The Appellate Review

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Message from the Chair

America! America!
God mend thine every flaw,
Confirm thy soul in self-control,
Thy liberty in law!

America the Beautiful, Katharine Lee Bates (1913)

I had intended to write about the need for further expansion of the Georgia Court of Appeals. Today is September 14, however. That topic will keep.

For the moment, as America unifies in response to the terrorist attacks, other matters seem frivolous. A natural responses is to ask, what can I do? What can we, as lawyers, do?

For the moment, for most of us, the answer is not much. Give blood. Write a check. Pray.

Particularly, as lawyers, the answer is not much. Lawyers, as such, don't do unification especially well. As lawyers, we are fundamentally about disunity. We are the zealous advocates of particular interests.

Someone is going to have to represent the particular interests of the alleged terrorists who have already been arrested. Someone is going to have to insist that they be treated with a fairness utterly incomprehensible to the perpetrators of these assaults. That someone, that lawyer, must be prepared to stand in the face of international outrage.

Some may suggest that, for now, civil liberties are a luxury we cannot afford. They are not. Civil liberties are most crucial when they are least convenient and when the persons benefiting from them are the least admirable. They are the heart of our freedoms. They are what is most worth fighting for.

Christopher J. McFadden

Highlights of this Issue -

Without Precedent: Footnotes in Judicial Opinions*

By Mark E. Steiner
South Texas College of Law

Ed.- Although this article was written about Texas, readers who have noted the differing styles of footnote use in opinions from the Georgia Court of Appeals will find this piece of interest.

Two years ago, four appellate practitioners wrote to the Texas Lawyer to complain about the use of footnotes in judicial opinions. Wendell Hall et al., Give Footnotes the Boot, TEXAS LAWYER (Nov. 17, 1997). The letter said that using footnotes for every citation was an "awful practice" that made opinions harder to read, and concluded that the use of footnotes "is a bad idea, and we think it will diminish the quality of written appellate advocacy and the value of our courts' opinions as precedent for future lawyers and judges." I share the concerns expressed in the letter. No good reason exists to abandon the use of citation sentences.

Substantive Footnotes

Judicial opinions now contain two very different types of footnotes: substantive and bibliographic. Bibliographic footnotes contain the same information ordinarily found in citation sentences. Substantive footnotes contain text that wasn't important enough to put in the opinion but the writer couldn't leave out altogether.

Substantive footnotes are misnamed because they hardly ever contain any substance. They also have few defenders. Even Bryan A. Garner, who favors the use of bibliographic footnotes, abhors the use of substantive ones. Garner, in fact, predicts that judges will react "with revulsion" to substantive footnotes in briefs. Garner, Unclutter the Text by Footnoting Citations, TRIAL (Nov. 1997).

The two main objections to substantive footnotes have been that they retard reading speed and comprehension and that they often contain ill-considered statements. See generally Abner J. Mikva, Goodbye to Footnotes, 56 U. COLO. L. REV. 647, 649 (1985); RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 352-

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353 (1996). Put simply, footnotes are interruptions.[1] Judge Mikva has observed, "If God had intended us to use footnotes, he would have put our eyes in vertically instead of horizontally." Quoted in Tony Mauro, Getting to the Bottom of the Argument, LEGAL TIMES, Dec. 17, 1990, at 10. Judge Posner explained:

> Not only must the eye glance to the bottom of the page, read what is written there, and then return to the place where the interruption occurred; but the material in the footnote will not flow easily from the sentence from which the footnote was dropped and into the following sentence-otherwise the writer would not have placed the material in a footnote. The interruption is to the mind as well as the eye.

FEDERAL COURTS at 352.

