 368, 369–70 (App. Div. 1987) (malicious killing of dog).

To summarize, both the preceding text and the content of a parenthetical should provide only the information that is necessary so that a judge will understand—and accept—the rule or argument without having to read the cited authority itself.⁵³

The text preceding a citation is important for another reason: it provides a reason for the judge to review (or not review) the parenthetical. To maximize the probability that the judge will read the parenthetical, the preceding text should inform the court of the relevance of the citation and accompanying parenthetical. You should not state the relevance of a case or statute only in the parenthetical. A well-crafted parenthetical is meaningless if the court skips it; draft the preceding

53. Judges expect motions and briefs to be “self-contained.” See Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge’s Views*, 51 DUQ. L. REV. 3, 36 (2013) (explaining that an “advocate should make his brief, as far as possible, self-contained”).

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text so that the court will want to know the substance of the parenthetical but does not have to read it to understand your point.

In addition to the preceding text, the purpose for including a parenthetical with a citation is relevant to what information a parenthetical should contain. An advocate may use parentheticals for various purposes:

1. Proving a rule from a single authority;
2. Illustrating a rule from a single authority;
3. Proving a rule that was synthesized from multiple authorities;
4. Proving or illustrating a significant rule or argument with more than one authority;
5. Showing the outcome and procedural posture of cases;
6. Countering and distinguishing adverse authorities; and
7. Applying the rules to your facts.

Part V of this Article provides many examples of parentheticals that are used for each purpose listed above. As shown in that Part, the information in those parentheticals is different because of the different purposes for including them.

IV. SEVEN GUIDELINES FOR DRAFTING EFFECTIVE PARENTHETICALS

Like persuasive writing, a perfect formula does not exist for drafting effective parentheticals. But you should follow certain guidelines to craft parentheticals that persuade. The following seven guidelines are based on common errors made in motions and briefs and on common misunderstandings of how to draft parentheticals.

A. *Guideline No. 1: Most Parentheticals Should Begin with a Present Participle and a Lowercase Letter and End Without Punctuation*

Most explanatory parentheticals, which often contain sentence fragments, should start with a lowercase present participle and end with no closing punctuation.⁵⁴ Common present participles for statutes include “authorizing,” “defining,” “prohibiting,” “providing,” and “requiring.” For case citations, common present participles include “affirming,” “concluding,” “dismissing,”

54. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.5(a)(i), at 59 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010) [hereinafter THE BLUEBOOK]; GUBERMAN, *supra* note 8, at 134 (stating that the “best” technique for parentheticals is to “start with an -ing word”) (emphasis in original); SMITH, *supra* note 32, at 57 (“A parenthetical illustration ordinarily begins with a *present participle* . . .”) (emphasis in original).

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“granting,” “holding,” and “reversing.”⁵⁵ Applying those principles, most parentheticals that follow citations to statutes and cases should look similar to these examples.

Statutory Examples: Ohio Rev. Code § 955.28 (providing that an owner of a dog is strictly liable for any injuries caused by the dog); Tex. Transp. Code § 541.001(4) (defining a “person” to include a “corporation”).

Case Examples: *Gregory v. Finova Capital Corp.*, 442 F.3d 188, 190–92 (4th Cir. 2006) (reversing class certification for the sole reason that the class action was not the superior method to resolve the dispute);⁵⁶ *Thomas & Betts Corp. v. Panduit Corp.*, 108 F. Supp. 2d 968, 975–76 (N.D. Ill. 2000) (granting summary judgment to defendants on claims for tortious interference and civil conspiracy).

Notice that the case parentheticals above start with the present participles, “reversing” and “granting,” and not with the phrases, “the court reversed” or “the court granted.” Notice also that there is one space before the opening parenthesis for the explanatory parenthetical.

Most parentheticals should begin with a present participle for one key reason: the participle—in just one word—informs a reader of the cited authority’s specific action. To illustrate, the present participle in the first example below (“affirming”) immediately tells the reader what the court did. In the absence of a present participle (the second example below), the content of a parenthetical may appear to be the thoughts of the writer, not the cited authority.

Example 1: *Flint v. Holbrook*, 608 N.E.2d 809, 811–15 (Ohio Ct. App. 1992) (affirming summary judgment for defendant on claim under dog bite statute because the defendant did not have possession and control over area where dog was kept).

Example 2: *Flint v. Holbrook*, 608 N.E.2d 809, 811–15 (Ohio Ct. App. 1992) (plaintiff could not prevail on claim under the dog bite statute for the dog attack and summary judgment for defendant was proper because the defendant did not have possession and control over area where dog was kept).

55. Other common present participles include adopting, allowing, analyzing, applying, approving, awarding, construing, denying, determining, discussing, explaining, finding, indicating, interpreting, issuing, limiting, overruling, permitting, reasoning, recognizing, rejecting, relying, remanding, requiring, ruling, upholding, and vacating.

56. See Eric P. Voigt, *A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action*, 31 REV. LITIG. 617, 637 n.87 (2012) (providing similar example).

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One more point about present participles. In parentheticals for cases, you must use the present participle “holding” with precision. Many students and litigators state that something was a “holding” when in fact it was not. A court must have actually decided a disputed issue for the result to be the holding of the case.⁵⁷ If you are in doubt, a better choice would be “concluding” or “determining.”

B. Guideline No. 2: Some Parentheticals May Begin with Something Other Than a Present Participle

You should not blindly follow the guideline that parentheticals should begin with a present participle. There are two important exceptions.

First, a parenthetical need not start with a present participle when quoting a full or partial sentence from a statute or case.⁵⁸ A present participle is unnecessary because the quotation marks immediately convey to the reader that the content of the parenthetical is from the perspective of the cited authority. Parentheticals with a full quotation should start with a capital letter and end with closing punctuation.⁵⁹

Statutory Example: Ohio Rev. Code Ann. § 1345.02(A) (“No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction.”).

Case Example: *See Nat’l Ass’n of Cas. & Surety Agents v. Bd. of Gov’rs of the Fed. Reserve Sys.*, 856 F.2d 282, 287 (D.C. Cir. 1988) (“It is, of course, a fundamental precept of administrative law that ‘[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure.’”).⁶⁰

A parenthetical containing only a partial quotation, however, may start with a lowercase letter and end with no closing punctuation. Chief Justice John Roberts used this approach when he litigated cases.⁶¹

57. See Judge Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1257 (2006) (stating that the distinction between a holding and dictum “requires recognition of what was the question before the court upon which the judgment depended”); *id.* at 1257–58 (“A judge’s power to bind is limited to the issue that is before him. . . .”) (quoting Judge Henry Friendly of the United States Court of Appeals for the Second Circuit).

58. See THE BLUEBOOK, *supra* note 54, at R. 1.5(a)(ii); GUBERMAN, *supra* note 8, at 138 (“Another way to use parentheticals is for a single-sentence quotation that speaks for itself.”).

