

Down with Footnotes*

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I abhor footnotes. And so do many of my colleagues on the bench.¹

Any information important enough to communicate to a judge belongs in the body of the document, not in a subterranean reservoir. Even if the information might be trivial, tangential, background, or expository, it still belongs in the body of the document.

Motions, memoranda, briefs, and other documents to be read by a judge should avoid footnotes altogether.² “Either a point is sufficiently significant to make, in which case it should be in the text, or it is not, in which case, don’t make it.”³ Leave the awkwardness of footnotes for legal treatises, law-review articles, law books, and bar journals, where itsy-bitsy numbers are standard fare.⁴

I have yet to come across something “footnoteable” that could not be incorporated into the text, possibly set off in parentheses.⁵ In my experience, the more the eyes (and head) bounce

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¹ When you came across the reference to this footnote in the text, you were curious, so curious that you immediately looked down here, right? Most readers cannot resist the temptation to take a look-see at a footnote.

² I go one step further than the late federal appeals judge Abner Mikva, a fellow foe of footnotes, who wrote, “I consider footnotes in judicial opinions an abomination.” Abner J. Mikva, *Goodbye to Footnotes*, 56 U. Colo. L. Rev. 647, 647 (1985).

³ *In Justice Breyer’s Opinion, a Footnote Has No Place*, N.Y. Times (July 28, 1995), <https://www.nytimes.com/1995/07/28/us/in-justice-breyer-s-opinion-a-footnote-has-no-place.html>.

⁴ As you read this article, think of it as a brief filled with footnotes.

⁵ I completely agree with Professor Rodell, who wrote in his classic bashing of footnotes, “[T]he footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes.” Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 41 (1936).

between text and tomb, the more intrusive and irksome it is, and the more potential there is for the mind to wander. Footnotes nag the reader, pulling at his or her attention and distracting from the text's narrative.⁶

Thirty-five years ago, one of the early advocates for plain English in legal writing, Professor David Mellinkoff, wrote, "Footnotes are used because they make legal writing look 'legal.'"⁷ That was not meant as an endorsement.

Although Mellinkoff described footnotes as "annoy[ing],"⁸ "a pain in the neck,"⁹ and "like watching a vertical tennis game,"¹⁰ he concluded that "footnotes are not all bad."¹¹ He then prescribed four appropriate reasons for using footnotes: (1) emergencies; (2) adding details about an assertion's source;¹² (3) giving context; and (4) adding special effects.¹³ None of these justifications survives scrutiny today.

As to emergencies (Mellinkoff gave the example of a newly discovered authority), computers have ended the need to use footnotes for last-minute inserts.

Next, an assertion's source belongs near the assertion rather than hidden out of eyesight in the bowels of the document. Even Mellinkoff said as much, admitting that "footnotes to sources

⁶ Judge Mikva again: "I hate to read footnotes. I always lose my place in the text and miss the train of thought the author is trying to get me on. But I am afraid that the footnote I fail to read is the key to the whole thing . . ." Mikva, 56 U. Colo. L. Rev. at 653.

⁷ David Mellinkoff, *Legal Writing: Sense & Nonsense* 94 (1982).

⁸ *Id.* Welcome back!

⁹ *Id.* I don't know about you, but right about footnote 9, I get out the pain-relief cream (greaseless because I wear dress shirts every day) and apply it to the back of my neck.

¹⁰ *Id.* Reading footnotes makes you act like a human bobblehead on steroids.

¹¹ *Id.* Yep, you just made another useless trek to the bottom of the page.

¹² Never use footnotes for legal analysis or citation to legal authority. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 133–34 (2008) (Scalia's view).

¹³ *Id.* at 94–95. Time to bring out the mega-maximum ultra-strength pain-relief cream.

distract the reader” and that “some good legal writers” prefer placing sources in the text.¹⁴

Then there is “context,” in which expanded portions of statutes, regulations, transcripts, and similar material are “available to those who need it, without disturbing the reading ease of those who don’t.”¹⁵ I appreciate that sometimes these materials need to be quoted at length. Consider instead putting the material in an appendix or an attachment.

Finally, Mellinkoff favored “a footnote to create a special effect — dramatic, humorous,¹⁶ a sidelight.”¹⁷ Drama in a footnote? Drama in a legal document is so uncommon that it deserves prominence and visibility, which exists only in the text. As for humor, don’t ever try to be funny, footnotes or no footnotes.¹⁸ If a sidelight has any value, again, it belongs in the document’s body, where it can be read in context.¹⁹

You can write persuasively and effectively without footnotes. Whenever you fancy a footnote, banish it from your mind.

My neck feels better already.²⁰

¹⁴ *Id.* at 95. Frustrated yet?

¹⁵ *Id.* (“*Id.*” is short for “idiotic.” What else do you call a footnote that is meant to banish two letters and a period?)

¹⁶ Mellinkoff must have been in a joyful mood when he listed “humorous.” Legal documents should abstain from humor. Something you find funny, a judge may find offensive, condescending, or callous.

¹⁷ *Id.* Another “*Id.*” The writing gods know no mercy.

¹⁸ Best to leave humorous asides to judges, though I advise judges to also stay clear of humor, except for a little wit here and there. The difference between wit and humor, according to 18th-century humorist Josh Billings, is that wit makes one think, while humor makes one laugh.

¹⁹ The reigning guru of legal writing, Bryan Garner, counsels, “If you scrupulously avoid footnotes, you will win over more readers than if you make a fetish of them.” Bryan A. Garner, *The Elements of Legal Style* 92 (1991). Wouldn’t it have been just as easy to have read Garner’s revelation in the text? Yes, it would have.

²⁰ To understand this humorous (witty?) statement, you need to have read footnotes 9 through 11.