Notes & Queries

Forewords and Afterwords

The business of life is to go forwards.
—Samuel Johnson

One of the pleasures of being a librarian is to examine each new book that arrives in the library. Even on a busy day, you can skim the title page and list of contents, before reading quickly through the preface or foreword. Anyone who does this routinely will be surprised to discover how many legal authors, editors, and publishers cannot spell *foreword.*

The legal profession has often been called conservative, perhaps because of its cautious adherence to precedent. Lawyers are constantly searching for historical authority. This looking backwards may explain why so many of them have trouble with the notion of forewords or forwards.

For some writers believe that the correct title for an introductory chapter is *Forward.* It could be some form of legal dyslexia, or perhaps they rely on a computerized spelling program that is clever enough to check for real words but not sufficiently intelligent to determine context or author's intent.

My discoveries of *Forward* include an advertisement for a book published by the American Judicature Society (with a quotation "from the Forward to the Second Edition"); a far-sighted *Forward* to a computer-law symposium published in the Spring 1990 issue of the *Hamline Law Review*; and an impetuous *Forward* from the president of the Student Bar Association at San Francisco Law School, printed in the Spring 1990 issue of *Res Ipsa Loquitur.*

The *Szladits' Bibliography on Foreign and Comparative Law* that covers 1984 to 1986 lists a *Forward* on page iii. Dean Donald M. Jenkins has a *Forward* in the Summer 1983 issue of the *Akron Law Review.* And a letter I received from a law library in Texas recalls the *Forward* to a book about a woman lawyer, who may perhaps have been ahead of her time.

Moving right along, if not forwards, we come to a larger group that prefers the wholly original form of *Foreward.* This spelling is a mystery, because it mirrors no other word and the misspelling would almost certainly be caught by an electronic spelling system. Can it be that there's a computer program out there that is not entirely word-perfect?

The *Users Guide* to the Law Library at Washington and Lee University has a *Foreward.* So does a 1992 booklet published by the American Bar Association's Commission on Women in the Profession, entitled *Lawyers and Balanced*

Lives: A Guide to Drafting and Implementing Sexual Harassment Policies for Lawyers.

The use of *Foreward* is not confined to the United States. A 1990 special issue of the *University of Western Australia Law Review* has a *Foreward* on state constitutional law. In general, though, this aberrant spelling appears to be an American disease.

Judge A. Leon Higginbotham is credited with a *Foreward* in volume 7 of *The Black Law Journal*, and Governor James R. Thompson has a *Foreward* in the Fall 1982 issue of *The Journal of Criminal Law & Criminology*. Other preliminary *Forewards* may be found in the Winter 1993 issue of the *Colorado Journal of International Environmental Law and Policy*; in the fifth issue of the 1989 *Food Drug Cosmetic Law Journal*; and in the first issue of the *California Western Law Review* for 1991–1992.

A possibly facetious *Foreward* appears in the Winter 1993 *Nova [Humor in the] Law Review*. That one at least deserves a laugh.

And some sort of jackpot should be awarded to Lee Modjeska, whose introduction to a 1980 symposium on Labor Law in the *Ohio State Law Journal* is headlined *Foreword* on page 273 and *Forward* on page 275, and is indexed as *Foreward* in the LegalTrac database.

Postscript or Afterword

The cynical reader need not suppose that the research for this note was easily achieved with the aid of an electronic full-text legal-research system. Several *Forewords* that are correctly spelled in the original sources are misspelled in their online versions — sometimes *Foreward* and on one occasion (just to enrich the stew) *Forword*. Of 25 *Forewards* identified in the Lexis Legal Resource Index LGLIND file, only two were in fact so spelled in the original journals. Let scholars beware: the virtual library does not always present an accurate image of the printed word.

— Lance Dickson
Stanford, California

Federal Reporter, Third Series: A Call for Opinions "Sufficient unto the Case"

Of all the legal events during 1993, one "nonevent" was at least highly symbolic, if not significant. On October 4, 1993, instead of publishing the 1000th volume of the *Federal Reporter, Second Series*, West Publishing Company released the first advance sheet of the *Fed-*

eral Reporter, Third Series. The first bound hardcover volume was published in December 1993.

This development was not anticipated by even the compulsive editors of *The Bluebook.*[1] To some extent, it was just a matter of time (or of headnotes and key numbers). In recent years the *Federal Reporter* has been growing by 20 to 25 bound volumes each year. As the millennium approached, the people at West Publishing must have debated the heavy choice between using four-digit volume numbers and starting over with a third series.[2] But the choice presented itself too soon.

This essay is a plea to the circuit judges on the U.S. courts of appeals to think before they write the long, scholarly — and in some cases *unnecessary* — opinions that fill the pages of the new *Federal Reporter, Third Series.*

Series-es

As Justice Joseph Story complained, "The mass of the law is, to be sure, accumulating with an almost incredible rapidity. . . . It is impossible not to look without some discouragement upon the ponderous volumes, which the next half century will add to the groaning shelves of our jurists."[3] That was in 1821, back in volume 19 of the *United States Reports,* and more than 50 years before there was a *Federal Reporter.*

The first *Federal Reporter* followed up a publication known as *Federal Cases.* The first series covers from 1880 through 1924; it contains all federal district-court and appellate opinions (the circuit courts of appeals were created in 1891) for that 44-year period — in only 300 volumes.[4] The decision to stop at 300 volumes coincided with an expansion in West Publishing's coverage of federal trial courts.[5]

Volume 1 of the second series was published in January 1925.[6] It, too, contained both trial and appellate opinions until 1932, when the *Federal Supplement* was inaugurated to publish federal district-court opinions separately.[7] The *Federal Supplement* now has more than 900 volumes, so a *Federal Supplement, Second Series* will not be long in coming. And since 1941, there have been more than 160 additional volumes of the *Federal Rules Decisions,* containing decisions on procedural issues.[8]

The federal appellate courts took 68 years to reach 999 volumes in the second series, and it does not take a librarian's eye to notice that the books themselves have grown in size over the years: recent volumes average more than 1,500 pages, roughly 1½ times the number of pages found in earlier volumes.[9]

The rate of growth has been accelerating. The total volumes in the second series reached 100 in 1939 (14 years); 200 in 1953 (14 years); 300 in 1962 (9 years); 400 in 1969 (7 years); 500 in 1975 (6 years); 600 in 1979 (4 years); 700 in 1983 (4 years); 800 in 1987 (4 years); 900 in 1990 (3 years); and 999 in 1993 (3 years). Even assuming — against this trend — that the current rate will remain constant, we can expect the first volume of the *Federal Reporter, Fourth Series* in about 34 years — less than half the time it took to get through the second series.

