The Scrivener

Scribes — The American Society of Legal Writers

Winter 2007

President's Column

Norman Otto Stockmeyer
Emeritus Professor
Thomas M. Cooley Law School

Our 2007 Annual Luncheon

Add this to your day planner: the Scribes Annual Luncheon this year will be on Saturday, August 11, in San Francisco. We will gather at the Hotel Nikko to elect officers and members of the Board of Directors, to present our annual Scribes Book Award and Brief-Writing Award, and to hear remarks from a renowned speaker. He is none other than former Scribes president and current board member Bryan Garner.

When he spoke at our 1989 annual luncheon, he was a 30-year-old University of Texas law-school instructor and had just published a new legal dictionary. He founded LawProse, Inc. the following year, and since then has held over 1,600 seminars, attended by more than 80,000 lawyers and judges. He has also written 21 books on legal writing, drafting, and usage and founded *The Scribes Journal of Legal Writing*, our premier member benefit. His topic will be "Knowing Your Stuff as a Legal Writer."

Bryan Garner will speak at the Scribes 2007 annual luncheon in San Francisco on August 11.

As in the past, we expect that Thomson West's sponsorship will allow us to keep luncheon tickets reasonably priced. Please plan to join us for a delightful luncheon program.

Follow-Up

My last Legal-Writing Tidbit (in the Fall 2006 column) reprinted Judge J. Dean Morgan's *Top Ten List for Legal Writers*. He is a former Chief Judge of the Washington State Court of Appeals. I since discovered that his court has posted on its website a helpful guide to best practices for brief writing. What a good idea! You can find it by going to *www.courts.wa.gov/appellate_trial_courts/*. Under "Court of Appeals Division I," look down and click on "Brief Writing—Best Practices."

I have also learned that Professor Wayne Schiess, author of *Writing for the Legal Audience* and *Better Legal Writing: 15 Topics for Advanced Legal Writers*, has ended his practice of sending out weekly e-mails with legal-writing tips (mentioned in my Spring 2006 column). But his blog is well worth a periodic visit, so add this to your list of favorite sites: www.utexas.edu/law/faculty/wschiess/legalwriting/.

Two more legal-writing blogs I visit regularly are Raymond Ward's *The (New) Legal Writer* (http://

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raymondpward.typepad.com/newlegalwriter/) and Ken Adams's *Adams Drafting* (http://adamsdrafting.com/). Give them a look, too.

Norman Otto Stockmeyer
Emeritus Professor
Thomas M. Cooley
Law School

Legal-Writing Tidbit

This issue's Legal-Writing Tidbit deals with writing for publication. As Scribes members, most of us have committed at least two acts of published writing. Yet many aspiring legal authors lack direction or focus and end up dreading the task. You too? I have found Rick Bales's article *Writing for Publication* helpful in this regard.

Professor Bales is a professor at Northern Kentucky University–Salmon P. Chase College of Law. His article is one of a series on effective legal writing that he wrote for the Kentucky Bar Association's *Bench & Bar*. Reprinted here is the section on the getting-it-written portion of the task. Other parts of his article—on choosing a topic and journal, and getting your article published—are also very helpful.

Green Bag Chooses Two Scribes Articles for Its 2007 Almanac!

Scribes Executive Director Joseph Kimble announced that *Green Bag* has selected two articles, published by Scribes, as winning examples of good legal writing. The first is Duncan MacDonald's *The Story of a Famous Promissory Note*, published in Volume 10 of the *Scribes Journal*. The second is Judge Diane Wood's *Original Intent versus Evolution: The Legal-Writing Edition*, in the Summer 2005 *Scrivener*.

Both articles will appear in the *2007 Green Bag Almanac and Reader*.

Writing for Publication*

Putting Pen to Paper

An introduction is like an operatic overture; it introduces the themes that will recur throughout the work. An introduction should accomplish three things. First, it should capture the reader's interest. A reader who is unexcited about your introduction is unlikely to read further. Second, the introduction should give the reader enough basic information about the topic to know what the article is about. Third, the introduction should provide a road map describing, in order, the various parts of the article. I like to do this in a paragraph that begins with a thesis statement, followed by a one-sentence description of each part of the article. For example: "This article argues that . . . . Part I provides background information concerning . . . . Part II describes . . . . Part III analyzes . . . . Part IV proposes . . . ."

Next after the introduction is a background section. If you are writing about the application of the "extreme and outrageous" element of the tort of intentional infliction of emotional distress to workplace claims, you will want to start by discussing the general contours of the tort. Keep two things in mind. First, make the background section as succinct as possible. Second, avoid a serial discussion of cases because this is difficult for readers to synthesize. Instead, organize your background section around the pertinent legal doctrines.

