The Stellar Parenthetical Illustration: A Tool to Open Doors in a Tight Job Market

By Laurie A. Lewis

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Introduction
When I first began teaching legal research and writing six years ago, I treated parenthetical explanations somewhat cursorily, instructing students that their primary purpose was to indicate the weight of cited authority.\(^1\) Over time, however, my treatment focus gradually shifted. I began teaching students that incorporation of illustrative parentheticals could bolster their legal analysis. Now I recognize that not only can the one-sentence illustration be used to expand upon analytic points, but that one well-crafted touches upon five areas of a student’s practice-ready skills. These skills include research, use of mandatory and persuasive authorities, rule synthesis and application, clarity and conciseness in writing, and citation form. Further, I have found that a student who achieves competency not only in formatting citations but also in drafting clear, concise, illustrative parentheticals demonstrates an understanding of rule permutations. In an increasingly tight legal job market, such competency can open doors both within and outside law school. Doors can open to better grades, journal invitations, publication offers, internship and externship placements, and jobs, including clerkships. Consequently, I have adjusted my curriculum to teach both the form and substance of citations containing parenthetical illustrations to make students more practice ready.\(^2\)

The Parenthetical Illustration: What Is It and How Can It Be Used Effectively?
Legal analysis is rule-based, which means legal rules are applied to a set of facts in a dispute to reach a conclusion. Such analysis often involves the application of an abstract rule to specific facts. Cognitive experts suggest, however, that humans are less likely to understand concepts described in the form of abstract principles than those that are expressed in narratives.\(^3\) “[T]he narrative’s communicative capacity is rooted in the way that the mind interprets, processes, and understands information.”\(^4\) Thus, a legal writer can most effectively communicate rule-based analysis by supplementing abstract rules with narratives illustrating how such rules operated in case precedent.\(^5\)

In the legal writing setting, abstract rules prevail. We legal writing professors are unlikely to assign research problems that result in a student’s finding a statute or a case setting out the applicable rule in a clear and organized manner. Usually the

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\(^1\) See The Bluebook: A Uniform System of Citation R.10.6 (19th ed. 2010).

\(^2\) An increasing emphasis upon the practice-ready skills students attain during law school is reflected in the American Bar Association’s recent shift to considering outcome measures as indicia of law school accreditation standards. See generally Catherine L. Carpenter et al., Interim Report of the Outcome Measures Committee, American Bar Association Section of Legal Education and Admissions to the Bar, May 12, 2008, available at <http://www.abanet.org/legaled/committees/OutcomeMeasures.doc>.


\(^4\) Id. at 2271.

There are four primary types of parenthetical illustrations: elucidation, elimination, affiliation, and accentuation. Each of these illustrations clarifies a rule, or offers a nuanced perspective. Such illustrations are not, however, meant to replace the in-text rule explanation and narrative analogy. If something is important, it should appear in the text. It is only after fully discussing the authorities critical to an argument that an authority accompanied by a parenthetical illustration is used.

Elucidation: This is the most important function of the illustrative narrative. The writer provides a specific example of how a rule is applied in a previous case. The narrative helps clarify the rule by placing it in context.

Rule: A promisor makes a promise with an expectation of reliance when, in light of all the surrounding circumstances, the reasonable promisor should have expected reliance. Parenthetical Illustration: (finding that a promisor should have expected reliance on promise to back debtor when he expressed no reservations about doing so and then no dissatisfaction with this arrangement for two years despite receiving monthly statements from promisee detailing the goods and services provided on credit)

Elimination: This type of illustration can serve to eliminate rule interpretations other than the one the legal writer intends.

Rule: While no special form of words is necessary to create a promise, to show that a promise is made, the promisee must state a voluntary, unambiguous commitment to engage in some future action rather than providing a mere statement of prediction or intention.

Parenthetical Illustration: (holding that a promise was not made to provide a loan when the banker stated he would “take this to the loan committee and within two days we ought to have something ready for you,” because it was a statement of prediction rather than a commitment to some future action)

Affiliation: This type of illustration can be used to make a rule more meaningful. The legal writer employs familiar terms to enhance the reader’s understanding.

