USALSA Report

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Trial Judiciary Note

A View from the Bench: Maximizing the Effect of Your Motions Practice

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Be brief, be pointed; let your matter stand
Lucid in order, solid, and at hand;
Spend not your words on trifles, but condense;
Strike with the mass of thought, not drops of sense;
Press to close with vigor, once begun,
And leave, (how hard the task!) leave off, when done.[1]

I. Introduction

Motions practice often receives too little attention in advocacy training and preparation for trial. This apathy towards motions is somewhat surprising, as well thought out motions practice can be critical to success at trial. Effectively using pretrial motions allows counsel to visualize the entire trial weeks in advance in order to prepare their themes and theories, and their proof.

But how do you get there and maximize the effect of your motions practice? What is required of the trial advocate? A friend of mine summarizes it this way: "Your job is to know the law or learn it before you argue it. The first chance to demonstrate that is in pretrial motions practice. So do your job right. Don't come limping into the fight." So let's break down how to "do your job right" into three parts: steps to take before you write, while you are writing, and after you submit your written motion to the court.

II. Pre-Writing

As my friend's guidance to counsel suggests, your first opportunity to demonstrate your competency in the law is when you file or respond to substantive motions and subsequently litigate those issues at a pretrial hearing. However, it is a bit deeper and more complicated than that. Not only will you demonstrate your competency in the law, but you will demonstrate your ability to comprehend the facts of that particular case and your ability to weave those facts with theory, law, and advocacy. In a nutshell, this is your first opportunity to build your credibility, that is "show yourself worthy of trust and affection,"[2] as an advocate.

The importance of credibility cannot be overstated. As a former trial and appellate judge once wrote, "credibility is the most important character attribute a trial attorney can have. Without it, a trial attorney cannot accomplish his two most important missions: educate and persuade the fact finder. Counsel at all times should be wary of the impact their actions may have on their credibility."[3] You only get one opportunity to make that first great impression, and you should take every opportunity to ensure you are viewed as a credible advocate worth trusting. Submit and litigate a motion with only half-hearted effort, and you will reap the credibility and outcome consistent with the effort you put into that motion.

Thus your mission to become a competent, credible, and effective advocate begins the moment you touch a case for the very first time. Your case file should have a place to list potential legal issues that might require a pretrial motion or might require you to respond to a pretrial motion by the opposing party. This list not only prepares you for trial, but it helps you provide your leadership or client with reasonable expectations involving case-shaping and case-determinative issues. As you continue to learn the facts of the case through early witness interviews and apply those facts to the law, new issues may emerge, many potential issues will wither away, and the issues requiring pretrial litigation will become clear.

The timing of motions is an important part of successful motions practice. Either the court's pretrial order or other rules will usually dictate when motions must be filed. But if court orders and rules of practice are not enough to ensure timely filings, counsel should consider the effect of untimely

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[1] Justice Joseph Story, *Advice to a Young Lawyer*, *in* 2 LIFE AND LETTERS OF JOSEPH STORY 88 (William W. Story ed., 1851).

[2] ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE xxiii (2008).

[3] Colonel James W. Herring, Jr., *A View from the Bench: Make the Routine, Routine*, THE ARMY LAW., Aug. 2014, at 41 n.3.

motions. Because judges strive to always get to the right answer, they do not like to be surprised. If your issue is unique, nuanced, or complicated, asking the judge to rule "on-the-fly" without sufficient time to research the issue and consider both parties' arguments may result in a ruling with which you do not agree and is detrimental to your case. Choose to force an on-the-fly decision on a discretionary evidentiary issue at your peril. There are ways to maximize trial strategy and prevent interfering with judicial economy, while simultaneously following the Rules for Courts-Martial, the Rules of Practice, and the court's pretrial order. Ensure you explore those options and take appropriate action to both preserve your credibility and get the best result for your client.

Intertwined in this pre-writing process is the critical task of researching the law. A trial advocate creates their reputation and demonstrates their worth to their client through the application of a case's facts to the law. What new appellate attorneys learn, most of whom have served as trial attorneys, is that an enormous amount of law exists outside of the Manual for Courts-Martial (MCM). This should be a lesson learned by trial advocates, not appellate attorneys, working the issues throughout the entire trial process. Too often, inexperienced counsel do not know where to start looking outside the MCM and Military Judges' Benchbook, so they read little else in preparation for filing motions and trial. That minimal effort will often get minimal results.