59. THE BLUEBOOK, *supra* note 54, at R. 1.5(a)(ii).

60. Brief for Petitioner at 45, *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461 (No. 02-658) (providing identical example by Chief Justice John Roberts of the United States Supreme Court).

61. See, e.g., Brief for Respondents at 17, *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (No. 00–1167).

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Good Example: *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“if there is no statute conferring authority, a federal agency has none”).⁶²

Good Example: *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (“the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking”).⁶³

Second, a parenthetical could start with something other than a present participle when it contains one word or a short phrase,⁶⁴ such as when citing several cases to illustrate a synthesized rule. In the example below, the text preceding the parentheticals states a concise synthesized rule from two cases; therefore, the short phrases in the parentheticals are necessary to inform the reader which parts of the rule came from which cases.

Good Example: Damages for emotional distress are not recoverable for the negligent or intentional killing of a pet. *Schrage v. Hatzlacha Cab Corp.*, 788 N.Y.S.2d 4, 5 (App. Div. 2004) (negligent destruction of dog); *Fowler v. Ticonderoga*, 516 N.Y.S.2d 368, 369-70 (App. Div. 1987) (malicious killing of dog).

Additionally, a parenthetical may contain one or two words when the cited authority sets forth examples of the same thing. The second example below conveys the necessary information to a judge better than the first one.

Example 1: *Kennedy v. Byas*, 867 So.2d 1195, 1198 (Fla. Dist. Ct. App. 2004) (concluding that emotional distress damages were not recoverable for negligent injury to pet); *Paul v. Osceola County*, 388 So. 2d 40, 41 (Fla. Dist. Ct. App. 1980) (determining that pet owner could not recover emotional distress damages for negligent injury to his pet).

Example 2: *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004) (concluding that emotional distress damages were not recoverable for negligent injury to pet); *Paul v. Osceola County*, 388 So. 2d 40, 41 (Fla. Dist. Ct. App. 1980) (same).

Because *Kennedy* and *Paul* have the same conclusion, the parenthetical for *Paul*, the later cited case, should state “same” (Example 2). In Example 1, when a judge reads the second parenthetical, the judge expects it to state something

62. Brief for Petitioner, *supra* note 60, at 21 (providing identical example by Chief Justice John Roberts of the United States Supreme Court).

63. Brief for Respondents, *supra* note 61 (setting forth identical example by Chief Justice John Roberts of the United States Supreme Court).

64. See GUBERMAN, *supra* note 8, at 137 (providing several examples of parentheticals with short phrases, which were taken from appellate briefs).

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different from the prior parenthetical. By not using the word “same,” the author forces the judge to pause to determine how the two parentheticals relate to each other.⁶⁵

C. Guideline No. 3: Parentheticals May Start with a Present Participle and Include Quoted Material

Starting a parenthetical with a present participle and quoting language from a statute or case are not mutually exclusive. An effective parenthetical often starts with a present participle and quotes key legal terms from a statute or case.

Good Statutory Examples: Ohio Rev. Code § 955.28(B) (providing that an “owner, keeper, or harbinger” of a dog is strictly liable for any injuries caused by the dog); Tenn. Code Ann. § 44-17-403(a)(1) (allowing recovery of “noneconomic damages” up to \$5,000 for the “intentional or negligent” death of a pet); Tex. Transp. Code § 541.001(4) (defining a “person” as an “individual, firm, partnership, association, or corporation”).

Good Case Examples: *United States v. Fried*, 450 F. Supp. 90, 93 (S.D.N.Y. 1978) (dismissing charges that failed “to state precisely what in the allegedly felonious paper is claimed to have been false”); *United States v. Devine’s Milk Labs., Inc.*, 179 F. Supp. 799, 801 (D. Mass. 1960) (dismissing indictment that did not “indicate what specific false statements or claims were to be made or presented”).⁶⁶

In the above examples, the present participles keep the parentheticals concise while highlighting the legally significant terms. In addition, because the clauses in those examples are not complete sentences, the parentheticals start with a lowercase participle and end with no closing punctuation, even though the parentheticals contain quoted material.

But do not start a parenthetical with a present participle and include a full quotation of a sentence.

Weak Example: *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (rejecting a probable cause test, “The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and

65. If, however, the parenthetical for *Kennedy* stated that the court *held* that the pet owner could not recover emotional distress damages but *Paul* did not have a holding on that issue, then “same” would be inappropriate. See *supra* Part IV.A (explaining why “holding” must be used with precision).

66. GUBERMAN, *supra* note 8, at 140 (using examples drafted by top litigators).

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articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”).⁶⁷

The prior parenthetical could be revised by including only the full quotation or integrating the first clause with the quotation (*e.g.*, rejecting a probable cause test and stating that the “Fourth Amendment permits a properly limited protective sweep” based on a “reasonable belief” that a danger exists).

D. Guideline No. 4: Parentheticals May Contain Two Clauses

Although parentheticals often have only one clause or sentence, they may contain two clauses that address related or separate points. The two clauses may start with a present participle or something else, and they may be separated by a conjunction or semicolon. The semicolon is useful to create a pause to emphasize the second clause or to make the parenthetical more concise. Here are two examples:

Example with Semicolon: *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) (explaining that an officer’s subjective intent is “irrelevant in determining whether that officer’s actions violate the Fourth Amendment”; “the issue is . . . the objective effect of his actions”).⁶⁸

Example with Conjunction: *Duct-O-Wire Co. v. United States Crane*, 31 F.3d 506, 509 (7th Cir. 1994) (applying Wisconsin law and requiring plaintiff to prove that “the interference was intentional”).⁶⁹

E. Guideline No. 5: Parentheticals Should Not Contain Hidden Rules

Many law students and lawyers mistakenly put important rules only in explanatory parentheticals and forget to state the rules in the text of the discussion.⁷⁰ Rules belong in the text preceding the parentheticals.⁷¹ An advocate should write a motion or brief so that the judge will understand the law and legal arguments without having to read the content of the parentheticals. The purpose of a parenthetical is not to introduce a new rule, but to illustrate or prove the rule that is stated in the preceding text.⁷² By hiding rules in parentheticals, the writer is forcing the judge to

67. Brief for Appellee at 8–9, *United States v. Murphy*, 516 F.3d 1117 (No. 06-30582) (setting forth identical parenthetical).

68. See Reply Brief of State of Florida at 17, *Florida v. Jardines*, 2012 WL 3132158 (No. 11-564) (setting forth similar parenthetical).

69. See Eric P. Voigt, *Driving Through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law*, 55 CLEV. ST. L. REV. 339, 351 n.37 (2007).

70. SMITH, *supra* note 32, at 59.

71. *Id.*

72. *Id.* at 59 (“[T]he parenthetical should supplement the rule by illustrating how the rule was applied in a specific factual context.”). As explained *infra* Part V.A, parentheticals may contain rules in limited situations.

