Winter 2012

The Scrivener

Scribes — The American Society of Legal Writers

Featured Articles

Scribes, Clarity, and the Center for Plain Language Host International Event in D.C.

On May 21–23, Washington, D.C. will see the luminaries of the international plain-language movement gathered in one place, the National Press Club. Clarity, an international association promoting plain legal language, and Scribes have joined the Center for Plain Language to host a conference focused on the United States' Plain Writing Act of 2010.

The Act was signed in Washington by President Obama in October 2010—while Clarity was holding its last conference, in Portugal. The Act requires the U.S.

(continued on page 2)

The President's Column: The Carrot and the Stick

by Steven Smith, Dean
California Western School of Law

This is to announce a contest. The fine print is at the end of the column.

The cliché that we get more of what we incentivize and less of what we punish undoubtedly applies to legal writing. So what should we do to provide incentives for good legal writing? And what should we do to discourage bad writing?

The contest: submit your best suggestions for recognizing good writing or penalizing bad.

Scribes recognizes, and rewards, some great writing. We give awards each year for the best student brief, the best student law-review note or article, and the best book on law. As an organization, we should undoubtedly do more to give more recognition to all the briefs, articles, and books that are nominated for these awards. In my experience, there are terrific pieces each year that do not receive the top award. We should honor them. Scribes also encourages each of the institutional-member law schools to award to its top five students the National Order of Scribes.

Several state and national organizations offer writing contests for students. Perhaps Scribes should collect and publish the winners of those contests. Most law schools give student writing awards. And, of course, legal writing and writing seminars inherently reward good writing—and insist that bad writing be improved.

(continued on page 2)

(Scribes, Clarity, and the Center for Plain Language Host International Event in D.C. *continued from page 1)*

government to write all publications, forms, and publicly distributed documents using the best practices of plain-language writing. The Act also requires all federal agencies to have plans for implementing plain language—and to report on the progress of those plans every year to the Office of Management and Budget.

This 2012 conference will provide opportunities for those who must comply with the Act to learn from one another and from plain-language experts. Plain-language advocates, practitioners, and lawyers from around the world will gather to exchange ideas.

Presenters include U.S. Congressman Bruce Braley, the sponsor of the Act; The Honorable Lee Rosenthal, chair of the Standing Committee of Federal Rules; Eamonn Moran, Law Draftsman, Department of Justice, Hong Kong; Dr. Annetta Cheek, Chair of the Center for Plain Language; Candice Burt, Clarity's current president, of South Africa and past president Christopher Balmford, of Australia; and Bryan Garner and Professor Joe Kimble of Scribes.

On Tuesday, May 22, the conference will host a dinner and national event, the annual ClearMark Awards. Now in its third year, the ClearMark Awards recognize the best plain-language documents in the U.S. and poke gentle fun at some of the worst.

The venue for the dinner and ClearMark Awards, and the entire conference, is the National Press Club in Washington, D.C. A private club for journalists and communications professionals, the Club has been a Washington institution for more than a century. The Club's mission is to be the world's leading professional organization for journalists. The Club is also a world-class meeting facility, hosting thousands of events each year.

For more information about the conference, visit its website, https://sites.google.com/site/claritydc2012/.

(President's Column: The Carrot and the Stick *continued from page 1)*

Faculty members are generally expected to publish. Many law schools present best-paper or best-scholarship rewards to faculty members. Bad writing may be penalized in law schools—it threatens an untenured faculty member's career, and it can severely hinder the publication of more senior faculty.

Judges are too seldom recognized for the quality of their writing. There aren't many reversals based on the quality of writing, although some appellate court judges do complain about what they have to read.

In private practice, the rewards for good writing are sometimes substantial; a partnership position may depend on good writing. Associates commonly receive feedback from partners on the quality of their writing, although anecdotal evidence suggests that this oversight often does not appreciate good writing.

There is some evidence that courts are fed up with bad writing. Witness the recent case of *Stanard v. Nygren*, which I wrote about in my last column. In that case, the Seventh Circuit affirmed the dismissal with prejudice of a complaint (and two amended complaints) that were so riddled with bad writing that they were unintelligible. The court also directed the attorney to show cause why the court should not impose sanctions and terminate his practice before the court. And the court reported his conduct to the bar for potential disciplinary action.

