



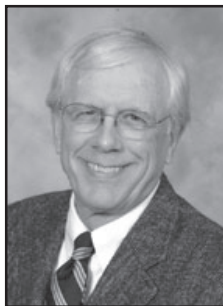
The Scrivener

Scribes – The American Society of Writers on Legal Subjects

Fall 2005

President's Column

*Norman Otto Stockmeyer
Emeritus Professor,
Thomas M. Cooley Law School*



*Norman Otto Stockmeyer,
President of Scribes*

In my first column, I introduced my fellow officers. This time I want to introduce the other members of the Scribes Board of Directors. They are listed in order of length of service on the board.

Bryan A. Garner lectures and publishes extensively on legal writing, usage, and drafting. His many books include *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*. He is also editor in chief of the recently published eighth edition of *Black's Law Dictionary*. He became a board member in 1990 as editor in chief of *The Scribes Journal of Legal Writing*. He was Scribes president in 1997–99 and returned to the board in 2004.

Steven R. Smith is president, dean, and professor of law at California Western School of Law. He has published widely in law and psychology and law and medicine. In 1987–88 he served as deputy director of the Association of American Law Schools. Since 1997, he has served on the Council of the ABA Section of Legal Education and Admission to the Bar and is currently section chair. He was first elected to the board in 1993.

Roger K. Newman, a professor at the Columbia School of Journalism, has also taught constitutional law at New York University, where he has been a research scholar since 1985. His book *Hugo Black: A Biography* was a Pulitzer Prize finalist and won the Scribes Book

Award in 1995. He is editor in chief of the forthcoming *Yale Biographical Dictionary of American Law*. He joined the board in 1997.

Richard C. Wydick is an emeritus professor of law at the University of California, Davis, where his special interest is antitrust law. He is the author of *Plain English for Lawyers*, now in its fifth edition. In 2005, the Legal Writing Institute presented him with its Golden Pen Award for the book, stating, "Perhaps no single work has done more to improve the writing of lawyers and law students." He has been a board member since 1998.

Charles Dewey Cole, Jr., is a distinguished trial and appellate lawyer with the Wall Street law firm Newman Fitch Altheim Myers, P.C. In addition to a J.D. degree, he holds a master's degree in library and information science and four LL.M. degrees, and he is a solicitor in England. His articles on the law, reviews of law books, and other scholarly contributions have appeared in print on scores of occasions. He was first elected to the board in 2000.

Joseph Kimble is a professor at Thomas M. Cooley Law School. He is the longtime editor of the "Plain Language" column in the *Michigan Bar Journal* and the current president of the international organization Clarity. As the drafting consultant to the Federal Judicial Conference Committee on Rules of Practice and Procedure, he led the work of redrafting the Federal

(continued on page 2)

Rules of Civil Procedure. He joined the board in 2001 as editor in chief of the *Scribes Journal* and this fall was named executive director.

Christy Nisbett, until becoming court administrator for the Travis County, Texas, probate court in 2004, was a senior lecturer at the University of Texas School of Law. She taught legal research and writing there for 18 years and was director of the legal-writing program. She also lectured at CLE legal-writing programs throughout Texas and was on the LexisNexis legal-research-and-writing advisory board. She was elected to the Scribes board in 2003.

Darby Dickerson is vice president, dean, and professor of law at Stetson University College of Law, where she has taught legal research and writing, federal pretrial practice, and litigation ethics. She served as director of legal research and writing from 1996 to 2004. She is the author of numerous law-review articles and the highly acclaimed *ALWD Citation Manual: A Professional System of Citation*. She was elected to the board at the 2005 annual luncheon.

The Hon. Lee H. Rosenthal is a United States district court judge for the Southern District of Texas. Previously she was a partner in the law firm of Baker & Botts. She regularly lectures at CLE seminars and chairs the Federal Judicial Conference Advisory Committee on Federal Rules of Civil Procedure. She is also a member of the board of editors for the *Manual for Complex Litigation*, published by the Federal Judicial Center. She was elected to the board in 2005.

I am honored to serve with these highly accomplished leaders in their respective fields. I cannot imagine a more distinguished board of directors for an organization of legal writers.

Legal-Writing Tidbit: The power of plain English

Background: Placing a shareholder proposal in a corporation's annual-meeting proxy statement is the only practical way for shareholders to communicate with each other about corporate policy. A few years ago, I used the process successfully by drafting a shareholder proposal using plain-English principles. I believe that using plain English made a difference.