Rule: To establish duress as a defense to a contract, the party alleging duress must show that he or she acted “involuntarily” in entering the contract. Parenthetical Illustration: (finding that because a property settlement agreement between divorcing spouses gave the wife nothing, this factor supported a finding that the wife signed the agreement involuntarily)

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6 See Charles R. Calleros, Legal Method and Writing 87 (5th ed. 2006), “Synthesis of authority is particularly important in analysis of case law. … Courts express their legal analyses in the context of individual controversies, and an isolated holding in a judicial opinion is often too limited to support an accurate prediction about how the decision will influence subsequent cases.” Id.

7 Legal writers vary on their preferences for citation placement. See generally Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008). I ascribe to Garner’s view that citations should be placed in footnotes, in part not to break up the textual flow of analysis. Moreover, teaching students to do footnote citations prepares them for having to use either these or endnotes in journal writing competitions.

8 Smith, supra note 5, at 35–41. Smith provides general descriptions and specific examples of each type of illustration.

9 See Nancy L. Schultz & Louis J. Sirico Jr., Legal Writing and Other Lawyering Skills 291 (5th ed. 2010).

10 Smith, supra note 5, at 39–40. Both the rule and its illustration are Smith’s.
Accentuation: This type of illustration emphasizes the rule’s effect, and can be quite dramatic in presentation.

Rule: Under Rule 9(B) of the Local Rules of Appellate Procedure, an appellant’s brief may not exceed 30 pages.11

Parenthetical Illustration: (refusing to address “Appellant’s Ninth, Tenth, Eleventh or Twelfth Assignments of Error as these assignments of error are contained in the portion of appellant’s brief that exceeds the page limit under Loc.R. 9(B)”)

When and When Not to Use Parenthetical Illustrations
As the above examples demonstrate, parenthetical illustrations can be helpful in numerous circumstances.12 While not essential for grasping the overall rules, narratives can bring a case alive for the reader. The writer who uses parentheticals to advantage in a brief can elicit a reader’s sympathy or arouse a reader’s outrage. Not only does the reader better grasp the rule’s operative effects, he or she is more likely to both remember and understand the legal concept when it is placed in context.13 The result can be a persuasive legal analysis with more support and depth of reasoning. It is equally important, however, that the student understand when not to use a parenthetical illustration. It should not be used if a rule from a precedent case is controlling on the issue being analyzed.14 Rather, the reader should be provided a full textual rule illustration around that case rather than a parenthetical illustration. If the rule is not controlling, and is therefore suitable for a narrative parenthetical, the next consideration is whether the illustration can be set out effectively in a single sentence.15 If not, then the illustration should be textual. Finally, parenthetical illustrations should never be used solely as a means to save space, as when students feel constrained by page and word limits.

Teaching the Parenthetical Illustration for Skill Development
Five areas of practice-ready skills are related to mastery of parenthetical illustrations: research, use of mandatory and persuasive authorities, rule synthesis and application, clarity and conciseness in writing, and citation form. I introduce the illustrative parenthetical with the open memorandum about week 10 of the fall semester, with this assignment being due around week 15.16 In addition to a class PowerPoint lecture explaining the four types of parenthetical illustrations and how they can be used persuasively in legal analysis, I also provide examples from the closed memorandum cases. For the next class, I ask students to bring examples of their own based upon these familiar cases, as well as to complete some exercises on parenthetical illustrations.

The exercises are designed to test understanding of the “dos and don’ts” of drafting parenthetical illustrations, including form and substance. Regarding form, the illustration starts with a lowercase letter, begins with a verb ending in “ing” describing the court’s action, includes articles but

11 Id. at 41. Both the rule and its illustration are Smith’s.
12 In her editing tips for briefs, Edwards suggests explicitly to “add explanatory parentheticals to citations.” Linda H. Edwards, Legal Writing: Process, Analysis, and Organization 360 (5th ed. 2010). Edwards states that parentheticals can be helpful when the citation is not textually discussed but is being used as additional authority, as support for a more minor point, or to quote a “nugget of language” or highlight unique case facts. Id. at 360–63. See also Laurel Carrie Oates & Anne Enquist, The Legal Writing Handbook: Analysis, Research, and Writing 157 (5th ed. 2010). “Occasionally, you will not need to include a full description of an analogous case . . . if you are using the case to illustrate a single point or if you . . . want to illustrate one aspect of a rule . . . you can use parentheticals.” Id.
13 The novice legal reader will remember a legal concept better once he or she understands the “story” of the parties. See Ruth Ann McKinney, Reading Like a Lawyer: Time-Saving Strategies for Reading Law Like an Expert 21 (2005).
14 Smith, supra note 5, at 46.
15 Id.
16 While writing two versions of the closed memorandum, students will have already learned about explanatory parenthetical information as it relates to weight of authority, and about basic case citation form. They practiced constructing citations not only for their closed memoranda, but also for three sets of research exercises and in Bluebook Workshops conducted by my teaching assistants. Students therefore receive continual feedback, including on citation questions in pop quizzes and a comprehensive research examination.
not ending punctuation (unless a full sentence quote), and does not exceed one sentence in length. Regarding substance, the illustration supplements but does not contain the rule, provides specific case facts but not specific party names, explains what the court decides in the context of the legal proposition at issue, and is neither overly broad nor too detailed. Reviewing some student examples in class and asking for suggestions on how to improve them reinforces understanding of both the drafting and utility of parenthetical illustrations.

