

Those Pesky Footnotes — Part I

By Douglas E. Abrams

It was November of 1976, and I was three months into my clerkship with Judge Hugh R. Jones of the New York Court of Appeals. The judge felt I was ready to cut my teeth on drafting part of an opinion, and I looked forward to seeing my words between the hard covers of a book for the first time. After writing and word-smithing the draft for a few days, I did what many other green law clerks would have done: I wrote some footnotes.

A few days later, Judge Jones returned the draft to me with his edits, minus the footnotes. Years of law practice had taught him that practicing lawyers are primary readers of published judicial opinions, and now he taught me. Avoid footnotes unless they genuinely advance understanding, he said. Footnotes might come naturally to a writer who has seen so many, and they might shine the spotlight on the judge or clerk who drafted them. But judicial footnotes also carry a price because lawyers must spend their time, and the client's money, parsing them and evaluating their citations for precedential effect in later cases.

Time is a precious, expensive, limited resource for courts, lawyers and clients. In our system grounded in *stare decisis* and concern about access to the courts, Judge Jones told me, the price of the footnoter's reflex or personal vanity to the administration of justice is simply too high.

“FLAUNTED PHI BETA KAPPA KEYS”

Footnotes pervade legal writing, as do their equally pesky first cousins, endnotes. Footnotes appear at the bottom of each page, of course; endnotes appear at the end of each chapter or at the back of the publication.

(I generally use the term “footnotes” here to encompass both footnotes and endnotes because I do not see significant differences between the costs and benefits of the two devices.) Each device comes in two basic varieties. “Citation notes” provide sources and authorities for statements made in the main text; “textual notes” continue the main text's factual or legal discussion, or introduce new thoughts, sometimes with a few citations.

Footnotes resemble worn-down prize fighters, who absorb repeated beatings, yet rise stubbornly from the canvas each time to take more punishment. Yale law professor Fred Rodell beat up on footnotes 70 years ago, disparaging them as “phony excrescences,” and as “flaunted Phi Beta Kappa keys of legal writing” designed to inflate the writer's ego at the expense of readers' eyesight and patience.¹ Footnotes have been attacked as a “virus,”² “a fungus,”³ “an insidious plague,”⁴ “a lazy form of writing,”⁵ a disease “metastasizing in legal circles,”⁶ and an “addiction . . . which mangles all legal writing.”⁷ And as “the darlings of some pedants,”⁸ “nuisances,”⁹ “means of concealment,”¹⁰ “hedges against forthright statements in the text,”¹¹ “a safe refuge for untenable hypotheses,”¹² “a fierce distraction,”¹³ and “a dangerous inconsequentiality.”¹⁴

Judge Abner J. Mikva has assaulted footnotes as “abominations” contrary to human physiology: “If God had intended the use of footnotes to be a norm, He would have put our eyes in vertically instead of horizontally.”¹⁵

Facing such strident criticism, what accounts for the endurance of these “flaunted Phi Beta Kappa keys of legal writing”? Much of the reason doubtlessly lies in the dominant legal writing culture, which too often begins

equating “footnote inflation” with erudition even before future writers leave law school. But footnotes also endure because most critics rightfully restrict their scorn to (1) textual footnotes, and (2) citation footnotes that morph into “string citations” listing a slew of sources or authorities for a proposition stated in the main text. Even most critics acknowledge an important role for efficient citation footnotes, which enrich the writer's dialog with the reader.

THE “CITATION FOOTNOTE”

Efficient citation footnotes share two characteristics. By providing sources or authorities for the writer's assertions, they permit readers to verify or respond. But efficient citation footnotes also avoid piling on sources or authorities for propositions able to stand on their own with much less support and sometimes with none.

Economist John Kenneth Galbraith explained that “everyone, professional and lay reader alike, needs to know on occasion the credentials of a fact.” Citation footnotes, he added, also “provide an exceedingly good index of the care with which a subject has been researched.” But Professor Galbraith drew “a line between adequacy and pedantry.”¹⁶ That is, between efficiency and string citations.

Efficient citations are essential in legal writing, where “argument depends as much on authority as on logic.”¹⁷ Advocacy seeks to persuade readers or to develop the law by testing legal doctrine, sometimes to its outer limits. Cited sources and authorities enable readers to analyze and answer. Except in briefs, judicial opinions and other documents that have traditionally incorporated citations in the main text,

footnotes are accepted homes for these sources and authorities.

Efficient citation footnotes can also serve other useful purposes. By quoting a cited statute or other authority verbatim, these footnotes help produce a self-contained writing that enables readers to proceed more conveniently without continually reaching for other volumes, including ones that may not be readily at hand. Citation footnotes may credit sources or authorities, an ethical obligation even when silence might not expose the writer to charges of plagiarism.¹⁸ Citations also enable writers to share the fruits of their research and thought processes with readers who simply wish to explore concepts discussed in the main text.

