"The debate is over whether to put citations to authorities in footnotes rather than in textual sentences in court opinions and briefs."

"To Note or Not to Note"

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Sunday, July 8, 2001, was a slow news day. Publication on the front page of the *New York Times* of an article on legal citation format conclusively demonstrates this.[1]

The debate is over whether to put citations to authorities in footnotes rather than in textual sentences in court opinions and briefs. Proponents of the Bryan A. Garner theory of legal writing argue that citations clutter a text.[2] Other commentators reject the advice, saying that it downplays the significance of precedent, and causes a reader's eye to jump up and down a printed page.

At one level, the debate seems relatively inconsequential. Indeed, this author is surprised by the vehemence with which the debate proceeds. However, for those of us who are legal writing teachers, a potentially important point arises: What do we tell our students to do? It is to that subject that this article now turns.

Distinguish Between Lawyer Briefs and Court Opinions

Much of the debate over the great footnote controversy appears to assume that the use of a footnote device is either a good or a bad idea in both court-prepared opinions and lawyer-prepared briefs, without distinguishing between the two. This is a mistake. Briefs and opinions are written for different purposes and for different audiences. Because of those differences, one should not assume that, if placing citations to authorities in footnotes rather than in text is a good or bad idea in court opinions, such placement is similarly good or bad in briefs.

Court Opinions

The argument for using footnotes to cite authorities in court opinions is that citations in the text are distracting and tend to make the text less readable for lay people. To the extent that the purpose of a court opinion is at least in part to educate the general public as to how the law looks at a particular subject, the argument for the use of footnotes instead of textual citations is legitimate, to a point. The use of citation footnotes does cut down on clutter. The typical member of the general public does not need detailed citation knowledge. Further, removing citations from the main text can be a useful device in causing judicial opinion writers to improve the flow of their expression, without pause.

At the same time, one may legitimately wonder about the premises of the argument. Does the average lay person actually read court opinions? One would expect that the most avid lay readers would be persons who are parties to a given case. However, my own experience as a practicing lawyer for 25 years is that clients mostly want to know who won; they figure it is my job to determine the legal "why."

A further premise of the pro-footnote argument is that the typical reader will scan text, without looking down at footnotes. Is that really true? My natural tendency as a reader, when I see a number in the middle of a discussion, is to look down to see what the number represents. Is that actually less of a pause than if the citation had been in the text?

Additionally, are we saying that court opinions should look more like law review articles? Is that the style we wish to emulate? When the general public thinks of documents with footnotes, they may well think of the high school and college research papers they had to prepare and mostly want to forget. That association will not stimulate lay readership of court opinions.

Finally, court opinions are increasingly being published electronically, on the Web. If one assumes that our society will someday go "paperless," then we have to think about how footnoted citations in court opinions will look electronically. Such footnotes would not improve the flow of the documents when there are bottomless pages.

[1] William Glaberson, "Legal Citations on Trial in Innovation v. Tradition," 150 N.Y. Times 1 (July 8, 2001).

[2] Bryan A. Garner, *The Winning Brief*, 114 (Oxford U. Press 1999).

Lawyer Briefs

Most legal writing students will never be judges. Certainly, it is unlikely they will become judges immediately after law school. Thus, the debate over whether court opinions should use citation footnotes instead of citations in text is almost entirely irrelevant to the teaching of legal writing to a typical law student. Of considerably more interest is the question of whether lawyers preparing briefs for courts should use citation footnotes or citations in text. As to *that* question, the dispositive answer is that lawyers need to know their audience. If a given judge likes citations in footnotes, use them. If the judge does not like citations in footnotes, then do *not* use them. Even Garner ultimately recognizes this; he just treats this proposition as an aside,[3] whereas it is in fact the single most determinative criterion. Most judges with whom I have talked do not like legal authorities cited in footnotes.

That said, there are a number of reasons why lawyers preparing briefs could rationally decide to place their citations to authorities in the main text of their documents (as has been traditional practice), as opposed to using citation footnotes. These reasons include the following:

First, unlike a court opinion, a brief's purpose is expressly argumentative. The lawyer's task is not to explain the law objectively; the lawyer's job is to persuade a court that a client's view of the law is correct, and should be applied to specific facts to arrive at a particular pro-client result. One of the lawyer's principal tools in this process is stare decisis. The lawyer does not want to relegate an important case's citation to a mere footnote. The lawyer wants the citation inescapably staring the court in the face. In a brief, citations are not merely incidental to the main purpose of the documents; they are *integral* to that purpose.

Second, many of the points made above as to footnote citations in court opinions are equally applicable to lawyer-prepared briefs. Do we really want legal briefs looking like law review articles? Do we want legal briefs containing lots of citation footnotes in an age when briefs will increasingly be filed electronically?

Finally, the *real* problem with bad prose, more often than not, is that the writer has not figured out what to say, so the prose reflects that. *There* is the problem that should be on the front page of the *New York Times.*[4]

Postscript

Following the original submission of this article for publication, a point/counterpoint discussion of the great footnote debate appeared in volume 38, issue 2, of *Court Review* (Summer 2001). Bryan Garner argued in favor of citation footnotes. Judge Richard Posner argued against them. Justice Rodney Davis argued in favor of them, while recognizing some of the practical difficulties they present.

There are two points about the *Court Review* debate worth adding for present purposes. The first is that the entire discussion in *Court Review* relates to the use of citation footnotes in judicial opinions. The discussion is not directed to the separate question of whether such footnotes are a good idea in lawyer briefs.

The second point is that the debate in *Court Review* ultimately revolves around the following Garner contention: "[Most judicial writers] interrupt their prose with *lots* of names and *meaningless* numbers. These are serious impediments to *readability*."[5] (Emphasis added.) My response is as follows: (a) To the extent the perceived problem is *lots* of case names, one solution is to avoid string citations. They are not useful except in "weight of the authority"

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[3] Garner, *The Winning Brief*, at 117.

[4] Those readers most interested in the debate may wish to review the following additional sources: K.K. DuVivier, *Footnote Citations?*, 30–May Colo. Law. 47, 48 (2001) (concluding that footnote citations are not currently the "best remedy for concerns about the readability of a brief."); Paul F. McAloon, *Defending the Lowly Footnote*, 73–Apr. N.Y.St. B.J. 64 (2001); Edward R. Becker, *In Praise of Footnotes*, ABA J (July 1996) at 104 (arguing for the proper use of footnotes to convey citations and other information to make them "readily available without getting in the way."); R. Aldisert, *Opinion Writing* 178 (West 1990) (suggesting the use of footnotes "to set forth multiple citations in order to support a single proposition in the text."); Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 648, 652 (1985) (generally describing the use of footnotes in judicial opinions as an "abomination," but describing authority citation footnotes as "the easiest to defend.").

[5] Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 Court Rev. 4, 16 (Summer 2001).

arguments. The best solution is not to simply move them to footnotes. (b) To the extent the perceived problem is *meaningless* numbers, that is not a problem for lawyer briefs in which the audience is a judge and where an advocate's pinpoint citation to an important authority that says exactly what the advocate claims it says is integral to the credibility of the advocate's argument. The problem in lawyer briefs is not meaningless *numbers*; it is citation to meaningless *authorities*. (c) To the extent the perceived problem is readability, is the solution to use footnotes? Isn't a better solution to have a clear point to make, to make it in short, plain sentences, to cite only to genuinely material authorities, and to put the citations to those material authorities at the end of sentences rather than in the middle?