The Citational Footnote

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Back in 1984, when I was clerking for the Fifth Circuit, I noticed that Judge John Minor Wisdom and Judge Alvin Rubin were writing some wonderfully clean judicial opinions. They had stripped the text of all citations — not case names, but all the numbers and other bibliographic information that typically follow the case names — and put them into footnotes. As a result, those judges' opinions actually had a discernible train of thought.

Now that's an unusual thing in legal writing.

Today, more and more judges and lawyers are starting to subordinate bibliographic references by relegating them to footnotes. There are many good reasons for making the change. But before we tally them, let's be clear what we're talking about. Two points merit attention here.

First, let's agree that readers shouldn't have to look at footnotes to understand the writer's point. And they shouldn't have to glance down to see what primary authority the writer is relying on. That ought to be up in the text, as part of a sentence in which one discusses the authority. Mainly the numbers — the bibliographic information — ought to be out of the way. It's true, though, that while the names of important cases (and perhaps of the courts that decided them) should appear in the textual discussion, cases cited for preliminary propositions might be cited exclusively in footnotes.

Second, we're not talking about substantive footnotes. I've long campaigned against so-called "talking footnotes,"[1] and this journal (which I've edited for a decade) is probably the only law journal that all but forbids them.[2] What we're talking about is the noxious

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[1] *See, e.g.*, GARNER, THE ELEMENTS OF LEGAL STYLE 91–92 (1991); GARNER, A DICTIONARY OF MODERN LEGAL USAGE 364 (2d ed. 1995); GARNER, THE WINNING BRIEF 117, 120–21 (1999).

[2] *See* THE SCRIBES JOURNAL OF LEGAL WRITING (since 1990).

habit of interspersing bibliographic references throughout legal analysis (or what commonly passes as legal analysis).

Getting Inured to Thought-Interrupters

Do you remember when you first started reading law? You were probably reading a judicial opinion, and surely among the most irksome things about the experience was encountering all the citations in the text. For beginning legal readers, the prose is quite jarring — as if you were driving down a highway filled with speed bumps.

These thought-interrupters were born of a technologically impoverished world. Originally, lawyers used scriveners who interspersed authorities in their notes. Then, in the 1880s, typewriters became popular, and it was all but impossible to put citations in footnotes. That's why citations have traditionally appeared in the text. They were there in 1900, they were there in 1925, they were there in 1950, and they were still there in 1975. It became a hardened convention.

Meanwhile, of course, the number of cases being cited in legal writing erupted during the years leading up to 1975. And by the turn of the 21st century, things had gotten even worse. With computer research and the proliferation of caselaw, it has become easier than ever to find several cases to support virtually every sentence. Only today I was reading a brief that had an *average* of 12 cases cited on each page.

Over time, the pages of judicial opinions, briefs, and memos have become increasingly cluttered. Some have become unreadable. Others are readable only by those mentally and emotionally hardy enough to trample through the underbrush.

As much as citations may plague readers, though, they plague writers even more. That is, when you put citations within and between sentences, it's hard to come up with shapely paragraphs. The connections between consecutive sentences get weaker. But worse, legal writers often intend a single sentence, followed by a

string citation with parentheticals, to stand for a paragraph. After all, it fills up a third or even half of the page. How would such a paragraph fare with a fourth-grade teacher? It would flunk.

In short, it doesn't really matter whether readers can negotiate their way through eddies of citations — because, on the whole, writers can't.

Reference notes can cure these ills. That is, put citations — and generally only citations — in footnotes. And write in such a way that no reader would ever have to look at your footnotes to know what important authorities you're relying on. If you're quoting an opinion, you should — in the text — name the court you're quoting, the year of the case, and (if necessary) the name of the case. Those things should be part of your story line. Just get the numbers (that is, the volume, reporter, and page references) out of the way.