Textual footnotes typically contain superfluous language that the opinion writer removed from the body of the opinion, but couldn't stand to let go altogether. As a result, says Judge Posner, "a lot of bad law is made in footnotes." FEDERAL COURTS at 352. Judge Mikva also has criticized the footnote's use as a "obiter dictum avoidance technique." Judges who can't bear to excise their ponderings and asides from the opinion just move them to footnotes. Mikva, Goodbye to Footnotes, 56 U. COLO. L. REV. at 648. A judge also may place material in footnotes because "he was not quite sure it was right" and yet it seemed necessary to complete his argument. FEDERAL COURTS at 352. Judges also tend to snipe at their fellow judges in footnotes. The rules about the precedential significance of judicial footnotes are, according to Judge Mikva, very fuzzy. Mikva, Goodbye to Footnotes, 56 U. COLO. L. REV. at 649. Some courts have concluded that footnotes are given full precedential effect. See Robert A. James, Are Footnotes in Opinions Given Full Precedential Effect? 2 GREEN BAG 2D 267, 267 fn I (1999). Some judges' concerns about the precedential effect of footnotes has led to concurring opinions that contain statements like "I do not join footnote #3 of the majority opinion." Primrose v. State, 725 S.W.2d 254, 256 (Tex. Crim. App. 1987)(Onion, P.J., concurring). While some jurisdictions may find footnotes precedential, it isn't hard in Texas to find dismissive comments about "dicta in footnotes" when a court of appeals is rejecting a party's argument. See, e.g., Alameda Corp. v. Transamerican Natural Gas Corp., 950 S.W.2d 93, 96 (Tex. App.-Houston [14th Dist.] 1997, pet. denied). In criminal appeals, some Texas courts have stated flatly that footnotes in opinions are dicta. See, e.g., Cooper v. State, 917 S.W.2d 474, 476 (Tex. App.- Fort Worth 1996, no pet.). These courts have relied upon a court of criminal appeals case that dismissed a footnote from a prior opinion by saying, "As is generally true with footnotes, we regard this footnote as dictum." See Young v. State, 826 S.W.2d 141, 145 n.5 (Tex. Crim. App. 1992).

[1] See what I mean

Of course, that statement appeared in a footnote, which means it's also dictum. But wait: if the statement about dictum is dictum, then footnotes may still be precedential or . . . . Like Judge Mikva said, it's fuzzy.

Despite the nearly universal condemnation by commentators, the use of substantive footnotes in Texas appellate opinions has increased over one thousand per cent in the last ten years.[2] Let's hope this unfortunate trend does not continue.

Garnering Footnotes

The increased use of bibliographic footnotes in Texas judicial opinions appears to be the result of the Rasputin-like influence of Bryan A. Garner. At the University of Texas appellate conference this year, one judge defended his use of footnotes by simply invoking Garner's name. Four judges on the Texas Supreme Court now use footnotes instead of citation sentences. Garner's influence also can be found in the Texas courts of appeals.

Bryan Garner is the author of the Dictionary of Modern Legal Usage (2d ed. 1996), The Elements of Legal Style (1991), and Black's Law Dictionary: Pocket Edition (1996). His most recent book is The Winning Brief: One Hundred Tips for Persuasive Briefing in Trial and Appellate Courts (1999), which I am using in my writing classes this fall.

Garner mixes ninety-nine excellent writing tips with one real clunker: he suggests that briefs should use footnotes instead of citation sentences. Garner apparently has told judges at conferences and seminars that judicial opinions also should use footnotes. The arguments in The Winning Brief in favor of footnotes in briefs are surprisingly weak, and I can't imagine Garner has any stronger arguments for footnotes in opinions.

Garner begins by noting "the age-old convention for briefs is that the citations belong in the text," and states "that's never been so of law reviews and treatises." THE WINNING BRIEF at 115. Garner then asserts that footnotes aren't used in briefs only because "the traditional method of preparing briefs involved typewriters, and it was all but impossible to get citations in footnotes with manual typewriters. That's why citations were in the text in 1900, and that's why they were still there in 1975." THE WINNING BRIEF at 116. Garner writes with the breezy confidence of someone who has no idea what he is talking about. By 1900 the citation sentence was the accepted convention for citing authority, not a capitulation to the typewriter. During the nineteenth century, the citation sentence developed alongside the rise of written opinions, the widespread publication of law reports, and the appearance of a firm theory of precedent. See Frederick C. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800-1850, 3 AM. J.

[2] I have no idea what the real figure is but this sounds about right.

LEGAL HIST. 28 (1959); Erwin C. Surrency, Law Reports in the United States, 25 AM. J. LEGAL HIST. 48 (1981).

