Where Should the Citations Go?

By Joseph Kimble

One more notable column from our 30-year-old archives. This one appeared in July 2010. I've had to update it somewhat. —JK

In the May 2010 column, I asked readers to vote on two citation formats—one putting citations in the text, the other putting them in footnotes. I gave three pairs of side-by-side examples that were identical except for the placement of citations. The examples were clearly from the same source, and the second one referred to "Sixth Circuit case law" and to what "the Sixth Circuit has held." For convenience, here's the third example only:

#1	#2
Once Plaintiff meets her burden of establishing a prima facie case of retaliation, the burden shifts to the employer who "may 'show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.'" *Rodgers v. Banks*, 344 F.3d 587, 602 (6th Cir. 2003) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). This latter burden, however, "'involves a determination of fact' and ordinarily is 'reserved for a jury or the court in its fact-finding role.'" *Id.* (quoting *Perry v. McGinnis*, 209 F.3d 597, 604 n.4 (6th Cir. 2000)). Defendants argue they can meet this burden as a matter of law, asserting that they would have reassigned Plaintiff based on "complaints from staff and prisoners about the unnecessarily harsh manner in which she performed her duties as school officer." (Defs.' Br. at 16.)	Once Plaintiff meets her burden of establishing a prima facie case of retaliation, the burden shifts to the employer who "may 'show[] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct.'"[1] This latter burden, however, "'involves a determination of fact' and ordinarily is 'reserved for a jury or the court in its fact-finding role.'"[2] Defendants argue they can meet this burden as a matter of law, asserting that they would have reassigned Plaintiff based on "complaints from staff and prisoners about the unnecessarily harsh manner in which she performed her duties as school officer."[3] 1 *Rodgers v. Banks*, 344 F.3d 587, 602 (6th Cir. 2003) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). 2 *Id.* (quoting *Perry v. McGinnis*, 209 F.3d 597, 604 n.4 (6th Cir. 2000)). 3 Defs.' Br. at 16.

I asked readers to vote for the examples marked #1 or #2, posing the question, "Which do you think reads better?"

One important point before announcing the winner: this is not about whether to use so-called talking, or substantive, footnotes. It's not about whether to drop incidental points—those bits you just can't quite fit in—to the bottom of the page. I'm no fan of talking footnotes, and I don't use them in this column or in *The Scribes Journal of Legal Writing*. But that's another debate. The question before us is where to put the references, the bare citations (and any brief parentheticals). Should they go in the text or in footnotes?

All right, the polls are closed and the votes counted. Voters preferred format #2—citations in footnotes—and by a fairly comfortable margin, 111 to 81. That's at least refreshing, if not remarkable, given our strong tradition of textual citations and the common complaint that the profession is notoriously slow to change. So good for us.

Although I did not ask voters to comment, quite a few did. It's interesting that people who voted for #1 tended to write somewhat more detailed comments. People who voted for #2 tended to make short comments like these:

- "Less cluttered and facilitates reading."
- "Much easier to read and understand."
- "#2 reads clearly without distraction."
- "Smoother flow when reading. More cohesive."
- "There's nothing to talk about. They [#2] read so much better."

As many of you may know, the most forceful proponent of footnoted citations is Bryan Garner, America's preeminent authority on legal language and writing. In his book *The Winning Brief*,

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he summarizes the pros and cons (the bracketed responses on the right are his):

Footnoted Citations
(Without Substantive Footnotes)[1]