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hunt for the relevant rules, thereby creating “obstacles” to the judge’s understanding of the arguments.⁷³ A few common mistakes are listed below.

Weak Example 1: A plaintiff must prove four elements to prevail on a negligence claim based on a dog bite injury. *Beckett v. Warren*, 921 N.E.2d 624, 627 (Ohio 2010) (requiring plaintiff to show that the defendant owned the dog, that the dog was vicious, that the defendant knew of the dog’s viciousness, and that the owner kept the dog in a negligent manner).

Weak Example 2: There are several exceptions to the requirement that police need a warrant to search a home. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (stating that police may enter a home without a warrant to provide medical care to an occupant based on “exigent circumstances”).

Weak Example 3: As this Court has explained, “[i]t is an established principle of constitutional law that the Equal Protection Clause protects against class or group-based invidious discrimination.” *Muller v. Costello*, 187 F.3d 298, 309 (2d Cir. 1999) (“The Equal Protection Clause prohibits arbitrary and irrational discrimination.”).⁷⁴

In those examples, the writers stated the relevant rules in the preceding text but then mistakenly introduced new rules in the parentheticals. Instead, the rules in the parentheticals should have been stated in the text preceding the citations. The parentheticals are not needed.

F. Guideline No. 6: Parentheticals Should Not Be Redundant

The content of the parenthetical must not repeat the preceding text; rather, it must add something new to the analysis.⁷⁵ The parentheticals below are common—but redundant—and should be avoided.

Weak Example 1: The district court held that the proposed class action was not the superior method to resolve the dispute. *Webb v. Carter’s*

For example, when a rule is paraphrased in the text of the discussion, the full quotation of the rule may be included in a parenthetical.

73. See Montiel, *supra* note 27, at 349 (“Obstacles that frustrate the judge or that make his or her job more difficult undermine the goal of the appellate brief.”).

74. See Brief of Amici Curiae Columbia Law School Sexuality & Gender Law Clinic in Support of Plaintiff-Appellee at 2, *Windsor v. United States*, 2012 WL 4201907 (No. 12-2335) (providing similar example).

75. See SMITH, *supra* note 32, at 59–60 (explaining that a parenthetical should not “merely restate[] the rule already stated in the text”).

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Inc., 272 F.R.D. 489, 504–05 (C.D. Cal. 2011) (concluding that plaintiffs could not satisfy the superiority requirement).

Weak Example 2: To recover for a claim of negligent intentional infliction of emotional distress, a plaintiff must be an immediate family member of the victim. *Nugent v. Bauermeister*, 489 N.W.2d 148, 150 (Mich. Ct. App. 1992) (requiring plaintiff to be immediate family).

The parentheticals above are pointless. They do not help the court understand the authority any better than the preceding text. Because judges expect a parenthetical to state something that was not said in the preceding text, they may read its content several times in hopes of gleaning new information about the authority, which they will not find. Thus, repeating the preceding sentence in a parenthetical will serve only to confuse and annoy—not persuade—judges. In addition, if an advocate has several pointless parentheticals at the beginning of a motion or brief, then a judge may skip the remaining parentheticals.⁷⁶ The problems with the parentheticals above could be remedied by including *new* information about the cases in the parentheticals.

Good Example 1: The district court held that the proposed class action was not the superior method to resolve the dispute. *Webb v. Carter’s Inc.*, 272 F.R.D. 489, 504–05 (C.D. Cal. 2011) (denying class certification where manufacturer had voluntarily refunded over \$2 million to its customers).⁷⁷

Good Example 2: To recover for a claim of negligent intentional infliction of emotional distress, a plaintiff must be an “immediate family” member of the victim. *Nugent v. Bauermeister*, 489 N.W.2d 148, 150 (Mich. Ct. App. 1992) (holding that the plaintiff, the victim’s best friend, could not recover for his emotional distress).

Now, the parentheticals contain information that supplements the text preceding the citations. The first parenthetical explains that the court denied class certification and why the class action was not the superior procedure. The second parenthetical states the holding of the case and provides a specific example of who is not an immediate family member.

The same principle applies for parentheticals accompanying citations to statutes. When statutory language is quoted in the text, the parenthetical should not contain the same quotation.

⁷⁶ Cf. Garner, *supra* note 17, at 10 (“If authorities are inaccurately described, the judge will lose confidence in the reliability of the brief and its author; if the judge reads on at all, she will do so with a skeptical eye.”) (quoting Justice Ruth Bader Ginsburg of the Supreme Court of the United States).

⁷⁷ See Voigt, *supra* note 56, at 645 n.132 (providing similar parenthetical).

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Weak Example: Under the statute, when “a person’s pet is killed,” the person may recover “up to five thousand dollars (\$5,000) in noneconomic damages.” Tenn. Code Ann. § 44-17-403 (allowing recovery of “noneconomic damages” up to “five thousand dollars”).

But when the preceding text paraphrases the statute and quotes only the key terms, the entire statutory provision may be quoted in the parenthetical.⁷⁸

Good Example: The statute expressly authorizes the recovery of “noneconomic damages” for the “intentional” or “negligent” death of a pet. Tenn. Code Ann. § 44-17-403 (“If a person’s pet is killed or sustains injuries that result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another, the trier of fact may find the individual causing the death or the owner of the animal causing the death liable for up to five thousand dollars (\$5,000) in noneconomic damages . . .”).

As explained above in Part III, an advocate must consider the text preceding a citation when drafting a parenthetical explanation. By doing so, the advocate will ensure that the parenthetical makes sense and is not redundant.

G. Guideline No. 7: Parentheticals Should Not Ramble

The information in a parenthetical should be focused and should not ramble. The parenthetical is not the place to discuss interesting nuggets from a case or fine points of law. A rambling parenthetical distracts judges, makes them question the advocate’s understanding of the cited authority, and undermines the advocate’s credibility. This results in judges distrusting the analysis of the cited authority. If a parenthetical exceeds one complete sentence or has more than two separate clauses, it is probably too long. The parenthetical below rambles because the advocate does not understand the purpose for the parenthetical.

Weak Example: *Kennedy v. Byas*, 867 So.2d 1195, 1198 (Fla. Dist. Ct. App. 2004) (the dog owner took her dog to the veterinarian for a routine procedure but there were complications during the surgery and the dog died and the owner claimed that the veterinarian was negligent in performing the surgery; the court held that the owner could not recover damages for her emotional distress and reasoned that dogs are personal property).

78. By including the full quotation in the parenthetical, a judge would not need to spend time locating the statute.

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A parenthetical should contain one main point and should concisely explain the relevance of the cited authority. To draft such a parenthetical, the writer must first understand the governing rules and the relevance of the authority to the client's situation. For example, assume that you represent a defendant where a dog owner seeks emotional distress damages because your client negligently hit the dog with his vehicle. You should first state the relevant rules in the text preceding the citation and then draft a parenthetical that proves or illustrates the rules.