More: Judges, Appeals, Opinions

There are of course more circuit judges today, deciding more appeals. During their first decade, the 9 circuits were assigned 30 judgeships;[10] today there are 13 federal courts of appeals with 179 judgeships.[11] Significantly, more district-court decisions are being appealed: in 1950, about 1 out of 40 were appealed; by 1990, the ratio was 1 out of 8. As a result, appellate filings have risen by a factor greater than 15 over that same period.[12]

No one — not lawyers, not law students, not professors, and not even the judges themselves — can hope to keep fully abreast of the over 15,000 opinions issued each year by the U.S. courts of appeals. One serious consequence is that federal caselaw today is not being subjected to the previous levels of critical evaluation so necessary for development and improvement.[13]

In the future, we can expect even more judges deciding still more appeals. Twenty years ago, one hyperbolic commentator predicted that by the end of the 21st century there will be 5,000 circuit judges disposing of 1 million appeals and filling 1,000 volumes — each year.[14] The 1990 *Report of the Federal Courts Study Committee* highlighted more conservative but nonetheless daunting projections that before the end of this decade more than 300 circuit judgeships will be needed and that the current record-breaking federal appellate caseloads will triple in the next 25 years.[15]

A Sense of Crisis

Much has been made of the so-called "crisis of volume" in the U.S. courts of appeals.[16] The dawning consensus among experts and insiders seems to be that the coping measures that have worked in the past — adding judges, hiring more law clerks, shortcutting appellate procedures — have played out. There is a growing belief in the need for some structural reform of the federal court system, although there seems to be little agreement on how to go about the restructuring.

But there is something that judges can do, before we call on Congress to add a new level of federal appellate court and before all the courts of appeals begin to resemble the Brobdingnagian Ninth Circuit.

The Opinion "Sufficient unto the Case"

We should expect our circuit judges to exercise some self-restraint — not in terms of ideology or judicial activism — but in how they perform their appellate art. Not every record on appeal presents a canvas worthy of a masterpiece. Simply put, I think the courts of appeals should write shorter opinions.

I advocate what the late Judge Alvin R. Rubin of the Fifth Circuit described as the opinion "sufficient unto the case":

> American judicial opinions surpass in verbiage, in length and in citation those written anywhere else in the world. . . . Occasionally each of us may render a decision, perhaps in a highly significant case, that demands exposition of the full palette of our talents, but I fear that much of our time and the time of our clerks is spent merely in seeking felicitous expression, adding citations and attempting to produce works of art. It would be worthwhile for judges to experiment with much simpler opinion models. We will succeed, however, only if we de-institutionalize the demand for scholarly opinions. A good motto for us might be: Sufficient unto the case is the decision thereof.[17]

Chief Judge Abner J. Mikva of the D.C. Circuit, who authored the first opinion in the third series, was quoted to complain about the increasing verbosity of circuit judges: "I wince at there being the need already for an F.3d. . . . Mostly we're writing longer and with more footnotes."[18]

When asked why he wrote at a stand-up desk, Justice Holmes explained, "[I]t's salutary. Nothing conduces to brevity like a caving in of the knees."[19] But judges today have computers and law clerks. How do we get them — the judges and their clerks — to write opinions "sufficient unto the case"?

What's Good for Lawyers Is Good for Judges

We should ask the judges to impose deadlines and page limits on themselves. You may think "No way!" But I answer "Way!" Deadlines and page limits are already part of the federal appellate milieu.

The Supreme Court follows what amounts to an annual term-end deadline for virtually all cases argued each October Term.[20] Lawyers must live with established briefing deadlines and page limits

— imposed by judges, who were presumably able to comply with such restrictions when they were in practice. Moreover, as a practical matter any deadlines and page limits would be passed on to the law clerks, who not only need to learn to adhere to such rules for their own future practice, but also are far less deserving of deference.[21]

Of course, care should be taken that such limits are not Draconian and that they make exceptions for the particularly difficult appeal that merits more time and more words. Otherwise, if the judge had only a set time to decide an appeal, no matter what (like on some television game show), there would be a real danger of an unintended bureaucratization and untoward delegation to law clerks. If a court were to draft standards for its internal operating procedures, the page limits for principal briefs in the Federal Rules of Appellate Procedure would provide, if anything, overgenerous limits for opinion-writing.[22]

Some appeals do deserve what Judge Harry T. Edwards of the D.C. Circuit calls "wide-angled adjudication."[23] Some appeals do present a recurring problem or dispose of an important legal issue or present an opportunity to clarify existing law. Those appeals merit a broader writing perspective — beyond correcting error — so that lawyers, litigants, and future courts will be guided by a fully reasoned opinion. Nonetheless, departures from the general limits and deadlines should occur about as infrequently as successful motions for extra pages or for more time on appellate briefs.

Lest you dismiss my suggestion as unrealistic, I offer two precedents from two different courts of appeals. First, the D.C. Circuit has experimented with internal procedures that (1) bar judges from hearing cases in a new term if they failed to circulate draft opinions in more than three cases that were argued at least six months previously, (2) require judges to respond to a circulated draft opinion within seven days, and (3) authorize the writing judge to release an opinion after 30 days pass without a dissent.[24] Second, in the early days of the Eleventh Circuit, the court developed time standards for most of the significant events of an appeal, and applied them to judges as well. As a result, in its first decade, that court was performing substantially more work per judge than the other courts of appeals — nearly one-third more than some of the others. Each chambers had to file a monthly report. Then the full report was routed to all chambers, showing the status of each appeal and indicating each responsible judge's actions.

Conclusion

Justice Holmes once observed that a common-law court could be expected to replicate the entire *corpus juris* in a single generation.[25] The lifespan of a "generation" of the *Federal Reporter* is becoming shorter and shorter. Consider, for example, how seldom you encounter a citation to the *Federal Reporter*. Sooner than you imagine, the same will be true of the *Federal Reporter, Second Series*.

Judges, do what *only* you can do. *Write opinions "sufficient unto the case"!*

— Thomas E. Baker
Lubbock, Texas

1. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION table T.1, at 165 (15th ed. 1991).
2. *See generally* Matthew Goldstein, *68 Years, 999 Volumes of F.2d End as New Era of F.3d Begins*, N.Y. L J., Oct. 14, 1993, at 1; Garry Sturgess, *1000 F.2d*, LEGAL TIMES, Jan. 14, 1991, at 7.
3. Joseph Story, Address Before the Suffolk Bar (Sept. 4, 1821), in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 237 (William W. Story ed., De Capo Press 1972).
4. 1 F. i (1880); 300 F. iii (1925).
5. Sturgess, *supra* note 2, at 7.
6. 1 F.2d iii (1925).
7. 1 F. Supp. iii (1933).
8. 1 F.R.D. iii (1941).
9. *Compare* 1 F.2d (containing 1,023 pages) *with* 999 F.2d (containing 1,584 pages).
10. Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 580 n.165 (1969).
11. 28 U.S.C.A. § 44(a) (West 1993).
12. Vincent Flanagan, *Appellate Court Caseloads: A Statistical Overview* tbl. 9 (1989), *reprinted in* 2 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS (no p.) (1990).
13. Stephen Breyer, *The Donahue Lecture Series: "Administering Justice in the First Circuit,"* 24 SUFFOLK U. L. REV. 29, 37-40 (1990).
14. John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 & n.2 (1975).
15. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 9, 114 (1990).
16. *Compare* Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994) *with* Michael C. Gizzi, *Examining the Crisis of Volume in the United States Courts of Appeals*, 77 JUDICATURE 96 (1993).
17. Dorothy W. Nelson, *Why Are Things Being Done This Way?*, THE JUDGES' J., Fall 1980, at 13, 15 (quoting Judge Rubin); *see also* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990).
18. Goldstein, *supra* note 2, at 7.
19. Quoted in CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS 324 (1945) (quoting Justice Holmes), *reprinted in* EDWARD J. BANDER, JUSTICE HOLMES EX CATHEDRA 209, 210 (1966).

