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## Footnotes Are Where the Horse Is Buried

Think twice about using substantive footnotes in briefs

By Kenneth F. Oettle

In law review articles, footnotes are a sign of scholarship. They enable the author to supply citations and substantive information while maintaining a logical flow. Because law review articles are meant to be studied at the reader's leisure, the footnotes work in synergy with, and are an acceptable adjunct to, the text.

Briefs are a different story. Because a court handles many cases and has piles of paper to read, it is not likely to treat your brief as an academic resource. Your footnotes may not get read, and if they do get read, they will interrupt the smooth, seamless presentation needed for persuasion.

### Footnotes Often Hide Weakness

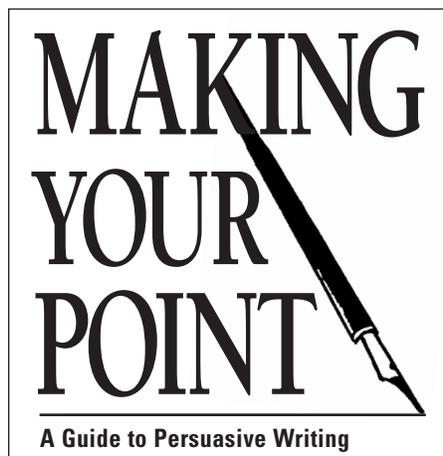
Experienced lawyers know that footnotes hide weakness. "That's where the horse is buried," one of my partners used to say. If you feel the desire to use a footnote, examine your motives.

Ask yourself if you aren't just dodging an unpleasant issue. A good gauge of this is whether you are footnoting in response to one of the adversary's strong points. If so, you are probably using the footnote to avoid confrontation.

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Another possibility is that you are pushing aside a thought you can't quite fit in. You sense but cannot articulate its relevance, so you drop a footnote and leave the reader to make the connection.

Some writers place strong arguments in footnotes to create the impression that their position is so powerful that even their footnotes are dispositive. They like the image of tossing off win-



ners at will.

This is wasteful. Footnotes may not even be read because they are interruptive and because they so often contain weak, or at best collateral, arguments. Don't create the risk that a strong argument may be overlooked. Put it in the text, where it will receive more attention.

### Exceptions to the Rule

You can and should use footnotes to denote a series of transcript or appendix references (e.g., March 25 is T1; March 26 is T2; and so forth). This is a neces-

sary aid to the court.

You may wish to use a footnote to dismiss an argument that is so bad that it isn't worth a double-spaced response. But do this cautiously because you are vulnerable to two tendencies: (1) underestimating the power of an opposing argument, and (2) leaving your own argument undeveloped. Be sure you are not unjustifiably minimizing the other side's point or missing an opportunity to highlight a fundamental flaw in the other side's case.

If a subject is complex, novel or esoteric, you may wish to provide supplemental authority without interrupting the flow of your argument. Dropping a footnote that contains such authority shows diligence and may help the court buttress an opinion in your favor.

But know that you pay a price for every footnote, like a commission on a securities trade. Footnotes force the reader's eyes to the bottom of the page, interrupting their train of thought. As an advocate, you want to create an argument so tight that everything you say seems to flow naturally, giving the impression of flawless logic. Footnotes interrupt this flow.

Sometimes you have to use footnotes, as when you face a page limitation, and you didn't leave enough time to slice away the fat without cutting muscle as well. As a last resort, you fall back on footnotes to make everything fit.

You may "get away with it." In other words, the court may not bounce your brief though you used footnotes to fit everything in. But you will pay for it nevertheless, having created a choppy, bloated "read." The court will likely be annoyed, and it may skip the footnotes

altogether.

In sum, a few uses of footnotes may be acceptable as long as you recognize that they come with a price, and as long as you make sure you are not using them to dodge a tough issue or to avoid figuring out how to drive your point home.

Fortunately, the tendency to use footnotes is not physiological (“once a footnoter, always a footnoter”). You can overcome the desire by developing the mindset that the text of the brief is where your battles must be fought.

### **Puzzler**

How would you tighten and sharpen the following sentence?

The use of the word “volunteers” in the statute creates an ambiguity as applied, in resolving whether the word “volunteers” in light of the surrounding circumstances means that to be culpable the actor must take the initiative in giving the false information or whether the actor could be culpable by simply giving the false information in response to a non-compulsive solicitation.

To get to the point that the statute is ambiguous, the revised version states up front that the word “volunteers” is ambiguous. To support the point, the revised version then sets forth the two

possible meanings of “volunteers.”

Phrases such as “in the statute,” “as applied,” “in resolving whether,” “in light of the surrounding circumstances” and “to be culpable the actor must” are implicit and fall away. The concept of the actor needing to take the initiative also falls away because it is implicit in the word “unsolicited.” Finally, the revised version eliminates one use of the phrase “the word ‘volunteers.’”

The revised version:

The word “volunteers” is ambiguous because it could mean either that false information must be unsolicited or that it must be given in response to a non-compulsive solicitation. ■