

Appellate Tip-Stop With the Explanatory Parentheticals (Please)

If I could give just three tips on legal writing, they would probably be the following: (1) in every document, section, paragraph, and sentence, get to the point; (2) write in a conversational style, using words and phrases that you would speak in intelligent oral communication, discarding from your writing words and phrases that you don't use when speaking; and (3) choose presentation methods that are reader friendly, and if in doubt, let reader friendliness be your guide, not templates or superstitions.

The pervasive use of Bluebook-style "explanatory parentheticals" frequently fails all three of those tips, and you should reduce your reliance upon them. Much of that reliance may be oblivious habit or a conscious but misguided notion that explanatory parentheticals are required. It may also be a shortcut masquerading as helpfulness.

The Bluebook. To write this tip, I had to first find the Bluebook in my office. Section B11 addresses "Explanatory Parentheticals." The problem it identifies is real; its prescription is borderline insane:

B11 Explanatory Parentheticals

Regardless of the type of authority you are citing, it is often helpful to include additional information to explain the relevance of the cited authority. Append this information parenthetically at the end of your citation but preceding any citation to subsequent history.

Explanatory parentheticals should take the form of a phrase that begins with a present participle, a quoted sentence, or a short statement that is appropriate in context. To save space, you may omit extraneous words such as "the" unless doing so would cause confusion. Do not begin with a capital letter or end with a period **unless** the parenthetical consists of a quotation that reads as a full sentence:

- *See Flanagan v. United States*, 465 U.S. 259, 264 (1989) (explaining that final judgment rule reduces potential for parties to "clog the courts" with time-consuming appeals).
- *Richfield Co. v. Fed. Energy Admin.*, 429 F.Supp. 1052, 1061-62 (N.D. Cal. 1976) ("Not every person aggrieved by administrative action is necessarily entitled to due process.").
- 5 U.S.C. § 553(b) (2000) (requiring agencies to publish notice of proposed rulemaking in the Federal Register).

For further guidance on explanatory parentheticals, see rule 1.5 ...

[from Rule 1.5]

Use parentheticals, as needed, to explain the relevance of a particular authority to the proposition given in the text. Parenthetical information is recommended when the relevance of a cited authority might not otherwise be clear to the reader.

Somehow from those "rules" it has become common to see multiple cases strung together with lengthy parentheticals behind them, or record citations with multi-line quotations or descriptions. And artisans of those monstrosities may feel that they have followed the "rules" and are being helpful.

A good paragraph shouldn't need explanatory parentheticals. If you find yourself citing authority and "the relevance of a cited authority might not otherwise be clear to the reader," then you've written a pretty terrible sentence or paragraph. I shouldn't need a parenthetical to understand why you're citing a particular case; a normal English sentence should tell me that. By the Bluebook's standard for when an explanatory parenthetical is a good idea, a good paragraph should never need one.

A poor solution. Addressing missing relevance by way of explanatory parenthetical fails all three of my overarching tips for writing. **First**, it definitely fails getting to the point. If it's not clear why the authority is relevant, then an important point has not been made. **Second**, to solve that omission, an explanatory parenthetical is not conversational or reader friendly.

No normal person speaks in explanatory parentheticals. **Jack:** "Hey, Jill, what's up with *Marbury v. Madison*?" **Jill:** "*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (holding that Section 13 of the Judiciary Act of 1789 was unconstitutional and thereby establishing judicial review of constitutional questions noting that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury')." That is only a *slight* exaggeration of common parentheticals, which tend to weld irrelevant detail, unconvivial prose, and block quotes all in an utterly grotesque presentation format after a citation.

By Bluebook "rule," explanatory parentheticals are not even sentences, and as for reader friendliness, simply test yourself when you encounter them. If you're like me, you skip them. Just like block quotes and over-capitalized headings. It is very difficult to be an effective writer if you do things that cause the reader to skip important points. But even worse, explanatory parentheticals cause *writers* to evade the critically important step of drafting good topic sentences and explaining the relevance of key authority in reader-friendly prose.

"But, Eric" (I can hear it now) "I created those parentheticals to show you what I was citing; I was trying to be helpful." Perhaps. Frequently, though, the explanatory parenthetical is the *lazy* solution. Distilling principles, crafting topic sentences?those are difficult analytical tasks. Pasting in text from a case without saying one way or the other what it means is not. There are a lot of great things about Westlaw, but one big danger is that it reduces legal research to cutting and pasting snippets of opinions. And those snippets tend to wind up in explanatory parentheticals. Write a good sentence instead; one that identifies what's important.

A better solution. The most effective way to communicate important points is to (1) get to the point (2) in conversational prose (3) presented in a reader-friendly way. Thus, if you have a number of cases from hither and yon that support what you are saying?and you genuinely believe that the rulings of four different generations of district court judges from 12 states you've never visited are worth pointing out?I would recommend writing a paragraph with a topic sentence that explains that there are quite a few cases over many years and jurisdictions that support what you are saying. And then I would just cite all of those cases, without parentheticals, and probably do so in a footnote so it is not obtrusive.

All I want to know is why you cited all of that stuff, and what's important. I don't want to go hunting for that answer in parentheticals. "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Some would place that wonderful line in a parenthetical behind the citation. That's exactly the kind of tendency I'm trying to change here.

So go forth and write good sentences that clearly explain the relevance of your authority and quote the great lines from cases. Then dispense with explanatory parentheticals, which are neither required nor good nor clear nor sentences nor commonly read and certainly no way to feature a great line.

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