20. SUP. CT. R. 3.
21. *See generally* JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS (1980); John G. Kester, *The Law Clerk Explosion*, LITIG., Spring 1983, at 20; J. Daniel Mahoney, *Law Clerks: For Better or Worse?*, 54 BROOK. L. REV. 321 (1988).
22. FED. R. APP. P. 28(g) (allowing 50 pages for principal briefs and 25 pages for reply briefs); FED. R. APP. P. 3(a) (allowing appellant 40 days after record on appeal is filed; appellee then has 30 days).
23. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 413-20 (1983–1984).
24. Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 785 (1983).
25. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

Notes Toward Better Legal Writing

What the ABA Has Said About Legal Writing

- "Given the central importance of effective writing to a wide range of lawyer work, the Task Force believes that too few students receive rigorous training and experience in legal writing during their three years of law study. . . . [M]any students, probably most students, receive very little opportunity to write with close supervision and critique as a continuing part of their law school experience."[1]
- "Legal writing is at the heart of law practice, so it is especially vital that legal writing skills be developed and nurtured through carefully supervised instruction."[2]
- "One theme that arose with regularity at the Just Solutions conference was language. In its simplest form, it found its expression in questions such as 'Why can't lawyers speak and write in simple declarative sentences?' Again and again, public delegates spoke of widespread public failure to understand the courts, the strange language that is spoken there, and the law's mysterious processes.

. . .

"[C]omprehensible legal language is not just a positive public relations effort, not merely helpful to counter negative public opinion about lawyers and the law, but . . . actually confers a competitive advantage on the practitioners who use it. A just solution would be the creation of Plain

English committees in every state bar association and charging them with rooting out unneeded legalese wherever it occurs."[3]

- Finally, the American Bar Foundation carried out a large survey of practicing lawyers. They asked these lawyers what skills are the most important — from a list of about 17 different skills. At the top of the list, in a class by themselves, were oral communication and written communication.[4]

Outline of an Effective Law-School Legal-Writing Program[5]

- It should be taught primarily by full-time professionals who teach writing full-time and who have long-term job security or at least multiyear contracts.
- It should include all three years of law school, with six or eight required credit hours plus electives.
- It should include several rounds of feedback in each course, the more individualized the better.
- It should make use of adjunct or student assistants, closely supervised, to help give some of the feedback in large classes (over 30).
- It should build on the same writing principles and models throughout the courses, and even the faculty members who don't teach writing should be made aware of those principles.
- It should include all forms of legal writing and drafting — including memorandums, briefs, litigation documents, statutes, contracts, and wills.
- It should work writing assignments into some of the non-writing courses.
- It should provide remedial help for students who need it.
- It should include a course in advanced research, at least as an elective.

The Current State of Legal-Writing Programs

The figures in this section — except in the items with their own footnotes — are all from a survey conducted for the Legal Writing Institute.[6] A total of 130 law schools responded to the survey.

- To begin, remember that most law schools teach legal writing together with legal research; so only about half the time is devoted to legal writing.
- 74% of schools require two semesters of legal research and writing; 11% require three semesters; the rest vary.
- 14% of schools give two credits to legal research and writing; 25% give three credits; 34%

give four credits; only 22% give more than four credits.

- At 85% of the schools, students receive written feedback on over four papers during the basic first-year course.
- Very few schools require legal drafting; less than half offer it even as an elective.
- This shameful failure to teach legal drafting is reflected in an American Bar Foundation study.[7] Of all the skills that were considered, the lawyers surveyed felt most miserable about their failure to learn legal drafting in law school.[8]
- At 44% of schools, legal research and writing are taught by full-time teachers who are on a "contract track"; the rest vary considerably, from tenure-track teachers to adjuncts.
- More and more schools — from 31 to 35, or about 20% of all ABA-accredited schools — use tenure-track writing teachers.[9]
- "While the MacCrate Report [*Legal Education and Professional Development — An Educational Continuum* (1992)] continues to generate interest in improving skills teaching, ABA support may be curtailed by antitrust concerns. Tight funding and the depleted admissions market are putting renewed financial and political pressures on many legal writing programs. For every legal writing colleague or program with a success story, we hear of another in crisis.

  Still, . . . the long-term picture for legal writing is bright. Applicants know that they need to learn to write, and schools that commit to a good writing program will be better able to compete for the shrinking applicant pool. Lawyers interviewing job applicants know that their new associate must write, and schools that commit to a good writing program will be better able to compete. Practicing lawyers know that students need to learn to write, so alumni and the bar will continue to ask what schools are doing about this crucial need."[10]

What the Legal-Writing Teachers Say

At the 1992 Conference of the Legal Writing Institute, which has about 1,800 members worldwide, the participants adopted the following resolution:

1. The way lawyers write has been a source of complaint about lawyers for more than four centuries.
2. The language used by lawyers should agree with the common speech, unless there are reasons for a difference.
3. Legalese is unnecessary and no more precise than plain language.

4. Plain language is an important part of good legal writing.
5. Plain language means language that is clear and readily understandable to the intended readers.
6. To encourage the use of plain language, the Legal Writing Institute should try to identify members who would be willing to work with their bar associations to establish plain-language committees like those in Michigan and Texas.

What Can Be Done After Law School?

- Programs of continuing legal education.[11]
- In-house editors at larger firms.[12]
- In-house training programs for new associates.
- Activities within national, state, and local bar associations. Three states — Michigan, Texas, and Missouri — now have Plain English Committees.
- Organizations devoted to legal writing and plain language. If you have published a book or two articles or published a judicial opinion in an official reporter, you should join Scribes. There's an application form in the back of this volume. And everyone should join Clarity, an international organization of lawyers and others with an interest in plain language. Write to Joseph Kimble, Thomas Cooley Law School, Box 13038, Lansing, MI 48901.
- Most of all, a willingness to learn new things and to change. Law schools are changing.[13] But will the profession allow these new lawyers to practice the clear style that law schools are trying to teach?

— Joseph Kimble
Lansing, Michigan

1. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 15 (1979).
2. COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LONG-RANGE PLANNING FOR LEGAL EDUCATION IN THE UNITED STATES 29 (1987).
3. STEPHEN P. JOHNSON, REPORT ON THE AMERICAN BAR ASSOCIATION'S "JUST SOLUTIONS" CONFERENCE AND INITIATIVE, JUST SOLUTIONS: SEEKING INNOVATION AND CHANGE IN THE AMERICAN JUSTICE SYSTEM 35 (1994).
4. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 473, 477 (1993).
5. *See* Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 THOMAS M. COOLEY L. REV. 1, 7 (1992).
6. Jill J. Ramsfield, *Legal Writing in the Twenty-First Century*, 2 LEGAL WRITING: J. LEGAL WRITING INST. (forthcoming 1996) (survey on file with author).
7. *See* Garth & Martin, *supra* note 4.
8. *Instilling Skills: Are New Lawyers Prepared to Practice?*, RESEARCHING

LAW: AN ABF UPDATE, Winter 1994, at 1, 6.

9. Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 537 (1995).
10. Linda Holdeman Edwards, *Message from the Chair*, SEC. ON LEGAL WRITING, REASONING AND RES. (Association of American Law Schools), Spring 1996, at 1-2.
11. *See* Bryan A. Garner, *Planning An In-House Writing Workshop? Reflections from a Veteran CLE Instructor*, LAW. HIRING & TRAINING REP. (Prentice-Hall Law & Business), June 1993, at 4.
12. *See* C. Edward Good, *The "Writer-in-Residence": A New Solution to an Old Problem*, 74 MICH. B.J. 568 (1995); Mark Mathewson, *In-House Editors: Letting the Experts Do It*, 1 SCRIBES J. LEGAL WRITING 152 (1990).
13. *See* Ted Gest, *Combating Legalese: Law Schools Are Finally Learning That Good English Makes Good Sense*, U.S. NEWS & WORLD REP., Mar. 20, 1995, at 78.

A Fresh Look at Clichés

There are thousands for whom the only sound sleep is the *sleep of the just*, the light at dusk must always be *dim, religious*; all beliefs are *cherished*, all confidence is *implicit*, all ignorance *blissful*, all isolation *splendid*, all uncertainty *glorious*, all voids *aching*. It would not matter if these associated reflexes stopped at the mind, but they issue by way of tongue, which is bad, or of the pen, which is worse.

— H.W. Fowler[1]

It's almost a cliché to say that writers should "avoid clichés." They are usually tired and ineffective. But not always. Sometimes they may be justified on grounds of brevity. And sometimes, given a refreshing twist, a cliché may even brighten a line.

The Dangers of Clichés: How the Tried and True Can Turn on a Moment's Notice and Bite the Hand that Feeds

In their book on legal writing, Tom Goldstein and Jethro Lieberman say that a cliché "broadcasts the writer's laziness."[2] Bergen and Cornelia Evans say that a writer who uses clichés is a "mere parroter of musty echoes of long-dead wit. His very attempt to sound clever shows him to be dull."[3] The reader almost wants to groan to the writer, "Couldn't you come up with anything better to say?" The reader is at least bored and perhaps even insulted by the commonality of it all.

Following is a list of phrases — certainly not exhaustive — that are fairly classified as clichés. Note that their very pervasiveness can mask how trite they are.

Achilles' heel
acid test
a great deal
agree to disagree
all walks of life
at first blush
auspicious occasion
bitter end
blessing in disguise
can safely say
considered opinion
conspicuous by its absence
draw to a close
end result
every effort is being made
explore every avenue
few and far between
for all intents and purposes
force and effect
force to be reckoned with
foregone conclusion
grievous error
harsh reality
height of absurdity
incontrovertible fact
inevitable conclusion
in no uncertain terms
not too distant future
null and void
of that ilk
of the first magnitude
on the books
own worst enemy
path of least resistance
pomp and circumstance
powers that be
pure and simple
rack and ruin
sour grapes
spur of the moment
stands to reason
step in the right direction
thing of the past
time and time again
to a fault
turn the tables
wreak havoc

Perhaps the most insidious clichés that have crept into contemporary writing are what Jacques Barzun calls "adverbial dressing gowns."[4] For instance: *seriously consider, utterly reject, thoroughly examine, be absolutely right, perfectly clear, definitely interested.* Apparently, says Barzun, "the writer thinks the verb or adjective would not seem decent if left bare."[5] So the writer feels a need to try and provide additional emphasis — a move that backfires and weakens the effect. Compare "I reject the accusation" with "I utterly reject the accusation"; Barzun disparages the latter as "spluttering."

Sometimes It's All Right to Be as Comfortable as an Old Pair of Shoes

So when can we allow for clichés? Possibly, when the cliché is unobtrusive and saves words. Sometimes, a cliché's very familiarity can work to a writer's advantage.

Take, for example, *pride and joy.* Most of us can remember hearing it from grandparents; and the grandparents probably heard it from theirs. Standard criticism would suggest that this — one of the most trite clichés ever — must

be struck. But what could go in its place? *Pride and joy* has come to express a combination of love, satisfaction, and delight. Trying to capture this in a few words would not be easy. So we can hardly criticize the lawyer who says of a client in final argument that the injured child was *his pride and joy.*

Likewise, we wouldn't object if a writer or speaker said that the apartment showed excessive *wear and tear.* Or that a deal *turned sour.* Or that someone *knuckled under,* instead of *gave in to pressure.*

Although writers must trust their good judgment, I offer these guidelines for the limited use of clichés.

First, ask yourself whether the cliché is really useful. Is it at least justified by its brevity? Most of the clichés listed earlier would flunk this test. *Blessing in disguise* is no improvement on *hidden blessing.* The *harsh* in *harsh reality* is an intensifier that doesn't intensify — like an adverbial dressing gown. *End result* and *few and far between* are redundant.

Second, in most cases, the less vivid the cliché, the better. Ironically, older clichés are less likely to draw attention to themselves by raising a picture in the reader's mind. We have become so used to some of them that we hardly notice. Hence the preference for *turned sour* over *went down the tubes.* Avoid above all the *current* clichés.

Third, generally do not try to create any effect or emphasis through a cliché. Their main virtue is brevity — not forcefulness. If you're trying to be clever, you probably aren't.

Twisting Clichés to Your Benefit: Where Old Dogs Really *Can* Learn Some New Tricks

Even the most used-up cliché can gain new life at the hands of a skilled writer. Sheridan Baker, addressing what he terms "rhetorical clichés," says they should be avoided unless the writer can find a twist.[6] Some of his examples:

Old Dogs
tried and true
sadder but wiser
in the style to which she had become accustomed

New Tricks
tried and untrue
gladder but wiser
in the style to which she wished to become accustomed

Not every writer can turn a phrase to this effect. But in the right context, the results can be potent:

- "The unwritten law" is not worth the paper it isn't written on.[7]
- I feel the spur of the moment thrust deep into my side.[8]

- Through thin and thin.[9]

With that, I rest my case. Better yet: I'm done.

— D'Ann Rasmussen
Albuquerque, New Mexico

1. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 234 (Ernest Gowers ed., 2d ed. 1965).
2. TOM GOLDSTEIN & JETHRO K. LIEBERMAN, THE LAWYER'S GUIDE TO WRITING WELL 128 (1989).
3. BERGEN EVANS & CORNELIA EVANS, A DICTIONARY OF CONTEMPORARY AMERICAN USAGE 96 (1957).
4. JACQUES BARZUN, SIMPLE & DIRECT: A RHETORIC FOR WRITERS 100 (rev. ed. 1985).
5. *Id.*
6. SHERIDAN BAKER, THE PRACTICAL STYLIST 234-35 (6th ed. 1985).
7. Credited to "Judge Biddle of Philadelphia," in HENRY WEIHOFEN, LEGAL WRITING STYLE 123 (2d ed. 1980).
8. Credited to Henry Thoreau, in GOLDSTEIN & LIEBERMAN, *supra* note 2, at 128.
9. Credited to columnist George Will (referring to Chicago Cubs fans' loyalty), in JAMES ROGERS, THE DICTIONARY OF CLICHÉS, Introduction (1985).