Pros	Cons
1. They shorten the average sentence length. 2. They make paragraphs more coherent and forceful. 3. They let readers focus on ideas, not numbers. 4 They eliminate the problems with string citations. 5. They expose poor writing and poor thinking in the text, thereby promoting clearer writing and thinking. 6. They result in fuller discussions of controlling caselaw. 7. They result in much greater efficiency in conveying ideas. 8. They make legal writing accessible to far more people.	1. Legal readers have already learned one system: textual citations. **[Yes, but legal writers have proved unable to handle the convention. . . . Besides, readers see citation-free text everywhere *except* in legal writing.]** 2. Citations often contain important information about precedents. **[All that important stuff should be woven into the prose anyway. Otherwise, readers accustomed to skipping over in-text citations are just as likely to miss your authority there as below.]** 3. Readers shouldn't have to glance at the bottom of the page. **[Right: brief-readers shouldn't ever have to read footnotes. All that's down there are volume numbers and page numbers—and optional parentheticals.]** 4. Writers can more easily fudge what authorities say. **[That's silly: too many fudge in the text right now.]** 5. The practice results in a confusion of literary genres: scholarship vs. practical writing. **[But the absence of substantive footnotes signals that this isn't scholarship.]** 6. You can't retrain yourself to read past superscripts. **[If you can retrain yourself to read past two lines of citational numbers, you can retrain yourself to read past a tiny superscript.]** 7. It requires more effort: you can't simply paste quotations and citations into your writing. **[If it results in greater accessibility for all readers, surely it's worth the effort.]**

In the next sentence after this chart, Garner observes: "Whereas the pros are hard to answer—often unanswerable—the cons are mostly easy to counter."[2]

The third item on the list of cons is probably advanced most often. Thus, some people who voted for #1 proclaimed that they "hate footnotes," probably on the theory that footnotes invariably require a downward glance. Not so—only when you need the numbers in order to pull out or pull up the authority.

The second con parallels the third, and so does the answer. Significant citational information need not be relegated to footnotes. Rather, the writer can—and usually should—provide the gist of the authority in the text. For instance: "The Michigan Trust Code provides . . ." or "But in 2009 the Sixth Circuit held . . ." or even "The leading case is *Harpo v King Bee*." Whatever the writer wishes to emphasize about the authority—or whatever the writer needs to introduce it or connect it analytically—can easily be put up front.

At any rate, if you're still not persuaded, at least read Garner's full argument on the subject.[3]

Let me now tell you the story behind my survey. In February 2010, I learned about a federal case in the Eastern District of Michigan called *Mosholder v Barnhardt*,[4] and more specifically about an opinion in that case denying the defendants' motion to dismiss or for summary judgment. All three examples marked #1 in the May 2010 column were from that opinion. And here's the stunner, from footnote 1 of the opinion:

> Defendants . . . followed what appears to be an Attorney General's office trend, citing every authority in a footnote. This practice is distracting to a reader and unacceptable to this judge. The Attorney General is notified that future filings in this judge's cases that confine case and statutory citations to footnotes will be stricken subject to refiling. Assistant Attorneys General Grill and Cabadas are directed to notify their supervisor(s) in writing of this point of procedure.[5]

Regardless of your vote or your opinion on footnoted citations, what do you think about an order like that? Page limits and type size and margins are one thing. They all go mainly to controlling length, although some court rules may bear on readability as well. But should individual judges be putting the brakes on a move to make legal papers more readable? Should they be stepping in on questions of formatting and style? Are they experts in these matters?

Now, the story has a mixed ending. The Office of the Attorney General has since reverted to putting citations in the text of all its briefs. Yet the case for footnoted citations remains strong—as evidenced by a majority of readers who voted on side-by-side comparisons. They could see the improvement. That's the overriding message for writers who have a choice and who put a premium on clarity and readability. ■

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ENDNOTES

1. *The Winning Brief* 179 (3d ed, Oxford U Press 2014).
2. *Id.*
3. See, e.g., *The Citational Footnote*, 7 Scribes J Legal Writing 97 (1998–2000); *Clearing the Cobwebs from Judicial Opinions*, 38 Ct Rev 4 (Summer 2001) (available at http://aja.ncsc.dni.us/courtrv/cr38-2/CR38-2Garner.pdf).
4. 2010 WL 5559406, No 09-CV-11829-DT (ED Mich filed Feb. 12, 2010).
5. *Id.* at *1.