There are several resources to expand your knowledge and ability to identify and litigate issues in your cases. First, The Judge Advocate General's School produces an outstanding resource in the Criminal Law Deskbook.[4] This document should be saved to your desktop and used regularly. The three most useful chapters are Crimes, Sexual Offenses, and Defenses, Chapters 20, 21, and 22, respectively.[5] These chapters will help you identify issues related to the charged offenses themselves, helpful not only for pretrial motions but critical for presenting and defending the case at trial. The Deskbook also covers a myriad of other topics often raised in pretrial motions, to include unlawful command influence, self-incrimination, search and seizure, discovery and production, and many others. Chapter 16 discusses the Rules for Courts-Martial and case law pertaining to motions practice and provides a list of possible motions that should be considered by both parties in every case. Second, through your LexisNexis account, you have access to two valuable hornbooks—*Military Rules of Evidence Manual*[6] and *Military Crimes and Defenses*.[7] They provide an invaluable tool in compiling relevant case law for a majority of the issues that you will encounter. Third, you should use the Court of Appeals for the Armed Forces (CAAF) opinion digest webpage.[8] This digest provides CAAF opinion summaries regarding scores of topics covered in CAAF cases dated back to 1999. Fourth, ask fellow counsel for prior decisions by your judge on the same point. Reading the judge's previous analysis on similar issues will help you better craft your arguments.

As you use these resources, along with good old-fashion case law research, you must develop a system to synthesize the legal authority that you review. Your system can be an electronic digest that collects related cases in easily referenced folders or a more "low tech" methodology of printing and compiling cases by topic. Compiling cases by topic allows counsel to quickly retrieve the most relevant case law when counsel later encounters a similar issue. Every counsel practicing today should have at the ready important cases on issues that are routinely litigated—aspects of Article 120, M.R.E. 404(b), 412–414, and 513, production of witnesses, and production of evidence, to name the most prevalent. Having these cases at the ready will assist you not only in writing your motions but in responding to your opponent's arguments and answering the judge's questions at the motions hearing.

III. Writing

Now that you have mastered the facts through interviews of witnesses and dissecting the case file and you have identified the relevant legal issues by researching the law applicable to the charges and other issues discovered in the case, it is time to begin outlining and writing. As a starting point, use of a "brief bank" is a poor method of drafting motions. Use of someone else's brief in this manner reeks of laziness, and deprives you of the full exercise of learning the law by drafting your own persuasive arguments based on your own synthesis of the law. During the motions hearing, it will become evident to the judge that your motion is not your product if you are unable to explain or recall information contained in the brief. Brief banks have their place. They help identify key case law at the start of legal research, they may spark some ideas as to argument, and they may ensure you do not miss a critical point. But you should not place your credibility and reputation on the line with someone else's motion[9]—a motion that likely involved distinguishable facts and possibly intervening case law.

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[4] THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH. U.S. ARMY, CRIMINAL L DESKBOOK, https://tjaglcspublic.army.mil/tjaglcs-publications (last visited 23 Jan. 2018).

[5] *Id.*

[6] STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (8th ed. 2015).

[7] DAVID A. SCHLUETER ET AL., MILITARY CRIMES AND DEFENSES (2nd ed. 2012)(as this resource grows outdated, counsel should ensure cases found here remain the most relevant case on point).

[8] U.S. CT. OF APPEALS FOR THE ARMED FORCES, http://www.armfor.uscourts.gov/newcaaf/opinions_digest.htm (last visited 23 Jan. 2018).

[9] "Counsel's signature constitutes a certification that he or she has read the motion . . . ; that, to the best of the signer's knowledge . . . it is well grounded in fact and warranted by existing law or is a good faith argument for the extension, modification, or reversal of existing law; and that it is not

If you planned correctly when the judge issued the pretrial order, you will not need to rely on someone else's work. Your writing process will begin with plenty of time for drafting, conducting any additional research and investigation, editing, and seeking feedback from co-counsel and supervisors. Starting this process the night before motions are due is a recipe for disaster, depriving your clients of the quality representation they deserve. From the onset, start the backward planning process, and you will not be caught flat-footed.