If footnoting your citations seems like such a revolutionary idea, ask yourself why you've never seen a biography that reads like this:

> Holmes was ready for the final charge. His intellectual powers intact (Interview by Felix Frankfurter with Harold Laski, 23 Mar. 1938, at 45, unpublished manuscript on file with the author), he organized his work efficiently so that little time was wasted (3 Holmes Diary at 275, Langdell Law Library Manuscript No. 123-44-337; Holmes letter to Isabel Curtain, 24 June 1923, Langdell Law Library Manuscript No. 123-44-599). He volunteered less often to relieve others of their caseloads (Holmes court memo, 24 July 1923, at 4, Library of Congress Rare Book Room Doc. No. 1923-AAC-Holmes-494), and he sometimes had to be reassured of his usefulness (Brandeis letter to Felix Frankfurter, 3 Mar. 1923, Brandeis Univ. Manuscript Collection Doc. No. 23-3-3-BF). His doctor gave him a clean bill of health (Mass. Archives Doc. No. 23–47899–32, at 1), told him his heart was "a good pump" (Holmes letter to Letitia Fontaine, 25 June 1923, at 2, Langdell Law Library Manuscript No. 123-44-651), and told him that very few men of Holmes's age were "as well off as he was" (*id.*) — to which Holmes drily replied that "most of them are dead" (Memo of Dr. Theobald Marmor, 26 June 1923, at 2, Morgan Library Collection, copy on file with the author). But he was pleased that the "main machinery" was "in good running order" (Holmes letter to Letitia Fontaine, 25 June 1923, at 1, Langdell Law Library Manuscript No. 123-44-651), and he

> frequently felt perky enough to get out of the carriage partway home from court and walk the remaining blocks with Brandeis (Brandeis letter to Clare Eustacia Bodnar, 22 July 1923, Brandeis Univ. Manuscript Collection Doc. No. 23-7-22-BCEBB).

No self-respecting historian would write that way. But brief-writers commonly do something very much like it:

> Agency decisions are entitled to the greatest weight and to a presumption of validity, when the decision is viewed in the light most favorable to the agency. *Baltimore Lutheran High Sch. Ass'n v. Employment Security Admin.*, 302 Md. 649, 662–63, 490 A.2d 701, 708 (1985); *Board of Educ. of Montgomery County v. Paynter*, 303 Md. 22, 40, 491 A.2d 1186, 1195 (1985); *Nationwide Mut. Ins. Co. v. Insurance Comm'r*, 67 Md. App. 727, 737, 509 A.2d 719, 724, *cert. denied*, 307 Md. 433, 514 A.2d 1211 (1986); *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513, 390 A.2d 1119, 1124 (1978). Thus, the reviewing court will not substitute its judgment for that of the agency when the issue is fairly debatable and the record contains substantial evidence to support the administrative decision. *Howard County v. Dorsey*, 45 Md. App. 692, 700, 416 A.2d 23, 27 (1980); *Mayor and Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 395–96, 396 A.2d 1080, 1087–88 (1979); *Cason v. Board of County Comm'rs for Prince George's County*, 261 Md. 699, 707, 276 A.2d 661, 665 (1971); *Germenko v. County Board of Appeals of Baltimore County*, 257 Md. 706, 711, 264 A.2d 825, 828 (1970); *Bonnie View Country Club, Inc. v. Glass*, 242 Md. 46, 52, 217 A.2d 647, 651 (1966). The court may substitute its judgment only as to an error made on an issue of law. *State Election Board v. Billhimer*, 314 Md. 46, 59, 548 A.2d 819, 826 (1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989); *Gray v. Anne Arundel Co.*, 73 Md. App. 301, 308, 533 A.2d 1325, 1329 (1987).

That's a fairly serious example of excessive citations, but it's actually mild compared to what writers do when coupling parentheticals with the citations.

The problem wasn't so bad 150 years ago, when relatively few cases would typically appear over a span of several pages. Today, partly because caselaw has mushroomed, much legal writing has become nearly unreadable. I'd like legal writers to stop producing so-called "prose" that looks like this:

> To state a claim under Rule 10b-5, a complaint must allege that the defendant falsely represented or omitted to disclose a material fact in connection with the purchase or sale of a security with the intent to deceive or defraud. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). A party's specific promise to perform a particular act in the future, while secretly intending not to perform that act or knowing that the act could not be carried out, may violate § 10(b) and Rule 10b-5 if the promise is part of the consideration for the transfer of securities. *See, e.g., Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir. 1986) (citing *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir.), *cert. denied*, 454 U.S. 835, 102 S.Ct. 136, 70 L.Ed.2d 114 (1981)); *Wilsmann v. Upjohn Co.*, 775 F.2d 713, 719 (6th Cir. 1985) (concluding that plaintiff's securities-fraud claim against acquiring corporation was in connection with defendant's purchase of plaintiff's stock where plaintiff alleged that part of consideration for sale of stock was false promise by acquiring corporation concerning future payments for stock plaintiff received in acquired corporation but holding that evidence of fraud was insufficient to support jury's verdict), *cert. denied*, 476 U.S. 1171, 106 S.Ct. 2893, 90 L.Ed.2d 980 (1986). *But see Hunt v. Robinson*, 852 F.2d 786, 787 (4th Cir. 1988) (holding that defendant's failure to tender shares in new company in return for plaintiff's employment did not state securities-fraud claim because the defendant's alleged misrepresentation concerned its tender of shares as required by the terms of the employment contract, not the actual sale of stock). The failure to perform a promise, however, does not constitute fraud if the promise was made with the good-faith expectation that it would be performed. *See Luce*, 802 F.2d at 56.

