



The Scrivener

Scribes — The American Society of Legal Writers

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Submission Deadlines

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Please send items for upcoming issues of *The Scrivener* to Jane Siegel at siegelj@cooley.edu.

To Subscribe

Go to scribes.org, complete an application, and submit it to Rebecca McAlpine at mcalpin@cooley.edu.

Future Scribes

To remain strong, Scribes must retain current members and attract new ones. Not only do we want experienced attorneys as members, but we also hope to persuade talented law students and recently licensed attorneys to join.

During the March 2014 Scribes board meeting, we held a focus group with eleven second- and third-year law students from our host, Chase College of Law at Northern Kentucky University. Most students were on either law review or the moot-court board. The group included full-time and part-time students, and both traditional and second-career students.

The students shared their thoughts about Scribes, about how they obtain and process information, and about why they join organizations. Although the group had some differences, below are some of the key points we drew from this valuable session:

- Three of the eleven had heard of Scribes: one at the National Conference of Law Reviews annual meeting, where we present the Best Law-Review Award, and two because Chase Law won the 2013 Best-Brief Award.
- The students had not seen the *Scribes Journal* or *Scrivener* before, but several noted, after seeing sample issues, that the publications contained articles on topics that interested them. When we told them about the *Scribes Journal* issue that included interviews with U.S. Supreme Court Justices, three indicated that they wanted to find the issue to assist with a U.S. Supreme Court seminar they were taking.
- As members of the law review and moot-court board, the students value articles about legal writing; they are more apt to read a piece if it is short.
- As a group, the students use different apps to organize material they want to read. They also preferred sites and apps that allow them to send reading materials to their email accounts, or to create a reading list available in the future, when they had time or needed to access that information.
- Most did not like to receive long e-mails but preferred e-mails with links, to direct them to more information about items that caught their attention, and a limited number of bullet points.
- They did not mind receiving occasional e-mails about events and opportunities, if they were short. Weekly e-mails would lead some to opt out. Most did not seem bothered by monthly e-mails from organizations.



Dean Darby Dickerson, president of Scribes

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(The President's Column *continued from page 1*)

- Several indicated that they use e-mail for business matters and prefer Facebook and other social-media sites, especially Twitter, for other matters, including information from organizations to which they belong.
- The students were not interested in joining organizations simply for résumé fodder. In fact, several indicated that they would not list an organization on their résumé if they were simply a member and not involved.
- They were more interested in organizations that had a prestige factor, meaning one that had criteria for membership beyond being a law student or attorney.
- Opportunities for serious mentorship will drive decisions about whether to join a professional organization. The opportunity to interact with experienced attorneys will also lead them to become more involved in the organization and participate in committee work.
- Many were interested in learning more about Scribes, and some indicated that they would welcome the opportunity to participate on Scribes committees because they value our mission and would be excited to work with experienced judges and attorneys on projects.

Based on this and other input we've received, I've asked the Membership and Outreach Committee to explore expanding law-student membership and to consider ways in which we can recruit and retain members, including newer attorneys.

We are also working on many other projects, including a potential award for outstanding brief-writing by attorneys. If you have ideas or would like to participate, please e-mail me at darby.dickerson@law.stetson.edu.

I also hope to see many of you at the annual Scribes Luncheon, which will be held at 12:30 p.m. on Friday, August 8, 2014, in Boston, in connection with the ABA Annual Meeting. Keep an eye out for your invitation!

Member News

James A. Johnson of Southfield, Michigan, an active trial lawyer in Michigan, Massachusetts, and Texas, has participated in The Practising Law Institute's program Trial by Jury 2013 held in New York City. His article *Persuasion in Opening Statement—Generating Interest in a Convincing Manner* is published in the course handbook.

New Members

Syed Ali (Pittsburgh, Pennsylvania)
Carron N. Armstrong (Dallas, Texas)
Douglas Bauman (Weston, Wisconsin)
Joel Bernstein (Lexington, Massachusetts)
Douglas Cooper (New York, New York)
Stacey L. Dinser-Hohl (Hamburg, Michigan)
Zaur Gajiev* (Calabasas, California)
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Robert Kelter (Chicago, Illinois)
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Donna Manvich (East Northport, New York)
Ramey McCracken (Mountain Home, Arkansas)
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E. King Poor (Winnetka, Illinois)
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Sarah Ruhlen (Syracuse, New York)
Todd Smith* (Fort Worth, Texas)
Pamela Zimba (Oakland, California)

* Student Editor Member.