Most lawyers and courts continue placing citations in the main text of briefs and opinions, though some commentators have argued lately for placement in footnotes instead. “When citations are included within the main text, it is easier for the reader to see that authority supports the argument,” say the traditionalists. “An argument with footnoted authorities . . . does not flow smoothly – the reader is forced to interrupt the reading of the main text to consult the notes.”¹⁹ If they wish, readers know enough to pass over citations in the main text, which normally are italicized. Because footnotes are subordinate to the main text, however, footnotes demean citations.²⁰

Bryan A. Garner, however, argues that placing citations in footnotes enhances readability by clearing underbrush from the main text. Main text citations, he argues, are throwbacks to pre-word-processing days, when aligning footnotes in briefs and judicial opinions was a nightmare for the scrivener or typist. Garner’s remedy today? “[P]ut citations – and generally only citations – in footnotes. And write in such a way that no reader would ever have to look at your footnotes to know

what important authorities you’re relying on. If you’re quoting an opinion, you should – in the text – name the court you’re quoting, the year in which it wrote, and (if necessary) the name of the court. . . . Just get the . . . volume, reporter, and page references . . . out of the way.”²¹

THE “TEXTUAL FOOTNOTE”: WHEN IN DOUBT, LEAVE IT OUT

Despite the worthwhile roles for efficient citation footnotes, I begin writing from a basic default position: Hardly anyone wants to read textual footnotes, and hardly anyone ever does.²²

Modern technology has made this default position more important than ever before, but also more tempting to ignore than ever before. “More important” because so much published legal writing today ends up on-line, where footnotes will likely be converted to endnotes; endnotes become more inconvenient, except to readers willing to print out the entire document, or to use hyperlinking repeatedly to wend through the entire document. “More tempting to ignore” because computerized search engines (Lexis, Westlaw and the like) and word processing now make footnote inflation so easy. We can churn out new footnotes by simply pressing a few keys, and the computer even automatically renumbers the existing footnotes and realigns everything on the page.

Because textual footnotes tend to distract and annoy, writers usually convey their message best by speaking in the main text or not at all. If a passage is important enough to include in the main text, find a graceful way to place the passage there; if not, leave it out altogether. Departures from the default position require careful consideration because the writer, and not the reader, controls the message. The writer, and not the reader, should make most of the tough calls.

This default position applies to textual footnotes in legal briefs, judicial opinions, law review articles, and non-fiction books. The rest of this article treats footnotes in briefs and similar filings before a tribunal. In the next issue of *Precedent*, Part II will discuss footnotes in judicial opinions, law reviews and non-fiction books.

FOOTNOTES IN BRIEFS

Advocates do not write as free agents committing their own thoughts to paper, but as the client’s professional representative, responsible for persuading the decision maker. Mounting docket pressures have restricted oral argument in favor of written submissions in federal and state courts, so the written word may be the better way, and indeed sometimes the only way, to fulfill this responsibility.

The maxim “Know your audience” underlies written trial and appellate advocacy, as it underlies all legal writing. Footnotes, permitted by Missouri Supreme Court Rule 84.06, belong in a brief only when they would help persuade the audience, the judges who need and expect persuasion as they perform their official duties. Court rules or conventions usually determine whether citations appear in the main text or in footnotes. But textual footnotes tend to interrupt the argument’s persuasion, and thus are “largely to be deplored in brief writing and should be used sparingly and only when really appropriate.”²³ Veteran Supreme Court advocate Robert L. Stern put the matter directly: “Judges are much more likely to see and read what you write if it appears in the text; they will not be persuaded by what they do not read.”²⁴

Frederick Bernays Wiener urged advocates to presume that footnoting in briefs is “self-defeating” because “it makes the writer’s thoughts more difficult to follow – and hence far less likely to persuade the judicial reader.”²⁵

Wiener found the presumption

rebutted for footnotes that “indicate qualifications to statements in the text, where such qualifications would interrupt the thought if they remained in the text,” or footnotes that “include citations on points of secondary importance.”²⁶ He cautioned, however, against using a footnote to respond to an adversary’s point: “[U]nless the opposition argument is utterly devoid of support in the record, it deserves reply in the text of your brief, and it is only your case that will be hurt when you drop your own views down to a footnote.”²⁷

A footnote may also treat a complex argument the advocate does not wish to press because it is unlikely to be dispositive, but also does not wish to abandon because the court might want to consider it at oral argument or after supplemental briefing.²⁸ Some courts, however, reportedly disregard arguments raised exclusively in footnotes.²⁹

A footnote may also cite reference material such as lengthy legislative history, whose inclusion in the main text would break the reader’s flow.³⁰ My mentor, Judge Jones, added that “if the text invites collateral questions or speculation, a short footnote may avert curiosity and thus diversion.”³¹ On the other hand, Judge Ruggero J. Aldisert warns that “marginal comments, often with piddling objections to minor points in the opponent’s brief or the lower court’s opinion, add little to and subtract much” from the force of the advocacy.³²

Because advocates write in the client’s stead, they should not let their own pride of authorship compromise this force. Trial and appellate filings are not law review articles. String cites might occasionally help show national uniformity or a decades-long trend in the law, but otherwise they are “rarely useful or impressive” in briefs.³³ Textual footnotes delving into collateral matters might display the advocate’s learning or tenacious research but, as Judge Aldisert advises, “Judges do not need a show-

and-tell exercise to reveal how smart you are.”³⁴ Lawyers serve their clients best when the court remembers the advocacy, and not necessarily the advocate.

