The Scrivener

Scribes — The American Society of Legal Writers

Winter 2008

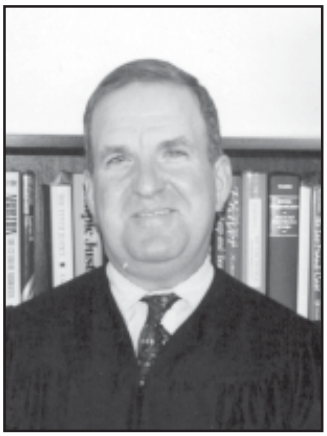
President's Column

by Stuart Shiffman

This coming year promises to be an exciting time for Scribes. The year began in New York City with a program on the legal writing of Abraham Lincoln. The program was a big success (you can read about it beginning on page 4 of this issue), and I would like to acknowledge the work of many Scribes members in putting it all together. In recent years, we have presented programs at Stetson University College of Law, the University of Houston Law Center, South Texas College of Law, the Association of American Law Schools meeting, and American Bar Association meetings. These programs spotlight legal writing and the role our organization plays in improving its quality.

I am also excited to announce the formation of the Lifetime-Achievement-Award Committee. For many years, our board has struggled with a way to properly recognize those individuals or organizations that have made major contributions to legal writing. During the past several years, in an ad hoc fashion, we have recognized individuals we believed were worthy of a lifetime-achievement award. The new committee will establish specific guidelines for the award and nominate worthy recipients. Bryan Garner, a former Scribes president, and one whose accomplishments in legal writing are well known, has agreed to chair the committee.

The formation of a new committee reminds me that our existing committees continue to be successful in their many diverse efforts. Our Annual-Meeting Committee has begun work on the luncheon held each year in conjunction with the annual meeting of the American Bar Association. This year, the meeting will be in New York City. Any Scribes members in the New York area who are willing to help with the details and presentation of the meeting should contact Executive Director Joe Kimble.



Stuart Shiffman, president of Scribes.

Other committees include Membership and Outreach, the *Scribes Journal*, *Scrivener*, Website, Legal-Writing Programs, and our awards committees—Law-Review, Brief-Writing, and Book Award. If you are interested in serving on any of those committees, we welcome your participation; please contact Joe Kimble.

Finally, I am looking forward to our board meeting in Las Vegas. The William S. Boyd School of Law will host our activities, including a writing seminar for students and local attorneys. Our panel will include board members Bryan Garner, Darby Dickerson, and Joe Kimble.

There may even be some time for a seminar on Texas Hold 'Em.

A *Scrivener* Book Review
The Little Book of Plagiarism

The Little Book of Plagiarism
By Richard Posner
Pantheon
ISBN: 9780375424755
Current Affairs; Law; Philosophy

The Little Book of Plagiarism by Judge Richard Posner is a stylish and insightful study of intellectual cheating and stealing that comes in many forms and has afflicted some of the world's greatest writers and artists.

Richard Posner is one of America's foremost observers of law and contemporary culture. In 1981, President Ronald Reagan nominated Posner to the United States Court of Appeals for the Seventh Circuit. Posner came to the judiciary after a distinguished career as a professor of economics and law at the University of Chicago. In addition to the dozens of opinions he authors each year, Judge Posner is the author of books on law and literature, the Clinton-Lewinsky scandal, the 2000 presidential election, and countless other observations on law and society. A 2004 poll of *Legal Affairs* magazine named him one of the top legal thinkers in America.

As a judge and economist, Posner brings a unique perspective to the issues raised by the sin of plagiarism. *The Little Book of Plagiarism* is small in size but substantial in perceptive observations. Posner makes several significant points in his novella-length discussion. First is the nature of the offense. Many view plagiarism as a sin limited to educational institutions. Posner correctly notes that plagiarism is far more than a beleaguered student's lifting words from others while preparing a term paper. The list of well-known authors accused of the sin runs from Stephen Ambrose to Kaavya Viswanathan, the first-time novelist whose two-book contract with Little Brown was voided after pages from her first novel, *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, were found to have been lifted from other sources.