Writing: It Can Be Taught and Assessed

by Professor Beth D. Cohen
Western New England University School of Law

Professor Cohen's comments appeared on Room for Debate, "Can Writing Be Assessed?" at NYTimes.com on March 10, 2014. Reprinted with permission.

Writing can be assessed. Any skill that can be taught, any skill that can be improved, can be assessed. Effective writing is a fundamental skill and a vital form of communication. And it is critically important to students, individually and collectively, that we continue to value and encourage good writing.

Making the essay optional on the SAT doesn't level the playing field and undermines the importance of good writing skills.

Individually, we judge the merits of writing whenever we read. In an educational setting, technical aspects of writing such as spelling, grammar, vocabulary, and punctuation can be evaluated. So too can clarity, organization, and analysis. Grading rubrics, outlines, checklists, and model essays are some of the tools available to help assess written work.

But writing is a process, and the most beneficial assessment is geared toward improvement rather than just assigning a score or a grade. The process of writing and rewriting takes patience, reflection, and perseverance—skills that are related to academic, professional, and personal success. Ongoing assessment helps both teaching and

learning, and students should be encouraged to write as frequently as possible with rigorous feedback and opportunities for revision.

The newly revised essay-optional SAT may undermine the importance of good writing skills. Because the essay is no longer mandatory, schools may spend less time and effort on teaching and assessing writing. Additionally, the opt-in essay does not help the stated goal of leveling the playing field but instead continues to perpetuate the bias and inequities inherent in standardized tests. Those who can afford coaching will be most likely to opt in to write the essay, and those who cannot will remain at a disadvantage. Since most students lack proficiency in writing, it makes no sense to minimize the significance of this skill on exams. Effective writing is integrally related to critical thinking, communication, mastery of subject matter, and problem-solving.

It has been said that resilience may be the best predictor of happiness and success. Of all the academic and test-taking skills, writing (and rewriting) requires resilience.

Beth D. Cohen is a professor of law, associate dean for academic affairs, and director of the legal research and writing program at Western New England University School of Law. She is a member of the board of directors of Scribes—the American Society of Legal Writers.

Would you rather receive this newsletter by e-mail?

If the answer is "yes," please take just a minute to let us know. Send your "yes" to Rebecca McAlpine at mcalpinb@cooley.edu. Don't bother if the answer is "no." And if you've already told us your preference, thank you!

Scribes Presents Annual Law-Review Award at NCLR in LA

Scribes Law-Review Dinner

The National Conference of Law Reviews, Los Angeles, California, March 27, 2014

A Duke University law student, writing about freedom of assembly, has won the 2014 Scribes Law-Review Award. Nicholas Brod won the award for his article *Rethinking a Reinvigorated Right to Assemble*, published in 2013 in the *Duke Law Journal*.

Mary Bowman, professor at Seattle University School of Law and chair of the Scribes Law-Review Award Committee, presented the award to Mr. Brod and the *Duke Law Journal* at the 60th annual National Conference of Law Reviews (NCLR) meeting in Los Angeles, California, on March 27. She presented the award during the Scribes award reception and dinner; Craig E. Gosselin, Senior Vice President, General Counsel, and Human Resources, Pacific Sunwear, gave the keynote speech. Southwestern Law School hosted the NCLR meeting.

Mary Bowman's and Nicholas Brod's remarks appear below.

Remarks of Mary Bowman Chair of Scribes' Law-Review Award Committee

Good evening, and welcome to the Scribes Law-Review Dinner. My name is Mary Bowman. I am a professor at Seattle University School of Law, and I am also the chair of the Scribes Law-Review Award Committee. Scribes is a national organization of legal writers that was founded over 50 years ago, and its goals include fostering a community among those who write about the law.

One of the ways that we do this is by bringing legal writers together to recognize excellence in legal writing. So I'd like to begin by thanking those who are responsible for our gathering here this evening:

- to the National Conference of Law Reviews, for making this Scribes dinner an annual event;
- to Thomson Reuters, for its long-standing support of the Scribes dinner at the National Conference of Law Reviews;
- to Joe Christensen, Inc., for producing the offprints of the winning article;
- to Thomas Cooley Law School, the home school of Scribes; and
- to Southwestern Law School, for hosting this conference.

Tonight, I am here to give two awards, recognizing the best student law-review article published in the preceding year and the journal that published that article. The first of these two awards honors the best student-written law review Note or Comment published in the preceding year.