My shareholder proposal related to Goliath Bank (a pseudonym, obviously), Michigan's largest financial institution. At the time, Goliath was the only large bank in Michigan that imposed fees on lawyers' IOLTA accounts. The Michigan State Bar Foundation uses IOLTA interest to support access to justice for indigent citizens throughout the state.

As a former president of the foundation, and a Goliath shareholder, I was embarrassed that the bank's fees were nibbling away at funds that would otherwise go to the foundation. My shareholder proposal was intended to rally fellow shareholders. The text of the proposal as submitted is reproduced in a box on pp. 3–4.

Drafting Considerations: Corporate investors are fairly sophisticated people. But often, they are not lawyers and cannot be expected to understand legalese. Shareholders are unlikely to vote in favor of something they won't read or can't understand.

Many proxy proposals are written in the form of a resolution, complete with *whereases* and *now therefore*s. Instead, I used an inviting question-and-answer format. I avoided both legal jargon and technical business terms, and I organized short sentences (average length of 15 words) into short paragraphs. The questions served as descriptive headings. Words of familiarity included *we* to refer to the proponents (me and members of my family), *you* for fellow shareholders, and *they* for other banks.

The biggest hurdle was to explain IOLTA accounts to laypeople. I tackled it head-on in the opening paragraph of the supporting statement. One unavoidably long sentence (29 words) was introduced by two shorter ones of 8 and 10 words. In contrast, the Michigan Rules of Professional Conduct describe IOLTA accounts in one 74-word megasentence (MRPC 1.15(d)(1)).

Rudolph Flesch's book *How to Write Plain English* offers a formula for measuring readability. Applying the Flesch formula to my proposal produced a score of +51. This meant the proposal should be comprehensible to a high-school graduate and was on par with both *Time* (+52) and *Newsweek* (+50).

In contrast, a representative sample of Goliath’s proxy statement for the previous year scored -12. According to Dr. Flesch, this meant the proxy statement was comprehensible to someone with a postgraduate degree and was more difficult to read than the *Harvard Law Review* (+32) or the Internal Revenue Code (-6).

SEC rules limit shareholder proposals to 500 words. This has the unfortunate effect of encouraging the use of long, compound, and technical words because they tend to carry more content than short ones. Don’t succumb to that temptation. Use plain-English principles to pack a lot of information into a relatively short, direct, and easy-to-read document.

Conclusion: As it turned out, shortly before the deadline for printing the annual-meeting materials, Goliath management avoided a proxy fight by agreeing to waive all IOLTA fees. I had corresponded with the CEO several times about the IOLTA-fee issue, with no success. So I believe that what changed the bank’s mind was the power of plain-English advocacy. When management realized that if shareholders read my proposal they would actually understand the issue, the bank capitulated.

Plain-English Shareholder Proposal

Here is the shareholder proposal that I submitted:

Proposal

We recommend that the Board of Directors adopt a policy of waiving fees for all IOLTA accounts so that every dollar of interest goes to support the work of the Michigan State Bar Foundation. Then Goliath can join the foundation’s IOLTA honor roll of banks.

Supporting Statement

What are IOLTA accounts? “IOLTA” stands for “Interest on Lawyer Trust Accounts.” The Michigan Supreme Court created the IOLTA program. Its purpose is to generate interest on pooled trust accounts that law offices maintain for client funds that are too small or short-term to justify creating separate accounts.

Where does the interest on IOLTA accounts go? Banks remit the interest in their IOLTA accounts to the Michigan State Bar Foundation. The foundation is an IRS 501(c)(3) tax-exempt charity. It uses the IOLTA interest to make grants supporting legal services to the poor and improvements in the administration of justice.

IOLTA enables low-income citizens to receive assistance with urgent legal problems, such as protection from family violence, child support and custody issues, and victimization of the elderly. Information about IOLTA grants in the communities served by Goliath is available on request to the Michigan State Bar Foundation, 306 Townsend Street, Lansing, MI 48933.

What is the IOLTA Honor Roll of Banks? IOLTA rules permit a bank to impose reasonable fees on such accounts. The

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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

Winter	February 15
Spring	April 15
Summer	June 15

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honor roll recognizes the generosity of banks that waive all fees on IOLTA accounts. They do this to maximize the amount of IOLTA interest available for foundation grants. The honor roll is published regularly in the *Michigan Bar Journal*.

