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THE Scrivener

Scribes—The American Society of Legal Writers

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Submissions

Please send items for upcoming issues of *The Scrivener* to Maureen Collins at 7collins@jmls.edu.

Scribblings from the President

By Scribes President Justice Michael B. Hyman

The most common complaint of professional legal readers, also known as judges, is that lawyers write poorly. Not every lawyer, of course; but far too many lawyers have trouble writing with conciseness, coherence, clarity, and style.



Justice Michael B. Hyman

I must assume lawyers care about their writing, their words. Yet, frequently their work product does not show it. There are a lot of ways for lawyers to sabotage their writing. For instance, they often fail to prune the marginal, extraneous, confusing, and redundant. Or they proceed in an illogical and unorganized fashion, daring the judge to figure it out. Some neglect to apply the relevant facts to the relevant law or mischaracterize or misrepresent the facts, the law, or both. Others inform, but do not engage, the judge.

Good legal writing is intelligible writing and intelligible writing is simply good communication. Two favorite quotations on legal writing are by the American humorist Will Rogers, and both involve Rogers focusing on the incomprehensibility of legal writing. Rogers once said, "The minute you read something that you can't understand, you can almost be sure that it was drawn up by a lawyer." He also observed, "Every time a lawyer writes something, he is not writing for posterity, he is writing something so that endless others of his craft can make a living out of trying to figure out what he said. Course perhaps he really hadn't said anything; that's what makes it so hard to explain." We can find a measure of comfort in Rogers having lived well before the rise of the plain language movement.

Scribes members like good legal writing. That's why we belong and participate. At our last board meeting, we discussed collecting examples of sloppy, clichéd, or awful writing. If you come across an example, send it to our executive director, Jamie Baker, at scribeslegalwriters@gmail.com. We will share your submissions in a future issue of this newsletter. (If you don't want attribution, just let us know.)

Since I asked for samples of bad writing, I thought I would share some recent items about good writing that recently crossed my desk.

On Judicial Writing: “The justice [Judith Ann Lanzinger of the Ohio Supreme Court] has prided herself on clear legal writing, literal interpretations of words, and the importance of placements of commas. But in recent years she has taught poetry as part of the National Judicial College to help fellow jurists with their own self-examination.” (From *Toledo Blade*)

On ‘Elegant’ Legal Writing: “Whereas good writing is meant to be read and understood, elegant legal writing is not. It is aggressively qualified, precise yet vague, and intentionally opaque. It should be intelligible only to lawyers, preferably only to the lawyer who wrote it. Hahaha. I have tried to shake off years of legal training and return to simple storytelling, but I know I haven’t been completely successful.” (From *BusinessMirror*, Makati City, Philippines, by attorney Dan Albert S. De Padua.)

On Writing Skills for Appellate Justices: In discussing the characteristics he sought in three new Georgia Supreme Court justices, Georgia Governor Nathan Deal placed “a high value on clear legal writing, and complimented all three of this choices on their skills in this area. ‘It’s too much to expect that everyone will like an opinion,’ [one of the new justices] said. ‘But it’s not too much to expect that they understand it.’” (From *Daily Report*, Georgia)

On Legal Writing and Children’s Books: “I wasn’t a particularly notable lawyer — although I did practice for 10 years — but there is something about the discipline of legal writing — the specificity — which works well with children’s writing, particularly picture books — in which information must

be imparted in a very economical way. I also wonder whether lawyers aren’t quite good at being edited as we come from a profession with a stark hierarchy and we are used to surrendering ownership of our work.” (From the *Daily Review*, Victoria, Australia, quoting Kim Kane, lawyer and advocate for children’s literature)

On Brevity: “Charles Dickens may have been paid for more voluminous content — as legend has it — but most petitions and motions are better served by imitating Hemingway’s obsession with brevity than the ‘best of times’ and ‘worst of times’ of 19th century fiction.” (From *Law 360*, by Jenna Ebersole)