After soliciting nominations from law reviews and journals throughout the country this fall, we received 73 entries. Please watch for your letter inviting nominees next fall, and be sure that your journal submits an article for consideration. Once Scribes receives the articles, the terrific legal-writing faculty at Thomas Cooley Law School read the articles; this year, they selected 16 finalists, which is more than usual and a testament to what a strong group of articles we received this year. These articles dealt with such diverse topics as drone surveillance in U.S. airspace, products liability for autonomous vehicles, protection for pharmaceutical trade secrets, and challenges to appeal waivers in plea agreements. I have served on this committee for eight years, and in my opinion, this was the most consistently strong group of finalists that I have ever seen.

I was joined in reviewing these 16 excellent articles by my colleagues on the Scribes Law-Review Award Committee, which picks the winning article. My colleagues on the committee are University of California, Davis law professor emeritus Richard Wydick, Barry University law

professor Glen-Peter Ahlers, legal adviser for the U.S. Army Corps of Engineers Steven Feldman, and University of Nebraska law professor Richard Leiter. We considered the importance of the topic and the author's thesis, the quality of the research, and of course the quality of the writing.

Despite the high quality of the other 15 articles that we read, however, the committee easily agreed that this year's winner of the award is Mr. Nicholas Brod, for his article *Rethinking a Reinvigorated Right to Assemble*, published in the *Duke Law Journal*.

Mr. Brod's article deals with a formerly obscure clause of the First Amendment, the Assembly Clause, which provides the "right of the people peaceably to assemble." This clause is formerly obscure because for decades, it was largely ignored in both caselaw and legal scholarship, as advocates, judges, and legal scholars focused instead on free speech and freedom of association. Over the last several years, however, scholars have attempted to reinvigorate the Assembly Clause, to correct perceived problems in free-speech jurisprudence and free-association jurisprudence. Mr. Brod's article persuasively demonstrates that this scholarship fails to appreciate the central aim of the Association Clause, which is not amorphous associations, but rather in-person, flesh-and-blood gatherings. Relying on both a careful textual analysis and the history of the First Amendment, Mr. Brod concludes that the Assembly Clause, properly understood, should provide greater protection than free-speech or associational rights for gatherings like the Occupy Movement encampments.

As you can probably tell from that description, Mr. Brod's article weaves together linguistics, legal scholarship, and legal history in a way that has important practical implications today. It is a terrific topic, very well analyzed and organized, with important implications. Another committee member noted that it made us think about the issue in a new way, with excellent use of sources to back up the article's claims. Professor Mark Cooney, who was the screener who selected the article as a finalist and who is also the editor-in-chief of *The Scribes Journal of Legal Writing*, said that he knew it "would win as soon as I finished it and placed it down on my desk. It was so, so good—the best I've

ever read in this competition (going back many years). What a breath of fresh air, what crisp, vivid, masterly prose."

My own notes on the article similarly describe it as "clear, lucid, focused, and engaging, with some very nice turns of phrase." My final note on the article simply says "wow."

It is therefore my great pleasure to present the 28th annual Scribes Law-Review Award to Mr. Nicholas Brod of the *Duke Law Journal*.

Before I present the award to the *Duke Law Journal*, I want to give you a bit more information about Scribes. Scribes members include judges, lawyers, law professors, deans, and legal editors, including student editors of law reviews. Journal editors have a particularly important role in fulfilling the mission of Scribes, both as you write your own articles and as you select and publish other authors' scholarship. As you make your decisions about which articles to publish, please take into account the quality of writing. And as you edit those articles, help your authors improve their writing as well as their ideas.

Every law-review editor in this room is eligible for membership in Scribes, and we even have a special dues category for law students: just \$15 a year. In return, you will receive future issues of *The Scribes Journal of Legal Writing*, like the one at your seat tonight. If you join Scribes, you can also then join one of the many active committees, and you can show your commitment to high-quality legal writing by noting your membership on your résumé. You can join Scribes by returning the application form that's inside your copy of *The Scribes Journal*, along with your payment. Or you can go to the Scribes website, www.scribes.org, and join.

Now I want to honor the *Duke Law Journal* for publishing Mr. Brod's excellent article. Duke is an institutional member of Scribes, and we appreciate its institutional commitment to excellence in legal writing.

Again, congratulations to the *Duke Law Journal* for fostering a rigorous approach to writing that produces such excellent work generally and for publishing Mr. Brod's article in particular. Accepting this award is the editor-in-chief of the *Duke Law Journal*, Mr. Chris Bryant.