The analytical part of an article is the most important part; it makes your article unique. Evaluate the current state of the law (or each approach if the authorities are split). Give your proposal as to what the law should be, together with the advantages, disadvantages, and responses to the disadvantages. Evaluate your policy levels. Illustrate how your proposal solves (or helps to solve) the problems raised in the cases you've already discussed in your background section. Be candid about the shortcomings or limitations of your proposal. Keep in mind that your proposal doesn't have to be a panacea—it just has to be an incremental improvement over the status quo.

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(Writing for Publication *continued)*

The conclusion of the article should simply summarize what you've already said. A common mistake is to raise new analytical issues in the conclusion. This inevitably results in truncated analysis. Avoid this temptation—anything new belongs, with extended discussion, in the body of the article.

After writing the article, edit incessantly. I usually spend at least as much time editing my articles as I do researching and writing combined. Get as many different people to proof it as you can. Ask them to review it not only for spelling and grammar, but also for clarity. One of the most useful comments they can make is that they don't understand a particular point—this means you need to explain it more carefully. Include nonlawyers among your proofreaders. If educated nonlawyers cannot understand your article, rewrite it until they can.

* Excerpt reprinted from 66 Bench & Bar 34 (Nov. 2002) with permission of the author and publisher. The complete article can be downloaded through the Social Science Research Network (http://ssrn.com/abstract=910042).

Teaching the Teachers: Effective Instruction in Legal Research

October 18–20, 2007, in Austin, Texas

In October 2007, the Tarlton Law Library will host a conference that will explore the teaching of legal research in today's information environment.

Teaching the Teachers: Effective Instruction in Legal Research will focus on the best methods and practices for teaching legal research to today's generation of law students. Conference faculty represent excellence in teaching and communication and come from the judiciary, the practicing bar, and the legal academy. The conference responds to and will further the National Conference of Bar Examiners' initiative to develop a stand-alone component of the bar exam focusing on legal-research methods and skills.

The conference will be held October 18–20, 2007, in Austin at the Tarlton Law Library and Jamail Center for Legal Research at the University of Texas. More information and registration details are available at http://tarlton.law.utexas.edu/ttt/.

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Deadlines

Spring	April 15
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Fall	October 15

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The Taming of the Rude*

by Michael B. Hyman

If I lose mine honour, I lose myself.[1]
—Shakespeare

William Shakespeare knew a thing or two about the law and lawyers. His plays frequently incorporated metaphors, rhetoric, and themes of a legal nature. The son of a justice of the peace, Shakespeare might have been an aspiring lawyer at heart. We don't know. But we do know that he admired how lawyers could strenuously spar and remain civil to one another: *Do as adversaries do in law, strive mightily, but eat and drink as friends.*[2]

Lack of civility concerns every judge and lawyer who takes pride in our profession. For me, civility means to be honest (intellectually and otherwise), ethical, courteous, trustworthy, conscientious, and competent. The absence of even one of these characteristics diminishes the level of civility. I wondered what Shakespeare would say about lawyer civility. I decided to meet with the Bard himself. When I entered his study, he was watching *American Idol* and feasting on a pint of Ben & Jerry's Chunky Monkey.

Shakespeare: *Heartily well met, and most glad of your company.*[3] *O, how they sing! Doth set my pugging tooth on edge.*[4]

Hyman: I want to get right to the point. What do you think of lawyers today?

S: *We have seen better days.*[5] *[Lawyers are] as full of quarrel and offence as my young mistress' dog.*[6] *Go hang yourselves all: you are idle, shallow things.*[7]

H: Bite your tongue, Willy! This is a discussion on civility.

S: *Pardon, my haste made me unmannerly.*[8]

H: No wonder you share some of the blame for the public's dim view of lawyers. Remember your line about killing all the lawyers? You meant it as a statement against tyranny. Most people think you were knocking lawyers.

S: *I am sorry that such sorrow I procure: And so deep sticks it in my penitent heart that I crave death more willingly than mercy.*[9]

H: Forget the melodramatic flourishes—you died 390 years ago. What is your advice on how lawyers should conduct themselves?

S: *No legacy is so rich as honesty.*[10] *I do despise a liar as I do despise one that is false, or as I despise one that is not true.*[11] *This above all: to thine ownself be true, And it must follow, as the night the day, Thou canst not then be false to any man.*[12]

H: Honesty is a given. So is trustworthiness and observing ethical precepts. What else?

