

The Scrivener

Scribes — The American Society of Legal Writers

Summer 2008

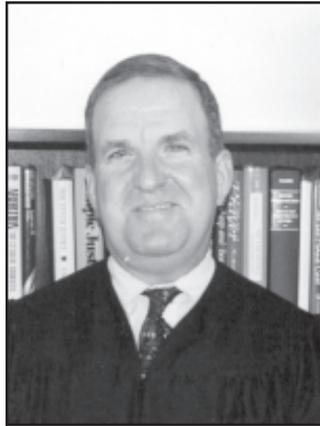
President's Column

by Stuart Shiffman

Being the president of an organization devoted to improving legal writing offers me a podium for the occasional observation about how we can improve not only what we write, but also what we read in the law. The law still values the word in printed form, as the increasing number of reported decisions, law-review articles, and legal textbooks proves. One might add to that total the increasing number of legal web pages and blogs, but the quality of writing on some of those sites may not be representative of the goal we share to improve legal writing.

With that brief explanation, I wish to address an issue that has troubled me since my first day in law school. It is an issue that I will discuss with a true story of that day in 1974 when I attended my first classes and began my study of the law.

My law-school career began without any indoctrination into the study of law. During my undergraduate career, I had not taken any classes that touched on the law or legal theory. I was truly a clean slate to be written upon and molded by my law-school faculty.



Stuart Shiffman

I remember well sitting down and opening my first casebook in contract law to begin reading the first case assigned in that class. Thirty minutes later, after reading the case three times, I had serious doubts about whether I had made the correct career decision in choosing the law. The case was not difficult—with one exception. The opinion referred to the parties by strange terms that I did not know. As I recall, the terms *plaintiff*, *defendant*, *appellant*, and *appellee* were sprinkled liberally throughout the opinion. But nowhere did the opinion associate those terms with the names in the captions of the case.

After three readings of the opinion, I could not determine who had sued whom in this contract dispute. Nor could I determine who had won at trial and who was now appealing the decision from the trial court. With absolute certainty, I knew there was no way I would ever practice law.

Somehow I muddled through the case and the next class. I recall my fervent prayers that someone else would be called on to discuss the case and the sigh I breathed when those prayers were answered. But I have never forgotten that experience, and it brings me to an important point in legal writing.

There is nothing wrong in legal writing with referring to the parties by their given names. Criminal-defense lawyers both at trial and on appeal avoid the designation *defendant* like the plague and always refer to their clients by name. Of course, this can also create a

difficulty, as exemplified by two cases from my community. One lawyer struggled with a client facing criminal charges whose last name was “Outlaw.” Another confronted the dilemma of a defendant in a drunk-driving case whose last name was “Lush.” But these rare instances only serve to justify that in most instances the use of a proper name takes away the sting of the term *defendant*.

For more than 20 years, I had occasion to read trial briefs and appellate decisions in which a party was identified by a multisyllabic designation that often had me shaking my head in bewilderment. The “third-party-defendant-cross-complainant” can often be difficult to recognize on page 15 of a trial memorandum. That designation in an appellate-court ruling, with the addition of the term *appellant*, does not lend itself to an easy determination about whom the court is speaking.

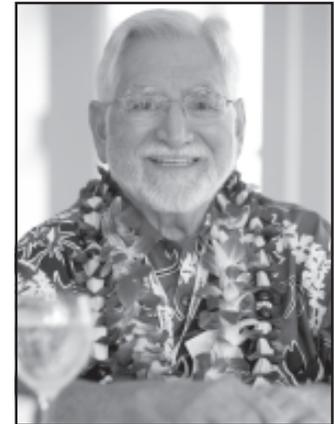
On this point I believe I have some strong allies in my corner. *Making Your Case: The Art of Persuading Judges* by Scribes honoree Justice Antonin Scalia and Scribes board member Bryan Garner supports my position in clear and concise language. I strongly recommend this recent Thomson West publication, and I direct your attention to page 121 for a discussion of this issue. Justice Scalia and my friend Bryan make the argument for me and, as talented writers, do so in a far more efficient manner than I can ever hope to accomplish. If for no other reason, the use of the parties’ names rather than their status in the litigation will in the long run save thousands of reams of paper and an equal number of barrels of ink. It also will reduce frustration for judges and attorneys across the land.