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Remarks of Nicholas Brod
Rethinking a Reinigorated Right to Assemble
Duke Law Journal

Thank you for having me this evening. I want to thank all those who served as screeners and on the award committee for taking time out of their busy schedules to read my piece: I am very grateful for their support. I would also like to recognize Chris Bryant—the editor-in-chief of the *Duke Law Journal*—who is here tonight and who, together with many of our editors, dedicated tremendous amounts of energy into putting my piece through publication. Finally, and as always, my thanks go to Professor Joseph Blocher, my adviser, for his help and encouragement throughout the writing process. It is a group effort to pull something like this off, and I am always struck by how much my piece benefited from the insights of so many different individuals at Duke Law School. Publishing a piece of scholarship can be a grueling process; I was fortunate to be surrounded by people who made that process energizing instead of exhausting.

All that said, I would be remiss if I didn't put in at least a short plug for the Assembly Clause, the topic of my Note. It has been forgotten for far too long. As a first-year law student, I was fascinated by the emergence of political movements like Occupy Wall Street and the Tea Party, movements that relied heavily on in-person gatherings. They provided a stark reminder that even in our digital age, physical political mobilization still matters—for both the left and the right. But in short order, the Occupy Movement collapsed and the Tea Party rallies died down. I was left wondering whether First Amendment law had anything to do with it.

The short answer is yes, at least in part. The long answer, of course, is detailed in my Note, which argues that such movements should be protected and regulated under the Assembly Clause, a constitutional provision that has been dismissed by courts and scholars in favor of the Free Speech Clause and the freedom of association. This result, I argue, runs contrary to the plain language and the historical roots of the First Amendment. And in the

process, it forces courts to rely on a legal framework ill equipped to assess how far the government can go in regulating physical gatherings.

A few scholars have attempted to reinvigorate the clause, but my Note contends that they overlook its central aim. They focus on the ability of the assembly right to provide an alternative to the freedom of association, which protects the right of certain groups to choose their members. But by examining the text and the history of the Assembly Clause, my Note submits that the clause should primarily safeguard flesh-and-blood gatherings—political rallies instead of political parties. I then draw on recent political movements to demonstrate why and how this interpretation of the Assembly Clause could better serve our constitutional project. A quick glance overseas, where such gatherings are the front lines for both change and oppression, throws into sharp relief the importance of this endeavor, of carefully thinking about how the First Amendment should simultaneously empower and regulate those seeking to make their voices heard.

I will conclude with a brief observation: the process of writing this Note numbers among the most formative experiences of my time as a law student. I know firsthand the important role that student scholarship can play in the intellectual life of a law school, so I thank Scribes for its long-standing commitment to student authors like myself. Thank you again for this recognition.



Writing Grammar Research

Avoiding the Pitfalls of Common Legal-Writing Errors

Writing Tip

Repetition or Redundancy

Repetition can make a document easier to understand or deadly dull. Repetition can appear in the specific words, in the use of headings or bullets, and in other aspects of the document. Use repetition as a tool when it enhances understanding or serves another purpose, but eliminate it in other circumstances.

Some forms of repetition are beneficial for reader and writer.

- Repetition in structure often keeps the reader mentally in place in the document.
- Consistent repetition of party names without change reduces likelihood of confusion.
- When repetition functions as alliteration, it may help make a point.
- Parallelism is a form of repetition of tense, format, or other feature in a series or list that makes the series or list more coherent and compelling.

Nevertheless, unless there is a good reason for repetition, its presence often makes the reader think the writer did not bother to edit and proofread the material. Repetition that fails to serve a purpose is too easily seen as laziness.

In the more-than-you-wanted-to-know department, here are names for common forms of repetition:

Alliteration	Repetition of the initial sounds of words.
Anadiplosis	Repetition of the last word in a line or clause.
Anaphora	Repetition of words at the start of clauses or verses.
Antimetabole	Repetition of words in successive clauses in reverse grammatical order.
Antistasis	Repetition of words or phrases in opposite sense.
Diacope	Repetition of words broken by some other words.
Epanalepsis	Repetition of the same words at the start and end of a sentence.
Epimone	Repetition of a phrase, usually a question.
Epistrophe	Repetition in which the same expression (single word or phrase) is repeated at the end of two or more lines, clauses, or sentences.
Polyptoton	Repetition of words having the same root but with different endings.
Polysyndeton	Superfluous repetition of conjunctions in a list to make a point.
Symplece	A combination of anaphora and epiphora in which repetition appears at the end and the beginning.

Grammar Tip

Grammar-Checkers

Many word processors include grammar-checkers along with spell-checkers. An Internet search for “grammar” will identify many other grammar-checkers, some free and others not. Grammar-checkers may or may not correctly identify grammar errors and may also label as errors sentences that are without a defect.