Plagiarism is not, however, limited to the theft of the written word. Rembrandt signed works of art that his assistants painted. Shakespeare lifted plots for his plays from other playwrights. Senator Joseph Biden appropriated the words of an English politician, Neil Kinnock, as his own. Posner tries to distinguish plagiarism from copyright infringement but finds the distinction a difficult one because of substantial overlap between the two. Ultimately, Posner concludes that the vice of plagiarism is reliance. "The reader does something because he thinks the plagiarizing work original that he would not have done had he known the truth."

The irony of this definition is that it excludes from plagiarism Judge Posner's own profession, the law. Since it also happens to be my profession, I must observe that lawyers may well be the most common practitioners of plagiarism in contemporary society. Partners claim authorship of legal briefs drafted by young associates. Judges issue written opinions drafted by law clerks. Professors publish scholarly works under their names when most of the work has been performed by willing student researchers. But Judge Posner dismisses this type of plagiarism (with perhaps the exception of the scholarly example) because everyone knows and accepts this legal pilferage. Judge Posner, a man who writes his own opinions, should not be so forgiving of his fellow practitioners.

One final observation from *The Little Book of Plagiarism* bears mention: the technological revolution has changed our perception of the sin. Computer programs now allow college professors and other interested parties to compare finished products for materials lifted without appropriate attribution. While this will expose academic offenders, it may have little impact on other commercial plagiarizers. Consider the University of Oregon's plagiarism of the section dealing with plagiarism from Stanford's teaching-assistant handbook.

The Little Book of Plagiarism is a worthy addition to the small cadre of reference materials that most writers keep within arm's reach of their computers. While it may be a small book, it deserves a big audience.

Stuart Shiffman

In Memoriam

Donald J. Dunn, a past president of Scribes, died on January 5, 2008, at his home in Orange County, California. Don was professor of law and dean of the College of Law at the University of La Verne in Ontario, California—and a nationally recognized law librarian. He was a member of Scribes from 1987 to his death in 2008. A memorial service will be held on Saturday, March 8, 2008, at the University of La Verne College of Law; a full tribute to Don will appear in the next issue of *The Scrivener*.

Donald J. Dunn at the Scribes Annual Luncheon, August 2006.

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Jane Siegel
Thomas M. Cooley Law School
P.O. Box 13038
Lansing, Michigan 48901
siegelj@cooley.edu

Scribes Cosponsors a Very Successful Lincoln Symposium

by Brad Charles

On a very chilly January 3, 2008, Scribes and the New York City Bar's Legal History Committee sponsored an unprecedented symposium on Abraham Lincoln's legal writing. Based on a collection of over 90,000 legal documents, the experts agreed: Lincoln was a remarkable legal researcher and writer.

From left to right: Mark Steiner, John Lupton, Harold Holzer, and Roger Billings.

Harold Holzer, distinguished Lincoln scholar and frequent documentary guest, opened the symposium by suggesting that studying Lincoln as a lawyer is important because his law practice shaped every decision he made as president. The research acumen that Lincoln gained as a lawyer, for example, greatly influenced his Cooper Union address. Holzer concluded that the Cooper Union address was an exceptional speech—one, in fact, that catapulted Lincoln to the presidential nomination—for two reasons. First, Lincoln extensively researched the views of the Constitution's 39 signers on the extension of slavery. Second, he displayed forceful reasoning skills. Even more impressively, he researched and wrote the speech while balancing a busy law practice and a growing political career. Above all, Holzer summarized, Lincoln revered the rule of law and argued that it should become the "political religion" of the country.

John Lupton, associate director, The Papers of Abraham Lincoln, next explained why Lincoln's documents were well reasoned. In particular, Lincoln often wrote honest, balanced jury instructions. Lupton noted that Lincoln handwrote all his legal documents, and his handwriting was "clear, bold, and distinct." He also pointed out that Lincoln's handwriting reflects what kind of thinker he was: "slow and deliberate." Lupton found that Lincoln's documents had fewer corrections than his contemporaries', showing that he usually got it right the first time.

Lupton also said that one of Lincoln's greatest skills was his ability to explain the complex in simple terms—a skill that he used in client letters and jury instructions.

In the famous almanac case, *People v. Armstrong*, Lincoln represented a friend's son who had allegedly beaten someone to death. The prosecution's witness claimed to have seen the beating by moonlight—well enough to identify Lincoln's client. On cross-examination, Lincoln questioned the witness's ability to see the beating with so little moonlight. Lincoln threatened to retrieve an almanac to prove that, on the night of the beating, the moonlight would have been insufficient to make a positive identification. The witness recanted.