After my retirement from the trial-court bench, I began a new career as an appellate advocate. In that work I have gained new respect for the difficulties often encountered in legal writing. These recent years have brought me new affection for the challenge of making legal writing more readable. Designating parties by name is one step toward improving legal writing. It is an easy task that all should strive to accomplish. In contemporary society where the media regularly examine judicial decisions and legal rulings, it is imperative that those legal documents be written so that they are intelligible. Accomplishing that goal should be a priority for the legal profession.

Roy M. Mersky, RIP

by Bryan A. Garner

On May 6, 2008, Roy Mersky died. He led as active and varied and entrepreneurial a life as any academic librarian ever has. He created a huge reputation both for the University of Texas’s Tarlton Law Library and for himself as its librarian. As the mentor for hundreds of other librarians around the country over several decades, he had an enormous impact on the very concept of what law librarianship entails. He served actively in countless organizations, but apart from the Tarlton and the University, there wasn’t an organization to which he was more ardently devoted than Scribes—The American Society of Legal Writers.



Roy Mersky

He was born in New York City on September 1, 1925, and grew up in the Bronx, graduating from Taft High School in 1943. The next year he was inducted into the U.S. Army, and he served with distinction in World War II, as part of the 345th Infantry Regiment through 1946. He began collegiate studies at the University of Wisconsin, taking his B.A. in 1948, his J.D. in 1952, and his master’s degree in library science in 1953. He was a cataloguer and librarian first at Wisconsin, then at the Milwaukee Public Library, then at Yale, and then at the Washington State Law Library. Finally, in 1965, he took the position that would occupy him through the next 43 years: professor of law and director of research at the University of Texas School of Law. For the last seven years of his life, he held the Harry M. Reasoner Regents Chair in Law.

He had an important policy at the Tarlton: any faculty member who requested an article would have it within an hour of the request, even if that meant retrieving it through connections in England or Australia or another part of the globe. And most books would be delivered within the hour, or as soon after that as possible. For

more than four decades, he and his well-trained staff supported the scholarship of one of the most productive law faculties in the country.

Although he published voluminously — the list of his publications runs to more than 12 pages — he is best known for his coauthored work *The Fundamentals of Legal Research*, which the Foundation Press first published in 1977 and is now in its eighth edition of 2002. This classic text evolved over the years to reflect the great shift from books to computers, and it remains the leading text in its field.

Roy Mersky was a member of Scribes for many decades and was on our board from 1974 to 1994. He served as president from 1991 to 1993. Throughout the years, he brought new members into the organization; he recruited the most active ones onto the board; he worked on the book-awards committee; he chaired the law-review competition committee; and he remained as active and dedicated a member as the organization has ever had. In 1994, he received the first-ever Outstanding Service Award from Scribes at the AALS Annual Meeting in Orlando.

Those who knew him considered him kind, considerate, loyal, compassionate, assertive, practical, driven, organizationally ambitious, civic-minded, brave, and indefatigable — even through his final illness. He never complained about ill health. He was always looking toward his next goal.

There are scholars throughout the world who, like me, owe vast personal debts to Roy Mersky and will be grateful to him all their lives.

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This issue of *The Scrivener* is generously sponsored by Stetson University College of Law and California Western School of Law.

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Submit Your Articles

Please send items for upcoming issues of *The Scrivener* (electronically or on disk) to the address shown below.

Deadlines

Fall	October 15
Winter	January 15
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Hear a Song—Write a Wrong

Poor Grammar in Song Lyrics: An Old and New Enemy to Clear and Succinct Legal Writing

by Kelly M. Feeley¹

Whether you are singing in the shower, the car, or the office, songs are a part of our lives. Pop, rock, R&B, country, rap, religious, folk, techno, classical, jazz, blues—the genres are endless, and music has been a part of our lives for thousands of years.² Although we give creative license to authors of prose and poetry to alter historical events, figures, and locations, we also give them leeway to use improper grammar.³ And this leeway has been taken to extremes in song lyrics.

