A Functional Approach to Footnotes in Briefs and Opinions

by Roger D. Townsend[1]

During the past decade, many have discussed whether to place citations in footnotes in briefs and opinions. Bryan Garner, for one, recommends that all citations to authority be placed in footnotes, primarily to make it easier to follow the logic of the text. Bryan A. Garner, *The Winning Brief* 114-30 (1996) ["Garner, *The Winning Brief*"]. Several justices of the Texas Supreme Court, including Justice Nathan Hecht, share this view, though other appellate judges and many appellate lawyers have taken the opposite position. *See, e.g.*, William J. Boyce, et al., "To the Editor," 11 *The Appellate Advocate* 23 (State Bar of Texas 1997). As an appellate lawyer, I suggest that we adopt a functional perspective, though tempered by the practicalities of today's appellate system.

To determine where to place information, first consider the function of the information. Information in briefs and opinions comes in three forms — substantive information, citations of authority, and citations to the record. Each serves a distinct function. The distinct function should influence the location of the information.

Substantive information

Substantive information is textual information that is not primarily a citation to the record or to authority. Substantive information makes up most of a brief or an opinion.

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Accordingly, substantive information should appear in footnotes only in the most limited circumstances. One circumstance could be to provide a contextual quotation explaining a paraphrase or other quotation in the text. More controversially, a footnote can contain tangential information that must be included for completeness, but that is not important enough to be included in the body of the text. Yet, one must always ask whether information not important enough for the body of the text should be mentioned at all. As a result, footnotes containing substantive information should seldom exist in either opinions or briefs. Both Garner and Judge Posner agree. Richard. A. Posner, "Against Footnotes," 38 *Court Review* 24 (Summer 2001) [Posner, "Against Footnotes"]; Garner, *The Winning Brief* 115-17.

Citation to authorities

Views differ the most regarding citations to authorities. Garner suggests including them in footnotes, while Posner generally disagrees. Posner, "Against Footnotes"; Garner, *The Winning Brief* 114-30. Both agree, however, that footnotes can be appropriate for a string citation when a string citation is necessary to show the majority or minority rule. *Id.* Footnotes can similarly be useful to provide a comprehensive list of secondary authorities. Footnotes can be further used to quote a statute or case in full, when the meat is either quoted or paraphrased in the text. Footnotes also can be used to explain the history of a predecessor version of a statute, when the history is not germane to the argument.

But the ultimate problem with including citations to authorities in footnotes is that not all authorities are created equal. For example, one footnote may cite *Marbury v. Madison*, while the next may cite *Mad Magazine*. Unless the reader examines every footnote, the reader will not know the difference. Thus, readers are forced to shift their gaze up and down, running the risk of losing their place in the text. In the words of Judge Posner, "they make the reader worker harder for the same information." Posner, "Against Footnotes."

To alleviate this problem, Garner proposes including descriptive information in the text, so that the reader does not have to consult the footnote unless the reader actually wants to locate the authority. Garner, *The Winning Brief* 114-30. As an example, "In 1803 in *Marbury v. Madison*,[2] the Supreme Court held that it had the power of judicial review." From the text alone, the reader learns that in 1803 the United States Supreme Court gave itself the power of judicial review in a case entitled *Marbury v. Madison.* The only information in the footnote is where to locate that case. Thus, the footnote does not need to be consulted unless the reader wants to locate and review the case itself.

Academically, Garner's idea is appealing. But Garner's proposed solution has practical limitations that defeat its usefulness.

First, advocates face page or word limitations. Repeating information from footnotes in the text, especially for mere citations, wastes words and pages that can be better used in explaining the argument. The same should be true for judicial opinions. Of

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[2] 1 Cranch 137, 2 L. Ed. 60 (1803).

course, both briefs and opinions should be succinct, and when the case allows, I have no quarrel with Garner's suggestion solely on that ground.

Second, to the extent that Garner's suggestion cannot apply to all footnotes — since there may be the occasional substantive footnote — the reader may be left to guess whether it applies to the particular footnote. Thus, the reader will be tempted to glance down anyway just to be sure.

Third, many (perhaps most) advocates filing briefs will be unfamiliar with Garner's suggestion, so the readers of their briefs will have to examine the footnotes to see what they contain. Those of us who regularly teach at Continuing Legal Education courses are constantly reminded that the people who most need to hear our messages are not in attendance. Because most lawyers (and pro se parties) filing briefs will not know these subtleties, readers of their briefs will have to review all footnotes, since the readers can seldom be sure which briefs adhere to Garner's suggestion and which do not.

