

War on Footnotes?

I attended a legal writing CLE several years ago and one of the issues raised has stuck with me ever since. The speaker stated flatly that anything worth putting in a footnote is worth putting in the text of the brief, proper. Therefore, said she, your briefs should contain no footnotes, whatsoever, as they are merely distracting and disrupt the flow of your writing.

Preposterous! said I, as I huffed and puffed back to the office. Surely, this sage has bumped her head on her ink well and awoken in an alternate universe where lawyers do not compartmentalize their points into "major" and "minor."

But I am beginning to believe there is wisdom in the advice given. If our goal is, above all else, to persuade, then why are we asking the reader to periodically stop following something important in order to focus on something less important? If it is less important, it is not persuasive. If we offer it to persuade, it is important.

What say ye?

Tony LaCroix, Missouri

It really depends on what you're putting in the footnote. For example, I think it's Bryan Garner who advocates putting case citations into footnotes (where permitted by the court) so they don't interrupt the flow of the narrative. That makes a lot of sense to me, especially when you try to parse through a long set of string citations.

Kevin W. Grierson, Virginia

I generally use footnotes to put things that would make the brief muddy, but the information is needed to clarify something. Things that would take the section on a different tangent if you just threw them in

Erin M. Schmidt, Ohio

I agree, Erin. Although I think it is preferable to avoid gratuitous footnotes, occasionally there are related issues (like an opposing argument that really doesn't merit serious discussion) that need to be addressed somewhere in a brief.

Jon van Horne, District of Columbia

SoloSez Popular Threads, April 2014

When I write about special ed, and perhaps talking about the varied services one sees based on race, I might footnote that services also vary drastically based on the "wealth" of the school district, which disproportional affects certain races and is a variable not controlled by the stats.

Erin M. Schmidt

He just wrote a piece for ABA Bar Journal where he said citations in the text of a brief are distracting. Garner advocates putting citations in footnotes.

I think either method is distracting.....
Tom Crane, Texas

If the material is argument, then yes, it belongs in the text. You can write so that minor matters don't distract in the text. If the material is citations, well, follow the local practice, and in my view it goes in the text because cites are not minor matters, and give pertinent information, like what court, and when. If the matter is something the judge likely already knows but might want to review again, like the text of a commonly cited statute or rule, now that is going in a footnote.

Rebecca K. Wiess, Washington

But aren't you taking the reader on a much more jarring tangent by not only throwing it in, but redirecting her to the bottom of the page? If you assume the footnote will be read as it is encountered, the flow is severely disrupted. If, on the other hand, you assume the reader will not read the footnote as it is encountered, you have simply added extraneous text.

Tony LaCroix

I like footnotes.[1]

David A. Shulman, Florida

[1] Even in emails.

Ha! Agreed. Citation to law is distracting. But I completely disagree with Garner's idea of relegating citations to footnotes. It would make more sense to relegate the text to footnotes so that the brief consists entirely of citations. What a lawyer says the law is in almost meaningless when compared to what a legislature or higher court has said the law is.

Tony LaCroix

There's a great fiction book called "The Brief Wondrous Life of Oscar Wao." There are lots of footnotes in the book, which make for great reading on their own as background information, but the story would not operate as well if the footnotes were part of the text.

And then, of course, is my favorite footnote by Judge Terence T. Evans of the 7th Circuit, who quotes the rapper Ludacris when talking about a court reporter's misspelling.[1]

[1] Which I have not posted here in case profanity is disallowed.

Sincerely,
Dwayne Allen Thomas, New York

I cannot comprehend how a thread on this topic at this time of year[1] can fail to mention 123 U.Pa.L.Rev 1474 (1975), in which the first word of the scholarly article is footnoted.[2]

[1] The beginning of baseball season, not All Fools Day.

[2] The first word being "The."