Neither law school nor the legal practice is about song lyrics, though, so this use of improper grammar may not seem like our concern. But novice legal writers, whether they be law students, legal clerks and interns, or young lawyers, are bombarded with songs on iPods, computer games, websites, radios, and televisions; in grocery stores; and just about anywhere else you can imagine. I was recently reminded, when my 14- and 15-year-old nieces came to visit me a few weeks ago, that people remember song lyrics—all of them—even the ones that some of us can hardly decipher or understand.

So how does this translate to law school, law practice, and legal drafting? If novice legal writers are bombarded with poor grammar throughout their day, and that poor grammar is ingrained in them, then our jobs as legal writing professors and legal mentors become even more difficult.

Grammatically incorrect song lyrics are not new. There are numerous websites and articles about the topic.⁴ As law professors, when each academic year ends and we plan for the next year, we must examine what techniques, exercises, presentations, lectures, handouts, etc. were successful and which ones should be changed, corrected, substituted, or retired. And as lawyers, we must decide how to teach and mentor novice legal writers when they join our firm, office, agency, or department. Law professors and lawyers tell novice legal writers to know their audience for each legal-drafting

assignment. If we want our current and future lawyers to understand and appreciate their audience, we must understand these novice legal writers as our audience. We must determine what motivates them, what encourages them, and what gives them information.⁵

Many influences on our novice legal writers are positive, but there are many enemies as well. Poor grammar is an enemy to legal writing, and if song lyrics are part of the problem, we should acknowledge them.⁶ The best way to plan an attack on our enemy is to identify it and make it work for us, not against us.

So what does this enemy—song lyrics that use incorrect grammar—really look like? Here are just a few examples:

Lenny Kravitz's *I Build This Garden for You*
We'll live each day in peace
in hope that we will one day reach
the rest of the world
*when they are ready to be teached.*⁷

“Teached”? Really?

Or Timbaland's *The Way I Are*
I ain't got no money
I ain't got no car to take you on a date
...
*Thug it out 'til we get it right*⁸

As if the title were not enough to make you cringe, “ain't” as a contraction, the double negative “ain't got no car,” and “thug it out” finished the job.

Or even Celine Dion's *Because You Loved Me*
Lifted me up when I couldn't reach
*You gave me faith 'coz you believed*⁹

Perhaps “because” could have made its way into that line and still kept the song's flow. “Because” is in the title, so it was possible.

And Oasis's *Wonderwall*
Because maybe
You're gonna be the one who saves me?
And after all
You're my wonderwall
 . . .
Said maybe
*You're gonna be the one that saves me*¹⁰

I don't mean that we should have an aversion to new words. It was not too long ago that the word *Google* did not exist,¹¹ yet now we can see a place for it, even in legal writing. I hope, though, that the Pussycat Dolls' "Stickwitu"¹² (that is "Stick With You" to us) does not become as accepted.

How can poor grammar in song lyrics help our mentees become better legal writers? The first step to becoming a better writer is to identify mistakes and become an astute editor.¹³ If novice legal writers are bombarded with poor grammar in song lyrics, then we can use those lyrics as examples in class or at firm orientations or meetings to discuss how to change them. This is not to suggest that a grammatically correct song will be more catchy, sell more copies, or be downloaded more often, but using current lyrics can be a way to engage Generations X and Y with material they are familiar with and even enjoy. It is also not unusual for writers to more easily identify mistakes in others' work because they are not vested in it.¹⁴ And shifting the focus to a nonlegal example can appeal to the novice legal writer because it is less threatening and more familiar.¹⁵ Once they can identify grammatical errors in song lyrics, novice legal writers may be better prepared to identify similar errors in legal documents and in their own writing.

