



BRIEFLY

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A (new) legal citation to consider

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What if we told you that there is a new parenthetical used in legal citations that is taking the appellate world by storm? Yes, it's hard to believe that appellate lawyers are so easily impressed but some of us just are.

The legal profession relies heavily on quoting cases for legal principles. Judges quote other decisions in their opinions, attorneys quote law and precedent in their briefs and motions, and members of the legal profession often rely (sometimes too heavily) on quotes in their writing.

It makes sense that lawyers and judges like to quote prior authority in their writing because much of American law develops through precedent, at times best communicated by quoting what a court has said in the past about a legal standard. Use of a quotation from a decided case assures the reader that the lawyer is presenting the correct legal proposition and adds credibility and persuasion to the argument.

Yet there probably is a consensus that fewer quotations in legal writing are often better. And that is because it is probably more true than not that if the quote had something good to say, the lawyer would have boiled it down to a pithy statement. See Alex Kozinski, *The Wrong Stuff*, 1992 *BYU L. Rev.* 325, 329 (1992).

While it's important not to overuse quotations, they cannot be abandoned altogether. So how do you use them effectively? When using quotations, an author often tailors the quoted passage to fit the context of the paragraph and to make the quotation more persuasive. This tailoring can create extra punctuation in the form of brackets and ellipses. If that quotation is later pulled into another legal writing, the next writer may retain these punctuation marks, add to them, or omit them to fit within that writing. The subsequent writer may also add parentheticals to note an alteration or omission from the prior quotation. The process of alteration can continue as quoted material is used again in later legal writings or cases.

Embedded quotations, quotation marks, ellipses, brackets, and parentheticals—combined with the Bluebook rules governing their use—add clutter to the legal writing.

Take for example this passage from a Court of Appeals in *Erickson v. Abby Sci., Inc.*, No. A17-0661, 2018 Minn. App. Unpub. LEXIS 3, at *18-19 (Jan. 2, 2018):

In addition, to allow the *Ericksons* to restart the limitations period on April 30, 2009, based on facts of which they previously were aware, would risk “mak[ing] a mockery of statutes of limitations by the simple expedient of creative labeling.” See *Weavewood v. S & P Home Invs., LLC*, 821 N.W.2d 576, 580 (Minn. 2012) (alterations and internal quotations omitted).

Because the quoted passage was altered in some way, the court had to add a parenthetical to signify the changes.

Or how about this passage from *Chi. Ins. Co. v. City of Council Bluffs*, 713 F.3d 963, 970 (8th Cir. 2013):

And, the policies defined “personal injury” as including “injury . . . arising out of . . . malicious prosecution[.]” *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 809 (8th Cir. 2012). Thus, to be entitled to coverage, the City was required to prove that at least one of either “Harrington or McGhee [was] seeking damages for an injury . . . arising out of malicious prosecution or a civil rights violation, that occur[red] during [the] policy period.” *Id.* at 812 (omission and second and third alterations in original) (internal quotation marks and citations omitted).

But why is it necessary for the reader to know that brackets, ellipses, alterations, or internal quotation marks were added or part of the original quote and have now been omitted? It's not.

Once a court has approvingly quoted a prior passage, that passage is part of the court's opinion and becomes precedent. These marks are even less necessary in today's era of electronic briefs and electronic legal research, in which the reader might simply click on a link to see the full quote. The clutter created by these marks breaks up the flow of the quotation and can be distracting. Or put another way: that clutter should be (cleaned up).

Jack Metzler, a prominent Twitterer—at least among #AppellateTwitter nerds—created and has been advocating for the use of a new legal citation rule. Yes, it is a parenthetical, but it's one of the

good ones. Metzler created a new rule and citation called “(cleaned up)” to simplify life for legal writers and readers by removing all the clutter and distractions associated with prior quotation alterations.

Under the rule, when a writer quotes an opinion that quotes another opinion, the writer should omit internal, nonmaterial quotation marks, alterations, or citations from the quoted passage. Rather than waste space with unnecessary clutter and information, use (cleaned up) and be done with it.

Here's how the passage from *City of Council Bluffs* could have been (cleaned up):

And, the policies defined “personal injury” as including “injury arising out of malicious prosecution.” *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 809 (8th Cir. 2012). Thus, to be entitled to coverage, the City was required to prove that at least one of either “Harrington or McGhee [was] seeking damages for an injury arising out of malicious prosecution or a civil rights violation, that occurred during [the] policy period.” *Id.* at 812 (cleaned up).

Note that we retained the bracket around “was” and “the” because the words were added and not part of the original quote, but by using (cleaned up), we are communicating to the reader that all internal nonmaterial quotation marks, alterations, or citations have been removed.

Since Metzler first introduced (cleaned up), many judges and lawyers—or “Legal Writing Heroes” as Metzler crowns them—have started cleaning up their quotations. In December 2017, Jason Steed, of Kilpatrick Townsend & Stockton LLP, wrote an article for the American Bar Association encouraging the use of (cleaned up). Steed noted that since October 2017, (cleaned up) has appeared in at least 120 court filings with Steed being the first to use it in a filing with the United States Supreme Court.

Courts all over the country—not to miss a good trend given the opportunity—have used (cleaned up) in over 60 opinions. And (cleaned up) continues to grab the attention of more and more judges. Since the start of 2019, (cleaned up) has been used in at least 60 judicial opinions.

In 2018, the Eighth Circuit became the fourth federal court of appeals to

use (cleaned up) in 2018, with several judges on the court now using the parenthetical in many of their opinions, including Judges Lavenski R. Smith and Judge Jane L. Kelly. Judge Kelly was the first judge on the Eighth Circuit Court of Appeal to use it, in *United States v. Steward*, 880 F.3d 983, 986 (8th Cir. 2018).

Other pioneering judges have been quick to embrace the opportunity to use (cleaned up) in a judicial opinion, including: Judge Thomas Reaveley writing for the United States Court of Appeals for the Fifth Circuit in *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017); Judge Don Willett (recently appointed to the Fifth Circuit Court of Appeals) writing as a Justice of the Texas Supreme Court in *Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 341 n.18, 350 n.80, 354 n.112, 362 n.177 (Tex. 2017) (Willett, J., dissenting); and #AppellateTwitter celebrity Judge Stephen Dillard of the Georgia Court of Appeals in a concurring opinion in *Oller v. Rockdale Hosp., LLC*, 804 S.E.2d 166, n.6 (Ga. Ct. App. Aug. 14, 2017) (Dillard, C.J., concurring).

(Cleaned up) has even won over legal writing extraordinaire Bryan Garner as he voiced his approval of the parenthetical in a tweet following Judge Reaveley's opinion in *Reyes*.

Yet as excited as these developments are for appellate nerds like us, there has yet to be a recorded use of (cleaned up) in Minnesota state court opinion. As the numbers of judges and practitioners using (cleaned up) grows, one wonders which Minnesota state judge will lead the charge and become the first Minnesota Meltzer “Legal Writing Hero.” As we all look forward to spring, maybe it is time to begin removing the clutter and distractions a little early by being a little more (cleaned up).

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