Good Example: Emotional distress damages are not recoverable for the negligent destruction of personal property. *Kennedy v. Byas*, 867 So.2d 1195, 1197 (Fla. Dist. Ct. App. 2004). Pets are “personal property.” *Id.* Thus, damages for a pet owner's emotional distress are not recoverable for the negligent killing of a dog. *Id.* at 1197–98 (holding that dog owner could not recover emotional distress damages resulting from the veterinarian's negligence).

In sum, the seven guidelines discussed above will help you craft parentheticals that persuade. The next Part explains how to incorporate your parentheticals into various advocacy pieces.

V. SEVEN WAYS TO USE EXPLANATORY PARENTHETICALS IN MOTIONS AND BRIEFS

This Part explains some of the most effective ways that an advocate can use parentheticals in persuasive writing.⁷⁹ This Part sets forth multiple examples of good and bad parentheticals for cases and statutes. When drafting the content of a parenthetical, remember to consider the text preceding the parenthetical and the purpose for including the parenthetical with the citation. If you follow that governing principle when drafting parentheticals, as well as the seven guidelines discussed above, your motion or brief will be clear, concise, and credible.

A. Proving a Rule from a Single Authority

A parenthetical explanation is often necessary to prove to a judge that the cited authority supports the stated rule. Judge Posner has explained that an advocacy piece should be “self-contained.”⁸⁰ If a judge must find and read the cited authority to understand the stated proposition or to determine whether the authority stands for the proposition, then the writing is unclear and the advocate has failed as a writer. Including a parenthetical with the citation can resolve any clarity problems. A

79. The list in Part V is not exhaustive.

80. See Posner, *supra* note 53, at 36.

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parenthetical should be used to prove a rule in two main situations: the rule was paraphrased based on the express language of a statute or case, or the rule was extracted from a case—meaning, the cited case does not expressly state the rule but its outcome, facts, and reasoning support the rule.

1. Proving Paraphrased Rules with Parentheticals

Advocates should usually paraphrase express rules from statutes and cases and not simply provide a block quote of the rule in the text of the discussion.⁸¹ For rules that are well established or will not be challenged, a parenthetical is unnecessary. But when a judge may doubt the validity of the paraphrased rule or when the judge would want to review the exact language, a parenthetical should follow the citation.⁸² The text preceding the citation will determine how much of the rule should be quoted in the parenthetical.⁸³ For instance, if an advocate paraphrases a rule and does not quote any parts of the rule in the text or quotes only a few terms, then a parenthetical may contain a full quotation of the rule (Examples 1 and 2 below).⁸⁴ The quoted language in the parentheticals below shows a judge that the cited authorities support the paraphrased rules. As a result, the judge will not question the advocate's credibility.⁸⁵

Good Example 1: To avoid dismissal, facts must be actually pled. *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 522 (6th Cir. 2008) (“The court should not assume facts that could and should have been pled, but were not.”).

Good Example 2: Under an express warranty, a seller may limit a purchaser's remedy to the “repair and replacement” of a defective part. Ohio Rev. Code Ann. § 1302.93(A)(1) (authorizing a seller to “limit or alter the measure of damages recoverable . . . by limiting the buyer's remedies . . . to repair and replacement of nonconforming goods or parts”).

81. If you paraphrase a rule and explain its relevance to your facts before quoting the rule, then you “[m]aximize the likelihood that the reader will adopt your interpretation.” Eric P. Voigt, *Writing Tips to Make New Lawyers Shine*, 12 TORTSOURCE 8 (2010). Further, paraphrasing an express rule is necessary when the rule cannot be “integrated into the writer's sentence.” See Anne Enquist, *To Quote or Not to Quote*, 14 PERSPECTIVES TEACHING LEGAL RES. & WRITING 16, 19 (2005) (explaining how to blend a quotation into a writer's sentence).

82. See Warner, *supra* note 46, at 23 (“A good rule of thumb is that you should quote only when the court might doubt that your description of the case is accurate . . .”); Enquist, *supra* note 81, at 16 (explaining that legal readers expect “to see the exact language of statutes, regulations, municipal codes, [and] constitutions”).

83. See *supra* Part III (discussing how the text preceding a parenthetical will determine what information belongs in the parenthetical).

84. See Sneddon & Hricik, *supra* note 46, at 84 (“If the case is not quoted in the text, a concise explanatory parenthetical inserted after the citation can state its pertinence.”).

85. See *supra* notes 53–54 and accompanying text (explaining that an advocate must be credible to be persuasive).

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You should not put the key parts of a rule only in a parenthetical. Significant language from a statute or case should be quoted in the text, not hidden in a parenthetical. For instance, say that you found a relevant rule where you represent an insured in a dispute over the meaning of an insurance term.

Weak Example: Ambiguous policy provisions must be construed against the insurer and in favor of the insured. *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 903 A.2d 1170, 1174 (Pa. 2006) (policy must be “construed in favor of the insured and against the insurer, the drafter of the agreement”).⁸⁶

Good Example: Ambiguous policy provisions must be “construed in favor of the insured and against the insurer, the drafter of the agreement.” *Prudential Prop. & Cas. Ins. Co. v. Sartno*, 903 A.2d 1170, 1174 (Pa. 2006).⁸⁷

Because the quoted rule is important and could be integrated into the sentence, the rule should be quoted in the text; the parenthetical is not needed.

2. Proving Extracted Rules with Parentheticals

A parenthetical explanation is also helpful to prove a rule where the cited case does not expressly state the rule but its outcome, facts, and reasoning (or some combination) support the rule. Because such extracted rules can be subject to more than one reasonable interpretation, they are often challenged.⁸⁸ When an extracted rule is likely to be challenged, an advocate should support the rule with a parenthetical that indicates, at a minimum, the outcome and legally significant facts of the cited case.

Good Example 1: Disciplinary procedures in an employment handbook do not alter an employer’s right to terminate employment for “no cause at all.” See *Trostle v. Combs*, 104 S.W.3d 206, 211–12 (Tex. Ct. App. 2003) (affirming summary judgment for employer on claim for breach of contract, even though the employer did not follow the “disciplinary policy” in the handbook, because “employment in Texas is at will”).

Good Example 2: A landlord does not have possession and control over a tenant’s property when the landlord merely performs common maintenance work. See *Engwert-Loyd v. Ramirez*, No. L-06-1084, 2006

86. Andrew M. Low, *Citing Authorities*, 40 COLO. LAW. 55, 55 (2011) (setting forth identical example).

87. *Id.* at 56 (providing identical example).

88. Lisa Greenfield Pearl, *Ten Brief-Writing Don'ts--the Judicial Clerk's Perspective*, 85 ILL. B. J. 285, 285 (1997); David H. Tennant, *For Maximum Persuasion: Higher Art in Case Citations (Parentheticals and More)*, 51 DRI FOR DEF. 66, 66 (2009).