A Short History of *Boilerplate*

I first heard the word *boilerplate* from the attorney I clerked for between my first and second years of law school. When I asked him what the term meant, he said it referred to standard contract clauses. Last year, as we were discussing contracts in my legal-writing class, I happened to use the term. One of my students questioned me: "*Boilerplate*? What's *boilerplate*?" I found myself giving the same (boilerplate) explanation I'd heard from my attorney-employer years earlier. "But," the student continued, "why are they called *boilerplate*?"

Well, it all began with . . .

Steamships and Steam Locomotives

Toward the end of the 18th century, the invention of the modern-day steam engine — by James Watt and others — gave rise to the steamship and the steam locomotive.[1] The first steam boilers were made of copper, which was easy to work with. But as steam-engine design improved and the steam pressure in the boiler increased, copper had to be replaced with iron (which was itself later replaced by steel and steel alloy).[2] In England and then in America, the technology developed for producing

the iron plates for the boiler — the boiler plates.[3]

And that's how we get — etymologically — to . . .

Newspapers

After the Civil War, many small-town newspapers began to supplement their local news with articles prepared by news syndicates. At first, the syndicates sent out only printed sheets; "[l]ater, these sheets were supplemented by making casts of printed matter in a central office and shipping the plates, commonly known as 'boiler plate,' to newspapers throughout the country."[4] (Later still, the syndicates, instead of sending out duplicate metal plates, began to distribute molded paper mats that could be used for casting plates in the newspapers' own plants.[5])

But why were the newspaper plates called *boiler plate*? The newspaper plates must have been smaller than the plates used for steam boilers. Apparently, the process of duplicating news articles was associated with the process of duplicating the plates for boilers.[6] This association may even have had a geographical element:

> Many newspaper syndicates started in Chicago, including the American Press Associates, which was founded in 1882 in the same building as a sheet-iron factory. Chicago printers dubbed the noisy American Press offices as a boilerplate factory. The term boilerplate was used derogatorily to describe the mechanical stereotype plates generally provided as single columns by syndicates . . . .[7]

At any rate, the term migrated from one industry to another. And then it was a short step from the literal to the figurative meaning, from "the metal plates used to duplicate a news article" to the article itself. Hence this definition among the current definitions of *boilerplate*: "syndicated material supplied esp. to weekly newspapers in matrix or plate form."[8]

Opinions of the United States Supreme Court

The opinions of the Supreme Court have mirrored this shift from literal to figurative meaning. In three decisions before 1900, the Court used the words *boiler plate* to refer to the kind of iron or steel plate used in making boilers.[9]

Nearly 70 years passed before the Court used *boilerplate* again. In *National Equipment Rental, Ltd. v. Szukhent*,[10] Justice Black, dissenting, described the contract in question as follows:

> Steve and Robert Szukhent, father and son farming in Michigan, leased from National two incubators for their farm, signing in Michigan a lease contract which was the standard printed form obviously prepared by

> the New York company's lawyers. Included in the 18 paragraphs of fine print was the following provision: ". . . the Lessee hereby designates Florence Weinberg [wife of one of the officers of the New York company] . . . as agent for the purpose of accepting service of any process within the State of New York."[11]

Justice Black characterized this provision as "boilerplate"[12] and criticized the majority for enforcing it:

> In this very case the Court holds that by this company's carefully prepared contractual clause the Szukhents must, to avoid a judgment rendered without a fair and full hearing, travel hundreds of miles across the continent, probably crippling their defense and certainly depleting what savings they may have, to try to defend themselves in a court sitting in New York City.[13]

And there you have the current legal meaning and flavor of *boilerplate*: a standard contract provision, one that is at least formulaic, probably legalistic, and possibly unfair.

— Carol Bast
Orlando, Florida

1. CEDRIC RIDGELY-NEVITT, AMERICAN STEAMSHIPS ON THE ATLANTIC 13-14 (1981); C. HAMILTON ELLIS, THE LORE OF THE TRAIN 18, 24 (1987).
2. RIDGELY-NEVITT, *supra* note 1, at 90.
3. *Id.* at 90, 281.
4. ALBERT A. SUTTON, DESIGN AND MAKEUP OF THE NEWSPAPER 246-47 (1948).
5. *Id.* at 247.
6. *See* THE OXFORD COMPANION TO THE ENGLISH LANGUAGE 138 (Thomas McArthur ed., 1992) (offering several definitions of *boilerplate* "by analogy with the production of steel plates for boilers").
7. RICHARD WEINER, WEBSTER'S NEW WORLD DICTIONARY OF MEDIA AND COMMUNICATIONS 55 (1990).
8. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 129 (10th ed. 1993).
9. Philadelphia, W. & B. R.R. v. Dubois, 79 U.S. (12 Wall.) 47, 62, 63 (1871); Schlesinger v. Beard, 120 U.S. 264, 267 (1887); Lehigh Valley R.R. v. Kearney, 158 U.S. 461, 465 (1895).
10. 375 U.S. 311 (1964).
11. *Id.* at 319.
12. *Id.* at 328.
13. *Id.* at 329.

Foul Is Fair: What Shakespeare Really Thought About Lawyers

We've all heard the line delivered with a smirk: "As Shakespeare said, 'The first thing we do, let's kill all the lawyers.'"[1] I've often wished that someone would *tell* all the lawyers what the quotation really means in context. Daniel J. Kornstein has ably taken on that charge, and a great deal more, in his thought-provoking book, *Kill*

All the Lawyers? Shakespeare's Legal Appeal (1994).

"Once heard," Kornstein observes, the famous lawyer line "clings to the mind like a burr."[2] That may be why it so often appears in court opinions,[3] treatises and law reviews, and the general media. Some legal writers treat the quotation as a negative reflection on lawyers,[4] while others just quote the language, implying that its significance is clear on the surface.[5] But it's not.[6] And Kornstein shows why in his second chapter. [References to this chapter are not pinpointed by page number. Ed.]

The nettlesome quotation was delivered in *The Second Part of King Henry VI*, one of Shakespeare's least-known plays, by Dick the Butcher, one of Shakespeare's least-known characters.

Shakespeare's trilogy about Henry VI covers the enthronement and fall of the 15th-century king. Alas, both in life and in the play, Henry was a softer man than politics calls for: "simple and sincere, a morally courageous and genuinely religious man."[7] Seeing his vulnerability, challengers schemed to overthrow him. The nobleman Richard Plantagenet was a serious threat. To weaken Henry, Plantagenet incited another challenger of lesser stature, Jack Cade, whom Shakespeare makes "a figure of mockery."[8] Cade's cohort was Dick the Butcher. Kornstein describes him as "an unschooled, buffoonish peasant who is part of a class rebellion to overthrow the king and his lawful government. He lacks credibility and is totally irrational."

The famous line is spoken well into the play, in act 4, scene 2. It's a good place for buffoons to provide some comic relief. Enter Cade and Dick, along with their scraggly band of rebels. First, Cade goes through his pedigree, after each item of which Jack delivers a deflating aside. For example:

> Cade: Therefore, am I of an honourable house.
>
> Butcher: [*aside*] Ay, by my faith, the field is honourable, and there he was born, under a hedge; for his father had never a house but the cage.