Typewriters had nothing to do with the persistence of citation sentences. Before the invention of the typewriter, the "traditional method" of preparing briefs and opinions was by hand. A nineteenth-century lawyer or judge could have used footnotes or marginalia for citations, but didn't. It is, of course, possible to get citations in footnotes when writing by hand. (All my first drafts for "scholarship" have been handwritten and have contained footnotes at the bottom of the page.)

Citation sentences in judicial opinions have a different purpose than footnotes in scholarly writing. That's why Judge Posner's book, which criticizes footnotes in judicial opinions, has footnotes while Judge Posner's opinions do not. That's why Joseph Story's treatises contained footnotes while Story's supreme court opinions did not. That's why Oliver Wendell Holmes' The Common Law had footnotes while Holmes' judicial opinions did not.[3]

Garner's technology argument (we should use footnotes because we can) overlooks the actual impact of technology. Neither Garner nor the judges who use footnotes appreciate that technology will transform their footnotes to endnotes when the cases appear in electronic databases. When a case first appears in electronic form -whether on a court website, or on Westlaw, Lexis, Versuslaw, or LOIS- the footnotes are converted to endnotes. If you want to look at the authority for any particular statement, you have to scroll down to the end of the document (which is one long page in electronic form) and guess where the footnote might be. After finding the footnote, you then must scroll up and try to find where you were before you began your intrepid search for the citation. It makes for very difficult reading. (It is a bit easier on the Texas Supreme Court website, because the footnotes in the opinions have hyper-links. If you click on the number, you are taken to the endnote containing the citation. The bibliographic endnote, however, does not have a hyper-link that gets you back to where you were in the opinion. Moreover, the supreme court site won't get a lot of traffic until it gets a searchable database; it probably is not the most popular site to read supreme court opinions.) On most court websites or on LOIS or Versuslaw, these endnotes will never be footnotes. On Westlaw and Lexis, the endnotes will become footnotes again only after the motion for rehearing is disposed of and the case is formatted for publication in the reporter. That wait can take months. Until then, you are treated to opinions that are extremely frustrating to read.

[3]I'm not certain whether it's true that Holmes *never* used footnotes. I checked the opinions in one term; they didn't have any. Anyone who is award of a Holmes opinion that contains footnotes should substitute this back-up sentence for the sentence in the text: "That's why Oliver Wendell Holmes used footnotes The Common Law, but rarely used them in opinions."

Endnotes are tough on readers, which even Garner has recognized. In The Winning Brief, he says, "[E]ndnotes simply aren't handy. For the reader who really wants to see the citation, it's annoying to have to flip back and find the relevant note." THE WINNING BRIEF at 156. It is even more annoying to scroll down and up to read endnotes. The use of footnotes in opinions has drastic consequences for online researchers.

Citation Sentences and Stare Decisis

Most discussions about footnotes in judicial opinions discuss the advantages and disadvantages of their use; there has been little discussion about what footnotes replace. Few judges or legal scholars have considered the importance of citation sentences in judicial opinions. I believe that citation sentences are an essential component of a judicial opinion, and footnotes are an inadequate substitute.

A famous study of the citation practices of state supreme courts began by asking a question that often goes unasked: why do courts cite authority at all? Lawrence M. Friedman et al., State Supreme Courts: A Century of Style and Citation, 33 STAN. L. REV. 773, 793 (1981). The authors answered that judges cite authority because judges have derivative, rather than primary, authority. Id. Judges aren't supposed to act in an unfettered manner. Id. As Lawrence Friedman and his colleagues explained:

> A judicial decision does not stand on its own. According to our legal theory, judges decide "according to the law." They are not free to decide cases as they please. They are expected to invoke appropriate legal authority for their decisions. In an obscure but definite way, they are bound to act in a principled manner. . . . It is a sign that judges have only secondary authority that they write opinions at all. Judges are expected to justify their decisions. A legislature, passing a statute, has no such obligation, its words come out as naked fiat. But the appellate decision is a reasoned document. It links the result reached with legal premises which have higher authority- the words of a statute, prior case law, or common law "principles."

Id. at 794. Citation sentences are part of a "reasoned document" that respects precedent.