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Ohio App. LEXIS 5461, at *4–5 (Ohio Ct. App. Oct. 20, 2006) (concluding that landlord did not have possession and control over tenant’s backyard where landlord changed the landscape and repaired the fence).

Good Example 3: When a contract between a plaintiff and defendant expressly authorizes defendant’s interfering conduct, the conduct is proper, not tortious. *See Franklin Tractor Sales v. New Holland N. Am., Inc.*, 106 F. App’x 342, 345–46 (6th Cir. 2004) (affirming summary judgment for defendant on tortious interference claim because its contract with plaintiff specifically permitted the defendant to sell products directly to plaintiff’s customers).

In each example above, the parenthetical explanations bring clarity and brevity to the writing. The parentheticals prove to a judge that the cited cases stand for the extracted rules. The parentheticals also focus the judge on the portions of the cases that are relevant to the extracted rules; they contain no superfluous details.⁸⁹

Despite the advantages of parentheticals, many law students and attorneys extract rules from cases and then fully describe each case in the text to prove the rules. But a parenthetical explanation is preferred to a full case description if the parenthetical can convey similar information in fewer words.⁹⁰ For example, say you represent a child who wants to invalidate a contract the child signed. You found one relevant case and extracted a rule from it. Compare these two examples:

Weak Example: A child may void a contract based on age if the child did not read it. In *Woodall v. Grant & Co.*, 9 S.E.2d 95, 95–96 (Ga. Ct. App. 1940), the child signed a contract to purchase stock options, and the contract stated that the child had attained the age of majority. The child, however, signed the contract without reading it. The court held that the child did not knowingly misrepresent his age and that he was not estopped from disaffirming the contract. *Id.* at 96.

Good Example: A child may void a contract based on age if the child did not read it. *See Woodall v. Grant & Co.*, 9 S.E.2d 95, 95–96 (Ga. Ct. App. 1940) (allowing child to disaffirm the contract he signed, but did not read, even though the contract represented that he was an adult).⁹¹

89. In all three examples above, the information in the parentheticals does not repeat the preceding text. *See supra* Part IV.F (explaining that a parenthetical should provide new information about the cited authority).

90. Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 175, 196 (1997).

91. *See* LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 96 (3d ed. 2011) (providing similar

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The example with the parenthetical is crisper than the example with the case description. The parenthetical conveys the same point as the case description—a child may void an unread contract—without losing the reader in the factual details.

Although parentheticals should be used to prove extracted rules, full case descriptions are not obsolete. You should describe your *best* cases in detail. Your best cases are binding on a major and disputed issue, have a favorable holding, and are factually analogous to your situation.⁹² Once the facts of a case are discussed in the text, you can analogize those facts to your client’s situation in the application section of the advocacy piece.⁹³

B. Illustrating a Rule from a Single Authority

A parenthetical is an effective tool to illustrate how a court has applied a rule—particularly an abstract rule—to a set of facts. Some rules, by their nature, are best understood in the context of factual situations. Examples of such abstract rules are the plausibility standard for motions to dismiss, the reasonable person standard for tort claims, and the probable cause standard for Fourth Amendment issues.

Parentheticals should be used to illustrate abstracts rules that are (1) undisputed, or (2) disputed but applicable to a minor issue.⁹⁴ By using parentheticals, an advocate can avoid cluttering a motion or brief with lengthy case descriptions, resulting in writing that is clear and concise. In both examples below, the parentheticals concisely illustrate how courts have applied the abstract rules on “plausibility” and “harborer” to specific facts.

Good Example 1: The supporting allegations for a First Amendment claim must be “plausible” to withstand dismissal. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009). An allegation of a “possible” constitutional violation is insufficient. *See id.* at 970, 971–72 (concluding that allegation that secret service forced only the protestors with an anti-presidential message to relocate was not a “plausible allegation” of viewpoint discrimination because those protestors, although required to move, were kept the same distance away from the president as the friendly demonstrators).

example).

92. *See* LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* 148 (5th ed. 2010) (“[I]f an element is in dispute and there are analogous cases, you will usually want to describe at least some of those cases.”); *see also* LAUREL CURRIE OATES, ET AL., *JUST BRIEFS* 183 (3d ed. 2013) (stating that advocates should “include full descriptions of the most important cases”).

93. Nonetheless, you should not have a fact-to-fact comparison in the application if the facts of the cited case are mentioned only in a parenthetical. Judges expect to see such facts in the text of a motion or brief.

94. Laurie A. Lewis, *The Stellar Parenthetical Illustration: A Tool to Open Doors in a Tight Job Market*, 19 *PERSP: TEACHING LEGAL RES. & WRITING* 35, 35 (2010).

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Good Example 2: To be a “harborer” of a dog, a landlord must have “possession and control” of the area where the dog lives. *Jones v. Goodwin*, No. C-050468, 2006 Ohio App. LEXIS 1246, at *5–6 (Ohio Ct. App. Mar. 24, 2006) (holding that landlords did not have possession and control over their tenant’s backyard where the dog was kept because the landlords did not access or use that area).⁹⁵

But for an important issue, you should explain an abstract rule with additional rules that are more specific; do not use a parenthetical to avoid the difficult task of extracting a specific rule from a case. For example, now assume that the rule on possession and control (Example 2 above) is relevant to a significant issue. If you want the judge to conclude that the client (a landlord) is not a harborer, you should extract a specific rule from *Jones* on when a landlord lacks possession and control and then include a parenthetical explanation. The parenthetical from Example 2 needs to be revised because the text preceding the parenthetical has changed and because the new purpose for the parenthetical is to prove, not illustrate, the stated rule.

Good Example: To be a “harborer” of a dog, a landlord must have “possession and control” of the area where the dog lives. *Jones v. Goodwin*, No. C-050468, 2006 Ohio App. LEXIS 1246, at *5–6 (Ohio Ct. App. Mar. 24, 2006). A landlord does not have possession and control over where a dog lives when the landlord uses the tenant’s property but does not access the dog’s living area. *See id.* at *2, *5–6 (determining that the landlords lacked possession and control over the tenant’s backyard where the dog lived because the landlords walked to tenant’s detached garage using the driveway and without accessing the backyard).

C. Proving a Rule That Was Synthesized from Multiple Authorities

A parenthetical explanation is useful to prove a rule that is synthesized from several authorities. Many times, courts do not state the specific rule that they are applying to their facts in reaching their holdings. Consequently, an advocate must analyze several cases on an issue and determine what theme or principle emanates from the cases. The result is a synthesized rule that is based not on what the courts said but what they did. Thus, parentheticals are usually necessary to prove the synthesized rule.

Good Example: For a tortious interference claim, improper conduct includes disclosing trade secrets or asserting false statements of fact.

⁹⁵ Assuming that this case is not binding on a disputed and important issue, no further discussion of the case is necessary.