I also instruct on the use of signals, given these often accompany parenthetical illustrations in string citations. Signals such as see, accord, and contra can be particularly useful in persuasive writing. Citing to an adverse authority and including a parenthetical illustration, for example, limits its impact while informing the court that you have considered it. Students should be cautioned, however, against having too many string citations. This may weaken rather than strengthen their analysis. Moreover, sometimes the court will not read string citations, or even become irritated if these are excessive or serve no purpose.

**Research and Use of Mandatory and Persuasive Authorities**

Research is required to uncover the relevant case law around a given problem. How well a student researches is reflected not only in what cases are found, but also in what cases are kept. Often I am asked “how many cases do I need?” I answer that while there is no set number, the quantity of cases required to adequately support an analysis depends upon relevant mandatory and persuasive authorities, and how analogous those are to the given problem. A student’s decisions about how to use cases reflect an understanding of the weight and importance of different authorities. Further knowledge is reflected by decisions about how much to discuss a case, whether as a textual narrative or one in parenthetical form. Thus, skills in researching and choosing authorities and determining their treatment factor into drafting a parenthetical illustration.

**Rule Synthesis and Application**

As noted earlier, rule synthesis is pivotal in writing a persuasive analysis. Learning to synthesize multiple cases into a set of legal principles is one of the hardest tasks a first-year student is asked to do. Yet, some proficiency with this task precedes writing effective case illustrations. First, the primary rule and its explanation must appear in the text. How a student formulates the synthesized rule will impact choice of support for the rule as well as selection of other aspects of the rule for inclusion in illustrations. Second, rule application should focus upon analogies to dispositive cases. How a student determines what facts to highlight from supporting authorities will bear upon an illustration’s

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17 See The Bluebook, supra note 1, at R.1.5; Smith, supra note 5, at 51–58. Yet another aspect of form is the citation formatting before adding a parenthetical illustration, and rules related to order and content of parenthetical information. See The Bluebook, supra note 1, at R.10.

18 See generally Smith, supra note 5.


20 See Schultz & Sirico, supra note 9, at 291.

21 A string citation should be used only when it contributes significantly to the analysis, and never just to demonstrate research expertise. See Mary Barnard Ray & Jill J. Ramsfield, Legal Writing: Getting It Right and Getting It Written 63 (4th ed. 2005).

22 “Remember that the doubting legal reader will check most authorities and will be annoyed if each is not pertinent.” Id.

23 By the time students are assigned the open research memorandum and are asked to incorporate parenthetical illustrations, they will have been instructed on electronic and book research in the classroom, sometimes by our research librarians, and also in Westlaw® and LexisNexis® training sessions.

24 See Amy Bitterman, The Rule Proof Variations, 18 Perspectives: Teaching Legal Res. & Writing, 109, 109–10 (2010). “Faced with explaining numerous decisions, the tendency of most students is to deal with precedent by focusing on the facts of specific cases without analyzing how those decisions relate to one another. … [S]tudents fail to take the next step in the inductive reasoning process of moving to general conclusions,” Id. at 109.

25 “What you write in the parentheticals that illustrate the legal propositions you have laid out absolutely must be sufficient to get your point across. … Here is the place for case parentheticals—they are a buttress to your points through clear, careful, and properly detailed illustration.” Michael D. Murray & Christy H. DeSanctis, Advanced Legal Writing and Oral Advocacy: Trials, Appeals, and Moot Court 81 (2009).
persuasiveness, whether used for elucidation, elimination, affiliation, or accentuation. The illustration showcases a student’s understanding of the nuances of the law and further persuades the reader of his or her position. Thus, skills both in rule synthesis and application are prerequisite to drafting an effective parenthetical illustration.