The organization of a motion is relatively easy, as the Rules of Practice dictate the format for all trial motions, to include providing counsel an example format that briefly describes the content required.[10] The rules require that all motions be presented in the following six sections:

> (1) the relief sought; (2) the burden of persuasion and burden of proof; (3) the facts in issue as believed by counsel and supported by the evidence; (4) a list of evidence and witnesses to be produced; (5) argument and the legal authority upon which the argument is based and contrary legal authority of which counsel is aware; and (6) a conclusion that restates the relief sought.[11]

An explanation of each section follows.

(A) Relief Sought

This is the most underutilized section in Army motions practice. Counsel usually meet the basic requirements of 1) telling the court what the party wants, and 2) stating whether they request oral argument. By limiting yourself to these two points, you deprive your motion of a strong, persuasive introduction that informs the reader of why all the subsequent text is important.

A typical "relief sought" section of a court-martial motion might state: "The Defense requests that the Court suppress the statement of the Accused given to Detective Smith. The Defense requests oral argument." That opening tells the judge little more than what is in the document's caption. The judge now has to skim through the entire motion hoping to determine the basis in law and fact for the request. Otherwise, the judge will read the "Facts" section without a clue as to how the proffered facts may be relevant, seriously depriving the writer of the persuasive power designed in the writing. There is an easy fix.

Counsel should view this section more as "Introduction" or "Summary of the Argument," with the obvious requirements to state the relief sought and the need for oral argument. Compare the above example to the following: "When a civilian investigator interrogates a military suspect at the behest of military officials, the civilian investigator must first read the military suspect his rights under Article 31(b). In this case, Detective Smith did not inform Private Jones of his rights under Article 31(b) before eliciting incriminating statements from Private Jones while interrogating him at the Fort Hood CID office at the request of Agent Murphy. Thus, the Defense requests that this Court suppress Private Jones statements to Detective Smith. Oral argument is requested."

Now the judge clearly knows not only the relief sought but also has an idea as to both the legal and factual basis for the request. As the judge reads the facts section and any attached documentation, the judge can focus on matters that are important to the issue presented in the motion.

There are numerous books that discuss how to present a persuasive introduction.[12] The key is writing a concise but comprehensive statement that tells the court what you want and why you are entitled to it. The judge must know what question to answer, on what grounds the party believes the question is to be answered, and why it should be answered in your favor. Anything short of that is a waste of an opportunity to persuade.

(B) Burden of Persuasion and Burden of Proof

The first question the court is likely to ask the parties before discussing anything else related to a motion concerns the burden of persuasion and burden of proof. The burden of persuasion establishes who presents evidence first and how the other party responds. There are several resources to help you determine who has the burden of persuasion, to include Appendix C in the Rules of Practice and Chapter 16 of the Criminal Law Deskbook.

Counsel are often confused regarding burdens in pretrial motions to preclude the opposing party from admitting evidence at trial, for example, when the defense seeks to prevent the government from admitting a text message based on hearsay. It is easy to be drawn into R.C.M. 905(c)(2)'s general rule that places the burden of persuasion on the moving party. In my example, when counsel accept this general rule as dispositive, the defense takes on the burden merely by seeking a pretrial ruling on the admissibility of evidence. If that were the rule, it would dissuade the defense from seeking a preliminary ruling on whether *the government's* evidence is admissible. Rather, as the government is the proponent of the evidence, it retains the burden to demonstrate admissibility.[13] That burden does not

interposed for any improper purpose . . . ." UNITED STATES ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, Rule 3.4 (1 Nov. 2013) [hereinafter RULES OF PRACTICE].

[10] *Id.* at 4–5, 20–21 (Rule 3, App. C).

[11] *Id.* at 4.

[12] *See, e.g.*, BRYAN A. GARNER, THE WINNING BRIEF 77–142 (3d ed. 2014); TERRILL POLLMAN ET AL., LEGAL WRITING 277–87 (2d ed. 2014).

[13] *See* United States v. D.W.B., 74 M.J. 630, 639–43 (N-M. Ct. Crim. App. 2015)(citing cases).

change merely because an opponent objects pretrial to the admission of that evidence at trial.

