



Litigation Practice Tip - April 2021

Don't start off on the wrong footnote: the best and worst uses of footnotes

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Footnotes are the bread and butter of law reviews and certain treatises. They are used to provide authority for virtually every sentence in the text; to expand upon points in the text; or just to provide side comments. While all of these may be worthy functions in academia, litigation briefs are different. Footnotes should play a much more limited role; use them judiciously.

Part 1: The Worst Uses of Footnotes

Putting all the cites in the footnotes. Some brief-writing seminars promote the idea that all citation to authority should be placed in footnotes. This is controversial and should be avoided for two major reasons.

First, it's not good advocacy. It makes the writer the show, when the show should be the law. The goal of your brief is not to have the judge conclude, "wow, that was a well-written brief!" Rather, you want the judge to think, "yes, counsel did a good job, but of course the facts and the law were totally on their side." For that to happen, the authority should be in the text. In addition, if the reader pauses to read the footnote, that interrupts the flow of the text.

Second and perhaps more important, courts simply don't like all the authorities in the footnotes rather than the text. One or two courts actually have rules prohibiting it, and both appellate justices and senior research attorneys I have heard unanimously condemn it.

Making arguments in footnotes. We have all done this, myself included. It's particularly tempting when you don't know where an argument fits into the organization of your brief.

But that's all the more reason to re-evaluate your organization, or to re-evaluate your argument. If the point is important, it should be in the text. If not, it shouldn't be in the brief at all. Otherwise, you are sending mixed signals. As one appellate court, cited in the Rutter Group's practice book, stated, "We are not fond of footnote arguments, as they make us unsure whether the appellant is attempting to raise a ground on appeal or is merely making a passing comment."

"Educating" judges with information they don't need. When you know a lot about a subject, it's tempting to share that information with an audience, especially a captive one, and you might think that footnotes are a good way to do that. Think again. The goal of the

brief is to persuade the court, not provide the judge with a free webinar. Ask yourself if the information is necessary for the judge to understand and decide the legal issue. If it is, the information belongs in the text. If the answer is no, delete.

Digressions. Avoid any footnotes that either begin with “By the way,” or could easily begin with “By the way.” Stay focused.^[1]

Part 2: The Best Uses of Footnotes

When necessary to preserve the flow of the text. The brief writing seminars are correct that throwing lots of lengthy cites to authority in the text, especially in the middle of a paragraph, can interrupt the flow of the argument. Sometimes a footnote can help with that problem, as, for example, when you paraphrase a statute and provide the text in a footnote. Footnotes can also help with unusually lengthy citations, such as some internet cites.

When an early footnote saves later space. In a related vein, a footnote placed early in a brief can save space in the later text and make the text easier to read. If, for example, the brief concerns CalWORKs or Medi-Cal, the first time you cite to a statute you can drop a footnote saying, “Unless otherwise stated, all statutory citations will be to the Welfare & Institutions Code.” Then further citations to that code can be signified just by “Section” or “§” followed by the relevant number of the code provision.

Collateral Points. The CEB practice book acknowledges that footnotes can be used to “mention a collateral point.” For example, if you are raising a point on appeal that wasn’t made in the trial court, you might acknowledge that in a footnote and explain why it’s permissible to do so under the circumstances. But arguably, even then you might want to make the point in the text, or save it for potential rebuttal in a closing brief. In any case, I agree with everybody who has written on the subject that the use of argumentative footnotes should be very limited.

So while it’s unnecessary and maybe not even desirable to eliminate all footnotes from your briefs, use them sparingly and wisely.

^[1] Careful readers of past Tips might note the inclusion of footnotes that at best might be called digressions. Sorry, readers, but you have not caught me in a French Laundry moment. These Tips are not briefs, and serve different purposes. The footnotes, in particular, are often geared towards entertainment, at least self-entertainment.

For questions or advice, please reach out to Richard Rothschild at rrothschild@wclp.org.



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