Clarity and Conciseness in Writing
Most students benefit from a refresher on how to write, including grammar basics. Some legal writing texts have large sections devoted to effective writing style. Other books are devoted entirely to legal document construction and word usage. Effective word choice, precise comparison, strong subject-verb connection, using plain English, and respecting proper grammar rules all contribute to well-written parenthetical illustrations. The sharp, persuasive illustration may require many drafts before the student gets it “right.”

Providing students with examples of how to make their illustrations tight yet complete, specific yet not too detailed, and creative yet true to the law assists their learning. More helpful, however, is having them practice writing parenthetical illustrations. I expect students to incorporate a modest number into their open memoranda in the first semester, and more into their motions and appellate briefs in the second semester. On each document, I comment specifically upon clarity and conciseness, skills that strengthen the persuasive power of parenthetical illustrations.

Citation Form
No matter how clear and concise a rule synthesis and application in a parenthetical illustration, however, lack of proper citation form dilutes its effectiveness. Exacting attention to detail, specifically to The Bluebook or ALWD Citation Manual, is critical. I tell my students that when opposing briefs are submitted and one contains poor citation form, the judge is apt to pick up the other side’s brief, perhaps thinking the one with more accurate citation form is also the one with more reliable legal analysis.

I begin instruction on citation form with the closed memorandum and continue it up through the appellate brief, building incrementally upon students’ knowledge base and equipping them to write increasingly more sophisticated citations. My grading rubrics include criteria for citations. Criteria for parenthetical illustrations encompass citation form as well as the narrative’s substance. Citation form is the fifth and final practice-ready skill area embodied in an illustration. Taken together with research, use of mandatory and persuasive authorities, rule synthesis and application, and clarity and conciseness in writing, these skills are illuminated in the stellar parenthetical illustration.

Competency in Drafting Parenthetical Illustrations Opens Doors
Our students face a tough legal job market. We strive to do what we can to help them gain a favorable footing in the job search process. One specific thing I aim to do is teach how to draft stellar parenthetical illustrations. In my experience, the student who achieves competency in this writing

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26 A complete description of the law requires that the student not only synthesize the rule, but also puts the legal principle in context by including relevant facts only. An in-depth analysis “identifies the facts that will satisfy the rule. … The cases are used judiciously to support or explain and justify the synthesized rule,” John C. Dernbach, Richard V. Singleton II, Cathleen S. Wharton, Joan M. Ruhtenberg & Catherine J. Wasson, A Practical Guide to Legal Writing and Legal Method 179 (4th ed. 2010).

27 See, e.g., Calleros, supra note 6, at 239–78; Oates & Enquist, supra note 12, at 453–714; Robin Wellford Slocum, Legal Reasoning, Writing, and Persuasive Argument 235–60 (2d ed. 2006).

28 Two well-known books are Terri LeClerq’s and Richard Wydick’s, which contain a series of lessons with practical exercises designed to lay a solid legal writing foundation. See generally Terri LeClerq, Guide to Legal Writing Style (4th ed. 2007); Richard C. Wydick, Plain English for Lawyers (5th ed. 2005).

29 I comment on briefs that careless citation errors detract significantly from the quality of the documents. It is not just about points subtracted for citation form, but rather, it is also how the documents as a whole reflect the students’ thoughtfulness, care, and accuracy in drafting arguments.

30 The 40,000 law students who graduated last spring are entering one of the worst job markets in decades. “This year’s classes have it particularly bad, according to lawyers and industry experts. Though hiring was down last year as well, they said 2009 graduates applied for jobs before law firms had felt the full brunt of the downturn.” Nathan Koppel, Bar Raised for Law-Grad Jobs, Wall St. J., May 5, 2010.
skill gets noticed. This is because in successfully employing a parenthetical illustration, the student first has to think and reason clearly. Without clear thinking, there can be no clear legal analysis. A student only reaches the stage of writing a stellar illustration after learning how to research; choose between authorities; synthesize rules; apply rules to specific facts; write clear, succinct prose; and use proper citation form. And all of this must be done within the customarily accepted guidelines for writing parenthetical illustrations. But once the student reaches this stage, doors open both inside and outside the law school’s walls.