As legal-writing professors and legal mentors, we are required by our jobs to find new ways to get our message across to our students and new lawyers or improve ways we have used in the past. The characteristics of Generation X and Generation Y/Millennials require that we stay on top of what influences them and identify how to communicate with them in ways they can better understand.¹⁶ One way may be to use the enemy of poor grammar in song lyrics to work to our advantage. Using song lyrics as an editing exercise may be a tool not to "write a wrong," but to right a wrong.

I am not suggesting that song lyrics are the wave of the future for teaching legal writing. But using song lyrics may be another way to get through to a few more students or new associates each year. And maybe, just maybe, we might hear our mentees singing along with a song and using correct grammar instead of how it is written. I can tell you that I am guilty of correcting a song and singing it the grammatically correct way.¹⁷ Who knows? Maybe I am not alone.

Endnotes

- ¹ Kelly Feeley is an assistant professor of legal skills at Stetson University College of Law, where she has taught research and writing since 2000. Professor Feeley also teaches interviewing and counseling, and she runs Stetson's ADR Board, which fields arbitration, client counseling, mediation, and negotiation competition teams.
- ² Music is believed to have existed for at least 50,000 years, according to www.wikipedia.org.
- ³ Thanks to Wikipedia at www.wikipedia.org.
- ⁴ When running a Google search using a myriad of combinations of these terms—*song, songs, lyrics, poor, bad, incorrect, and grammar*—I retrieved 8,000+ to 43,000+ hits. Not all were as relevant as others. (Google search conducted on July 2, 2008.) One particularly funny site was www.amiright.com, dedicated to "making fun of music, one song at a time."
- ⁵ Generation X and Generation Y/Millennials process, accept, and understand information differently. Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?* 9 Leg. Writing 119, 143 (2003).
- ⁶ And we thought that abbreviations used in texting and IMing were the most recent enemy. Phyllis Coulter, *Friend or Foe: Impact of Texting, Blogs on Writing up for Debate*, Pantagraph (May 28, 2008) (available on Westlaw at 2008 WLNR 10033940). They are, but FTR, it would be OT for me to discuss them here. To translate, go to Netlingo.com.
- ⁷ According to www.ascap.com, Leonard A. Kravitz (or Lenny Kravitz to you and me) wrote these lyrics. I was unaware of this song and its lyrics before reading Gina Vivinetto's article on St. Petersburg Times Online Tampa Bay, *Lyricists Have Tense All Their Own: Improper Perfect*, http://www.sptimes.com/2005/01/04/news_pf/Floridian/Lyricists_have_tense_shtml (Jan. 4, 2005).
- ⁸ Believe it or not, this song has seven writers! See www.ascap.com. Lyrics courtesy of [elyrics.net](http://www.elyrics.net) at <http://www.elyrics.net/read/t/timbaland-lyrics/the-way-i-are-lyrics.html>. To hear an incredibly funny video parody of this song called "Bad Grammar," go to <http://www.myspace.com/jamesatwar>. An example of the parodied lyrics: "I don't use no syntax, I ain't got no idea what a singular verb is, I'm worsar at superlatives, And I don't ever use no double negatives."
- ⁹ Diane Eve Warren is responsible for these lyrics, www.ascap.com. Thanks to [elyrics.net](http://www.elyrics.net) for the lyrics at <http://www.elyrics.net/read/c/celine-dion-lyrics/because-you-loved-me-lyrics.html>.
- ¹⁰ According to BMI's website, Noel Thomas Gallagher of Oasis wrote this song (<http://repertoire.bmi.com>). Lyrics courtesy of Lyrics007.com at <http://www.lyrics007.com/Oasis%20Lyrics/Wonderwall%20Lyrics.html> (last accessed July 2, 2008).