Since that time, many storytellers have attributed the victory to Lincoln's almanac ruse. Lupton, however, believes that Lincoln's legal-writing skill in drafting perfect jury instructions during the prosecutor's closing argument is what won the trial.

Roger Billings of the Chase College of Law, Northern Kentucky University, presented his findings on Lincoln's letters to clients. Lincoln, he said, wrote letters to inform his clients of case progress. In one, Lincoln shamelessly stated that he wanted to end a slowly progressing case: "I want to get the matter off my hands." In another progress letter, Lincoln showed his honesty when he matter-of-factly stated that he'd been neglecting work for politics; given some mild political setbacks, however, he now had time for the client's case.

Billings said that Lincoln also wrote letters to apologize. In one, he apologized for losing documents after stowing them in his stovepipe hat. In another, the

apology wasn't as interesting: "I at last found time," he wrote when responding to a client inquiring why he hadn't been more diligent. While never careless, Lincoln wasn't perfect. In explaining why he hadn't timely filed the documents to get a corporate charter, he wrote to his client, "I let a few days slip before getting to it." Actually, it had been six months—time spent in political debates.

Lincoln also wrote fee letters and "righteous indignation" letters when he felt the need to defend his character.

Professor Mark E. Steiner of South Texas College of Law, author of *An Honest Calling: The Law Practice of Abraham Lincoln*, commented on the three presentations. He noted that Lincoln was a remarkable researcher and writer who used his skills to draft a slavery proclamation that could withstand constitutional scrutiny. That, Steiner explained, is why the Emancipation Proclamation has the "moral grandeur of a bill of lading."

As the president, Lincoln's lawyer skills were apparent especially when he demanded precise definitions and used persuasive logical syllogisms. Steiner also noted that Lincoln was annoyed by capitalism's acceleration of time and diminishment of lawyer autonomy.

Before concluding the program, Joe Kimble, Scribes' executive director, moderated an insightful question-and-answer session for the 50-member audience.

All in all, it was a fascinating evening; all came away with greater admiration for Lincoln as a lawyer.

A video of the symposium will be available for viewing on the Scribes website.

Brad Charles is a visiting professor teaching legal research and writing at Thomas M. Cooley Law School—and a new member of Scribes.

Judges Write About Writing

Judges not only write opinions, they have opinions—often strongly worded ones—about the state of legal writing today. With this issue of *The Scrivener*, we start a new feature: a collection of quotations from judges about legal writing. Send your favorites to siegelj@cooley.edu, and we'll print them here.

Robert Markle alerted us to this recent final word in an opinion from the United States Court of Appeals, Seventh Circuit, authored by **Judge Posner** and issued January 16, 2008:

> A note, finally, on advocacy in this court. The lawyers' oral arguments were excellent. But their briefs, although well written and professionally competent, were difficult for us judges to understand because of the density of the reinsurance jargon in them. There is nothing wrong with a specialized vocabulary—for use by specialists. Federal district and circuit judges, however, with the partial exception of the judges of the court of appeals for the Federal Circuit (which is semi-specialized), are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English, as we hope this opinion has demonstrated. The able lawyers who briefed and argued this case could have saved us some work and presented their positions more effectively had they done the translations from reinsurancese into everyday English themselves.

To read the entire opinion, go to http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=showbr&shofile=07-1823_017.pdf.

A Brief Conversation

by Mark Cooney

The attorney swiveled his chair around to look out his ninth-floor window. The setting sun's last glimmers of light cast an orange glow across the windshields of the few remaining cars parked below. He'd just polished off the second half of a sub sandwich he bought for lunch seven hours earlier. The working draft of an appeal brief sat on his desk behind him, next to some crumbs and an empty coffee mug. The brief was due the next day, but a late-afternoon client meeting had run into early evening, and he was only now getting back to it. He took a deep breath and swiveled back around to face the brief. Assuming the role of diligent editor, he took up his red pen and went to work. After a few moments of reading, he put pen to paper and, with a mighty slash, annihilated a wayward sentence. "Ouch!"

Attorney: What the . . . ? Did you just . . . ?