The contest is this: What is the *best* way we as a profession can recognize and encourage *good* writing, or discourage *bad* writing? Send your proposals by May 1, 2012. Three members of the Scribes board will be asked to pick the top three suggestions. Then we'll print them in the next *Scrivener*. The winners will each receive a copy of a very special book (to be published shortly) on legal writing. Entries may be sent directly to me at ssmith@cwsl.edu, or to the Scribes home office at platen@cooley.edu. Let us hear from you.

Plain Isn't Plain

by Mark Cooney

We have only ourselves to blame, we advocates of plain language. It's that word *plain*. It sounds so . . . so . . . plain. There's no denying the word's negative connotations. *Plain* brings to mind things lacking beauty or sophistication—bland things. So when legal professionals hear the cry for plain language, many envision legal documents that won't get a prom date, that won't go to the symphony, that won't have any pepperoni on top.

Instead of plain language, we should call it *clear* language, *strong* language, *direct* language, or *confident* language. Those words have a positive vibe. They connote power. And that's exactly what plain-language legal writing has. It isn't plain at all. It's refreshing, persuasive, interesting, and sometimes colorful. It has strength and, yes, beauty.

Let's start with strength. Ask the Ninth Circuit whether it thought plain language lacked punch when it read this sentence in a Supreme Court opinion: "The Court of Appeals was wrong, and its decision is reversed."[1]

The plain word rocks you to the core: you were *wrong*. A more inflated alternative (*committed reversible error*) would only weaken the message, making it softer and more abstract. And you might prefer softer sometimes. Unlike the Chief Justice of the United States (who wrote that sentence), we mortals might shy away from telling an appellate panel that a respected lower-court colleague was *wrong*. And that just proves my point: it's a fallacy that plain words are weak words. Plain strengthens. Inflation weakens. Too many lawyers think the opposite. They're wrong.

And is plain language really an ugly duckling? Can a lawyer, judge, or scholar write with flourish and flair using plain little words? Consider this passage fleshing out the common-law hearsay exception for so-called verbal acts, which the writer calls "performatives":

> In a baseball game, after a close play at third base, the umpire raises his right hand with thumb extended and bellows, "Y're out!" Those words are a performative; by speaking them, the umpire *did* something. His words *made* the runner out. What if the same two words had been bellowed at the same moment by a beer-soaked fan in the stands? Then they would not be a performative, but merely a narration of what the fan had perceived.[2]

That's not dull or lifeless, is it? You can almost taste the Cracker Jacks. Yet it contained only a single four-syllable word—*performative*—that appeared only twice and, in this context, was a term of art that couldn't be sacrificed. Other than that term of art, the writer used only

(continued on page 4)

In This Issue

Submit Your Articles

Please send items for upcoming issues of *The Scrivener* (electronically) to the e-mail address shown below.

Deadlines

Spring	April 15
Summer	July 15
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Jane Siegel
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(Plain Isn't Plain *continued from page 3)*

two words with more than two syllables: *extended* and *narration*. He used each of them only once, and neither is stuffy or intimidating. In short, that passage was written in plain language, yet it shined. Richard Wydick wrote it. He also wrote the landmark book *Plain English for Lawyers*.

Works by great nonlegal writers also prove that small, plain words can bring a page to life:

> A barn, in a day, is a small night. The splinters of light between the dry shingles pierce the high roof like stars, and the rafters and crossbeams and built-in ladders seem, until your eyes adjust, as mysterious as the branches of a haunted forest.[3]

That was by John Updike, and 32 of his 45 words were one syllable. The rest were only two syllables, except for *mysterious*.

But oh, what a picture he painted.

Small, plain words aren't dull. When selected and arranged with care, they are the colors that make great art.