Double-spacing aggravates this problem in a particularly virulent way because consecutive sentences get further separated and paragraph breaks become more infrequent.

Even if you strip out the citations, something the careful reader will have to do anyway (by mental contortion), you end up with unimpressive, wooden prose:

> To state a claim under Rule 10b-5, a complaint must allege that the defendant falsely represented or omitted to disclose a material fact in connection with the purchase or sale of a security with the intent to deceive or defraud. A party's specific promise to perform a particular act in the future, while secretly intending not to perform that act or knowing that the act could not be carried out, may violate § 10(b) and Rule 10b-5 if the promise is part of the consideration for the transfer of securities. The

> failure to perform a promise, however, does not constitute fraud if the promise was made with the good-faith expectation that it would be performed.

But now that you can see what you're actually saying, you can more easily focus on style. So you edit the paragraph:

> To state a claim under Rule 10b-5, a complaint must allege that the defendant — intending to deceive or defraud — falsely represented or failed to disclose a material fact about the purchase or sale of a security. A party's specific promise to do something in the future, while secretly intending not to do it or knowing that it can't be done, may violate Rule 10b-5 if the promise is part of the consideration for the transfer. But not performing the promise isn't fraud if the promisor expected in good faith to be able to perform.

The revised passage isn't a work of art. But it's much closer than the original is — and probably as close as most discussions of Rule 10b-5 ever could be.

Go back and look at the original passage. Look at how much more difficult it is to tease out the essential ideas. In your imagination, try double-spacing it, so that you fill up the entire page. Now imagine page after page of this. You get the idea.

Although objectors say there is no sound reason for footnoting citations, in fact there are at least ten good reasons. Although some of these are related, they're subtly distinct. Here's what happens when you effectively use citational footnotes:

1. You're able to strip down an argument and focus on what you're saying.

2. You're able to write more fully developed paragraphs.

3. Meanwhile, your paragraphs will be significantly shorter than they would be with the citations in the text.

4. You're able to connect your sentences smoothly, with simple transitional words. Typically when citations are between

sentences, writers tend to repeat several words that aren't necessary once the sentences are put together without citational interruptions.

5. You're able to use greater variety in sentence patterns, especially in the use of subordinate clauses.

6. You can't camouflage poor writing — or poor thinking — in a flurry of citations. And you won't be tempted to bury important parts of your analysis in parentheticals.

7. String citations become relatively harmless. I don't favor them, but I'm not adamantly opposed to them either — not if they're out of the way.

8. You'll find it necessary to discuss important cases contextually, as opposed to merely relying on citations without ever discussing the cases you cite. You'll pay more respect to important precedent by actually discussing it instead of simply identifying it in a "citation sentence," which isn't really a sentence at all.

9. You'll give emphasis where it's due. That is, the court and the case and the holding are often what matters ("Three years ago in *Gandy*, this Court held . . ."), but the numbers never are ("925 S.W.2d 696, 698" — etc.). Numbers, when sprinkled through the main text, tend to distract.

10. The page ends up looking significantly cleaner.

Many brief-writers and many judges have been persuaded by these points. They've begun using citational footnotes because they want to be better writers.

Over the past decade, I've conducted more than 25 judicial-writing seminars for state judges throughout the country. Although this point about footnoting citations is only the tiniest part of my

teaching, you see a trend emerging nationally. In Delaware, for example, four of the five supreme court justices put all their citations in footnotes. In Alaska today, virtually all reported cases have citations in footnotes. And you see the trend elsewhere — in Georgia, Minnesota, Texas, and Washington, to cite but a few examples.

Will It Really Work?

Some legal writers feel qualms about departing from established custom. Let me answer three common misgivings.