Finally, do not list the burdens in this section and then ignore them throughout the rest of the motion. Incorporate the burdens into your argument, demonstrating how you met your burden or why the opposing party did not meet their burden. Like any good argument, do not just say it. Analyze and argue it in detail.

(C) Facts (the facts in issue as believed by counsel and supported by the evidence)

The "facts" listed in your motion are not evidence. They are mere offers of proof meant to help prepare the judge and the parties for the motions hearing. As Rule of Practice 17.8 states, "[a] judge's essential findings will not be based on offers of proof."[14] Accordingly, a motion's asserted facts amount merely to an exposition of the facts the moving party expects to elicit, but they are not evidence in and of themselves. As an appellate court warned judges long ago, we must "not let counsel stray into stating what someone would say if they were called. Force them to call the witness, provide valid real and documentary evidence or provide a stipulation. Sticking to proper procedure will save [the judge] time and grief and provide a solid record."[15]

Thus, do not assume the judge will accept your assertions and allow you to move directly to argument. Rather, attach documentary evidence to support your claims, be prepared to call witnesses to support your claims, or talk with opposing counsel prior to the hearing and enter into a written stipulation of fact for the purposes of the motion. Under Rule of Practice 3, for the court to consider facts without evidence, counsel must enter into a separate written stipulation of fact on undisputed matters so that it is clear which facts both parties agree on and the judge can engage in an appropriate colloquy with the accused.[16]

Do not use the "facts" section of your brief to restate every fact related to the case. You need only state the facts that are relevant to decide the particular motion you are filing. For example, if you are filing a motion to dismiss for failure to comply with the R.C.M. 707 "120 day" clock, you will probably not need to relate all the underlying facts of the alleged crime. Instead, you will need to focus on the facts related to the timeline between preferral of charges and arraignment. Including facts which have no relevance to your motion will confuse the reader and detract from your subsequent argument.

You must gain a mastery of the facts in your case before you begin to write. Your failure to master the facts may lead to either "overstatement" or "omission," both ways to quickly lose credibility. By overstating the facts, "readers will be instantly on guard, and everything that has preceded your overstatement as well as everything that follows it will be suspect in their minds because they have lost confidence in your judgment or your poise."[17] Nothing could be worse for the litigator whose job is to persuade the judge to rule in favor of their client. Be scrupulous in asserting your facts, and, if anything, understate but do not overstate. Keep it simple, and keep it to "just the facts, ma'am."

Another common error is omitting facts that may appear harmful to your position. Counsel owe a duty of candor to the court. Omitting material facts, likely to be highlighted by your opponent, will certainly result in a loss of credibility. Bad facts must be dealt with, not ignored. It simply does not make sense to run and hide from "bad" facts. The judge "must look facts in the face,"[18] so you should confront them head-on as well. Eventually, the judge is going to identify the overstated or omitted facts, and if you have not analyzed the true facts within your issue development, the judge must 1) wonder why you overstated or omitted the true account, and 2) conduct the analysis without your input or perspective. Neither helps you obtain the result that you want for your client.

(D) Witness/Evidence (a list of evidence and witnesses to be produced)

In this section, you must list each document and witness that you request the court rely on. In doing so, you should carefully consider what evidence is necessary to meet your burden. The goal is to present enough evidence to meet the burden, while avoiding the presentation of unnecessary evidence.

Ensure that the witnesses you request are available at the motions hearing, either in-person or remotely. If the defense expects the government to produce its listed witnesses for the motions hearing, the defense must comply with R.C.M. 703(c)(2) by providing the government with the contact information for the witness and a synopsis of expected testimony sufficient to show the relevance and necessity of the witness.

Do not present unnecessary evidence. First, if the document is already in the record of trial, there is no need to present it again. Instead, you can simply refer to the document already contained in the record. For example, you

[14] RULES OF PRACTICE, *supra* note 9, at 11.

[15] United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987).

[16] RULES OF PRACTICE, *supra* note 9, at 5 ("Motions requiring findings of fact must be supported by evidence presented by the parties or by a written stipulation of fact.").

[17] WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 73 (4th ed. 2000).

