The Scrivener: Modern Legal Writing

Footnote Citations?

by K.K. DuVivier
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Let's face it—legal citations can interrupt the flow of sentences and make them harder to read. In comparison, the widely used Modern Language Association documentation style recommends short parenthetical citations in text that direct readers to a list of authorities at the end; for example, "(Gilligan 105)." Another format commonly used in history, art history, and other disciplines is that of the Chicago Manual of Style. The Chicago note style uses raised numerals in the text to refer readers to authorities in endnotes or footnotes. Although such a footnote style is predominant in law reviews, few have advocated it in legal opinions—until now.

Footnotes and Readability
Of Judicial Opinions

At the California Appellate Justice's Institute in the fall of 2000, Bryan Garner, the editor of the seventh edition of Black's Law Dictionary, recommended that citations be placed in footnotes to make judicial opinions more readable. Some California judges have taken Garner's advice to heart and are relegating all of their citations to the bottom of the page. Justice Rodney Davis of California's Third District in Sacramento has started placing all of his case citations and statutory references in footnotes. "It's far more conducive to understanding what the opinion is actually saying than sandwiching in these arcane numerical references that break up the text and make it sound like you're writing in a foreign language," says Davis.

California Supreme Court Justice Ming Chin generally dislikes footnotes. Yet, he also finds "an element of attractiveness in the idea" of using them in opinions. Nevertheless, he has not been convinced to follow Garner's advice. He jokes, "Most of us learn to just skip over the citations anyway. We get used to them." Justice Chin's point is well taken—legally educated audiences do get used to citations and skip over them when they interfere with readability. However, legal readers do not always skip over the important information conveyed by the citations in the text. For example, consider the following fictional citation: Smith v. Murphy, 39 P.99 (Colo. 1915), cited in Brown v. Interstate Corp., 85 P.3d 5 (Colo. Ct. App. 2000) (quoting Restatement (Second) of Contracts § 90 (1979)). Although this citation may seem lengthy, it provides the readers with important information about the weight of authority for the legal proposition it supports. From the citation alone, readers can glean at least three important points: (1) that the 1915 case was determined by the highest court in the state; (2) that although this original case is old, the Colorado Court of Appeals still considers the case controlling authority because the court recently cited it; and (3) that the proposition the case is cited for is well-established nationwide to be recognized by the Restatement.

When the citation immediately follows a proposition, significant information about the weight of the authorities can be determined at a glance. However, if the citation is placed in a footnote, the author cannot count on readers making the extra effort to look down to the bottom of the page and to make the necessary connections. Consequently, much might be lost by moving citations to footnotes at the bottom of the page where they most likely will be ignored.

Write for the Audience

Judicial opinions are written for a number of audiences. One of the primary audiences for these opinions is the litigants, who presumably are not legally educated. These lay readers want to know the outcome of the case and prefer to read it in plain English, without citations that seem to interrupt the flow and obscure the meaning. However, most readers of judicial opin-

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K.K. DuVivier will be happy to address them through the Scrivener column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.

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ions are lawyers: the litigants' attorneys and other attorneys who may be reading the case for its precedential value. Furthermore, the readers of legal briefs are primarily legally educated—judges, law clerks, and other attorneys. Thus, any advantage gained by moving citations out of the text might be outweighed by the value of the information in the textual citation.

Finally, if better readability is the goal, citations are not the biggest impediment. There are simple techniques to keep citations from seriously interrupting the train of thought. One of the simplest is to move most citations to the end of sentences. Also, most writers can better improve readability by concentrating on their writing techniques. As California Second District Justice Daniel Kolkey says, "When you look at the great legal writers, models like Cardozo and Holmes, it's about writing in the active voice and keeping the sentences short. It's not just about where you put the cites."

**Conclusion**

Some day courts may embrace footnote citations. However, until that day comes, I would not, in most cases, advocate footnote citations as the best remedy for concerns about the readability of a brief.

**NOTES**

4. Id.
5. Id.
6. Id.
8. Supra, note 3.

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**20th Annual Day of Caring for Breast Cancer Awareness**

**May 12, 2001, Denver Merchandise Mart**

The AMC Cancer Research Center will sponsor the 20th Annual Day of Caring for Breast Cancer Awareness on Saturday, May 12, 2001. There will be thirty-two seminars and forty exhibits providing information on prevention, treatment, and survivorship issues. Cost is $45 and includes lunch and an “inspirational” fashion show. Day of Caring is not a fundraising event, but is self-supporting. One-half of the cost of the event is paid by registration fees; the balance is funded by sponsors, donations, and a silent auction. Scholarships are provided for those who cannot afford the registration fee. For complete information or to register, call (303) 239-3367, or e-mail: DayofCaring@AMC.org.

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**Nominees Sought for National Association of Counsel for Children 2001 Outstanding Legal Advocacy Award**

**Deadline: June 1, 2001**

The National Association of Counsel for Children ("NACC") created the Outstanding Legal Advocacy Award to honor excellence in the field of children's law, advocacy, and protection. The NACC presents this award annually to individuals and organizations making significant contributions to the well-being of children through legal representation and other advocacy efforts. The NACC is looking for people who have "tipped the scales" in favor of children, especially those who cannot rise above their circumstances without help. Accomplishments such as work in child welfare, juvenile justice, private custody and adoption, and policy advocacy should be considered when suggesting nominees. Past nominees have included attorneys, judges, administrators, social workers, probation officers, GALs, and volunteers. Nominations are due by June 1, 2001, and should be mailed to: Awards Committee, National Association of Counsel for Children, 1825 Marion St., Suite 340, Denver, CO 80218. For complete information about the award and for a copy of the application form, contact the NACC at (303) 864-5320.