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The Footnote=An Interruption

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The Scrivener: Modern Legal Writing



The Footnote = An Interruption

by K.K. DuVivier

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A footnote is like being called downstairs to answer the doorbell while enjoying the rites of the bedroom.

Noel Coward

The footnote is a familiar tool in legal scholarship. Some of the best law review articles, legal encyclopedias, and legal treatises devote half of each page to detailed, supporting footnotes. Footnotes make sense in this context. Readers of these sources have a dual objective: to glean a general framework for an argument and to find specific authorities to support each point. *The Colorado Lawyer* is such a research source. It lists authorities in endnotes so its readers may complete an article uninterrupted, but they also may find the more specific sources if they should need them.

In contrast to these research sources, briefs to a court should avoid footnotes. In a brief, your goal is to compel and persuade your readers. To be effective, the main text should flow coherently and should be easy to read. Footnotes defeat both of these aims.

Footnotes interrupt the flow of the main text. After turning to the footnote, the readers must take a few minutes to regain context. Or, if the readers wait to review the footnotes after finishing the main text, then the footnotes are out of context.

Footnotes make reading a brief more difficult. Many judges hate them, and some refuse to read them at all. Chief Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit stated, "If God had intended for us to use footnotes, He would have made our eyes vertical instead of horizontal."¹

Furthermore, do not be tempted to use footnotes to evade a page-limit restriction. Courts easily recognize this ploy and may question your integrity. The proposed amendment to

Rule 32 of the Federal Rules of Appellate Procedure specifically addresses footnotes. Subsection (7)(B)(iii) of the proposed amendment states that footnotes count toward the 280-words-per-page limit. The Committee Note for the proposed amendment states that the word count "eliminates any incentive to use footnotes or typographical 'tricks' to squeeze more material onto a page."

So, how can footnotes be avoided? Carefully consider your key arguments. If a point is important enough to say, you should say it in the main text. Cut out unnecessary details and asides that add little to your argument.

I am secretary of the Appellate Practice Subcommittee of the Litigation Section of the Colorado Bar Association. At a few of our meetings, we discussed footnotes. The consensus was to avoid them whenever possible. If you must include footnotes, try to limit yourself. Although the context will determine when footnotes are appropriate, a rule of thumb given was that within a thirty-page brief, one might use ten, but generally no more than four footnotes. Finally, the subcommittee discussed two occasions when footnotes might be appropriate because the information was significant, but its addition to the main text would weaken the flow of your argument.

First, footnotes may be helpful to supplement statements in the text. They can plug the holes and make your brief more complete. If you have an extensive quote to a statute or document or if you have a list of cases that support a point, you may want to discuss the key words or the main cases in the text and then list the additional detailed information in a footnote. Nobody likes string cites, but a footnote may be a good place to use one to show the weight of authority.

Example: The "battered child syndrome" is accepted as evidence of child abuse in a number of jurisdictions.fn

Fn: See, e.g., State v. Moyer, 151 Ariz. 253, 727 P.2d 31 (Ct. App. 1986); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); State v. Dumlao, 3 Conn. App. 607, 491 A.2d 404 (App. Ct. 1985).

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401 or through e-mail to: duvivier@spot.colorado.edu.

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Second, a footnote may be a good way to respond to peripheral arguments made by opposing counsel. Why dignify the point by putting it in your text? Use the text to be active, to put forward your main theory and to blend in responses to your opponent's strong arguments. Use a footnote to be reactive, to respond to your opponent's irrelevant cases or arguments.

Many courts, including the U.S. Supreme Court, include key points in footnotes to the courts' opinions.² However, using footnotes is one thing; reading them is another. Gain the courts' respect and gratitude: keep extensive footnotes out of your briefs.

NOTES

1. Powers, "Legal Writing Program Discusses 'Lost Words,'" *Syllabus* 4 (Fall 1993).

2. Leo Smith, Reporter of Decisions to the Colorado Court of Appeals, told me that the Colorado Court of Appeals does not use footnotes in its opinions. I had contacted him about an article I was preparing on citation form in the Colorado courts [DuVivier, "Are You Practicing an Uninformed System of Citation?" 23 *The Colorado Lawyer* 27 (January 1994)], and Mr. Smith wryly pointed out that I had ten footnotes in the article.



NITA National Session to be Held in Boulder: July 5-19

The National Institute for Trial Advocacy ("NITA"), in cooperation with CU Law School, will hold a national session at the Law School on July 5-19. The session will feature daily courtroom performances, small working groups with individualized instruction, critiquing and constructive suggestions from an expert faculty, faculty demonstrations, and videotape review. The curriculum includes the following topics: jury selection; opening statements; direct and cross-examination of law and expert witnesses; objections; examination of adverse witnesses; impeachment and rehabilitation; introduction of evidence and demonstrative exhibits; closing argument; exercises on case analysis and communication skills; and ethics.

The tuition for this NITA program is \$2,595; partial tuition scholarships may be awarded on the basis of financial need. CLE credit information will be available prior to the program. Early registration is encouraged because enrollment is limited. For more information, call NITA at (800) 225-6482.

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