James S. Tyre, California

I can't believe you failed to mention that "the" is actually footnoted twice, and that the entire page is three lines long, the rest being footnotes.[1]

[1] HAHHAHAHAHAHAHA

Sincerely,
Dwayne Allen Thomas

SoloSez Popular Threads, April 2014

And are we *really*ignoring *Don't* Cry** Over Filled Milk: The Neglected Footnote Three to Carolene Products****, 136 *U. Pa. L Rev.* 1553 (1988)<http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3917&context=penn_law_review>?

Tim Ackermann

I don't think anyone writing for a living should follow any "always do this" or "never do that" rule.

I use footnotes sparingly, but do so in a way that, IMO, doesn't distract.

1. If I have a footnote, it is almost always at the end of a paragraph. Since the paragraph completes a discrete thought, I'm not interrupting the reader in mid-thought. Footnotes in the middle of sentences are an abomination.
2. Footnotes evolve for me. If I make a point in a brief that I am not convinced I want or need, I will often put it in a footnote in a draft. As I review the draft, I might delete the footnote if it doesn't add anything substantial, or if it detracts from the overall argument.
3. Where I keep a footnote it is usually a narrow point that is related to the main point I am making in that paragraph, or an elaboration on some fact set out in the paragraph. It's not a major enough point to put in text, but it's not so irrelevant that I delete it. Plus, putting it in text would, in my view, interfere with the flow of argument more than asking the reader to read a footnote

Patrick W. Begos, Connecticut

I agree. Often, perhaps most of the time, the citation is integral to any brief.

Tom Crane

Personally, I'd like to see the sidenote gain acceptance.

http://www.edwardtufte.com/bboard/q-and-a-fetch-msg?msg_id=00001d

James M. McMullan, Alabama

SoloSez Popular Threads, April 2014

I agree that footnotes should be very rare although my personal preference would be all cites in footnotes. I might put some very small image, like an icon, in a footnote. Otherwise, images will be attachments. I also RARELY use two column table to compare text passages.

John Page, Florida

Our local appellate court LOATHES Garner-stype footnote citation, and footnotes in general. It makes its staff move all footnotes to the text before the judges read, and for a Garner-style brief it will send it back to the lawyer to re-format with cites in the text. At a recent CLE, they explained that having to jump up and down to read the cites is more distracting, and the cites are the whole point.

Dineen Pashoukos Wasylik

I thought Chaucer was the last “serious” ~~sidebars~~ use

Tom Crane

I use footnotes to address minor substantive points; I don't shunt all citations to footnotes, a la Garner. Here are a number of articles and posts addressing the use of footnotes:

http://www.abajournal.com/magazine/article/textual_citations_make_legal_writing_onerous_for_lawyers_and_nonlawyers/

<http://www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html>

<http://blog.legalsolutions.thomsonreuters.com/practice-of-law/rejecting-gurus-advice/>

<http://raymondpward.typepad.com/la-appellate/2014/02/citations-in-footnotes-the-never-ending-debate.html>

Lisa Solomon, New York

Thank you for posting Dineen. It's good to have a bit of data on the topic.
:-)

My general rule on footnotes is quite simple:

Could I write this sentence (or paragraph) more powerfully without the footnote?

That usually solves it. Nine times out of ten it means I work the footnote into the paragraph in some way.

Jimmy, I hope you didn't mean the side note comment as a joke. I think there might be situations where a side note works wonderfully.

I'm also interested in opinions about pull quotes. Is there any place in brief writing for the pull quote. I tried to introduce one into a brief a couple weeks ago but it didn't make it past the editing board (i.e. the lawyer who hired me). My client kind of chuckled and said he'd rather not have it in the brief. Any opinions on pull quotes?

Joshua Smith, Idaho

You rebel, you :-)

I assume that you set of the pullquote typographically (as in a magazine article). I generally recommend avoiding using typographical crutches (such as bold, italics, underlining and allcaps) to provide emphasis.

Lisa Solomon

No, I was serious. It is much less disruptive to scan to the side for a sidenote than to move your eyes vertically from text to footnote to text. Edward Tufte is a big proponent of the sidenote.

Sidenotes also tend to require larger margins which in return narrows the body of text which in turn makes the physical act of reading easier and quicker.

Kindly,
Jimmy Mac
James M. McMullan