Further, even if a court were to adopt Garner's suggestion as a rule, I doubt whether the clerk's offices of the various appellate courts would have the resources to examine every footnote of every brief to enforce compliance. Thus, readers still may feel the need to look at every footnote to confirm there is nothing extra in it.

Thus, as an advocate, I think the preferred method is to cite authorities in the text. The savings in page space, the avoidance of the head-bobbing problem, and the tradition that most lawyers and judges have grown up with seem to outweigh Garner's recommendations as applied to the real world.

Citations to the record

Most court rules require, and all judges and accomplished advocates recommend, that every factual assertion in a brief be supported by a citation to the record. A citation to the record enables the reader, if in doubt, to locate a specific page in the record to verify the statement in the text. In practice, a busy court may rarely check the record unless (1) the fact cited affects the decision, or (2) opposing counsel disputes the fact. Consequently, the content of the citation contains secondary information, to be consulted only if necessary. The mere existence of *a* citation ordinarily suffices to assure the reader.

From a functional perspective, therefore, placing a citation to the record in a footnote makes sense. No one needs to know the substance of a citation to the record while reading the text; the reader wants to know only that a citation — any citation — exists.

Nevertheless, a reader may still experience the head-bobbing problem common to all footnotes. And this may occur even if the reader is informed (or the rules) require that every footnote will contain only a citation to the record. Reading habits are hard to break, and some brief writers will violate the convention even if mandated by a rule.

Another practical problem is that the record citation often will be short, such as "R 25." Placing that citation in a footnote takes an entire line on a page. For courts having page limitations on briefs, few advocates will want to use an entire line for a short footnoted record citation in a footnote. I have done my own study of this problem and found that it can account for eight to twelve pages in a fact-intensive brief of fifty pages.

For courts that now count words, rather than pages, then footnoted record references do not pose that problem.

Nevertheless, because of the head-bobbing problem, a theoretical solution would be to require that citations to the record occur in endnotes. The reader would not have to flip to the end of the brief while reading, only when checking the source of support for a particular assertion. Yet, to the same extent some advocates will violate the rule, endnotes for record citations will not work: the occasional writer may still place something there that should not be there, leaving the reader with a suspicion that the end-notes had better be reviewed contemporaneously with the text. This would defeat the purpose of such a rule, and it is more cumbersome to flip pages to locate endnotes, than simply to glance at a footnote at the bottom of the same page one is reading.

Differences between opinions and briefs

Functionally, the suggestions for briefs may not always apply to judicial opinions. Moreover, not all appellate opinions are equal. The highest court in a jurisdiction may be more inclined to cite authorities in footnotes, perhaps because — as the highest court in a jurisdiction — whatever it holds is binding. By contrast, lower courts may be more inclined to place their citations in the body of the text, so the reader can immediately determine whether the court is relying on binding precedent or merely a law-review article. That may explain some of the differences between judges about whether to place citations in footnotes. Judge Posner, who opposes citations in footnotes, is the judge on an intermediate court of appeals, the Seventh Circuit. Justice Hecht, who favors citations

in footnotes, is a judge on what is usually a court of last resort, the Supreme Court of Texas.

Despite these differences in opinion-writing, however, the preference for briefs should be different. All courts should want advocates in their briefs to cite authority in the body of the text so that the reader can quickly evaluate its strength, unless the advocate has enough space available to follow Garner's suggestion of repeating much of the same information from the footnote in the text.

A glimpse into the future

Before long, all briefs may be electronic, either in the form of a CD-ROM or simply posted on the Internet. Opinions are largely on the Internet now. With a simple click of the button, the reader can see a footnote and then click back to the text. When the electronic age fully arrives, the disagreement over footnotes may disappear, because the head-bobbing problem will be eliminated.

Until then, however, a functional difference does exist in the use of footnotes in briefs and opinions. There also is a difference between the use of footnotes between lower and higher courts. These previously unexplained differences may account for the divergent views that have been expressed on this subject. Despite all the interesting proposals, the practicalities of page and word limitations, limited appellate resources, and a largely uneducated bar currently renders many of the proposals for change largely academic.