On Accessible Writing: “Write so that the document serves its purpose, whether that purpose is to inform, to persuade or otherwise. The goal is never to demonstrate how smart the writer is. If the writer can use a style that makes the writing accessible to the busiest of readers, the writer will effectively demonstrate intelligence, and the reader will appreciate the effort.” (From Baylor Law School website, Interview with Professor Matthew Cordon, director of Legal Writing Center)

On Attitude: “Pointing out errors by opposing counsel is fine if you can accomplish it in a way that is professional. Making jabs, snide comments or disparaging remarks is distracting, and unattractive, and will not advance your cause with the court.” (From *JDSupra*, by Sarah Hyser-Staub)

On the Benefits of Good Writing: “Clear writing in legal briefs wins cases, according to the results of a new study, which found that there is a clear statistical correlation between the clarity of a brief requesting summary judgment and the likelihood that a judge will grant the request.”

In a draft academic paper published by the Social Science Research Network earlier this month [July 2016], Shaun B. Spencer, an assistant professor at the University of Massachusetts School of Law, Dartmouth, and Adam Feldman, a Columbia Law School fellow and Ph.D. candidate at the University of Southern California, found that after controlling for attorney experience, law firm size and a lawyer's status as a repeat player before the motion judge, there is a "statistically significant correlation" between brief readability and summary judgment decisions." (From Law 360, by Aebra Coe)

Wonder what Will Rogers would say about that?

KISS: A Really Simple Way to Increase Your Article's Impact

By Norman Otto Stockmeyer*

Back in 2012, I wrote an article for *The Scrivener* on ways to boost an article's readership. (It's available at <http://ssrn.com/abstract=2064756>). Since then I have learned of a really simple additional way. We all know that to increase readability, use short words and short sentences. It turns out that using a short title for your article can increase the likelihood that it will be read. And cited by others.

Based on a sample of 1,107 papers on SSRN's Legal Scholarship Network, a Cambridge law professor has found that for both abstract views and downloads, it helps to have a short title. Mathias Siems, "Legal Research in Search of Attention: A Quantitative Assessment," 27 *King's Law Journal* 170 (2016). Professor Siems suggests that short, catchy titles quickly capture readers' attention.

An earlier study tracked citations to articles appearing in select U.S. law reviews from 1980 to 1995. It found that "articles with shorter titles received significantly more citations than articles with longer titles." Ian

Ayers and Frederick Vars, "Determinants of Citations to Articles in Elite Law Reviews," 29 *Journal of Legal Studies* 427, 440 (2000). (Somewhat paradoxically, having a colon in the title helped, too.)

It also helps to make your title snappy. Recently, Stanford law professor Mark Lemley took a boring article, with an equally boring abstract, which had been posted on SSRN for nine months, and reposted it. His only change was to give it a new, catchier title. Within a couple of days, the "new" article had been viewed six times as often, and downloaded three times as often, as the original article. <http://leiterlawschool.typepad.com/leiter/2016/12/a-case-study-in-ssrn-downloads-or-fuck-redux.html>

So the KISS principle applies to titles. If you want to increase your chances of being read and cited — and who doesn't? — **Keep It Short and Snappy.**

**The author is a past president of Scribes and a frequent contributor to legal journals and newsletters.*

A Tribute to Frank Wagner

By Joseph Kimble

Frank D. Wagner died on August 28. I've been asked to write a short tribute for Scribes, whose Board of Directors he served on for three years (2010–2013). While a Board member, Frank helped organize the 2012 Clarity Conference in D.C. (Scribes was a sponsor) and, most notably, arranged to present the Scribes Lifetime-Achievement Award to Justice John Paul Stevens. The video presentation was shown at Scribes' Annual Luncheon in 2012.

His good service to Scribes, though, was one small accomplishment among his own lifetime of achievements. Many — perhaps most — of you know that he was Reporter of Decisions for the United States Supreme Court. But did you know that after his 23-year tenure (1987–2010) he had more volumes of the *United States Reports* to his credit than any previous Reporter? A grand total of 82. He also proposed, designed, and supervised the creation of the Court's first website, in 2010.