What are other banks doing? More than 82 percent of the banks participating in Michigan's IOLTA program waive fees on all IOLTA accounts and are listed on the honor roll. This includes all the other major banks operating in Michigan: Bank One, Michigan National, National City, and Old Kent. Even so, the need still greatly outpaces available resources. A recent study found that only 20 percent of the legal needs of the poor are met each year.

What does Goliath do? Presently, Goliath imposes fees on IOLTA accounts with balances under \$5,000—even though law offices have no control over the balances held in such accounts. Ethics rules prohibit a lawyer from depositing personal funds into an IOLTA account, even to meet a bank's fee-waiver threshold.

Why is this a Board matter? Goliath should join the overwhelming majority of Michigan banks that have adopted the enlightened policy of waiving fees on all IOLTA accounts. As shareholders, we should be embarrassed that our bank is not on the honor roll.

Bank executives regard the matter of IOLTA fee waivers as merely one of product pricing. We believe, rather, that it poses a significant issue of corporate social responsibility, to which the board should respond affirmatively.

If you share our belief, please vote FOR this proposal.

Institutional Members

University of Akron Law Center (Akron, OH)
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United States Court of Appeals for the Armed Forces
(Washington, D.C.)
Washburn University School of Law (Topeka, KS)
Western New England College School of Law
(Springfield, MA)
William Mitchell College of Law (St. Paul, MN)

A Tribute to Glen-Peter Ahlers

Scribes Executive Director 1997–2005

Tom Steele, Scribes Executive Director, 1988–97

Scribes suffered a great loss this summer when Glen-Peter Ahlers resigned after serving eight years as executive director. Scribes lost the glue that held the organization together. Glen-Peter has had a busy life as a father of six, as associate dean of Barry University's law school, as an author, and as our executive director. Glen-Peter served four Scribes presidents—Bryan Garner, Gary Spivey, Donald Dunn, and Beverly Ray Burlingame. Not only did he manage the organization on a daily basis; he was also the face of Scribes to many members and to the rest of the nation's legal community. As executive director, Glen-Peter provided effective and efficient services to Scribes members.

His association with Scribes began in the late 1980s when he came to Wake Forest as associate director of the law library. GPA, as we called him because of how he signed his memos, used his experience as editor of the *Washburn Law Review* to edit *The Scrivener*. He quickly demonstrated his superior writing and editing abilities and became *The Scrivener's* editor. Glen-Peter worked hard to bring *The Scrivener* from a few photocopied pages to the professional look and feel we enjoy today. He also ushered in a period of timely quarterly publication. But he did so much more. Glen-Peter worked with me as an associate executive director in fact (although not in title) for nine years. He was a great sounding board on policy and a knowledgeable adviser on technical issues as Scribes worked to become more efficient and effective in providing services to members. Because of his years served in the trenches, Glen-Peter was particularly prepared to take over as executive director after my decade of service.

To understand the magnitude of his service as the manager of Scribes, one must not only appreciate the quiet way he went about his job, but also understand the environment in which Scribes existed. Scribes almost ceased to exist in the early 1970s because it had no home. The national office moved, like a circuit-riding judge, each time a new president was elected. Stability began when the board established the office of executive

secretary at Wake Forest University School of Law. Ken Zick served as executive director, then I did, and Glen-Peter followed nine years later. Running a nonprofit organization requires all the skills that running a small business demands. Glen-Peter mastered the financial, technical, staff, membership, and service aspects of Scribes. Under GPA's management, the organization thrived. If a manager manages well—and Glen-Peter managed Scribes well—then few come to understand the efforts it takes. Few of us knew of, or appreciated, his managerial successes.

Over the past 20 years, membership in non-mandatory legal organizations has declined. Even the ABA has experienced a drop in membership. Yet Scribes has maintained a stable membership and continuity in program. Our board of directors, including Glen-Peter, worked hard to keep membership rolls up. Glen-Peter provided the daily stability needed for our success. The hours required to keep the organization going were long, but you'd never hear it from Glen-Peter. Not only did he maintain the organization, but he strengthened it, technologically and financially. From the shoestring budget he took over, GPA managed savings in office costs to provide the current board with a significant financial cushion. In fact, the Scribes budget today is almost identical to the budget he inherited from me! That fact alone speaks volumes about his abilities.

Scribes was a labor of love and not merely a duty. Glen-Peter's good humor and peaceful personality have long been a great asset for the organization and for the board. His knowledge of Scribes makes him a terrific living resource for the organization. In his resignation letter to the board, Glen-Peter promised to keep Scribes in his heart. I hope he also keeps us close at hand.

We will all miss him.