Once the case is over, the lawyer sometimes adapts part of a brief and submits it to a law review for publication directed at a wider audience. Law review footnoting conventions, one topic in my next article, then prevail. While the brief remains a brief, however, the lawyer remains the voice of the client. “On the words you use,” the eminent British jurist Lord Denning said, “your client’s future may depend.”³⁵ The client comes first.

Next article: Those Pesky Footnotes – Part II (judicial opinions, law reviews and books)

ENDNOTES

1. Fred Rodell, Goodbye to Law Reviews, 23 Va. L. Rev. 38, 40 (1936); Fred Rodell, Goodbye to Law Reviews — Revisited, 48 Va. L. Rev. 279, 281 (1962).
2. Kenneth Lasson, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 Harv. L. Rev. 926, 939 (1990).
3. Abner J. Mikva, Goodbye to Footnotes, 56 U. Colo. L. Rev. 647, 647 (1985).
4. Arthur D. Austin, Footnotes as Product Differentiation, 40 Vand. L. Rev. 1131, 1133 (1987).
5. Richard A. Posner, The Federal Courts: Challenge and Reform 352-53 (1996).
6. William R. Slomanson, The Bottom Line: Footnote Logic in Law Review Writing, 7 Legal Ref. Servs. Q. 47, 49 (1987).
7. W. Duane Benton, Book Review, 86 Yale L.J. 197, 199 (1976) (reviewing A Uniform System of Citation (12th ed. 1976)).
8. Hugh R. Jones, Appellate Advocacy, Written and Oral, 47 J. Mo. Bar 297, 300 (June 1991).
9. Mario Pittoni, Brief Writing and Argumentation 39 (1967).
10. David Mellinkoff, Legal Writing: Sense and Nonsense 94 (1982).
11. *Id.*
12. G.W. Bowersock, The Art of the Footnote, 53 Am. Scholar 54, 61 (1983/84).
13. Tom Goldstein & Jethro K. Lieberman, The Lawyer’s Guide to Writing Well 100 (2d ed. 2002).

14. J.M. Balkin, The Footnote, 83 Nw. U. L. Rev. 275, 277 (1989).

15. Abner J. Mikva, Law Reviews, Judicial Opinions, and Their Relationship To Writing, 30 Stetson L. Rev. 521, 524 (2000). See also Abner J. Mikva, *supra* note 3, at 648.

16. John Kenneth Galbraith, The Great Crash 1929, at xxiv (3d ed. 1972).

17. Helen A. Anderson, Are Citations on the Way Down? The Case Against Footnotes, available at <http://www.wsba.org/media/publications/barnews/archives/2001/dec-01-citations.htm> (Dec. 2001).

18. Elizabeth Fajans & Mary R. Falk, Scholarly Writing for Law Students, ch. 6 (2005).

19. Helen A. Anderson, *supra* note 17.

20. George Rose Smith, A Primer of Opinion Writing, For Four New Judges, 21 Ark. L. Rev. 197, 211 (1967).

21. Bryan A. Garner, Legal Writing In Plain English § 28, at 77 (2001).

22. See what I mean? I will not do this again!

23. Hugh R. Jones, *supra* note 8, at 300. See also Nancy L. Schultz & Louis J. Sirico, Jr., Legal Writing and Other Lawyering Skills § 27.01[e][iv], at 312 (3d ed. 1998).

24. Robert L. Stern, Appellate Practice in the United States 325 (1981).

25. Frederick Bernays Wiener, Effective Appellate Advocacy § 75, at 145 (rev. ed by Christopher T. Lutz & William Pannill eds., 2004).

26. *Id.* § 75, at 145-46.

27. *Id.* § 75, at 146.

28. Alan D. Hornstein, Appellate Advocacy in a Nutshell 222-23 (2d ed. 1998).

29. Bryan A. Garner, The Redbook: A Manual on Legal Style § 9.9, at 139 (2d ed. 2006).

30. Frank E. Cooper, Writing In Law Practice 266 (1963).

31. Hugh R. Jones, *supra* note 8, at 300.

32. Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument § 17.3, at 235 (2d ed. 2003).

33. *Id.* § 17.1, at 231.

34. *Id.*

35. Lord Alfred Thompson Denning, The Discipline of Law 5 (1979).



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