Citations to authority reinforce the doctrine of stare decisis. Things that are important appear in the text; things that are not important appear in footnotes. It is easier to believe that judges are constrained by precedent when that precedent appears in the text of the opinion, rather than relegated to a footnote. Earl Maltz has argued that the doctrine of stare decisis reinforces one of the most widely shared values in the American political system that "principles governing society should be 'rules of law and not merely the opinions of a small group of men who temporarily occupy high office.'" The Nature of Precedent, 66 N.C. L. REV. 367, 371 (1988). The doctrine of stare decisis "fosters the appear-

ance of certainty and impartiality by providing a seemingly neutral source of authority to which judges can appeal in order to justify their decisions." Id. Also, Maltz argues that "the influence of precedent works to limit the actual impact which any single judge (or small group of judges) has on the shape of the law." Id. These widely shared values about the importance of citing precedential authority are undermined by the use of footnotes.

The footnote is an unworthy substitute for the citation sentence. The citation sentence announces the importance of precedent and tradition; the bibliographic footnote announces the self-importance of the writer, whose words alone make law. The footnote sends a signal that the cited precedent is of the minor importance. The footnote "is relegated to the bottom of the page. . . . It is excluded from the main body of the text, either because it disturbs the flow of the text, because it is not essential to the argument, or because it is a digression or afterthought. The footnote lives a life of exclusion and marginalization." J. M. Balkin, The Footnote, 83 NW. U. L. REV. 275, 276 (1989).

Footnotes in judicial opinions marginalize precedent. That's why judicial activists use footnotes. Kenneth Geller, an appellate lawyer in Washington, D.C., studied the use of footnotes in opinions from the fall 1989 term of the United States Supreme Court. He found that the four members of the court's "liberal bloc" wrote the most footnotes while the more conservative members wrote the fewest. David Margolick, The Footnote Fetish in Judicial Opinions: A Weather Vane of High Court Philosophy?, N.Y. TIMES, Jan. 4, 1991, at B14. The admonition to avoid the use of footnotes in the Judicial Opinion Writing Manual published by the American Bar Association comes in a section appropriately entitled "Judicial Restraint."

An Unnecessary Break With Tradition

I find it particularly disheartening to see conservative judges abandon the citation sentence. Conservative judges, after all, are supposed to respect tradition and resist change for change's sake. Using footnotes for citations is a needless innovation because it solves a problem that doesn't exist. Judge Posner has written, "To footnotes that merely cite cases or other authorities the only objection is that they are unnecessary." FEDERAL COURTS at 352. Posner noted that opinion writers "discovered long ago that they could print the citations right in the text without disturbing the reader's concentration; the italicization of the case names in modern case reports helps the eye of the reader so inclined to skip easily over them." Id. Similarly, the present chair of this section and three of his colleagues have pointed out that "citations in the text are very helpful and instructive. Lawyers do read the citations in briefs and opinions, and the citations do not interrupt the flow of reading. In our view, it is far more cumbersome and it interrupts one's train of thought to read one sentence and then drop to a footnote to determine what authority the court is citing for the proposition stated." Hall et al., Give Footnotes the Boot, TEXAS LAWYER (Nov. 17, 1997).

When some Texas judges began to use bibliographic footnotes, this did not follow any hue and cry that citation sentences had outlived their usefulness. It is safe to say that lawyers hate footnotes of any kind in judicial opinions. When the topic came up at the UT Appellate conference, Pam Baron, who was moderating a panel of supreme court justices, asked the audience whether it preferred footnotes. From my vantage point, it looked like every single member of the audience voted in favor of citations in the text of opinions. I did not see one hand raised for footnotes.

Conclusion

The plain-language revolution is over, and the revolutionaries won. Like most revolutions, fervor has overtaken reason. The citation sentence has been branded as part of the ancien regime, but it's a bum rap. Citation sentences reinforce principles of precedent and stare decisis; footnotes undermine those principles. Citation sentences do not make opinions less readable; footnotes do. Citation sentences belong in judicial opinions; footnotes do not■

CLE Alert!

The Lawyers Advisory Committee of the Eleventh Circuit is hosting an event entitled "Inside the Eleventh Circuit: A Dialogue with the Clerk of Court." Thomas K. Kahn, the Clerk of Court, and his staff will make a presentation. It will take place ***Wednesday, October 24 from 8:30 am to 10:00 am in the En Banc Courtroom at the Eleventh Circuit courthouse at 56 Forsyth Street, Atlanta.*** CLE credit of 1.5 hours is available.
Call 404-335-6654 to register.