The next example's charms are more subtle. This one won't conjure the sights and sounds of a sun-drenched ballpark or a rustic barn, but its tone is confident and direct. It reflects plain language's greatest value to writers and readers: clarity. The issue on appeal was whether a trial judge properly rejected a prisoner's attempt to sue without liability for costs. The answer hinged on whether the prisoner was in "imminent danger of serious physical harm" when he sued:

> But the judge's reasoning was incomplete because it ignored the alleged beating. Although the beating (if there was a beating) occurred before Fletcher sued, an untreated wound, like an untreated acute illness, could pose an imminent danger of serious physical harm. Interpreted generously, this is what his pro se complaint alleges.[4]

What makes this writing so crisp? A lot of little things. The writer began a sentence with *But*, which allowed him to quickly signal contrast and then move on. He used the strong word *because* instead of the flabby *for the reason that* or *due to the fact that*. He wrote *before* instead of lapsing into *prior to* or *prior to when*. He chose *sued* instead of a wordy alternative like *commenced suit*, *initiated his action*, or *brought suit*. The writer also had the confidence to call the beating a *beating*, instead of the more abstract *assault*, *physical assault*, or *battery*. Those terms of art weren't necessary here, so the writer wisely avoided them because the lawspeak version—*assault*, for example—dilutes the concept. (We've all read and heard *assault* so often that it hardly sounds painful anymore.)

United States Court of Appeals Judge Richard Posner wrote that one.

Now, all legal writing can't be conversational and vivid. What may fly in court briefs, opinions, or articles, where legal writers often flesh out rules as Wydick did above, won't fly in contracts or statutes. But I ask you this: Have you ever read a wordy, legalese-infused commercial contract, corporate bylaw, promissory note, zoning ordinance, or statute and found beauty or grace in it? Has the inflated language and wordiness made those documents inspiring or artistic? Are they grand expressions of the English language's rich potential?

Clearer, more direct language—plain language—at least makes them easier to read and understand.

Beautiful.

Endnotes

1. *Winter v. Nat. Resources Def. Council, Inc.*, 555 US 7, 12 (2008).
2. Wydick, *True Confessions of a Diddle-Diddle Dumb-Head?*, 11 Scribes J. Legal Writing 57, 71 (2007).
3. Updike, *Pigeon Feathers*, The New Yorker, Aug. 1961, at 25.
4. *Fletcher v. Menard Correctional Ctr.*, 623 F.3d 1171, 1173 (7th Cir., 2010) (citations omitted).

Meet Google Scholar Citations

by Norman Otto Stockmeyer*

Introduction

Last year *The Scrivener* published my article on using the Social Science Research Network (SSRN) to create an online archive of your scholarly publications ("Do You SSRN?" in the Winter 2011 issue of *The Scrivener*, available at http://ssrn.com/abstract=1727484). Since then, Google has launched Google Scholar Citations (GSC). It too can be used to create an online archive. This article explains the similarities and differences between the two.

SSRN basics

With SSRN, you first create an author page, and then upload abstracts and PDF copies of published articles. You can invite visitors to your SSRN author page by including a link in your website bio and e-mail signature block. Visitors to your author page can then view abstracts of your articles and download PDF copies of them. SSRN maintains a running count of the number of times an article is downloaded. SSRN download counts have increasingly become a measure of scholarly influence.

Google Scholar Citations

GSC is even easier to use. Instructions are at http://scholar.google.com/intl/en/scholar/citations.html. Once you establish a Google account and your Scholar Citations profile, Google automatically imports links to all articles that are available through a Google search of your name. Visitors to your profile can then access your articles by clicking on the link; they can also access works that cite your articles, like a built-in *Shepard's*.

Because Google's search robots cannot penetrate Westlaw's and Lexis's "walled gardens," they may miss some articles, although they do pick up articles available on HeinOnline. You can add citations to others manually. As with SSRN, you can link to your online GSC profile. Rather than counting article downloads, GSC measures scholarly influence by counting citations to articles. Citation counts are even graphed by year.

Some differences

SSRN is available to anyone. So is GSC, to an extent. But only academics with a verifiable .edu e-mail address can elect to make their profiles public. The advantage of a public profile is that it will appear in Google Scholar results whenever someone searches your name.

With SSRN you can also upload works in progress, but GSC links only to items already on the World Wide Web. (Once a work in progress is uploaded to SSRN, however, within a matter of days Google's search robots will find it and add it to your GSC profile.)

SSRN accepts and displays only PDFs; GSC lists and links to all forms of web content.

SSRN articles are listed in the order of the number of downloads; GSC lists articles by the number of citations they have garnered.

Both SSRN and GSC provide for the posting of contact information, but only GSC allows the inclusion of a photo. With photos, colored background, and citation graphs, GSC could be described as a Facebook wall for authors.