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Fred Siegel Co. v. Arter & Hadden, 707 N.E.2d 853, 859–61 (Ohio 1999) (reversing grant of summary judgment for defendants where evidence showed that defendants used “information protected as trade secrets”); *Days Inn Worldwide, Inc. v. Sai Baba, Inc.*, 300 F. Supp. 2d 583, 594–95 (N.D. Ohio 2004) (denying motion to dismiss a tortious interference claim because plaintiff alleged that defendant misrepresented material facts).

A few types of synthesized rules that should be used in persuasive writing are (1) stating that courts have consistently done what you are asking your court to do or that courts have consistently refused to do what your opponent is asking your court to do, (2) stating that courts have or have not created exceptions to a general rule, and (3) stating that courts have or have not applied a rule to different factual situations. After each synthesized rule and citation, an advocate should include a parenthetical explanation to prove the rule.

Good Example 1: Texas courts have consistently rejected claims for breach of employment handbooks for at-will employees, even where the handbooks contained disciplinary procedures. *See, e.g., Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282, 283 (Tex. 1993) (reversing jury verdict finding employer liable; determining that plaintiff was an at-will employee, even though the handbook set forth procedures for “discharged employees to receive a review of their termination”); *Trostle v. Combs*, 104 S.W.3d 206, 209, 211–12 (Tex. Civ. App. 2003) (affirming summary judgment for employer despite that handbook “establish[ed] methods for demoting or firing employees”).

Good Example 2: The Supreme Court has permitted various warrantless searches that were conducted not with probable cause, but with only a “reasonable suspicion” of criminal activity. *See, e.g., United States v. Knights*, 534 U.S. 112, 121 (2001) (upholding search of probationer’s home based on “reasonable suspicion”); *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 344–46 (1985) (upholding search of public school student based on “reasonable suspicion” and concluding that “probable cause is not an irreducible requirement of a valid search”).⁹⁶

The alternative to using parentheticals—fully describing the cases in the text—would add unnecessary length and would place undue weight on the details of the cases instead of focusing a judge on the synthesized rules. The parentheticals in both examples above avoid those problems by providing only the information necessary to prove that the citations support the synthesized rules.

⁹⁶ *See* Brief for United States at 49, *United States v. Jones*, 132 S. Ct. 945 (No. 10-1259) (setting forth similar example) (internal quotations omitted).

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The other alternative—string citations without parentheticals—would also not be a good option.⁹⁷ Although the writing would be concise, a judge would not be convinced that the cited cases support the synthesized rules.⁹⁸ The parentheticals in both examples, however, connect the synthesized rules to the outcomes and key facts of the cases. Specifically, the parentheticals in Example 1 show that the searches were valid and that the searches occurred in a home and public school. The parentheticals in Example 2 show that the employers prevailed and provide the type of disciplinary procedures contained in the handbooks. In short, the parentheticals demonstrate the advocate’s command of the cases, thus enhancing the credibility of the advocate and his arguments.

D. Proving or Illustrating a Significant Rule or Argument with More Than One Authority

Litigators should cite more than one authority to support an important rule or argument. By using parentheticals, a litigator can cite to several authorities supporting the stated proposition and explain their relevance to the proposition without having pages of full case descriptions.

Citing several authorities is especially necessary when binding authority is scarce or non-existent for a contested issue and the most on-point authority is merely persuasive. This situation may arise in federal court where your circuit court has not addressed the issue but sister circuits have done so. It may also arise in jurisdictions like Ohio where each intermediate appellate decision is binding only on the trial courts within the appellate court’s geographic district and merely persuasive as to trial courts and other appellate courts outside the district.⁹⁹

Assume that in the two examples below the cited authorities are merely persuasive. You should cite more than one authority to prove to your court that the stated proposition is supported not by one outlier case but by several cases. The persuasive authorities should be cited with parentheticals, which should show how the cited cases support the proposition.¹⁰⁰

97. Cf. Joseph C. Merling, *Advocacy at Its Best: The Views of Appellate Staff Attorneys*, 8 J. APP. PRAC. & PROCESS 301, 301–02, 307 (2006) (surveying forty-two appellate staff attorneys from federal and state courts and finding that most respondents agreed that “citations of more than three cases without intervening bracketed explanatory text are unhelpful”).

98. *See id.*

99. *See State v. Thompson*, 950 N.E.2d 1022, 1025 (Ohio Ct. App. 2011) (“[D]ecisions of other appellate districts are not controlling authority for this court.”).

100. *See Sarah E. Ricks & Jane L. Istvan, Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs*, 38 U. TOL. L. REV. 1113, 1121 (2007) (“Parentheticals are also useful when citing several cases to illustrate the same principle.”); Charles A. Bird & Webster Burke Kinnaird, *Objective Analysis of Advocacy Preferences & Prevalent Mythologies in One California Appellate Court*, 4 J. APP. PRAC. & PROCESS 141, 152 (2002) (explaining that California judges and staff attorneys prefer parentheticals when “dealing with a large body of similar authorities”).

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Good Example 1: Ohio courts define an “owner” and “harborer” of a dog in the same manner under both the dog bite statute and the common law. *See Jones v. Goodwin*, No. C-050468, 2006 Ohio App. LEXIS 1246, at *6 (Ohio Ct. App. Mar. 24, 2006) (affirming dismissal of common law claim because the defendant was neither the owner nor harborer of the dog under the statute); *Burgess v. Tackas*, 708 N.E.2d 285, 287–88 (Ohio Ct. App. 1998) (applying statutory definition of owner and harborer in upholding summary judgment on common law claim).

Good Example 2: Other federal appellate courts have upheld delays of only ten seconds between knocking and entering a defendant’s home. *See, e.g., United States v. Gatewood*, 60 F.3d 248, 250 (6th Cir. 1995) (concluding that delay of about ten seconds was sufficient before entering apartment that officers knew contained cocaine); *United States v. Garcia*, 983 F.2d 1160, 1168 (1st Cir. 1993) (holding that “a wait of ten seconds” after knocking was “reasonable” because the contraband could have been easily destroyed or hidden).¹⁰¹

Remember, however, that if any case above was binding and legally and factually on point for a significant issue, you would fully describe it in the text.¹⁰²

E. Showing the Outcome and Procedural Posture of Cases

A rule has more weight if a court applied the rule to the facts before it, as opposed to merely quoting the rule from a prior case. Thus, when a court has directly applied a rule to its facts in a way that supports your argument and the rule is important to your issue, a parenthetical should indicate the outcome and procedural posture of the case. To illustrate, if you are arguing that a rule *is not* satisfied in your situation, then you should find and cite a case where the rule was not satisfied and include a parenthetical with the outcome and procedural posture of the case (Example 1 below). Likewise, if you are contending that a rule *is* met in your circumstance, then you should cite a case where the rule was met and use a parenthetical explanation (Example 2 below).

Good Example 1: To be a “harborer” of a dog, a landlord must have “possession and control” of the area where a tenant keeps the dog. *Jones v. Goodwin*, No. C-050468, 2006 Ohio App. LEXIS 1246, at *5–6 (Ohio Ct. App. Mar. 24, 2006) (upholding summary judgment for landlords

101. *See* Brief for United States at 24, *United States v. Banks*, 540 U.S. 31 (No. 02-473) (setting forth similar example).