Cade then launches into a call to revolt, promising that, when he is king, seven halfpenny loaves will be sold for a penny, beer pots will have ten handles instead of three, and it will be a felony to drink weak beer. He concludes that his subjects will "worship me their lord." Following Cade's extravagant speech, Dick gamely proposes: "The first thing we do, let's kill all the lawyers."

Kornstein's first meaning for this line is the surface one, a criticism of lawyers as elite protectors of the rich and powerful. Although

Kornstein does not stress its comic dimensions at this level, the line rings of comic hyperbole even when it is read as criticism. (Kornstein does note that the conduct of the rebels appears to be comic relief.) Shakespeare certainly knew the value of a laugh, and as Kornstein points out, the line no doubt got a reaction from the lawyers and law students who populated Shakespeare's audiences. In the context of a humorous scene, spoken by a "totally irrational" character, Dick's proposal is a comic one-liner.

Why was it funny? Spoken for the first time, it would prompt laughs of surprised recognition, both from lawyers at the mention of their in-group, and from others who were either close to that group or who had varying degrees of hostility toward lawyers. After all, lawyers have always had enough knowledge and power to inspire a mixture of hostility and respect. Even in Shakespeare's time, many harbored hostility toward lawyers as a group.[9] Laughter is a socially acceptable way to vent hostility.[10]

At its second level, Kornstein says, the line is dramatic irony, meaning the opposite of what it says on its face. The discussion that follows it corroborates this second meaning. Cade and the crowd propose to hang a man simply because he can read and write. These characters see lawyers and the literate as a threat to their schemes. But the literate Shakespeare could not have seriously meant that the literate should be hanged. Thus, the line really suggests its opposite: that lawyers and literate citizens are in fact quite valuable, precisely *because* they hinder fools and tyrants. As Kornstein puts it, "To have a successful revolution, you must get rid of the lawyers."

Dick's line also has a third, often overlooked, meaning as a critique of perverse misapplication of the law. The whole of *The Second Part of King Henry VI* deals with upsetting the social order. In addition to the plots against Henry, the play recounts an intrigue by nobles against the Duke of Gloucester, who had been Henry's popular protector. The nobles frame Gloucester's wife as a witch, falsely accuse Gloucester of treachery, and have him killed. Energized after the good Gloucester's death, the mob assembles for Cade's rally. So when Dick proposes to kill the lawyers, Kornstein says he may be protesting against "perverted, false law, such as accused and killed the good duke of Gloucester."

Kornstein develops these theories in a scholarly yet readable manner in chapter 2 of his book. Despite a strained digression in which he proposes that the con-

temporary film *Hook* somehow illuminates the meaning of Dick's line, the rest of the chapter rings true as an explication of its multiple levels of meaning. At the chapter's end, Kornstein emphasizes the line's nuances:

> To give lawyers a simple thumbs up or thumbs down flattens out the ambiguities of politics and history, turning the chiaroscuro of real life into a one-dimensional caricature in primary colors. Is it likely that Shakespeare, usually so subtle in his personality portraits, made legal characters into stick figures in a morality drama?

Kornstein then urges those who would thoroughly understand the quotation to look at Shakespeare's approach to the law in his other plays.[11] Thus Dick's line is both title and leitmotif of this book as it explores Shakespeare's view of lawyers and the law.

The book includes a thorough exposition of Shakespeare's own encounters with the law, as revealed in public records.[12] Describing Shakespeare as "a litigious fellow in a litigious age,"[13] Kornstein believes Shakespeare learned this trait from his father, John. William, he says, became obsessed with a 20-year land dispute that ended in the loss of the family lands, a loss that may have made legal reform one of Shakespeare's goals. But Shakespeare had other experiences with the law that were more neutral or even positive. Moreover, in London, "Shakespeare was part of the court crowd, involved in the jurisprudence of his day."[14] These experiences prompted Shakespeare to choose various settings and laws for his plays, creating a "wide-angle lens" on the law.[15]

Realizing that "courtroom trials make for good drama and feed a large public appetite,"[16] Shakespeare included them in two-thirds of his plays.[17] But even when Shakespeare was not staging trial scenes, he raised numerous legal issues that Kornstein engagingly argues are relevant today.

Kornstein uses *The Winter's Tale* to revisit the Bork hearings — a leap, but nonetheless an intriguing one. In *The Winter's Tale*, King Leontes accuses his wife, Hermione, of adultery. The innocent Hermione is tried in a court but appeals to Apollo, who acquits her. Thus, mercy trumps strict construction. Kornstein saw the same theme played out at the Bork hearings, where "Bork represented reason and strict law, [while Senator] Specter stood for emotion and discretion."[18] Not surprisingly, Kornstein concludes that Shakespeare provides no simple resolution of these two viewpoints.[19]

At another Supreme Court confirmation hearing, the very words of Shakespeare's character

Iago were introduced, and perhaps for the same inflammatory purpose as in the play *Othello*. Othello, the play's tragic hero, is a military officer who passed over Iago for promotion. Seething with resentment, Iago vows to ruin Othello. Acting the role of a friend while hinting to Othello that he knows a secret, Iago extols the importance of reputation:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands.
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.[20]

When Othello insists on knowing Iago's secret, Iago falsely hints that Othello's wife, Desdemona, has been unfaithful, inciting Othello's jealousy and beginning his downfall.

At Clarence Thomas's confirmation hearing, Senator Alan Simpson, a Thomas supporter, read Iago's speech about reputation — ostensibly, Kornstein says, as "comfort for a troubled heart."[21] But Kornstein suggests that Simpson, like Iago, may have been using the speech for an ulterior motive: to inflame Thomas's anger so that both Simpson and Thomas could "[go] after Anita Hill as Desdemona."[22]

The play *Richard II* recalls another Richard for Kornstein. The play tells the story of a king with unchecked power, and "should be read as a play about no one — not even the king — being above the law."[23] Kornstein reminds the reader that the same theme emerged from *United States v. Nixon*.[24]

Kornstein finds one more legal issue in Richard II's pardon by his successor. President Nixon was of course pardoned by President Ford, and later the defeated President Bush pardoned government officials for their involvement in the Iran-Contra affair. Kornstein explains that, characteristically, Shakespeare presented both sides of the complex issue of pardons. Richard expressed the side of mercy, entreating, "Say 'pardon,' King; let pity teach thee how."[25] Another character presented the objections to pardons: "If thou do pardon, whosoever pray,/ More sins for this forgiveness prosper may."[26] Kornstein clearly sides with the objectors when he remarks on the unrepentant attitude of those pardoned by Ford and Bush.[27]

Kornstein finds in Shakespeare's other plays such diverse legal subjects as contract law, the insanity defense, slander, and the "living document" theory of consti-

tutional interpretation.[28] He then explores Shakespeare's own legal knowledge and the theory that he may have been a lawyer or a law clerk, a theory that Kornstein finds interesting but unproven.[29]

Kornstein never quite takes a stand on the meaning of Dick the Butcher's injunction. Instead, at the book's close, he concludes that Shakespeare's attitude toward lawyers was ambivalent, pointing out that Shakespeare included both favorable and unfavorable portraits of lawyers in his plays.[30]

The book includes some unproductive fancies, as when Kornstein speculates what claims *might* have arisen out of the facts of *Othello*: Othello suing for slander? for invasion of privacy? for intentional infliction of emotional distress?[31] Since these points are not developed, they might well have been omitted from the book. But enduring a few excesses is the price the reader pays for a book brimming with imaginative reflections about Shakespeare and the law.