If you search under "Frank D. Wagner" and "C-SPAN," you'll find a talk that Frank gave to the Supreme Court Historical Society on his work as the Reporter. He described himself as an "editor of sorts," not a "full-service editor." As most of you will again know, his office was responsible for checking the accuracy of quotations, citations, and (to some extent) the facts in opinions — and also checking for typographical errors, preferred spellings, grammatical mistakes, and deviations from the Court's own style manual. During the talk, Frank told a few stories that word nerds will love: a Reporter's catching Justice Holmes's misspelling of *principle* and receiving a gracious letter that now hangs framed in the Reporter's Office; a debate over the two spellings *marijuana* and *marihuana*; and published differences in slip

opinions over *attorney's fees* and *attorney fees* and *attorneys' fees*.

Of course, the Reporter's other responsibility is to prepare a syllabus for each opinion. (Frank used the plural *syllabuses* — a good call, in my opinion.) To the extent that there is any serious controversy over the Reporter's work, it's prompted by the syllabuses. Volume 16 of *The Scribes Journal of Legal Writing* includes Frank's article *How Not to Write a Syllabus*. He described receiving letters asserting that one syllabus or another had misrepresented the opinion. He dutifully reported those concerns to the author of the majority opinion, and each time the syllabus came back reapproved without changes. He did acknowledge, though, that in one or two cases the syllabus prepared by previous Reporters may not have been entirely accurate.

Christine Fallon, who succeeded Frank as the Reporter, had these reflections: "Frank was my mentor, colleague, and friend for more than 30 years. He was an exceptional legal writer and editor, who generously shared his knowledge and expertise with colleagues and others interested in the reporting of decisions. His wise counsel and steady guidance will surely be missed by the members of our profession."

Among Frank's other professional accomplishments:

- President of the Association of Reporters of Judicial Decisions (2002–2003).
- Editor of the quarterly newsletter of the Supreme Court Historical Society (2011–2014).

-
- Mentor for law students writing case summaries for the Cornell Legal Information Network (2010–2016).
 - Author of many articles on legal subjects.

Frank was an English major at Cornell University and received his law degree from Pennsylvania State University Dickinson School of Law. Before working for the Supreme Court, he was an editor for the Lawyers Co-operative Publishing Company.

My fondest memory of Frank is a personal one. In 2011, Scribes held its annual luncheon in Toronto. I drove there with my 87-year-old mother. After I introduced her to Frank and his wife, Carol, they spent the longest time talking with her and making her feel welcome among a room full of strangers. For days and months afterwards, she reminded me of how good it felt to have someone treat her so warmly. And every time I saw Frank after that, he never failed to ask, “How’s your mom?” He was a kind and thoughtful man.



JMLS Scribes Student Chapter Welcomes Dean Darby Dickerson

A Great Article on Jury Instructions

By Terri LeClerq

Writing Better Jury Instructions: Antitrust As An Example.

Coauthors: Joshua P. Davis, Associate Dean for Academic Affairs and Professor, University of San Francisco and Senior Fellow, American Antitrust Institute (AAI); Shannon Wheatman, President Kinsella Media LLS, design and implementation of notice programs in class-action notices, bankruptcies, and other major mass claims; Christen Stephansky, Notice Manager, Kinsella Media LLS.

Joshua P. Davis et al., *West Virginia Law Review*, Forthcoming 2017

<http://awards.concurrences.com/articles-awards/academic-articles-awards/article/writing-better-jury-instructions-antitrust-as-an-example>

I love this article. First, these authors practice what they preach: this is an exemplary example to teach students, or help young attorneys, to write prose that prospective jurors—or clients—can easily read and comprehend. It certainly helps that the authors come from different disciplines and backgrounds: their disparate knowledge provides us with a deeper understanding into both grappling with legal concepts and overcoming the typical reader's confusions. For instance, the authors have studied storytelling and psychology:

Further, recent scholarship has focused on the notion of "schemas" and their influence on a jury's understanding of the law.¹⁹ The idea is that jurors bring preexisting frameworks for understanding the world—"schemas"—to bear in the task of finding facts.²⁰ These schemas can play various roles for jurors. Perhaps most obviously, they can shape a juror's beliefs about what is and is not permissible behavior in the marketplace—beliefs that may or may not conform to antitrust doctrine. Schemas can have other effects as well. They can, for example, influence how a juror reads a document, affecting what the juror expects to see and whether the juror is able to understand information provided. Although the task is ambitious, we tried to take into account principles of cognitive and educational

psychology in structuring the proposed jury instructions and in attempting to modify jurors' schemas so that they more closely resemble those of experts in antitrust law.

