



WRITING CLEARER LEGAL BRIEFS

Use Footnotes Sparingly

Savannah Blackwell

Last November, Judge Beth Labson Freeman of the U.S. District Court for the Northern District of California rejected a filing from class action attorneys who had stuffed seventy-six footnotes into a twenty-five-page brief. Squished, single-spaced annotations—dense citations, explanations and applications of law, key and ancillary arguments—swallowed the bottom half of nearly every page.

Judge Freeman, who sits in San Jose, received the excessively notated brief despite having issued a standing order instructing parties to use footnotes sparingly and refrain from dropping citations into them. She ordered the lawyers to file a new brief with “no footnotes.” Judge Freeman declined to be interviewed for this story.

Legal writing experts—academics and practitioners—and judges who were interviewed for this article all agreed: a brief rife with substantive footnotes is a poorly composed piece of advocacy. Filing such an egregious example, regardless of the standing order, was not a wise move.

“That sounds horrifying,” said Patricia Plunkett Hurley, who teaches legal research and writing at UC Berkeley School of Law (Berkeley Law). “It’s off-putting to very busy judges and their clerks, and everybody else. You’re not guiding them through your argument.”

“It would be unreadable,” said longtime appellate attorney Myron Moskowitz, who recently published a book about best techniques for appellate brief writing. “And not persuasive.”

While you won’t find the commandment in the California Rules of Court, the *California Style Manual*, or the federal equivalents, avoiding the substantive footnote—an annotation at the bottom of the page explaining or arguing a point related to one in the text—is a nearly universal principle of effective legal brief and memo writing.

“Most judges say use them sparingly, which is what we say [at Berkeley Law],” said Hurley.

That’s also what students are taught at UC Hastings Col-

lege of the Law (Hastings), said Reuel Schiller, associate dean for research at Hastings, and Stephen Tollafeld, associate director of the school's Legal Writing and Moot Court Department.

The reasons for avoiding substantive footnotes should seem obvious. They impede readability. They distract and potentially irritate the reader. They interrupt the flow of the logic and the language, thereby making it harder to follow the argument. The more difficult it is to follow the argument, the less likely it will prevail.

Legal brief writers should never relegate an important point or argument to a footnote, which, by its very nature, signals the text contained within is of lesser significance than that in the main body.


"If you want to make sure someone doesn't read what you're writing, put it in a footnote or a block quote," said Jim Humes, presiding justice of the First Division of the California Court of Appeal for the First Appellate District, and a former legal writing teacher. "The human eye passes right over footnotes and block quotes."

"Why hide something in a footnote?" asked Peter Rose, managing attorney for the First Appellate District.

Think of the Reader's Needs and the Purpose of the Writing

Long, textual footnotes may be appropriate in scholarly books or law review articles, but they do not suit the purpose of legal brief writing.

Readers of scholarly works have the luxury of time and "expect the writer to have exhaustively researched every angle and every area of their argument," said Tollafeld. Like Berkeley Law's Hurley, Tollafeld also teaches students to avoid substantive footnotes when writing memos for attorneys at law firms.



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—Judge Teri Jackson, assistant presiding judge, San Francisco Superior Court

For courts and practicing lawyers, "excessive footnotes undermine the kind of precision they're looking for," Tollafeld said.

Schiller put it this way: "A legal brief should be designed to deliver important information quickly and efficiently."

It would be hard to find a judge who would disagree.

"Judges want you to get to the main issues quickly," Judge Teri Jackson, assistant presiding judge of the San Francisco Superior Court, said. "When I sit down and read a brief, I want it to be clear and to the point. Squeezing substantive arguments into footnotes is not effective."

"If you really can't cover all the necessary points to make your argument in the allotted page limit, then you should seek leave of the court to ask permission to file a longer brief," Judge Jackson added. "That is basic."

Overuse of Footnotes Is a Product of Poor Thinking and Poor Planning

Excessive annotation is a sign the writer hasn't done the critical front-end work of identifying her strongest arguments and determining the most logical ordering of their components.

In other words, it shows she has not thought out what she wants to say.

Throwing in a lot of footnotes is “sloppy organization and sloppy thinking,” said Chris Gauger, the supervising attorney of the Research Unit at the San Francisco Public Defender’s Office.

It’s a problem rooted in an inability to organize, agreed appellate attorney Moskowitz.

Gauger is a proponent of the “up-or-out” approach favored by many legal writing experts, including Bryan Garner, the editor of *Black’s Law Dictionary* and numerous writing guides. If the argument or point is important enough to mention at all, it should go “up” in the main body. Otherwise, it’s “out.”

Do not put supporting points for your argument in footnotes, either, said Schiller. “If it’s self-evident, you don’t need the footnote. If it’s not, then you need it up in the text.”