In places, Kornstein's writing is pitched more to the lay person than to the lawyer, as when he explains the meaning of such terms as *special damages* and *slander per se*.[32] But with its extensive footnoting and its lengthy list of works cited, the book is scholarly enough to also be of interest to law professors, especially those who teach law-and-literature courses. For other lawyers, the book is simply a good read, one that provides a full response to those who glibly quote "kill all the lawyers" out of context.

— Judith D. Fischer
Anaheim, California

1. THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.
2. DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS? SHAKESPEARE'S LEGAL APPEAL 22 (1994) (hereinafter cited by page number only).
3. *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting); Williams v. First Fed. Sav. & Loan Ass'n, 651 F.2d 910, 926 (4th Cir. 1981); *In re* Marriage of Wagner, 222 Cal. Rptr. 479, 484 (Ct. App. 1986); Greene v. Greene, 436 N.E.2d 496, 502 (N.Y. 1982); Spence v. Flynt, 816 P.2d 771, 787 (Wyo. 1991).
4. *See, e.g.*, *Williams*, 651 F.2d at 926; A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 826 (1990).
5. *See, e.g.*, Glenbrook Road Ass'n v. Board of Zoning Adjustment, 605 A.2d 22, 32 n.5 (D.C. Ct. App. 1992); *Spence*, 816 P.2d at 787; William Domnanski, *Shakespeare in the Law*, 67 CONN. B.J. 317, 330 & n.119 (1993).
6. *See Walters*, 473 U.S. at 371 n.24; Saul Boyarsky, *"Let's Kill All the Lawyers": What Did Shakespeare Mean?*, 12 J. LEGAL MED. 571 (1991); Howard Nations, *Tribute to Lawyers*, TRIAL, July 1992, at 67, 70; Thomas

W. Overton, Comment, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069, 1093-94 (1995).
7. HAROLD C. GODDARD, THE MEANING OF SHAKESPEARE 30 (1951).
8. VICTOR L. CAHN, SHAKESPEARE THE PLAYWRIGHT 322 (1991).
9. *See* Overton, *supra* note 6, at 1094-96 (quoting Elizabethan lawyer jokes).
10. *See id.* at 1076-78.
11. *See generally* EDWARD J. WHITE, COMMENTARIES ON THE LAW IN SHAKESPEARE (2d ed. 1913).
12. Pp. 15-21.
13. P. 15.
14. P. 14.
15. P. 20.
16. P. 176.
17. P. xii.
18. P. 187.
19. P. 181.
20. OTHELLO, act 3, sc. 3.
21. P. 156.
22. P. 157.
23. P. 198.
24. 418 U.S. 683 (1974).
25. KING RICHARD THE SECOND, act 5, sc. 3.
26. *Id.*
27. P. 202.
28. Pp. 68-71, 106, 157-62, 129.
29. Pp. 237-38.
30. Pp. 240-41.
31. P. 161.
32. P. 167.

Confessions of a Computer Note-Taker

If you're like me, the realization may have dawned as early as grade school. Then again, it may have come as late as the beginning of your legal career. Either way, the realization has probably been reinforced when secretaries have muttered that you should consider taking penmanship lessons from a doctor. At some point in your life, you may have been forced to face an ugly truth: you have terrible, truly awful, indecipherable handwriting. Furthermore, you have had, and always will have, terrible, truly awful, indecipherable handwriting. You are, in short, one of the cursively impaired, an apostate of Palmer Penmanship. You may also have discovered that, in a profession built largely on the written word, this can be something of a handicap.

But the difficulties in communicating with others can pale beside the headaches that bad handwriting can cause in communicating with yourself. Of all the tasks that bedevil members of the Order of the Scrawling Chicken Scratch, none is more consistently infuriating than trying to decipher our own handwritten notes. They are often scribbled in the heat of legal battle and tucked into odd corners of documents, or spread across multiple

legal pads, or, worst of all, crammed onto those insidious little yellow Post-It® notes (usually the smallest size available). When reviewed days (or even hours) later, they can represent the nadir of incomprehensibility, with nothing to aid in their decoding. The writer's frustration is then compounded by realizing that they must be of tremendous significance, or else they wouldn't have merited a note in the first place.

Fortunately, technology has come to the rescue, assuming that you are not a Luddite and have some typing skill. Enter the personal computer. The latest generation of notebook computers are replete with Pentium® chips, massive RAM and hard drives, built-in "mice," extended battery life, CD-ROM drives, and full multimedia capability. They allow full-function "on-the-fly" computing, including the taking of blessedly legible notes in all situations and locations.

Skeptics, computer-phobes, and the insufferably smug possessors of legible handwriting may wonder whether all this expensive technology is worth it. After all, don't most people manage to learn decent handwriting in grade school, and haven't handwritten notes (on clay tablets or parchment or whatever) served us well enough?

If legibility were the only benefit, this skepticism might be justified. But computer note-taking has advantages that even the neatest handwriting cannot offer. On computer, all your notes will be well organized (more on that later) and, if a notebook computer is used, immediately available at all times. This eliminates the "where-did-I-put-that-yellow-pad?" syndrome, which seems to afflict even the most organized lawyers. Proper note-taking techniques will also ensure that all your notes are searchable through the search functions in your word-processing program. This can help you keep accurate, current to-do lists, and also allow you to immediately "recall" past conversations, negotiating points, and the like. These snippets can be extremely effective in negotiations. ("Gee, Mr. Jones, my notes seem to reflect that on March 18 you indicated that you did not expect to receive warranties concerning . . . .") Finally, computerized notes can be easily copied out of your note files and shared with colleagues by e-mail. This permits the rapid dissemination of knowledge among many attorneys — and in a form that, unlike voice-mail, can then be copied into their own computer note files for future reference.

To be truly effective, however, computer note-taking requires both a proper technique and the proper equipment. Of course, the neces-

sary keyboarding skills are considerably beyond the modified hunt-and-peck system used by many attorneys (most likely those over age 35). You have to be able to touch-type at a moderate speed and without looking at the keyboard. But accuracy is much less important, since notes can always be reviewed and revised. While there are many tutorial software programs for typing, this is probably not a skill that can be acquired mid-career, unless your life is much more leisurely than that of most practicing lawyers.

After keyboarding skill, good note-taking requires that your notes be "search-friendly" for your word-processing software. This means, above all, uniformity concerning any terms — especially names and dates — that you are likely to search for in the future. For example, dates should always be written the same way ("3/28/95" or whatever other form is quickest). Your software's automatic dating functions should be used with care, since using the function keys (F1, F2, etc.) can be difficult when typing blind, and using the wrong function can cause the dates of your notes to change every time the note file is retrieved. Perhaps most important, persons, companies, and other likely search terms must *always* be referred to in the same way (usually by initials or some other form of abbreviation). Over time, this requires considerable discipline and a good memory, along with a judicious choice of abbreviations, but it is vital to the search function. Finally, you need a uniform, convenient symbol for identifying future "action items." This can be a single symbol that would not otherwise be used in your note-taking (e.g., # or @). Alternatively, you can create a more elaborate identifier that would be easier to spot when scanning the page.