Conclusion

Both of these bibliographic websites are relatively easy to set up, and GSC even maintains itself by adding items as its search robots discover them. Authors looking for ways to showcase their scholarship should consider investing a couple of hours in setting up an SSRN author page and a GSC profile.

* The author is an emeritus professor at Thomas M. Cooley Law School and a past president of Scribes. His articles have appeared in periodicals from A (the *ABA Journal*) to W (*Woman Lawyers Journal*). His SSRN author page is http://ssrn.com/author=80303 and his Google Scholar Citation profile is at http://scholar.google.com/citations?user=tEoPN2QAAAAJ.

Member News

Mark Harrison, of Osburn Maledon in Phoenix, Arizona, coauthored an article, "When Judges Should Be Seen, Not Heard—Extrajudicial Comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct." The article appeared in the New York University Annual Survey of American Law for 2009. For almost four years, Mark chaired the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. The new code proposed by the commission was adopted almost verbatim by the ABA House of Delegates in 2007.

Scribes to Cosponsor International Conference in Washington, D.C., May 21–23, 2012

Scribes will cosponsor a conference with Clarity and the Center for Plain Language May 21–23, 2012. Clarity is an international organization dedicated to clear writing in law, government, and business. The Center for Plain Language, located in Washington, D.C., is a national organization that promotes plain language in government and that spearheaded passage of the Plain Language Act in 2010. For more information, go to https://sites.google.com/site/claritydc2012/home.

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Help Scribes Grow

Would you be willing to help promote Scribes? Do you have friends or colleagues who might like to join? Will you be speaking at or attending any program involving legal writing or legal language? We would be happy to send you some of the attractive Scribes brochures to distribute. Just send an e-mail to our executive director, Norman E. Plate: platen@cooley. edu.

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Volunteer Judges Needed

Please consider volunteering for the *Scribes National Best Brief Award Competition*. This is a great opportunity—especially for faculty who teach writing or advocacy, or who coach moot-court teams. This is a time-limited volunteer opportunity, and your name and law-school affiliation will be publicized in the Scribes newsletter *The Scrivener* as well as in the program at the Scribes Award Luncheon at the American Bar Association annual meeting. The dean at your school will also get a thank-you letter from Scribes. Each volunteer will read from three to six briefs and evaluate whether each brief could be considered a national winner of the *Scribes Best Brief Award*. No scoring or critiquing is necessary—just an up-or-down vote for each brief. Three volunteers read each brief, and the Awards Committee makes the final decision from the pool of briefs that received two "up" of three votes. It is fun and educational to read briefs from all over the country on a variety of interesting legal issues, especially because you do not have to comment on or critique the briefs. If you are interested in volunteering, please contact Beth Cohen at bcohen@law.wne.edu. The contest takes place in April and May.

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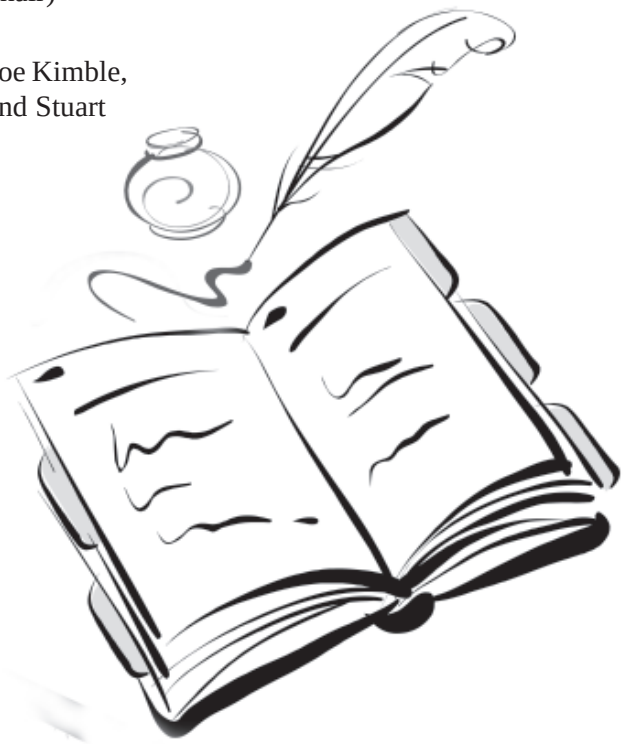

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