

REINING IN FOOTNOTES

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One of my students has informed me that according to an unwritten rule, a student comment with fewer than 80 pages of footnotes will never see publication in our school's law review. This rule compels me to recall the words of Professor Fred Rodell: "[T]he footnote foible breeds nothing but sloppy thinking, clumsy writing, and bad eyes. Any article that has to be explained or proved by being cluttered up with little numbers until it looks like the Acrosses and Downs of a crossword puzzle has no business being written."¹ Throughout the law school world, footnote mania seems to be pandemic.

In almost any student-run law review, a glance at student pieces reveals footnotes occupying at least one-third to one-half of the typical page. Moreover, law professors seeking offers of publication have long realized that their chances of success depend upon giving student editors what they want: among other things, an excess of footnotes.

This article addresses two questions. Why has the revolution in teaching first-year legal writing failed to help solve the problem? What can legal writing faculty tell law review students about the proper role of footnotes?

In first-year legal writing courses, students typically hone their writing skills by drafting memoranda of law, appellate briefs, and other documents that practitioners craft. At most law

schools, the students include citations within the text of their documents and rarely insert a footnote. They do not include discussions about side issues; instead, they stay focused on their issues. Moreover, they do not write academic articles. In drafting lawyering documents, they learn to cite authority for legal propositions according to a functional theory about citation:

- (1) Cite authority to identify a source of a quotation; a source of law, usually a case, statute, or regulation; or a secondary authority that supports an argument.
- (2) In identifying sources, cite only to direct authority, when available, as opposed to secondary sources that discuss the authority.
- (3) Cite only as much authority as is necessary to justify your statements. If you need to cite more than one source for a proposition, you rarely need to cite more than three sources.

A Preoccupation with Footnotes

When students move on to writing for law reviews, they seem to believe that their new enterprise is such a unique endeavor that the lessons of the first-year legal writing course do not apply. At an orientation meeting for the law review, an editor tells them that they must write long footnotes offering extensive discussions of every collateral topic imaginable. (Perhaps I exaggerate, but only slightly.)

The editor also tells the students to write concise sentences, because finances permit the law review to publish only a certain number of pages, and long sentences waste pages. The result is articles brimming with nominalizations and other unfortunate devices that make the prose hard to digest. Yet, ironically, a competing law review policy results in space wasted on excessive footnotes.

Thus, the philosophy of writing that students learned in the first year is relegated to the first year and perhaps to some upper-level skills courses.

Student editors may protest that these footnotes are necessary for a complete discussion of the topic at hand. However, the editors might discover a different viewpoint if they were to leave

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¹ Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 41 (1936).

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the law library and pass through the doors of the campus library. There, they might peruse scholarly journals in a variety of challenging fields and find that the ones permitting footnotes allow them only to identify the source of a quotation, a finding, or an idea.

Why have law reviews moved to this bizarre direction? My theory is that the problem stems from a lack of self-confidence on the part of the law review editors. Editors are rookies in the academic world. They attempt to compensate for their inexperience by demanding an inordinate number of elaborate footnotes. Unfortunately, this preoccupation may lead them to fiddle with footnotes instead of grappling with the text.

A Primer

It is past time to rein in footnotes. Instead of adhering to the wooden rule that more is better, legal writers should adopt a functional approach: use footnotes when you need them. Here is a primer.

The Principle: The reader should be able to understand the text without having to read any footnotes. Thus, footnotes give additional information, but not information necessary to understand the meaning of the text.

Rule I: Use footnotes to provide supporting authority for statements in the text. Use a footnote to:

- provide the citation to a case, statute, regulation, secondary authority, or similar authority that you mention in the text.
- cite to the source of a quotation or a paraphrase of a quotation.
- cite to the source of an idea or conclusion that did not originate with you. (Deciding when an idea or conclusion is significant enough to require citation is often a judgment call.)

Rule II: Use footnotes to carry on a discussion collateral to the text, that is, a discussion that elaborates on the text, but is not essential to understanding the text. A collateral discussion may:

- provide a brief bibliography of relevant sources.
- explain more fully information or statements in the text.

Rule III: Include collateral discussions only when they will truly help the reader. Avoid discussions that are unnecessarily extensive or very peripheral to the discussion in the text.

An Example

To explain sound practice in footnoting, I offer this example. I repeat the first three paragraphs of this article; However, I insert footnotes at the end of almost every sentence. In each footnote, I explain whether I would include a footnote, and, if so, what information I would include in the footnote.

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¹ I could cite to my “interview” with the student. However, the name of the student would be of no interest to the reader; therefore, the citation would not be worth the ink. If identifying the student would be meaningful to the reader, I would include the footnote.

² Because I quoted a source of interest to the reader, I must cite to the source: Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 41 (1936).

³ Here, I could include citations to numerous articles criticizing law review practices and insert pinpoint citations to discussions of footnoting practices. Three citations should be enough. However, if I believed that I should use the footnote to provide a full bibliography on the subject, I would use the footnote for this purpose. This sort of bibliographic footnote is an unfortunate peculiarity of law reviews.

In almost any student-run law review, a glance at student pieces reveals footnotes occupying at least one-third to one-half of the typical page.⁴ Moreover, law professors seeking offers of publication have long realized that their chances of success depend upon giving student editors what they want: among other things, an excess of footnotes.⁵

This article addresses two questions. Why has the revolution in teaching first-year legal writing failed to help solve the problem?⁶ What can legal writing faculty tell law review students about the proper role of footnotes?⁷

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“When reading a footnoted opinion one’s eyes are constantly moving from text to footnotes and back again. ... If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane.”

—Abner J. Mikva, *Goodbye to Footnotes*,
56 U. Colo. L. Rev. 647, 648 (1985).

⁴ A typical footnote might include examples of articles with extensive footnotes or even a full-scale empirical study of footnotes in law reviews. I believe that the statement in the text is self-evident and would not include this footnote.

⁵ I might include a footnote if I could easily find a source that supported the statement. If not, I would not bother to engage in a lengthy research foray, because the statement in the text would surprise no academic reader and thus is self-evident.

⁶ This footnote could be either of two types. The first type would direct the reader to a later section of the article discussing the topic (“*See infra* note 68.”). This sort of footnote is padding. The second type would be an extensive footnote on the history of legal writing pedagogy with reference to textbooks in the field, pinpointing their respective discussions of footnotes and including parenthetical descriptions of those discussions in each book. I view this footnote as unnecessary.

⁷ Like the preceding footnote, this footnote could be one of two types. The first type would unnecessarily direct the reader to a later section of the article discussing the topic. The second type would cite to articles and books in the legal writing field that discuss guidelines for including and drafting footnotes. Although this discussion might be relevant, I would reserve judgment this early in the article. I would wait until later in the article to find a location offering a developed discussion of the topic. I would include parentheticals after citations only when necessary.