102. *See supra* Part V.A.II and accompanying text.

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because the landlords did not access or use the area where the tenant kept the dog, let alone have “possession and control” over that area).

Good Example 2: The Missouri Trade Secrets Act preempts common law tort claims that are based on the wrongful use of trade secrets. *See Lasco Foods, Inc. v. Hall & Shaw Sales, Mktg., & Consulting, LLC*, No. 4:08CV01683, 2009 U.S. Dist. LEXIS 99535, at *3, *18–19 (E.D. Mo. Oct. 26, 2009) (granting motion to dismiss claims for unfair competition and breach of duty of loyalty because they were based on the use of “trade secret information”); *Bancorp Servs., L.L.C. v. Hartford Life Ins. Co.*, No. 4:00-CV-70, 2002 U.S. Dist. LEXIS 26267, at *12–13, *14 (E.D. Mo. Feb. 25, 2002) (granting summary judgment to defendant and holding that the Missouri Act preempted the unfair competition claim).

The parentheticals with the outcomes and procedural postures convey to your court that you have carefully chosen the cited cases to support the stated rules and did not simply pluck out-of-context statements from the cases. As a result, the parentheticals strengthen your credibility.

In addition, judges often want to know the outcome and procedural posture of cited cases because the persuasive weight of a case depends on such information.¹⁰³ The type of motion at issue and whether an appellate court affirmed or reversed a lower court’s ruling determine the persuasive weight of a case in light of the different standards of review.¹⁰⁴ For example, a ruling on a motion for summary judgment is reviewed *de novo*, but a ruling on a motion for a new trial is reviewed under an abuse of discretion standard.¹⁰⁵ Thus, if you have two analogous cases, the case where the grant of summary judgment was affirmed (*de novo*) is more persuasive than the case where the grant of a new trial was affirmed (abuse of discretion).¹⁰⁶ And a decision reversing the grant of summary judgment is more persuasive than a decision affirming summary judgment.¹⁰⁷ A parenthetical is a good place to indicate a case’s outcome and procedural posture.

103. *See* Judge Stephen J. Dwyer et al., *How to Write, Edit, & Review Persuasive Briefs: Seven Guidelines from One Judge and Two Lawyers*, 31 SEATTLE U. L. REV. 417, 420 (2008) (stating that the controlling standard at the trial court depends on “the relief sought and the procedural posture of the case” and the controlling standard on appeal depends on “the type of lower court decision or judgment that has been appealed”).

104. *See id.*

105. *See* *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (stating that the abuse of discretion standard applies to an appellate court’s review of a decision on a motion for a new trial); *Levy v. Sterling Holding Co.*, 544 F.3d 493, 501 (3d Cir. 2008) (“We review *de novo* the grant or denial of summary judgment by a district court.”).

106. *See id.*

107. The implicit argument to your trial court is that if it does what your opponent is asking, your court will be reversed on appeal—similar to the lower court in the cited case. SCALIA & GARNER, *supra* note 24, at 53 (2008) (stating that the “most persuasive” case is one where a party lost in the trial court but prevailed on

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F. Countering and Distinguishing Adverse Authorities

To persuade, an advocacy piece must address adverse authority, especially the opponent's best authority.¹⁰⁸ Although you could wait until your response, the best place to refute your opponent's strongest authority is in your initial motion or brief.¹⁰⁹ If you affirmatively refute adverse authority, then you can present it in a light most favorable to your client and not sound defensive.¹¹⁰ But when you ignore adverse authority, you imply that the authority is fatal to your argument.¹¹¹

Many attorneys address adverse authority ineffectively.¹¹² They state that the adverse cases are "distinguishable" and then list the facts, holding, and reasoning of each case but fail to explain *why* the cases are distinguishable. Even when attorneys identify the reasons for being distinguishable, the discussion of the adverse cases is usually too long, resulting in losing a judge in the details.

A better approach is to use parenthetical explanations to counter the adverse authorities. An advocate should first analyze the adverse authorities for a common theme (*e.g.*, they conflict with a recent binding case or they are factually distinguishable). The advocate should then state the theme in the text and include parentheticals when citing the adverse cases. By using parentheticals in the following examples, the advocate refuted several adverse cases in a short space

appeal) (emphasis in original).

108. See Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 J. LEGAL WRITING INST. 257, 264–66 (2002) (explaining that over 80% of federal judges surveyed responded that addressing an opponent's best arguments is "essential" or "very important" in persuasive writing); Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999) (" [A] good brief . . . acknowledges and seeks fairly to account for unfavorable precedent."); The Honorable Lawrence W. Pierce, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829, 841 (1993) ("While bringing an adverse ruling to the court's attention might seem like the last thing a zealous advocate would want to do, to fail to come forward with this information may be the equivalent of shooting oneself in the foot.").

109. See Posner, *supra* note 53, at 37 ("Be sure to 'front' adverse legal or factual materials that your opponent can be expected to emphasize in his response brief . . ."); SCALIA & GARNER, *supra* note 24, at 10 (directing advocates to address an adversary's "significant" points in their opening briefs).

110. See BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 406 (2d ed. 2006) ("If you let your opponent raise the [adverse] authority first—or, worse, leave it for the court to discover on its own—you'll have to not only defend your position but also explain why you didn't cite it."); Mark A. Drummond, *What Judges Want*, 31 LITIG. 3, 4 (2005) ("There also is a persuasive power to citing contrary authority: It appears that you are less concerned about it when you admit its existence.").

111. See Ricks & Istvan, *supra* note 100, at 1134 (stating that ignoring bad law or facts may "communicate to the court that you believe that case or those facts are fatal to your client's position"); Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 389 (2008) ("Indeed, failure to disclose negative information might enhance the importance of the information, because the audience will assume that a competent lawyer would refute the information if refutation were possible.").

112. See Robbins, *supra* note 121, at 269–70 (surveying 355 active federal judges and finding that almost 30% of judges rated attorneys' ability to analogize and distinguish cases as "fair" or "poor").

and directed the judge to the specific reasons the adverse cases were not persuasive.¹¹³

Good Example 1: The two cases relied on by the government are factually distinguishable because each case involved a *second* search based on a valid warrant; the second search was independent of the initial illegal search. *See Segura v. United States*, 468 U.S. 796, 800–01 (1984) (explaining that the factual basis for the warrant for the second search was independent of the initial illegal entry); *United States v. Moreno*, 758 F.2d 425, 427 (9th Cir. 1985) (“the information from which the warrant was procured was completely distinct from the [initial] illegal entry”). In this case, there was only one entry into defendant’s home. And it was an illegal warrantless search.¹¹⁴

Good Example 2: The employment handbooks in the two cases cited by Plaintiff contained no disclaimer stating that employment was at will; unsurprisingly, those courts determined that the handbooks altered the at-will status of those employees. *See Paniagua v. City of Galveston*, 995 F.2d 1310, 1314–15 (5th Cir. 1993) (relying on the “absence of any disclaimer” in concluding that the employee’s claim was valid); *Vida v. El Paso Employees’ Fed. Credit Union*, 885 S.W.2d 177, 180–81 (Tex. Ct. App. 1994) (ruling that handbook lacking any disclaimer altered plaintiff’s at-will employment). But unlike the handbooks in those cases, Plaintiff’s handbook contains two explicit disclaimers. Plaintiff’s claim for breach of contract, therefore, is meritless.