The subject of footnotes provides an opportunity to teach students about the importance of editing, said Schiller, Tollafield, and Hurley. “They should be asking, ‘Is this [point] important? Or is it something that just gratifies my ego in some way?’” Tollafield said. Resisting the urge to footnote “is about exercising control over expression and having discipline as a writer.”

Appellate attorney Polly Estes, who worked at the United States Court of Appeals for the Ninth Circuit for twelve years—four as a staff attorney in the motions unit, and eight as chief clerk to Judge Carlos Bea—said the briefings that came across her desk at the court, in her practice, and in clerkships in Texas rarely contained excessive, substantive footnotes.

Rose said the number of footnote-clogged briefs filed at the First Appellate District of the California Court of Appeal has dropped significantly since the rules were changed to impose word limits for briefs and motions, instead of page limits, and a rule was added specifying that footnotes count toward the word limit.

But Moskowitz said he still encounters briefings jammed with substantive footnotes. He attributes the problem to judges’ overuse of footnotes in their opinions. “Judges say lawyers shouldn’t put substance into footnotes,” he said. “But they do it. Lawyers tend to tack to what judges do in their opinions.”

Hurley, however, pointed out that the court “can do whatever it wants.” Attorneys, on the other hand, would be wise to do as judges say, not necessarily as they do, and always, always check to see if the bench has issued a standing order concerning citations and footnotes (or anything else for that matter).

Of Course, There Is an Exception to the Rule

Some jurists are known for taking a hard-line approach to the issue. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit, for example, has never used a footnote in any opinion he has written in his thirty-four-year career as a judge. United States Supreme Court Justice Stephen Breyer likewise follows a “no footnotes” philosophy.

But others believe there’s a time and place for a substantive footnote—limited to those occasions when failing to address an ancillary point is likely to produce a lingering state of distraction in the reader, but interrupting the flow of the main text would be problematic as well.

The late United States Supreme Court Justice Antonin Scalia, in *Making Your Case: The Art of Persuading Judges*, which he coauthored with legal writing guru Garner, argued, “Some relatively unimportant matters are worth discussing below in the text.” Scalia then quoted Judge Frank Easterbrook, a colleague of Posner’s on the Seventh Circuit and a former deputy solicitor general, from a letter Judge Easterbrook wrote to the high court explaining the “SG’s” style of using footnotes not only “to anticipate the other side’s weaker arguments,” but also “to address arguments that the other side has never made—but that the justices or their clerks might think up.



“Putting such information in footnotes makes it possible to file a cogent and streamlined brief, the sort of thing that will persuade on first reading, while keeping potentially helpful elaboration available for the judge to consult later.”

Formerly an adherent to the “up-or-out” policy of footnoting, Justice Humes said he’s come to support use of substantive footnotes—when needed to stave off reader distraction.

“Sometimes there is an issue that is very tangential, but if you don’t say something about it, it can be distracting to the reader, because the reader is left wondering if there’s something to that tangential,” Justice Humes said. “You want to do whatever you can to make sure the reader doesn’t get distracted. To help focus the reader, you dismiss the argument or tangent without putting it in the main text.

“While [having] too many footnotes distracts the reader, sometimes putting in one will reduce distraction.”

Appellate attorney Estes has found this limited use of substantive footnotes helpful when writing for judges. She uses a substantive footnote “to quickly answer a tangential question you know will pop into their minds,” she said. “Then they can relax and refocus their attention on following the story in the logical manner in which you’ve presented it. It frees up their concentration.”

Of course, footnotes can be used for reference, rather than substantive, purposes.

Rose, for example, mentioned using a footnote to quote the full text of a statute, when quoting only a portion in the main body.

Moskovitz uses a footnote when he needs to correct a mistake in the record, to help the clerk avoid confusion.

“I never put arguments in a footnote,” he said. “Footnotes should be just for law clerks.”

The *California Style Manual* includes some examples of use of footnotes for nonsubstantive purposes, such as for explaining that all future references to a code or set of rules unidentified in the body of the brief will be to the one fully cited in the main text on initial reference.

But when it comes to substantive matters—making your arguments, explaining the law, showing how and why the cited authority supports your position—“there has to be a strong presumption against textual footnotes,” as Hastings’s Schiller put it. “It’s about streamlining.”

Hurley and her Berkeley Law colleagues plan to use the story about Judge Freeman’s rejection of the footnote-jammed brief as a teaching tool.

“The big takeaway point is to remember your basic task, which is to persuade and inform the court as for your strongest argument,” she said. “You can’t do that when you’re alienating them with any kind of less helpful writing like bogging them down in footnotes.

“You have to guide the judge. Take the court by the hand. To do that, you tell it as concisely and clearly as you possibly can.”

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