First, many writers fear that if they don't put citations up in the text, their readers won't know (1) what court is being cited, and (2) how recent the cases are. In fact, though, you generally won't be footnoting naked propositions of law. Instead, you should say something like "Just last year, the Third Circuit held — . . ." or "Section 28.007 of the Insurance Code requires . . ." so that the reader can get the gist of your authority without having to glance down at the bottom of the page.

Second, on a similar note, some object to footnoting citations on grounds that it supposedly diminishes the importance of precedent. No one ever leveled this accusation against Judge John Minor Wisdom or Judge Alvin Rubin, two of the most respected Fifth Circuit judges who, from about 1983 to the end of their careers, footnoted all their citations. As Judge Wisdom, a careful stylist, put it in a 1993 article: "Citations belong in a footnote: even one full citation such as 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990), breaks the thought; two, three, or more in one massive paragraph are an abomination."[3]

Third, many judges complain about footnotes.[1] True, other judges praise them,[2] but if you listen closely, the complaints are strong enough to give any sensible writer pause. In fact, I believe

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[3] John Minor Wisdom, *How I Write*, SCRIBES J. LEGAL WRITING 83, 86 (1993).

that the complaints are valid when directed at footnotes that contain substantive discussion. But I also know that most judges who hear the merits of reference notes and see good examples generally agree that textual citations are blemishes. Whenever I teach a seminar on judicial writing, a strong majority of the judges finally conclude that they think it makes sense to put citations in footnotes. A few others, however, think otherwise. And if you know that's what a judge thinks, take heed of the judge's preference. Just don't let your temporary heed become your regular habit.

Until the mid-1980s, law offices and judicial chambers had no choice. Citations had to go into the text. Only professional printers had a realistic option of footnoting citations. (Before typewriters were introduced in the 1880s, of course, mid-text citations were a scribal convention.) The personal computer liberated us of this technological constraint.

Speaking of technology, what about the argument that putting citations in footnotes complicates on-line legal research? Even if there are some shortcomings in some media, I'm confident that they're short-term problems. For example, hypertext links to footnotes will cure the problem of having them appear inconveniently as endnotes. In any event, though, I unabashedly believe that (1) the print form must have primacy; and (2) technology will readily adapt to footnoted citations for purposes of on-line research. If you have complaints, lobby the companies that provide WESTLAW and LEXIS and the courts that post their opinions on websites.

Helping Along the Glacial Change

In every state where I've spoken to judges, a majority have said that they would prefer footnoted citations. Reform is coming. It may take a generation or two, but it's coming. Gradually, legal writers will learn to put all citations in footnotes but to refrain from saying anything else in footnotes. The only frightening

prospect is that, when you're putting together an opinion or brief, piling citations onto the page won't be enough: you'll actually have to have a coherent thought worth expressing.

If the citational footnote becomes the norm, it will be one of the greatest helps in improving the expository prose that lawyers produce.

Examples of Cases Using Citational Footnotes

Anyone curious about what citational footnotes look like in context might look at any of the following cases. It's especially enlightening to compare them stylistically with other cases in the same volumes.

- *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986).
- *Alamo Rent A Car, Inc. v. Schulman*, 897 P.2d 405 (Wash. Ct. App. 1995).
- *Curry v. Curry*, 473 S.E.2d 760 (Ga. 1996).
- *Warden v. Hoar Constr. Co.*, 507 S.E.2d 428 (Ga. 1998).
- *KPMG Peat Marwick v. Harrison County Fin. Corp.*, 988 S.W.2d 746 (Tex. 1999).
- *M.P.M. Enters. v. Gilbert*, 731 A.2d 790 (Del. 1999).
- *Aleck v. Delvo Plastics, Inc.*, 972 P.2d 988 (Alaska 1999).
- *State v. Martin*, 975 P.2d 1020 (Wash. 1999) (en banc).
- *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (Tex. 1999).
- *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88 (Tex. 1999).
- *Williams v. Kimes*, 996 S.W.2d 43 (Mo. 1999) (en banc).
- *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864 (Tex. 1999).
- *United States v. Parsee*, 178 F.3d 374 (5th Cir. 1999).
- *McGray Constr. Co. v. Office of Workers Compensation Programs*, 181 F.3d 1008 (9th Cir. 1999).
- *Minneapolis Public Housing Auth. v. Lor*, 591 N.W.2d 700 (Minn. 1999).