Second, their thesis is straightforward: if a major project is worth doing, it's worth doing right, and right can mean empirical testing. They maintain that empirical testing will become an integral part of drafting, for instance jury instructions, to ensure that you reach your intended audience.

Third, the authors follow the advice of all experienced legal writing teachers: set-up paragraphs, headings that track the topic sentences, topic sentences, sentence and paragraph variety with an emphasis on 'short enough,' graceful transitions, inclusion and exploration of counter arguments, plus footnotes to our favorite legal writers and explanatory material if needed. (Joe Kimble and Lou Sirico, for instance, are quoted throughout.) Here's an example of both topic sentence and facing counter arguments:

Why do jury instructions matter? The question may seem somewhat heretical. But it is worth asking. We provide three answers: jury trials still occur; the prospects at trial inform settlements; and jury instructions not only reflect but may inform the law.

They take us through the technical steps of finding the document's proper, diverse audience. They work through implementing old jury instructions with newer ABA requirements of readability. If you teach antitrust, or work in that field—lucky you. You get a quick primer and update. I have worked with Shannon Wheatman on a national survey and product before, the Federal Judiciary Center's Model Plain Language Class Action Notices. She does not cut corners, as you will see in this 60-page article with examples.

Legal writers and legal teachers might add Internet empirical research into their drafting problems, or require practicing writers to run their documents through the Internet's Survey Monkey to see just how many readers can actually follow the argument or information. Once writers see the results, they too will embrace empirical testing. After all, as the authors point out, a 2003 literacy study found that less than 15% of U.S. adults were proficient in "integrating, synthesizing, and analyzing multiple pieces of information located in complex documents." Yikes. Survey Monkey, here I come!

Scribes to Co-Sponsor 12th Global Legal Skills Conference

Scribes will again be a co-sponsor of the Global Legal Skills Conference, an international gathering of experts who promote training and mastery of legal writing and other skills necessary for law practice. The 2017 GLS Conference will be held in Monterrey, Mexico at the Facultad Libre de Derecho de Monterrey. The conference is also sponsored by the Instituto Tecnológico Autónomo de México Department of Law (Mexico City), The John Marshall Law School of Chicago (where the GLS Conference was founded), and the University of Texas at Austin School of Law.

This year's conference will begin on Wednesday, March 15, 2017 and continue through Friday, March 17, 2017. Participants are expected from Australia, Canada, China,

Colombia, Estonia, Germany, Ireland, Italy, Mexico, the Netherlands, Qatar, Switzerland, Turkey, the United Kingdom, the United States, and Venezuela.

A special feature of the March 2017 conference is a workshop on contract negotiation and drafting for law students. In this workshop, English- and Spanish-speaking law students will act in teams to negotiate and draft a simple business contract – for example, a franchise agreement for a hotel or restaurant. Negotiations will take place in English and Spanish, and the resulting document will be drafted in both languages.

Further information about the conference is available at <http://glsc.jmls.edu/2017>.