*Glen-Peter Ahlers, Scribes
Executive Director 1997–2005*

Just *Sue* 'Em!

Mark Cooney

Sue the bastard!

Even if said in jest, this oft-repeated phrase makes lawyers cringe. Aside from its obvious crassness, it feeds the perception that, instead of basing lawsuits on a careful evaluation of the law and the facts, lawyers simply accede to their clients' most base emotions and file lawsuits in the spirit of nastiness and bravado.

Still, you've got to admit it . . . the phrase sure is tight and catchy! Just consider the possible alternatives if the phrase were infected with the same inflated-language disease that afflicts many briefs and court opinions: *Bring a cause of action against the bastard!* *Initiate legal proceedings against the bastard!* *Commence a legal action naming the bastard as a defendant!* Jeez, talk about sucking the life out of a phrase.

This is all my somewhat absurd way of pointing out that many lawyers, judicial clerks, and judges simply don't seem satisfied using the simple words *sue*, *sued*, and *suing*. Perhaps to some, they seem too pedestrian. So they inflate these words to make them sound loftier and more complex. This is a mistake. If you're describing a run-of-the-mill civil suit, rarely is it necessary or helpful to go into a detailed description of the act of suing. It's an unnecessary use of four, five, or sometimes more words when one word will do.

By sticking with the simple, one-word verb *sue*, *sued*, or *suing*, you can save your extra words for those substantive points in the sentence that deserve more explanation. Consider this example:

Original: ABC brought a cause of action against XYZ for breach of contract, alleging that XYZ's widgets failed to conform to the contract specifications.

Better: ABC sued XYZ for breach of contract, alleging that XYZ's widgets failed to conform to the contract specifications.

The second version is much easier on the reader. It also keeps the reader's focus on the more important information about the basis for the claim.

Examples from actual appeal briefs

You may see others, but for now, let's concentrate on just one edit: using the verb *sue*, *sued*, or *suing*

instead of the more elaborate language that you see in the originals.

Original: Chambers initiated an action against Kay, asserting causes of action for breach of contract and quantum meruit.

Better: Chambers sued Kay for breach of contract and quantum meruit.

Original: Appellant did not contemplate and had no interest to institute any cause of action against Respondent.

Better: Appellant did not contemplate and had no interest in suing Respondent.

Examples from actual court opinions

Courts sometimes show an aversion to the simple verb *sue*. In the following examples, the word *sue* can replace phrases that needlessly use as many as six words:

Original: By virtue of this section, a property owner who is forced to institute his own legal action to establish that a taking has occurred . . . is entitled to a full reimbursement of all costs and expenses

Better: By virtue of this section, a property owner who is forced to *sue* to establish that a taking occurred is entitled to a full reimbursement of all costs and expenses.

Original: Although the clause does not discuss the ability of the customer to commence a cause of action against E-Z Pass, the parties can by contract incorporate into their agreement a clause that would give E-Z Pass the opportunity to investigate challenges to billings before a customer could commence a suit.

Better: Although the clause does not discuss the ability of the customer to *sue* E-Z Pass, the parties can by contract incorporate into their agreement a clause giving E-Z Pass the opportunity to investigate challenges to billings before a customer could *sue*.

So just *sue*

Don't succumb to the absurd notion that the words *sue*, *sued*, and *suing* are too pedestrian for lawyers to use. These are good, strong verbs that can tighten up your writing considerably and help your reader focus on the important information in your sentence. In your legal writing, at least, *sue* the bastards!

Mark Cooney teaches at Thomas M. Cooley Law School and chairs the Appellate Practice Section of the State Bar of Michigan.



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From Our Peevish Readers

Mark Adler sent us this cranky e-mail all the way from England:



- It has recently become fashionable in England to add the word *Solicitors* to the firm name instead of the traditional & *Co.* I practice with as little formality as possible under my own name from a converted bedroom at home, with no help except that sometimes my wife brings me a cup of tea. I am irritated out of all proportion by letters grandiosely addressed to

Mark Adler Esq.

Mark Adler Solicitors

- And while I'm being a grumpy old man . . . Among this morning's offerings were the papers for the purchase of an empty piece of scrub land. They included the six-page list of furniture and fittings standard for the sale of houses (so there should be no argument afterwards about whether the seller should have left the curtain rails or the carpets). But for a derelict field? Each of the 100-odd items was individually ticked "None at the property." Give me strength!

(Mark wrote from a place called "April Cottage," so we don't think Mark should be so grumpy.)