- ¹¹ Google was created by Larry Page and Sergey Brin at Stanford University as an improved version of their search-engine project *BackRub* begun in 1996. In September 1998, Google became more of the search engine that we know today. Information about Google's history can be found at <http://www.google.com/corporate/history.html> (accessed July 2, 2008). *Google* was added as a verb to the Oxford English Dictionary in 2006, according to Anders Bylund's July 5, 2006, article, *To Google or Not to Google. The Motley Fool—To Educate, Amuse & Enrich*, www.fool.com (accessed July 2, 2008).
- ¹² From the Pussycat Dolls' official website, www.pcdmusic.com.
- ¹³ Jo Anne Durako, Kathryn M. Stanchi et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719, 731 (Spring 1997).

- ¹⁴ *See id.*
- ¹⁵ *See generally* Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 Leg. Writing 37 (2001).
- ¹⁶ *See generally* McGaugh, *supra* n. 5.
- ¹⁷ Yes, I have sung *Wonderwall* as "Maybe, you're going to be the one who saves me" even though that is not how it goes. *See* Gallagher, *supra* n. 10.

News from Members

Bruce J. Berkman, a member of Berkman, Henoch, Peterson & Peddy, P.C., in Garden City, New York, has entered his third year as columnist for the Mortgage Bankers of America's lead publication, *Mortgage Banking Magazine*. His latest column in the June 2008 issue is entitled "Service Errors to Avoid." Lexis-Nexis, Matthew Bender has also just published the first 2008 supplement to his three-volume treatise, *Berkman on New York Mortgage Foreclosures*.

Judge Mark Painter, of the Ohio First District Court of Appeals in Cincinnati, was a presenter at the International Conference on Modern Legal Drafting in Kuala Lumpur, Malaysia, July 22. His topic was "Why Some Courts Are Banning Legalese." Judge Painter, an internationally known expert on plain legal writing, is the author of five books, including *The Legal Writer: 40 Rules for the Art of Legal Writing*. He has given more than 100 presentations on legal writing.

Troy Simpson announces the publication of his new book, *Win More Cases: The Lawyer's Toolkit*, by Serenson Pty Ltd, Australia, 2008, recommended retail price \$149. The book is available as a paperback and electronically via www.win-more-cases.com. Although published in Australia, the book has content targeted specifically to American lawyers.

Professor Otto Stockmeyer, past president of Scribes, now has his writing cast in bronze. Professor Stockmeyer wrote the inscription on Michigan's 18th Legal Milestone plaque, rededicated in Plymouth, Michigan, on May 13. The state bar's Legal Milestone program commemorates famous Michigan legal cases, locations, and personalities. Professor Stockmeyer was instrumental in the state bar's decision to commemorate the famous contract-law case of *Sherwood v. Walker* (1887), which involved Rose of Aberlone, a supposedly barren cow, and the doctrine of mutual mistake. The plaque was erected in Plymouth, farmer Sherwood's hometown.

Christopher G. Wren, an assistant attorney general with the Wisconsin Department of Justice and a member of the Scribes board of directors, received one of six Best Brief awards from the National Association of Attorneys General. He accepted the award at the association's 2008 summer meeting in Providence, Rhode Island, for a reply brief filed at the petition stage in *Wright v. Van Patten*, 128 S. Ct. 743. The annual award, judged by an outside panel of experienced U.S. Supreme Court practitioners, honors excellence in brief writing in the U.S. Supreme Court by state attorneys.

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When Judges Don't Write About Writing (aka Pet Peeves)

From **Otto Stockmeyer**:

My pet peeve is judicial opinions that trade snide asides. A recent example prompted this complaint. In *Ross v. Auto Club Group*, 748 N.W. 2d 552 (Mich. 2008), one justice snipes at a colleague:

I also find it striking that Justice Kelly herself employed reasoning similar to that of

The victim snipes back:

My colleague fails to recognize that this material difference distinguishes the case at bar not only from Kirksey, but from

Becoming personal is not becoming. Nor is it effective writing, either in legal briefs or in judicial opinions. Take the second quotation, for example. Omitting the personal aside would improve the tone of the sentence:

This material difference distinguishes the case at bar not only from Kirksey, but from

Now, please, isn't that more judicial?

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