S: *Heat not a furnace for your foe so hot that it do singe yourself.*[13] *Some rise by sin, and some by virtue fall.*[14]

H: Personal attacks, rudeness, harassment, and the like demean both the perpetrator and the legal profession.

S: *[We] have much to do to keep them from uncivil outrages.*[15] *In a false quarrel there is no true valour.*[16] *Be thou familiar but by no means vulgar.*[17]

H: Young lawyers should consider as role models only those lawyers who demonstrate civility. They understand the true meaning of professionalism. Boisterous conduct and anger have no place in our repertory.

S: *Do not plunge thyself too far in anger.*[18] *Mend your speech a little, lest you may mar your fortunes.*[19]

H: Excuse me, but some Chunky Monkey is melting on your tights.

S: *Out, damned spot!*[20]

H: What is a lawyer's most valuable asset?

S: *This is the short and the long of it.*[21] *Reputation, reputation, reputation!*[22] *Such as we are made of, such we be.*[23]

H: Final thoughts?

S: *Good counselors lack no clients.*[24] *What a piece of work is [an honorable lawyer]! How noble in reason! How infinite in faculties! In form, in moving, how express and admirable! In action how like an angel!*[25]

H: You sure can put words together beautifully! You have expressed what I too believe—aggressive advocacy has limits; cross the line and soil your reputation.

S: *The fault, [dear lawyers] is not in [y]our stars, but in [you].*[26] *Away! let's go learn the truth of it.*[27]

H (smiling): Bill, *[p]arting is such sweet sorrow.*[28]

Endnotes

1 Antony and Cleopatra, III, 4.
2 The Taming of the Shrew, I, 2.
3 Coriolanus, IV, 3.
4 The Winter's Tale, IV, 3.
5 As You Like It, II, 7.
6 Othello, II, 3.
7 Twelfth Night, III, 4.
8 King Henry the Eighth, IV, 2.
9 Measure for Measure, V, 1.
10 All's Well That Ends Well, III, 5.
11 The Merry Wives of Windsor, I, 1.
12 Hamlet, I, 3.
13 King Henry the Eighth, I,1.
14 Measure for Measure, II. 1.
15 The Two Gentlemen of Verona, V, 4.
16 Much Ado About Nothing, V, 1.
17 Hamlet, I, 3.
18 All's Well That Ends Well, II, 3.
19 King Lear, I, 1.
20 Macbeth, V, 1.
21 The Merry Wives of Windsor, II, 2.
22 Othello, II, 3.
23 Twelfth Night, II, 2.
24 Measure for Measure, I, 2.
25 Hamlet, II, 2.
26 Julius Caesar, I, 2.
27 Measure for Measure, I, 2.
28 Romeo and Juliet, II, 2.

* Reprinted from *The CBA Record* (Chicago Bar Association magazine) (May 2006). Michael B. Hyman is a Cook County, Ill., circuit court judge.

News from Members

Ed Bladen reports that he has written a new article on the Michigan Consumer Protection Act. Find it online at the State Bar of Michigan's URL: http://www.michbar.org/consumer/articles.cfm.

Jeffrey M. Leving has published a new book, *Divorce Wars: A Field Guide to the Winning Tactics, Preemptive Strikes, and Top Maneuvers When Divorce Gets Ugly*. Jeffrey's earlier book, *Fathers' Rights*, was very successful. His new book offers ethical advice on winning any divorce, even the most adversarial. Using real-life examples, he covers everything from winning settlement strategies to getting the most from your day in court. Named one of America's Best Lawyers by Forbes Radio, Jeffrey Leving was honored by the National Center for Missing and Exploited Children after helping reunite Elian Gonzalez with his father. The new book is available from HarperCollins.

Graydon S. Starling has published the 2007 annual supplement to his book, *Law of Reinsurance*, and a review of recent books about maritime insurance law. Graydon's review includes critical commentary about the authors' proposals for reform. The review is *Marine Insurance Law: Six Recent Books and Some Questions About Reform*, 37 J. Mar. L. & Com. 615 (Oct. 2006).

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Helping Jurors Understand the Law

Scribes Panel on Writing Plain-English Jury Instructions January, 6, 2007, in Washington, D.C.

*by Maureen Murphy**

A juror must apply law to facts and reach a decision, but it's not that simple. What are "mitigating circumstances"? Why "a preponderance of the evidence" instead of "more likely than not"? Do we really expect jurors to understand when they're told that a defendant's failure to testify is not "a factor from which any inference unfavorable to the defendant may be drawn"?

Justice James Ward, Professor Peter Tiersma, Professor Joseph Kimble, Professor Wayne Schiess, and Justice Carol Corrigan.