Rules Update

As many of you have heard, the Georgia Supreme Court has amended some of its rules. Among the changes of note, new Rule 16 requires that the type size used in pleadings "shall not be smaller than standard pica or elite type or 12-point courier font." This rule (formerly Rule 18) previously allowed the use of 10-point courier font.

Under revised Rule 42, a party has 20 days to respond to a petition for certiorari. The Court also eliminated the requirement for the separate filing of an enumeration of errors.

The United States Court of Appeals for the Eleventh Circuit has proposed amendments to its rules. Those can be seen at the Court's website: www.ca11.uscourts.gov. Most of them are "housekeeping" changes. Under the revised Internal Operating Procedures under Local Rule 34, oral arguments would be scheduled for Tuesday through Friday instead of Monday through Thursday. In addition, the procedure stating that the members of the panel would be disclosed one week in advance has been deleted.

Hearsay Objection Raised on Appeal

By Eric Kane

I recently encountered a hearsay question on appeal that all litigation and appellate lawyers ought to be aware of. In the case, a suit on a promissory note, I moved for summary judgment. The defendant argued that a document submitted in support of the motion did not demonstrate that summary judgment was warranted, but did not argue that the document was inadmissible. The court granted summary judgment, and on appeal, the defendant for the first time argued that the document was irrelevant, not authenticated, and contained hearsay, and therefore was inadmissible. The relevance and authenticity arguments failed for the usual reason that objections not raised at trial cannot be raised for the first time on appeal.

A hearsay objection, however, may be raised for the first time on appeal. Hearsay is an exception to the general rule because "hearsay evidence has no probative value even if it is admitted without objection." Germany v. State, 235 Ga. 836, 840, 221 S.E.2d 817 (1976). Georgia courts have stated that hearsay testimony is not only inadmissible, its introduction without objection does not give it any weight or force whatever in establishing a fact. Accordingly, an appellate court can consider the hearsay question notwithstanding the lack of a timely objection to the evidence in the trial court. See Handley v. Limbaugh, 224 Ga. 408, 413, 162 S.E.2d 400 (1968); Howell Mill/Collier Assocs. v. Pennypacker's, Inc., 194 Ga. App. 169, 171, 390 S.E.2d 257, 260 (1990)■

Please send comments on this issue or contributions to future issues to: ewasmuth@sgrlaw.com

Section members are encouraged to submit items that they believe would be of general interest to Section members.

Calendar of Events

Updated September 17, 2001

Monthly meetings (4th Friday, except as designated)

Leadership Meeting (open)	*10/26*
Membership luncheon	*11/30 (5th Friday)*
Leadership Meeting (open)	*12/21 (3rd Friday)*
Membership luncheon	*1/11 (State Bar Mid-year Meeting)*
Leadership Meeting (open)	*2/22*
Membership luncheon	*3/22*
Leadership Meeting (open)	*4/26*
Membership luncheon	*5/24*
Annual Membership Meeting	*6/28 (Election)*

Seminar

State Appellate Practice	*March 8, 2002 (tentative)*
Federal Appellate Practice	*February, 2002*
Advanced Seminar	*June, 2002*

Newsletter Publication

September, 2001
December, 2001
March, 2002
June, 2002

Social

Reception	*TBA*

Projects

Report to Judge Blackburn	*November, 2001*

Other Events

Advisory Committee on Legislation deadline: Oct. 1 (preferred) or Dec. 3.

Annual seminar, meeting and dinner, Appellate Advocacy Committee, Tort and Insurance Practice Section, American Bar Assn., August 4, 2001, Chicago

Annual meeting, Counsel of Appellate Lawyer, October 5-6, 2001, New York City

Semi-annual Appellate Practice Institute, Summer 2002

IMPORTANT Note To Members

We need your email in order to send you section notices and reminders.

You can go to the State Bar's web site - to the Membership Department's "Address Change Form" and verify that we have your correct address and email. Currently 117 of our members do not list their email addresses.

While on the State Bar's web site - check your CLE hours and visit our section's web page where we'll post this newsletter and a list of section members. We're also linked to ICLE under "Section Meetings". You can register with ICLE for ICLE seminars online!

If you know someone that would like to join our section, instructions are on the State Bar's web site.

www.gabar.org