The principle of "search-friendliness" also extends to organizing files on your computer's hard drive or file server. Left to their own devices, most attorneys seem to organize their hard drives to mirror the organization of traditional paper-based files. Each client gets a directory, and each matter, whether transactional or litigation, is given a subdirectory, with possible further subdirectories designated for different types of material (correspondence, draft documents, notes, memos, etc.). But it's very inefficient to locate the note file for each matter within these separate client and matter directories, because each directory must be searched separately. This can be time-consuming during periodic hunts for "action items" to include on a to-do list. Search efficiency can be maximized by centralizing

all note files within a single directory, ideally the first directory under your computer's default directory. These centralized note files should also include all material (in addition to your handwritten notes) that you may wish to access in the future (e-mails, comments to draft documents, etc.).

You should carefully consider the choice of equipment — especially your notebook computer, surprisingly few of which seem well designed for note-taking. The most important feature is probably the keyboard. Noisy keyboards can sound disturbingly loud in a meeting room or in the background of a telephone call, and can quickly serve to make the note-taker *persona non grata*. Keyboards with long "strokes" for each key can significantly slow typing speed. Another small but vital feature is the presence of raised dots on the "f" and "j" keys to assist in finger placement. However bad your handwriting may be, no handwritten notes are likely to be as incomprehensible as those typed with your fingers on the wrong keys.

Nonkeyboard features to look for include a screen that can be folded flat so the machine can be placed on your lap under the tabletop. This reduces the visual intrusiveness of note-taking and also helps to muffle the noise that even the quietest keyboard can produce. Replacing batteries should be simple, and the machine should have a "pause" or other feature that allows batteries to be replaced without the machine shutting off. Some other features — like mouse design and placement, and screen design — have less effect on note-taking (although they can be extremely important to other aspects of mobile computing, such as the ease of use in crowded airplane seats). Finally, while they are convenient for network access, docking stations should probably be avoided if they also require the use of a detachable keyboard. Blind typing at speed is largely a matter of muscle memory, and it's best to avoid having to alternate between two keyboards of different size.

Because it is a social task, note-taking during meetings involves etiquette. To avoid disrupting the flow of conversation, have a supply of charged batteries and practice the changeover beforehand. Better still, use a plug-in power pack; but be sure to carry a *long* extension cord, together with adapters for two-pronged wall sockets. When traveling abroad, remember to take along the proper plug adapters, currency converters, and surge protectors (which are all different types of equipment, although some features can be combined).

Finally, consider the effect that your note-taking is having on other

persons at your meetings. Notebook computers are increasingly evident at business meetings, particularly those that involve large transactions with sophisticated participants (although the computers seem to be used by financial and accounting types to run spreadsheets). Many persons, though, still regard a computer in the hands of a note-taking lawyer with the same attitude that primitive natives may have had toward cameras: an almost superstitious awe combined with considerable suspicion. If you think that the fellow giving you the fish-eye from across the table may be concerned that you are taking down every syllable in order to beat his brains out at some future date, you might ask whether your note-taking is disturbing him. With any luck — and a good explanation of the efficiencies that your note-taking will create for the benefit of all — he'll keep talking and you'll be able to get it all down.

—Keith J. Kosco
San Dimas, California

Two Publishers Reprint Historical Law Dictionaries

As more and more libraries see their late-19th-century and early-20th-century holdings fall victim to the scourge of acid paper, two legal publishers have helped preserve some of the most important reference books from yesteryear. For the past several years Fred B. Rothman & Co. (of Littleton, Colo.) has published reprints of historical law dictionaries. And the Lawbook Exchange (of Union, N.J.) has begun to do likewise.

The more ambitious program to date has been Rothman's. Thus far, its dictionary reprints include:

- Archibald Brown, *A Law Dictionary and Institute of the Whole Law* (London: Steven & Haynes, 1874) (reprinted in 1988).
- Irving Browne, *The Judicial Interpretation of Common Words and Phrases* (San Francisco: Sumner, Whitney & Co., 1883) (reprinted in 1983).
- Alexander M. Burrill, *A Law Dictionary and Glossary*, 2 vols. (2d ed., N.Y.: Baker, Voorhis & Co., 1867) (reprinted in 1987).
- Arthur English, *A Dictionary of Words and Phrases Used in Ancient and Modern Law* (Washington, D.C.: Washington Law Book Co., 1899) (reprinted in 1987).
- J. Kendrick Kinney, *A Law Dictionary and Glossary* (Chicago: Callaghan & Co., 1893) (reprinted in 1987).

- [William Rastell,] *Les Termes de la Ley* (Am. ed., Portland, Maine: J. Johnson, 1812) (reprinted in 1993).
- Thomas Tayler, *The Law Glossary* (N.Y.: Baker, Voorhis & Co., 1877) (reprinted in 1986).
- J.J.S. Wharton, *The Law Lexicon, or Dictionary of Jurisprudence* (1st Am. ed., Harrisburg, Pa.: I.G. M'Kinley, 1848) (reprinted in 1987).

More recently, the Lawbook Exchange has begun publishing a few reference books of this kind:

- Henry C. Black, *A Law Dictionary* (St. Paul, Minn.: West Publishing Co., 1891) (reprinted in 1991).
- Henry C. Black, *A Law Dictionary* (2d ed., St. Paul, Minn.: West Publishing Co., 1910) (reprinted in 1995).
- John Bouvier, *A Law Dictionary*, 2 vols. (Philadelphia: T. & J.W. Johnson, 1839) (reprinted in 1993).

In both cases, the publishers have produced these reprints with acid-free paper and bound them in high-quality, durable covers.

Even if these reprints have proved remunerative, there is no doubt that the publishers have provided a genuine service to the legal world by making these reference books more widely available.

—Bryan A. Garner
Dallas, Texas

Wanted: Appreciations

The next volume of the *Scribes Journal* will be devoted primarily to appreciations: essays commemorating the great legal writers who have influenced later generations of writers. If you would like to contribute a piece of this kind, please submit it to Beverly Ray Burlingame, Thompson & Knight, 3300 First City Centre, 1700 Pacific Ave., Dallas, Texas 75201.

Wanted: Darrow Letters

I am preparing *Selected Letters of Clarence Darrow* for the University of California Press. If you have any of his letters or photocopies of them, I would be grateful to hear from you. My address is Robins, Kaplan, Miller & Ciresi, 2800 LaSalle Plaza, 800 LaSalle Ave., Minneapolis, Minnesota 55402-2015; or call (612) 349-8511.

—Randall M. Tietjen
Minneapolis, Minnesota

Wanted: Law Dictionaries

For my continuing work in legal lexicography, I am actively purchasing law dictionaries, especially antiquarian ones. Anybody desiring an offer on English-language law dictionaries should write to me at LawProse, Inc., 5949 Sherry Lane, Suite 1280, Dallas, Texas 75225-8008; or fax to (214) 691-9294.

—Bryan A. Garner
Dallas, Texas