The ponderous and convoluted world of the jury instruction was the subject of a January panel on *Jury Instructions in Plain English*, presented by Scribes on January 6, 2007, in Washington, D.C., at the meeting of the Association of American Law Schools. The panelists were Justice Carol Corrigan (California Supreme Court), Justice James Ward (California Court of Appeal, retired), Professor Peter Tiersma (Loyola Law School, Los Angeles), Professor Joseph Kimble (Thomas Cooley Law School, Lansing, Michigan), and Professor Wayne Schiess (University of Texas, Austin).

Several states have made their jury instructions more understandable; California, for example, recently completed projects to rewrite its civil and criminal instructions in plain English. Justice Ward chaired the civil-instructions committee and Justice Corrigan the criminal.

Professor Tiersma, who served on the California committees as a linguistics expert, opened the discussion with a bit of history. About 100 years ago, judges began instructing juries to help them reach their decisions according to the law. Written or *pattern* jury instructions appeared in the 1920s and '30s. These pattern instructions focused on preventing error, not on writing clearly. Because pattern instructions were the best way to avoid reversal on appeal for misstating the law, courts relied on the verbatim language of statutes and precedent.

When tested, jurors usually get jury instructions wrong about half the time. Professor Kimble believes that the traditional language of jury instructions, while maybe not the worst legal writing, represents the worst *failure* of legal writing. "When someone's liberty—or even life—is on the line, lawyers haven't been able to state the law in an understandable way." Kimble cited a study concluding that probably dozens of people have been condemned to die by juries who didn't understand the instructions.

Professor Kimble offered several suggestions for revising jury instructions:

(1) *Let an experienced writer with a background in plain language prepare the first draft.* When an expert writer is brought in late in the process, the writer can often make only cosmetic changes. Professor Kimble noted that "good style improves substance from the beginning."

(2) *Adopt and follow accepted style and drafting guides.* For usage and style generally, Kimble suggested Bryan Garner's *Dictionary of Modern Legal Usage* (2d ed. 1995) and *Garner's Modern American Usage* (2d ed. 2003). For jury instructions specifically, he suggested Professor Tiersma's lead article in Volume 10 of *The Scribes Journal of Legal Writing.*

(3) *Don't believe the myths about plain language*. For instance, it is not baby talk, and it is not imprecise. In fact, plain language can reveal inconsistencies and uncertainties that traditional legal language tends to hide.

(4) *Test your product*. The California task force sent out draft proposals for public comment, and then revised them. Another way to test is to use readability benchmarks. Kimble said that readability testing, while controversial, can have a kind of negative value: if you score poorly, there's a good chance you need to revise. The ideal way is to spot-test the draft on typical readers. If money and resources are tight, try to recruit volunteers from local universities.

(5) *Aim for accuracy, but don't get discouraged about the occasional miss*. Don't let worries about being overturned at the appellate level paralyze you, or nothing will ever change. Even if you make mistakes, the gains in juror comprehension far outweigh any losses. Remember that traditional instructions are overturned too.

Professor Wayne Schiess discussed his experience on a plain-language jury-instructions task force in Texas. Surprisingly, the task force found that most of the original instructions were "in good shape" (little use of jargon, few awkward constructions, etc.). The challenge was to make them better; the task force did, and testing showed modest improvements in reader comprehension.

Schiess cautioned that the judicial members of a task force are key. The Texas group, for example, included a judge who resisted simple language, making the effort harder. Schiess reported that since the task force finished, the draft has been in limbo for more than nine months. But there is now some movement by the Texas state bar to revive the plain-language effort.

Finally, Justice Corrigan gave specific background about the California reforms. Clear, simple jury instructions are essential to reach the state's increasingly diverse community; jurors speak 70 or more languages and approach the process from many different legal traditions. Justice Corrigan advised everyone to remember that not every juror has absorbed the culture that native-born U.S. residents take for granted.

Reforming jury instructions involves both an intellectual challenge and a cultural change for lawyers. And there will always be those with a vested interest in keeping things the way they are. The California groups overcame inertia and fear by involving a broad range of interest groups, reaching out and incorporating feedback on draft instructions, and assertively making the case for reform. Justice Corrigan reminded the audience that changes to jury instructions are not changes to the law. "Problems in the law are not your job. Your job is to explain the law as it exists at this time."

The discussion was well attended; the audience included Scribes luminaries Roy Mersky, Glen-Peter Ahlers, and Roger Billings. And it was successful: the panel was, in the words of one person, "terrific."

* Maureen Murphy is an attorney with the Washington, D.C., firm Cohn and Marks L.L.P.

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