Someone unsure of his or her ability to spot errors may wish to use a grammar-checker to identify sentences that need an extra examination, but it is a mistake to blindly accept the judgment of a computer program. See “The Dangers of Relying on Spell Check” and “Grammar Check” at <https://www.servicescape.com/article.asp?cid=93325>; “Automated Grammar Checking” at <http://www.economist.com/blogs/johnson/2012/08/computers-and-language-continued>; and “Comparing Grammar Checkers” at <http://www.serenity-software.com/pages/comparisons.html>.

Research Tip

Brainstorming

Start any research project with a few minutes of brainstorming, noting all the ideas that come to mind, places to look, points to research. Sometimes a great idea at the start can be forgotten in the process and never pursued. One approach is to make these notes at the bottom of the document in which you intend to work. You can then easily refer to these notes, add more notes, and cross out others as you move forward.

Points that will often recur include, especially in a litigation context:

- Availability of relevant presumptions and inferences — Both statutes and caselaw will provide or explain any available presumptions and inferences.
- Burden of proof — Where will the burden of proof fall? Is there some step that can be taken to shift the burden of proof or a cause of action that affects the burden of proof to the advantage of your client?
- Definitions — Relevant definitions may be statutory or may appear in caselaw or other sources. The absence of a clear definition for a significant term may be equally important.
- Standing and capacity of the various parties or participants — Who will have to be involved in any resolution? Are there issues that may affect the ability to involve those persons: minority, mental incapacity, lack of required licensure, inability to obtain personal jurisdiction?
- Timing — Are there issues of prematurity or of mootness? Is a statute of limitations looming or expired? Are there claim requirements with short time periods (often in probate, actions against government defendants)?

Uncertainty is the mother of most research, so your task is to reduce or eliminate uncertainty when possible and to define its scope when it cannot be eliminated. Also consider the uncertainties that your opponent may face. Use all the sources available to fulfill these goals.

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(Brainstorming *continued from page 8*)

Brainstorming techniques are discussed at <http://www.mindtools.com/brainstm.html>; <http://www.inc.com/ss/7-unique-brainstorming-techniques>; <http://personalexcellence.co/blog/25-brainstorming-techniques/>; <https://owl.english.purdue.edu/engagement/2/2/53/>; and a host of other materials available on the Internet.

Internet Research Tip

Legal Dictionaries

A variety of legal dictionaries are available on the Internet.

- First (1891) and second (1910) editions of *Black's Law Dictionary* are available at <http://blacks.worldfreemansociety.org/top.htm>.
- The U.S. Courts website provides a glossary at <http://www.uscourts.gov/Common/Glossary.aspx>.
- Wex is a free legal dictionary and encyclopedia sponsored and hosted by the Legal Information Institute at the Cornell Law School. Wex entries are collaboratively created and edited by legal experts. Wex is available at <http://www.law.cornell.edu/wex>.
- Lawyers.com offers a legal dictionary based on *Merriam-Webster's Dictionary of Law* (2001) at <http://research.lawyers.com/glossary>.
- The World Wide Legal Information Alliance offers a legal dictionary based on *Duhaime's Legal Dictionary* at <http://www.wwlia.org/LegalDictionary.aspx>.
- A wide collection of legal dictionaries is at <http://www.yourdictionary.com/>, including *Anderson's Dictionary of Law* (1893), *Bouvier's Law Dictionary* (1856), *Criminal Justice Today Glossary*, *Criminology Today Glossary*, *Criminal Law Glossary*, *Canadian Bankruptcy Glossary*, *Divorce Law Dictionary*, *Duhaime's Law Dictionary*, *Everybody's Legal Glossary*, *Glossary of Commercial Fraud*, *International Law Glossary*, *INS Glossary of Immigration and Naturalization Law*, *Law Glossary*, *Legal Lexicon's Lyceum*, *Merriam-Webster's Law Dictionary*, *Oxford Law Dictionary*, and *Wiki Law Dictionary*.
- Then there is *Nolo's Free Dictionary of Law Terms and Legal Definitions* at <http://www.nolo.com/dictionary>.
- Two other sites, <http://www.babylon.com/define/56/Legal-Dictionary.html/> and <http://www.legaldictionaries.org/>, will look up the word in multiple legal dictionaries at once.

Before citing a legal dictionary to a court, it makes sense to search that court's recent decisions to identify which dictionaries the court has cited. If a judge has a strong preference, it will show up in a search for "dictionary," and you can then use that knowledge to your advantage.

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