Brief: Sorry, buddy, but I felt that one. Not that I don't appreciate the edit. In fact, I'm feeling a bit bloated—you know, the way you feel after polishing off the El Grande Beef Burrito down at the Taco Loco. Can you trim a few pages?

Attorney: Trim pages?

Brief: You don't have to take my word for it. Just ask Justice Antonin Scalia, Third Circuit Judge Ruggero Aldisert, Ninth Circuit Judge Alex Kozinski, Tenth Circuit Judge Carlos Lucero—and the list goes on and on.[1] They've all lamented the glut of glut. Unnecessary length puts off judges. Don't write to the page limit as if it's a goal. Cut me down to my essentials—no excess baggage.

Attorney: Well, it's an important case. But I suppose I might be able to shave some off here and there.

Brief: That's the spirit! And not to be a nag or anything, but I couldn't help noticing that your questions presented are in all capital letters. They're big, imposing blocks of solid caps, and they're *long*. One's 98 words of solid caps. Just *look* at that thing. Do you find that easy to read?

Attorney: But everybody does them that way.

Brief: That's not what I asked you.

Attorney: Well, I just add the word *Whether* to my argument headings to create my questions presented, and the court rules require all caps or boldface type for argument headings in appeal briefs.

Brief: Then choose lower case for both, and bold your argument headings. Those big blocks of all caps are virtually unreadable.[2] They make your reader's eyes go buggy.

Attorney: Well, I never really thought about it. I guess I could try lower case.

Brief: And don't forget to trim down those questions presented after you switch them to lower case. Legal-writing guru Bryan Garner advises lawyers not to exceed 75 words even when using his multi-sentence "deep issue" style.[3] Your questions presented are 98 and 95 words, and they're single sentences. In fact, they're sentence fragments, given your "Whether" style. Couldn't you shoot for something informative but much more readable, say about 50 words?

Attorney: Okay, okay, I'll tighten them up and use lower case. I suppose that will make it a bit easier for the reader.

Brief: Wow! Actually thinking about your reader!

Attorney: Listen, Mr. Sarcasm, I can just shred you if you'd prefer . . .

Brief: No! I'm sorry! I'll stop! . . . Except . . . there is another thing.

Attorney: What *now* ?

Brief: Well, in your analysis of the *Jackson v XYZ Corp* case—you know, that important court-of-appeals case that you devote almost a full page to—I see that you describe the parties as *the appellant* and *the appellee*.

Attorney: So?

Brief: Well, don't you hate that when you're reading? You lose track of who's who. You have to stop in mid-thought and try to remember who the darn *appellee* was. It drives readers nuts. In fact, Federal Rule of Appellate Procedure 28 (d) tells lawyers to avoid the terms *appellant* and *appellee* when describing parties. And a number of states, like Alaska, Iowa, South Dakota, Utah, and Washington, have done the same in their rules.[4] Doesn't that tell you something about what readers think?

Attorney: But how else am I supposed to write it—*the plaintiff* and *the defendant*?

Brief: Well, *the defendant* is informative if you're analyzing an appellate opinion in a criminal case, but the *Jackson* case was a civil suit—age discrimination, right? Try descriptive status words to identify the par-

ties and the other "main characters" in the story. It's more reader-friendly. So how about telling your reader that in *Jackson*, the *employee's supervisor* and *coworkers* said improper things to *the employee*, *the employee* complained to his *employer*, but the *employer* did nothing about it? Isn't that easier to follow?

Attorney: I can see how that might help.

Brief: And another thing . . .

Attorney: Is there no end?

Brief: You haven't used any topic sentences to help your reader follow the flow of your argument. Your headings help identify the main arguments, but in a bunch of places in the text, you dive into new subtopics or case discussions without giving any hint of where you're going. If you're switching gears or building on something you've already said, let your reader know with a quick topic sentence. Don't hold your reader in suspense.[5] Plus, those topic sentences give you a chance to reinforce important points—they're good advocacy tools for the shrewd lawyer.

Attorney: Hey, why do you care so much about all this nit-picky little stuff? What do you want out of this?

Brief: Well, I guess I just want what everyone wants.

Attorney: To win cases?

Brief: No. I just . . . I just want . . . to be loved.

Attorney: I'm gonna be sick.