First, doors open to better grades, both on written assignments and exams. In a writing course, if a student buttresses points with additional authorities accompanied by illustrative parentheticals, then the analysis has a stronger foundation and can be the basis for a student’s receiving a higher grade. Illustrative parentheticals can also be used to identify when a student goes wrong in the thinking process. I frequently ask students to incorporate them in an analytic outline for conferencing purposes prior to submitting a paper. Then in conference, I flag inappropriate or weak use of authorities. The student leaves better prepared to write, including convincing illustrations, thereby producing a better work product. In a doctrinal exam, responding quickly to issues with parenthetical illustrations when time is at a premium can also bolster a student’s grade.

Second, doors open to journal invitations. Most law school journals base invitations on a writing competition in which competitors must use endnotes or footnotes. This is when the citation format itself is critical. Assessment of the competition paper includes a sizeable grade on the footnotes. Focus on proper citation form throughout the year therefore pays off. Further, I find that requiring students to use footnotes for all documents (other than the closed memorandum) boosts their confidence for the write-on competition. In addition to formatting citations accurately, when a competitor incorporates parenthetical illustrations into the analysis, journal editors are all the more impressed. Consequently, a student may have a greater likelihood of being invited to join.

Third, doors open to publication offers. If a student joins a journal, then he or she has an opportunity to hone research and writing skills, including drafting citations. In writing a note or a comment for potential publication, the journal member who has experience writing illustrative parentheticals has an initial advantage in constructing scholarly footnotes. Hence, a publication offer may ensue. Even if not a member of a journal, however, a student can use parenthetical illustrations in papers for writing courses, and be offered publication outside the law school.

Fourth, doors open to internships and externships. When students apply for these, a writing sample is customarily requested. Most students use a paper from their legal research and writing course. If this document includes not only

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32 I routinely do so prior to their submission of the appellate brief, worth 50 percent of the semester grade. Students feel more confident in completing the writing process. Further, incorporating illustrations in their analytic outline facilitates initial choices among authorities. They can more readily identify any gaps in support of their arguments, and plug in cases accordingly.

33 Some students tell me that writing illustrative parentheticals in their exam answers enables them to more completely describe the law around a given issue.

34 See Eugene Volokh, Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review 237 (3d ed. 2007). “Checking and editing footnotes is a big part of the law review’s job, so the editors are looking for people who are good with footnotes.” Id.

35 Former students who become journal editors and grade competition papers tell me that sometimes they recognize my students’ papers (although anonymous during the grading process) by the completeness of footnotes, including illustrative parenthetical information.
Teaching how to draft stellar parenthetical illustrations in the first-year writing curriculum, therefore, can provide students with a competitive advantage. 

Fifth and finally, doors open to jobs, including clerkships. Especially in this bleak job market, many students seek clerkships as a first step in their legal career. Each year, I have an increasing number of academically strong students asking for clerkship recommendations. As they did well in my class, they likely achieved some proficiency in crafting illustrative parentheticals. Thus, not only do the students have strong recommendation letters from me, but their writing samples are apt to be attractive to judges. Other employers also emphasize writing skills in the hiring process. With more frequency than before, even when I am not asked to write a letter but to serve as a reference, employers call or e-mail me and specifically inquire about students’ writing strengths. For these situations and others, I strive to teach students skills that will open doors to them in law school and beyond.

Conclusion

A carefully crafted parenthetical illustration can be a powerful tool in persuasive legal analysis. It can also reflect skills in research, use of mandatory and persuasive authorities, rule synthesis and application, clarity and conciseness in writing, and citation form. The student who attains competency in drafting illustrations is more practice-ready, and may find doors opening to better grades, journal invitations, publication offers, internship and externship placements, and jobs, including clerkships. Teaching how to draft stellar parenthetical illustrations in the first-year writing curriculum, therefore, can provide students with a competitive advantage in this tight job market. 

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36 This past spring, for example, one first-year student I helped place into a summer internship was one of 80 applicants for an unpaid position with a nonprofit organization, and another student was one of 110 applicants for an unpaid summer internship with a federal government agency.

37 A former student who is an associate with a large, prestigious corporate law firm in Washington, D.C., tells me that when potential hires are equal in qualifications, it is the writing sample that often is dispositive.