[18] Frank v. Bangum, 237 U.S. 309, 347 (1915)(Holmes, J., dissenting).

do not need to attach the charge sheet to your motion as an enclosure. The charge sheet is already in the record and may be considered by the judge in ruling on your motion. Second, if your opponent has already attached the document as an enclosure to her motion, there is no need for you to attach it to your response brief. It is already a part of the record and you may rely upon it to the same extent as your opponent. Finally, if you intend to offer a document into evidence during the trial, attach it as a Prosecution or Defense Exhibit as opposed to an enclosure to your motion. There is no need for the document to be attached twice in the record of trial.

(E) Legal Authority and Argument (argument and the legal authority upon which the argument is based and contrary legal authority of which counsel is aware)

If the "Relief Sought" section is the most underutilized, the "Legal Authority and Argument" section is the most underdeveloped. This section is for obvious reasons the most important portion of your motion. This is where you apply the facts to the law. You spent three years in law school developing the skills necessary to expertly advocate for your client through this very analysis, and it is the key aspect in obtaining the sought relief. So why does it so often get the short shrift?

One court summarized your task this way—"Praised be he who can state a cause in a clear, simple and succinct manner, and then stop."[19] The hard part for many counsel is not the "stop" part, but ensuring they state their "cause in a clear, simple and succinct manner." One way to meet this objective is to use what many legal writing experts, and the Rules of Practice, recommend— "signposts"[20] or "bold headings so the court can follow."[21] Each bold heading should provide a clear, concise statement foretelling the argument about to be advanced.[22] Here is an example:

> 1. Detective Smith interrogated the accused at the request of CID investigators concerning a jointly investigated crime.
>
> 2. Therefore, M.R.E. 305(b)(1) required Detective Smith to advise the accused of his rights under Article 31(b).
>
> 3. Because Detective Smith failed to advise the accused of his rights, the only remedy is suppression of the accused's statement.

As in this example, a reading of just the bold headings provides a clear picture to the judge why you believe you win both factually and legally. This technique not only assists the reader, it assists the writer in providing organization to the motion and ensures the writer stays on point when writing beneath each heading.

Under each heading, you should include your detailed analysis of both the law and the facts concerning that point. Where the law provides a certain "test" or "factors" to be applied, your analysis should begin with a clear recitation of that test or those factors. You must then demonstrate why the facts of your case meet that test or those factors. Your analysis should include a comparison to other appellate opinions, with an explanation of why your facts are either similar or dissimilar, leading to the result you advocate.

Let me provide a too frequently occurring example concerning admissibility of an alleged sexual assault victim's other sexual behavior. In these motions, counsel inevitably lay out in extensive detail the holdings of *Gaddis* and *Ellerbrock*.[23] While reference to those cases makes sense, as they are considered the pivotal cases on M.R.E. 412, the trial practitioner must realize that the judge is very familiar with both cases. Stringing together quotation after quotation from those two cases adds very little value to the motion, and is unlikely to persuade the judge to rule in your favor. Find cases on point with your facts. Remember, *the judge is not your law clerk.* It is your responsibility to find similar cases—and if you cannot find military cases you should look for federal cases when analogous rules exist—and analyze those similar cases to demonstrate why certain evidence should or should not be admitted. If you conducted an exhaustive search and found nothing on point, say so. But nothing is more satisfying to a litigator than to read an opinion that mirrors the arguments made with the cases provided by the litigator. Do not just cite the seminal cases followed by a page of argument and concluding with a fist-pounding assertion that justice demands the judge grant your request. Instead, convince the judge through the application of your facts to the law that your position is correct. Find cases on point and argue them.

Also in your analysis, as I stated in the "Facts" section above, do not run and hide from the "bad" facts—"Facts do not cease to exist because they are ignored."[24] If you believe those "bad" facts are not dispositive, then you should compare and contrast case law to demonstrate why those seemingly "bad" facts do not prevent you from obtaining the requested relief. Young advocates love to argue the obvious points, but the judge does not need much help with the obvious points. What the judge, and your client, needs is for you to clearly present those tough facts in contrast with the law and provide a clear legal basis for the requested relief. To do otherwise is a waste of effort.

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[19] Jungwirth v. Jungwirth, 240 P. 222, 223 (Ore. 1925).

[20] GARNER, *supra* note 12, at 173; ROSS GUBERMAN, POINT MADE 93 (2d ed. 2014).

[21] RULES OF PRACTICE, *supra* note 9, at 20.