Brief: Hey, buddy, I may be just another brief to you, but this is my one big chance. I don't want to be just another lackluster brief. I don't want the judges to clench me in frustration or roll their eyes in disgust while reading me. I don't want them to point at me and ask their clerks why some attorneys "don't seem to think about the people who actually have to read these things." You just file the thing, but I'll have to go into the judges' chambers and listen to the reaction when I'm being read.

Attorney: All right, all right.

Brief: I'm just saying that you should think about the things—even seemingly little things—that will make it easier for your reader to read me. Watch your sentence and paragraph length, strive for clarity—all those little things that add up to a strong, readable . . . Hey. HEY! What are you doing? Where are you taking me? No. NO! Not the shredder!

Attorney: Relax, I'm just walking you down to the kitchen. I'm gonna need lots of strong coffee while I work on you. I've got a lot more work to do than I thought.

Brief: Just don't put your cup down on me. It leaves those nasty coffee rings.

Attorney: You're really pushing your luck now, pal.

Endnotes

1 Bryan A. Garner, *Justice Scalia Shares Views on Good Usage and Style*, 35 Student Law. 10, 11 (2007); Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 Miss. L.J. 645, 645, 646, 651 (2006); Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. Rev. 325, 326 (1992); Robert R. Baldock, Carlos F. Lucero & Vicki Mandell-King, *What Appellee Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates*, 31 N.M. L. Rev. 265, 269 (2001).

2 Bryan A. Garner, *The Redbook* § 22.1(c), at 403 (2d ed. 2006).

3 Alaska Stat. Ann. § 212(c)(7); Iowa Code Ann. § 6.14(4); S.D. Codified Laws § 15-26A-63; Utah Ct. R. Ann. § 24(d); Wash. R. App. P. 10.4(e).

4 See Joseph Kimble, *The Straight Skinny on Better Judicial Opinions*, in *Lifting the Fog of Legalese: Essays on Plain Language* 89, 90–91 (2006).

Mark Cooney is an associate professor at Thomas M. Cooley Law School, where he teaches legal writing.

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45 Golf Road
Springfield, Illinois 62704
(217) 546-3710
msshiffman74@sbcglobal.net

Vice President – Steven R. Smith

California Western School of Law
225 Cedar Street
San Diego, California 92101-3090
(619) 525-1405
ssmith@cwsl.edu

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Stetson University College of Law
1401 61st Street, South
Gulfport, Florida 33707
(727) 562-7858
darby@law.stetson.edu

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Circuit Court of Cook County, Illinois
50 West Washington Street
1401 RJ Daley Center
Chicago, Illinois 60602
(312) 603-4984
hymikeb@aol.com

Executive Director and *Journal* Editor – Joseph Kimble

Thomas M. Cooley Law School
P.O. Box 13038
300 South Capitol Avenue
Lansing, Michigan 48901
(517) 371-5140
kimblej@cooley.edu

Past President – N.O. Stockmeyer

Thomas M. Cooley Law School
P.O. Box 13038
300 South Capitol Avenue
Lansing, Michigan 48901
(517) 371-5140
stockmen@cooley.edu

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Thompson & Knight LLP
1700 Pacific Avenue, Suite 3300
Dallas, Texas 75201
(214) 969-1110
beverly.ray.burlingame@tklaw.com

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Newman Fitch Altheim Myers, P.C.
14 Wall Street
New York, New York 10005-2101
(212) 619-4350
dcole@nfam.com

2008–2011 Bryan A. Garner

LawProse, Inc.
5949 Sherry Lane, Suite 1280
Dallas, Texas 75225
(214) 691-8588
bglawprose@yahoo.com

2006–2009 Christy Nisbett

Travis County Probate Court
P.O. Box 1748
Austin, Texas 78767
(512) 854-9559
christy.nisbett@co.travis.tx.us

2005–2008 Hon. Lee H. Rosenthal

United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, Texas 77002-2600
(713) 250-5980
lee_rosenthal@txs.uscourts.gov

2007–2008 John R. Wierzbicki

Thomson West
50 Broad Street, East
Rochester, New York 14694
(585) 258-3751
john.wierzbicki@thomson.com

2006–2009 Christopher G. Wren

Wisconsin Department of Justice
P.O. Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7081
wrencg@doj.state.wi.us

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