As a result of the parentheticals in Example 1, the writer’s point—that both adverse cases involved a second, lawful search—is easy to grasp. In Example 2, a judge easily understands that the key distinguishing fact in the adverse cases is the lack of a disclaimer in the handbooks.

The writer’s point would be more difficult to grasp if the adverse cases were fully described in the text. Contrast Example 1 above with this one:

Weak Example: The two cases relied on by the government, *Segura v. United States*, 468 U.S. 796 (1984), and *United States v. Moreno*, 758 F.2d 425 (9th Cir. 1985), are factually distinguishable. In *Segura*, the officers’ initial search was illegal, but they searched the apartment a second time after obtaining a valid warrant. *See* 468 U.S. at 800–01. In *Moreno*, the police conducted two searches. The second search in

113. *See Warner, supra* note 46, at 22 (stating that a parenthetical is effective “for citing or distinguishing a number of cases in rapid succession”).

114. *Cf. GUBERMAN, supra* note 8, at 122 (discussing these rules and facts but not providing the case citations or the parentheticals).

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Moreno was reasonable because it was performed after obtaining a warrant. *See* 758 F.2d at 427. Here, the evidence seized by the officers was a direct result of their initial illegal entry into defendant's home. There was no second search.

Without the parentheticals, a judge may have to read the discussion several times to understand the writer's point.

G. Applying the Rules to Your Facts

Although often overlooked by advocates, parentheticals should be used in the part of a motion or brief where you apply the law to your client's situation. Parenthetical explanations should be included with citations in the application in at least three circumstances.

First, after explaining the governing rule on an issue with other rules, you should cite the most factually similar case in the application and include a parenthetical.¹¹⁵ The text preceding the parenthetical should connect the client's key facts with the governing rule and demonstrate why the client should prevail, and the parenthetical should show how the cited case applied the rule to similar facts.¹¹⁶

Good Example 1: Even assuming that Defendant acted in part based on competition, it acted improperly because it misappropriated Plaintiff's engineering trade secrets. *See Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853, 861 (Ohio 1999) (holding that evidence that attorney misappropriated trade secrets in competing for same clients was sufficient proof of improper conduct to defeat summary judgment).

Good Example 2: Plaintiff's failure to notify Defendants of their alleged breach bars his warranty claim. *See Radford v. Daimler Chrysler Corp.*, 168 F. Supp. 2d 751, 754 (N.D. Ohio 2001) (dismissing plaintiff's claim for breach of implied warranty because plaintiff did not allege that "she provided defendant with [statutory] notice").

Good Example 3: Defendant's alleged affirmative misrepresentations about the potential merger were promises to act in the future and are not actionable. Plaintiffs must—but cannot—present evidence that

115. This situation arises when an advocate needs only rule-based reasoning, not analogical reasoning, for an issue. Rule-based reasoning is stating a rule and then directly applying it to facts, but analogical reasoning is showing factual similarities between a case and the client's situation. *See* LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 5 (5th ed. 2010).

116. The examples in this part use the general terms "Plaintiff" and "Defendant" to help you understand the relationship between the stated points and the parentheticals. In a real application of a motion or brief, you should use the proper names of the parties.

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Defendant intended to deceive Plaintiffs at the time its alleged misrepresentations were made. *See Emerick v. Mut. Ben. Life Ins. Co.*, 756 S.W.2d 513, 519 (Mo. 1988) (holding that trial court should have directed a verdict against plaintiffs where only evidence of fraud was that defendant “changed its mind” *after* the representation was made).

In just one clause, each parenthetical makes the relevance of the cited case clear—that another court has applied the governing rule to similar facts in a way that supports your argument. As a result, you maximize the probability that your judge will reach the same conclusion as the cited cases.

Second, parentheticals should be used in the application after stating the specific relief you want from your court. The preceding text should identify the relief sought, and the parenthetical should show that other courts have granted identical relief for similar reasons.

Good Example 1: The claim for tortious interference should be dismissed because Defendants are parties to the three contracts at issue. *See Smith v. Schnuck Mkts., Inc.*, No. 4:04CV711, 2006 U.S. Dist. LEXIS 43438, at *2, *17–18 (E.D. Mo. June 27, 2006) (dismissing tortious interference claim for sole reason that defendant was a party to plaintiff’s contract).

Good Example 2: Defendant never entered into a contract with Plaintiff. In the absence of a meeting of the minds as to the Letter of Intent, this Court should issue summary judgment for Defendant. *See Klamen v. Genuine Parts Co.*, 848 S.W.2d 38, 40 (Mo. Ct. App. 1993) (affirming summary judgment for defendant because “no meeting of the minds occurred between the parties”).

The parenthetical explanations above demonstrate your understanding of the relevant authorities.

Third, including a parenthetical for a cited statute in the application is an effective way to remind your judge about key statutory terms that were previously discussed.

Good Example 1: Plaintiff is entitled to recover up to \$5,000 for her emotional distress under the statute. *See Tenn. Code Ann. § 44-17-403* (authorizing the recovery of “five thousand dollars . . . in noneconomic damages”).

Good Example 2: Because Defendant did not object to the interrogatories until sixty-one days after being served, it has waived all objections. *See Fed. R. Civ. P. 34* (requiring a party to object to interrogatories “in writing within 30 days after being served”).

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In both examples, the statutory language could not be integrated into the sentences, so the parentheticals are necessary to avoid interrupting the flow of the argument.

VI. CONCLUSION

The explanatory parenthetical—if crafted and incorporated effectively—can pack a persuasive punch in motions and briefs. By using parentheticals, you will draft motions or briefs where each cited authority clearly supports each proposition, and you will avoid having lengthy discussions of multiple cases. Parentheticals also demonstrate your knowledge of the cited authority and how it supports your argument. In short, parentheticals will make your writing clear, concise, and credible—the goals of every persuasive work.

To draft effective parentheticals, you must follow the one governing principle: the substance of a parenthetical depends on both the content of the text preceding the citation and the purpose for including the parenthetical. For instance, a parenthetical that proves a paraphrased rule should contain different information than one that illustrates an abstract rule. By following the seven guidelines above, you will draft parentheticals that are free of the common errors made by law students and attorneys. The result will be a motion or brief that likely convinces a judge that the client's position should be adopted.