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Commentary: Tread Lightly With Footnotes

Seven Tips for Effective Usage, or Why Judges Are Not Like Pigs Hunting for Truffles

Footnotes can be distracting. But avoiding them entirely is not the answer, writes Martin J. Siegel. Used incorrectly and excessively, footnotes tax the reader and reflect poor writing. Used properly and sparingly, they add to a brief's overall effectiveness. He offers seven lessons for footnotes done right, starting with "Don't. They should be the rare exception, not the rule."

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In "The Footnote: A Curious History," Anthony Grafton quotes Noël Coward as saying that "having to read a footnote resembles having to go downstairs to answer the door while in the midst of making love."

Yes, footnotes can be distracting. But avoiding them entirely is not the answer. Used incorrectly and excessively, footnotes tax the reader and reflect poor writing. Used properly and sparingly, they add to a brief's overall effectiveness. Here are seven lessons for footnotes done right.

• *Lesson No. 1*. The first and most important thing when it comes to writing with footnotes is: Don't. They should be the rare exception, not the rule, and most pages shouldn't include them. If it isn't important enough to be in the body of the brief, it's probably unnecessary.

Still, all rules have exceptions, and there are times when footnotes make sense. A footnote is a good way to anticipate or respond to a secondary argument or distinguish contrary authority. The body of the brief should address the other side's main arguments and cases. However, if two or three sentences can dispose of a lesser point or decision and completely disregarding it would invite danger, a footnote is the tool of choice.

• *Lesson No. 2*. Footnotes are also ideal homes for string cites, but employ them sparingly, not for run-of-the-mill propositions. When it matters that many or different courts agree, as when the other side invokes contrary authority, a footnote is the best place for the citations.

What about consigning all citations to footnotes? This is a long-simmering debate interesting only to the sort of person who scours used bookstores for old manuals of style. There is no right answer, just personal preference. Mine is for including citations in the body of the brief, so judges won't have to stop and scan the bottom of the page to see what courts made the decisions and when.

• *Lesson No. 3* . Housekeeping belongs in footnotes. Drop a footnote to answer a question about the facts or procedural history that, while nonessential, would otherwise nag the reader. Set out the full text of statutes or rules in footnotes, saving the relevant portion for the body.

• *Lesson No. 4*. Some jobs aren't meant for footnotes. Don't use them to present the entirety of an argument unless the client won't

mind if the court finds the argument waived. As the 7th U.S. Circuit Court of Appeals wrote in *U.S. v. Dunkel* (1991), "Judges are not like pigs, hunting for truffles buried in briefs." Many courts treat an argument raised only in a footnote as inadequately preserved for appellate review.

Nor should footnotes serve as sanctuaries for personal attacks on the court or opposition. Lawyers occasionally seem to think that otherwise inappropriate invective will pass muster as long as it hides out in a footnote, but the court is unlikely to see it that way. Counsel should resist the temptation to score this sort of point in a footnote no less than she would in the text above.

Lastly, showing off needless or irrelevant erudition or research is not a wise use of footnotes. If the citations or legal discussion directly advance the argument, fine. But briefs are not law review articles, where footnotes are accepted vehicles to explore tangents or display breadth of scholarship.

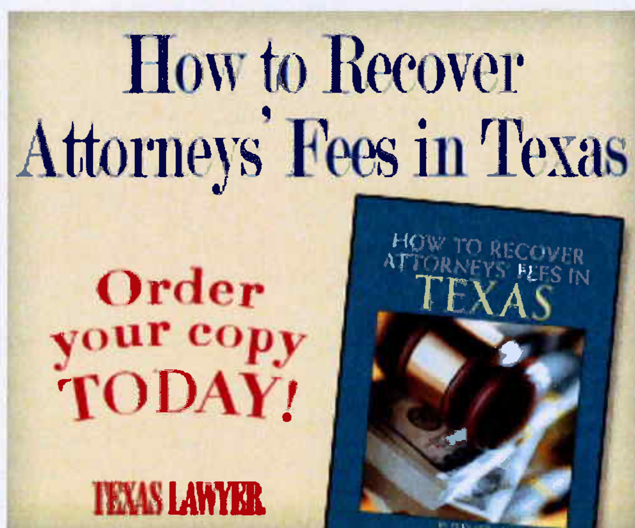
• *Lesson No. 5.* When using footnotes, the admonition to edit and refine goes double. While all parts of a brief require rigorous review and honing to the bare essentials, the need for accuracy and brevity is especially acute for footnotes. Their very nature is distracting. The reader's eyes should not linger at the bottom of the page, away from the main event, for a moment longer than necessary, so weigh every word carefully and make the footnote as tight as possible.

• *Lesson No. 6.* Footnotes should not appear in typeface smaller than 12-point. Although Texas Rule of Appellate Procedure 9.4(e) allows use of 10-point type, it is too small for comfortable reading. On the other hand, do use a smaller typeface for footnotes to set them off from the body of the brief.

• *Lesson No. 7* . Finally, footnotes are not a handy way to circumvent the rules governing the length of briefs. If the case is in a court that regulates length through word limits, such as a federal court of appeals, this will be impossible, since Federal Rule of Appellate Procedure 32(a)(7) counts words in footnotes toward the limit. While the strategy may appear more promising in Texas appellate courts, which enforce length though page limits, it is still inadvisable. Judges notice and hate such things.

In one case decided when federal appellate courts had a page limit rather than a word limit, *Varda Inc. v. Insurance Co. of North America* (1995), the 2nd U.S. Circuit Court of Appeals ordered the prevailing party to pay the loser's costs because the winner squeezed so much extra text into no fewer than 58 footnotes. If the facts and argument in the footnotes had been in the brief, it would have been 20 pages over the limit.

In shifting the costs, the 2nd Circuit recalled a case from 1596, in which an English judge actually imprisoned a lawyer for filing a 120-page pleading. The judge ordered the warden to cut a hole in the document, place it around the lawyer's neck, and "lead the said [pleader] bareheaded and barefaced round about Westminster Hall, whilst the Courts are sitting, and . . . show him at the Bar of every of the three Courts within the Hall." As the 2nd Circuit wistfully concluded, the over-footnoted brief "stirs nostalgia for the rigors of the common law."



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