*I am not at all in a humor for writing.
I must write on until I am.
- Jane Austen*

Houston CLE a Success

By Brooke-Noelle D. Royes, Scribes Student Member

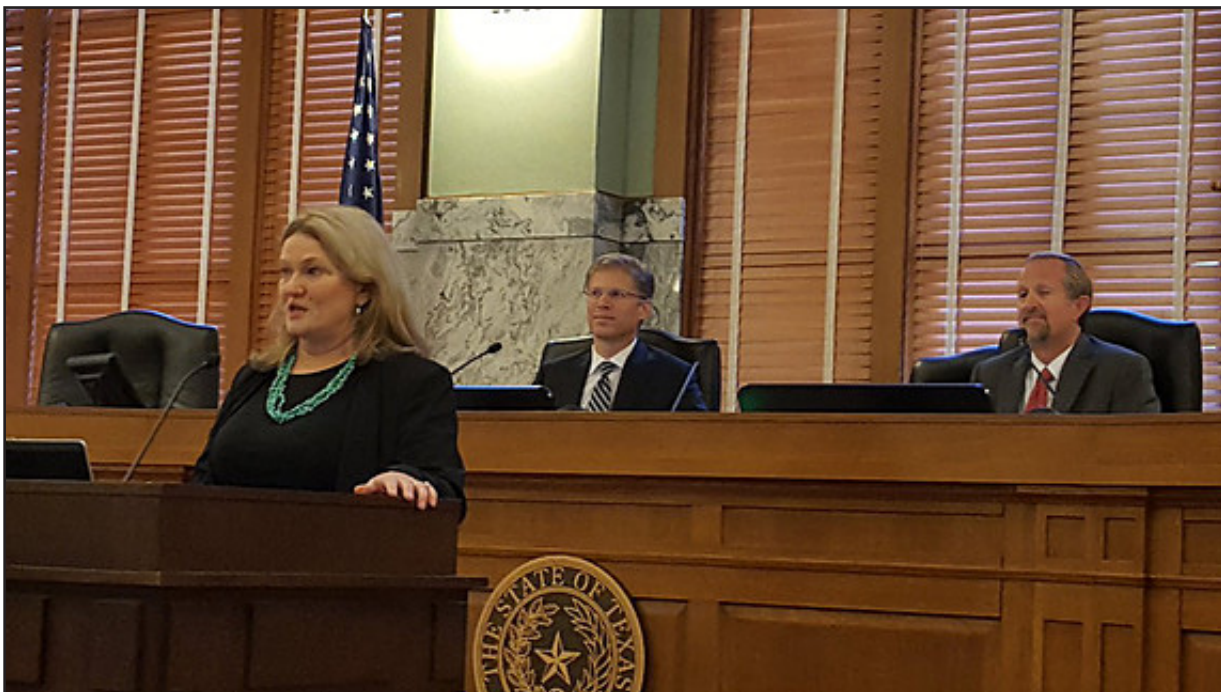
Thank you to all who were able to participate in the 2016 Houston CLE held at the Harris County 1910 Courthouse on October 28, 2016. The CLE kicked off with a welcome from Chief Justice Kem Frost of the Court of Appeals for the Fourteenth District of Texas, and Dean Darby Dickerson, now of The John Marshall Law School.

During the first presentation, "Giving Clients What They Want: Clear, Concise Communication," Bill Buck of ExxonMobil Upstream Companies and Chuck Boettcher of Waste Management spoke about streamlining legal writing to be more reader-focused and more effective.

Next, Ann Ryan Robertson of Locke Lord, LLP, provided further insight on the topic of audience with a segment titled "Reader-Focused Legal Writing for Arbitration;" sharing the most effective ways to get the client's message across in arbitration.

The 2016 Houston CLE closed with the compelling panel "Effective Motion-Drafting in Trial & Appellate Practice," moderated by Erin Busby. The panel included commentary and practical tips on effective motion-drafting from Hon. Jane Bland, and Hon. George Hanks.

Be sure to join us for the 2017 Annual Scribes CLE event coming up on April 21st, 2017 in Oklahoma City, Oklahoma. We look forward to seeing you there!



Scribes Board Member Chief Justice Kem Frost introduces panelists Bill Buck and Chuck Boettcher



The American Society of Legal Writers

Please join us for the
Scribes 2017 CLE

Legal Writing: Art & Craft

Save the Date

Friday, April 21, 2017
Oklahoma City University
School of Law

Lifetime-Achievement Award:
OKCU President Hon. Robert Henry

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