Don LeDuc, responding to **Sue Liemer's** peeve in the last edition of this newsletter about using two prepositions in a row, sent this story. Don noted that it's an old one among English teachers who always pontificated about ending sentences with prepositions:

- I was reminded of an incident with a child who asked Daddy to read her a story. "Which one would you like to hear?" her father asked. "Dr. Seuss," she said, "but I want *Horton Hears a Who*, not *Green Eggs and Ham*." So downstairs went Daddy to get the book, but while he was there, Mommy said, "I thought you were going to put out the trash." So after his trip outside, Daddy rushed in, grabbed the book, and went upstairs. "So are you ready?" he asked his daughter. "I've got *Green Eggs* right here." "Oh, Daddy," she replied, "why did you bring the book I didn't want to be read to out of up for?"

Robert Markle sent us two of his pet peeves:

- I do not understand why people say things like this: "In its opinion, the court didn't speak to that issue." What's wrong with "speak about" or "discuss"? Are issues receptive when spoken to? Or do they shy away from conversation?
- I am also peeved by the perversion of basic rules of grammar to reach a politically correct result. For example: A pronoun must agree in number with its antecedent. *Everyone, anyone, someone, everybody*, and the like are singular. To avoid the dreaded (but grammatically correct) *his*, otherwise intelligent writers resort to "Anyone who forgets their ID card will not be admitted." Who are the *they* the writer refers to?
- What's worse is the same sort of grammatical mistake when the antecedent is a noun rather than a pronoun: "Even if the CEO forgets their ID card, they will be turned away." Judge Gee was right; this is a barbarism. See Thomas G. Gee, *A Few of Wisdom's Idiosyncrasies and a Few of Ignorance's: A Judicial Style Sheet*, 1 *Scribes J. Legal Writing* 55, 60 (1990).

New Members

Yoshinori Himel (Sacramento, CA)

Audrey Sullivan Jacob (Palo Alto, CA)

Maria Mindlin (Davis, CA)

Mark Nordman (Los Angeles, CA)

Brian Sheridan (Ishpeming, MI)

Christopher R. Sullivan (Minneapolis, MN)

Catherine J. Wasson (Harrisburg, PA)

News from Members

John G. Browning, a partner at Browning & Fleishman, P.C., in Dallas, Texas, received the Stephen Philbin Award for Excellence in Legal Reporting from the Dallas Bar Association for his weekly column, “Legally Speaking,” in the Rockwall County *Herald Banner*. Browning’s column entitled “The Sins of Our Fathers,” an examination of the consequences of the eugenic sterilization laws of the early 20th century, was honored as best suburban newspaper feature. Browning was also recently recognized as a Texas “Super Lawyer” by *Texas Monthly* and *Law and Politics*, a distinction reserved for the top 5 percent of attorneys practicing in Texas.

Cullen M. Godfrey announced the publication of two articles in the *Texas Bar Journal*: “A Brief History of the Oil & Gas Practice in Texas,” 68 Tex. B. J. 818 (Oct. 2005), and “The Revised Role of Lawyers After Sarbanes-Oxley,” 68 Tex. B. J. 932 (Nov. 2005).

Marc M. Schneier coauthored, with Justin Sweet, the seventh edition of *Legal Aspects of Architecture, Engineering, and the Construction Process* (Thomson/West 7th ed. 2004). Marc also published a pair of articles, “Liability of Owners and General Contractors for Workplace Accidents,” “Part I: Premises Liability” and “Part II: Defenses to Premises Liability,” in *Construction Briefings* (Thomson/West Nov. 2004 & Dec. 2004).

Norman Otto Stockmeyer was profiled in the November 7, 2005, edition of *Michigan Lawyers Weekly* as part of the newspaper’s “Leaders in the Law” series. The front-page article prominently noted that Otto is the new president of Scribes.

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Judge Mark P. Painter (Cincinnati, OH)
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Thomas M. Steele (Winston-Salem, NC)
Norman Otto Stockmeyer (Lansing, MI)
Anthony Turley (Toledo, OH)



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Scribes Executive Office Moves

The Scribes Executive Office has moved to Thomas M. Cooley Law School. The new executive director is Joseph Kimble. The new address is Thomas M. Cooley Law School, P.O. Box 13038, Lansing, Michigan 48901. Please address all future correspondence (address changes, dues payments, and so on) to Professor Kimble at that address. Or e-mail him at kimblej@cooley.edu.

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- (3) served as an editor of a legal publication, or
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