[22] GARNER, *supra* note 12, at 403–22.

[23] United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011); United States v. Ellerbrock, 70 M.J. 314 (C.A.A.F. 2011).

[24] United States v. Jordan, 57 M.J. 236, 244 (C.A.A.F. 2002)(Sullivan, S.J., dissenting)(quoting ALDOUS HUXLEY, PROPER STUDIES (1927)).

A few final points on presentation of case law. Use block quotations sparingly, and minimize the stringing together of case quotations.[25] Both methods of writing invite skimming and point to a "lazy" writer who has not taken the time to synthesize the law.[26] Instead, quickly synthesize the law with citations to support your reading of the law, including a parenthetical quickly explaining why or how that case supports your argument.[27] Simply listing cases with no clear statement of their relevance does not advance your cause and at best invites the reader to guess at the relevance, and at worst to ignore your citation. And finally, ensure your citations, to include introductory signals, are in accordance with *The Bluebook*. Refusing to take the time to demonstrate your professionalism may cause you to lose credibility and will inevitably distract from your argument

This section of your motion is the most important part of the brief. Ensure that you understand the law, state it correctly in your brief, and demonstrate why the facts of the case support the conclusion you advocate. Keep it succinct, yet fully apply the law to the facts in your case.

(F) Conclusion (a conclusion that restates the relief sought)

"Close powerfully."[28] Restating the relief sought is the minimum requisite effort to comply with the Rules of Practice. Even this simple task sometimes proves too much, as the conclusion too often contradicts the first page's "Relief Sought" section. Those errors are likely the result of laziness in using a previously filed or brief bank motion—and evidence of no personal and supervisory review. Consider spending a few extra moments to recast your issues in a fresh, powerful, and persuasive light, highlighting your primary arguments and reasons the court should grant your requested relief. If the judge read your brief straight through, this will be the last paragraph read. Make sure you leave the desired lasting impression and go out with a bang, rather than a fizzle.

IV. Post-Submission

You have written your motion, incorporated feedback from fellow counsel who critically reviewed your motion, and submitted your final product to the court. All is done. Well, still not quite. When the opposing party submits their response, ensure you review it in a timely manner. While not necessary in all cases, you should consider filing a reply. A reply motion may be appropriate when you become aware of additional case law relevant to deciding the issue, you significantly alter or add new points to your argument, the opposing party addresses significant matters not addressed in your motion, or the opposing party points out a significant error in your presentation of the law or facts. A reply in these scenarios allows the motions hearing to be a much more efficient tool for the court to obtain all of the facts and answers necessary to fully decide the issues at hand.

Likewise, counsel must come to the motions hearing fully prepared to discuss in detail the facts and appellate decisions cited in both parties' motions. An inability to fully answer the judge's questions or present detailed counter-arguments deprives counsel of their last opportunity to effectively advocate for their client. Pretrial hearings are fully maximized when both counsel come fully prepared, providing the court the best opportunity to ensure a just result.

V. Conclusion

Your client, whether that is the United States or an accused Soldier, deserves an attorney who is competent, professional, and always gives their best effort. You owe it to your client, the profession of law, and the profession of arms to give it your best effort each time you come before the court. Do not "come limping into the fight" with half-hearted approaches or just filing paper to get something in. Rather, prepare, strategize, write, and then fight "with vigor."

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[25] GARNER, *supra* note 12, at 494 ("You shouldn't see yourself as a mere quotation-assembler.").

[26] GUBERMAN, *supra* note 20, at 176 ("'Quotations from cases are effective only if used sparingly. Quoting at length from opinion after opinion is a lazy way of writing a brief, and the finished product is likely to be unconvincing. Long before the brief approaches its end, the reader has begun to skip over the quotations.'" (quoting Federal Circuit Judge Dan Friedman)); *see also* SCALIA & GARNER, *supra* note 3, at 125–29.

[27] "Accompanying a citation with a parenthetical serves three important purposes—(1) it tells the brief reader why you are citing the case, (2) it shows where the case fits into the theme or focus of your brief, and (3) it achieves the objective of concise brief writing." GUBERMAN, *supra* note 20, at 163 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ADVOCACY 263–64 (2d ed. NITA 2003)).

[28] SCALIA & GARNER, *supra* note 3, at 37.