The Scrivener

Scribes — The American Society of Writers on Legal Subjects

Fall 2003

President's Column

Beverly Ray Burlingame
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Dallas, Texas

This issue provides keen insights about both writing and the law. I think you'll enjoy the summary of Judge Noonan's remarks at our luncheon last August. And you'll be interested in learning about SPELL, a 2000-member group of people who love language and "are determined to resist its abuse and misuse in the news media and elsewhere." There are other gems, as well, including pieces on the best test of a new lawyer's writing and on the generic masculine pronoun — a topic that may sound dryly grammatical, but has actually sparked a heated controversy.

Scribes Work

Recently, I've appointed chairs and members of all nine Scribes committees. You'll find these appointments on page 5. Please let me know if you're interested in serving on any of these committees so that, in the future, I can seek to involve more Scribes members in the important work of Scribes.

Even if you're not a 2003 committee member, you can contribute to the committees' success. For example, if you've read a 2003 law book that you found noteworthy, please email Michael Hyman, the Book Award Committee chair, so that we can include the book in our list of 2004 contenders.

Similarly, if you've written a piece that might be suitable for *The Scribes Journal* or *The Scrivener*, please email Joe Kimble or me, attaching a copy, if possible. And if you're a Scribes member in Georgia, we'd really appreciate your input in planning the next Scribes membership meeting, which will occur in early August 2004 in Atlanta, the site of the annual ABA meeting.

So that you can contact the committee chairs more easily, I've included their email addresses on page 5.

Gift Idea

Need a unique gift for a legal-writing friend? If your friend qualifies for Scribes membership, I have just the solution. For less than the cost of a law book or a gold pen, you can give your friend a year's Scribes membership.

Just use the membership form at the end of this newsletter, noting that the membership is a gift.

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President's Column

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A Legal-Writing Tidbit: Abandon Formulaic Openers

> "The selection of the starting words should always make the audience want to hear more."
>
> Jeffrey McQuain, *Power Language: Getting the Most Out of Your Words* 109 (1996).

In drafting court papers, lawyers routinely waste their openers by repeating, more or less verbatim, the very words of the paper's title. This peculiar habit has led Kevin McDonald, a D.C. lawyer, to coin the phrase "hence the title" — what a judge might say after slogging through an opening like this one, in a paper filed by a hypothetical company named Belcom:

> **DEFENDANT BELCOM COMPUTER, INC.'S RESPONSE TO PLAINTIFF WORLDWIDE TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE PLEADING BASED ON DEFENDANT'S VIOLATION OF THIS COURT'S JUNE 13, 2001 ORDER**
>
> TO THE HONORABLE JUDGE OF SAID COURT:
>
> NOW COMES DEFENDANT BELCOM COMPUTER, INC. ("Belcom"), and files this its Response to Plaintiff Worldwide Telecommunications, Inc's Motion to Dismiss or, in the Alternative, to Strike Pleading Based on Defendant's Violation of This Court's June 13, 2001 Order ("Worldwide's Motion to Dismiss"), and for its Response, would respectfully show unto the Honorable Court as follows:

This opening plainly doesn't make the judge want to hear more. Even worse, it reminds the judge — twice — that Belcom is accused of violating a court order. And it doesn't even begin to dispel that notion. Finally, it tells the judge nothing at all about Belcom's position.

Most judges probably skim over such inane chunks of text. But if judges actually stopped to consider such an opener, their only conceivable response would be: "Hence, the title! I can tell that the paper isn't falsely labeled."

By devoting the entire first paragraph to restating the title, lawyers waste judges' time and sacrifice a valuable chance for persuasion.

Compare that opening to this one:

> **Belcom's Opposition to Worldwide's Motion to Dismiss**
>
> Defendant Belcom has fully complied with this Court's June 13, 2001 Order to amend its counterclaim. As the order requires, the amended pleading states specific facts supporting Belcom's contention that Worldwide deceived the patent office in applying for the patent-in-suit, thus rendering the patent invalid. Instead of disputing those facts, Worldwide now seeks drastic relief — asking this Court to dismiss or strike Belcom's invalidity counterclaim. Worldwide's motion should be denied.

This is better, both in substance and style, because:

- It doesn't repeat Worldwide's contention that Belcom has violated a court order.
- It points out the limited scope of the order and argues that Belcom has complied with it.
- It states Belcom's position that Worldwide has deceived the patent office (and thus suggests its incentive to seek dismissal of the counterclaim).
- It tells why Belcom opposes the motion.
- It points out the drastic nature of relief sought.
- It's shorter and easier to read.
- It doesn't merely parrot the title.
- It contains no legalese.
- It abandons the usually unnecessary practice of defining short forms for papers and party names.
- It changes all-capital text to small caps or ordinary text, making the paper more readable.
- It eliminates underlining, which takes up white space and makes prose less readable.

Most lawyers can rattle off a hence-the-title opening for any paper, even without an inkling of their position. That fact alone reveals that such an opening can't possibly advance the client's cause. By replacing formulaic openers with forceful arguments, lawyers can capture judges' attention, enhance their credibility, and show from the outset why their clients should win.

Scribes Board Members

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Editor in Chief, Summer 2003 and Fall 2003 issues of *The Scrivener* — Beverly Ray Burlingame

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

Deadlines

Winter	**February 15**
Spring	**May 15**
Summer	**August 15**
Fall	**November 15**

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SPELL Your Way to Goof-Proof Writing

N.O. Stockmeyer
Professor
Thomas M. Cooley Law School

Scribes members may be interested to know about two other organizations devoted to good writing. One is Clarity, a worldwide group of lawyers and nonlawyers who seek to promote the use of good, clear language by the legal profession. My colleague Joe Kimble, who is a Scribes Board of Directors member, is Clarity's incoming President. The Winter 1999 issue of *The Scrivener* provides more information on this fine organization. And its website is www.clarity-international.net.

The other organization is SPELL, the Society for the Preservation of English Language and Literature. Founded 20 years ago by a retired advertising executive, SPELL now has nearly 2,000 members throughout the U.S. and Canada. They include professional writers, editors, teachers, attorneys, executives, and students. It is, in the words of its website, "an organization of people who love our language and are determined to resist its abuse and misuse in the news media and elsewhere."

SPELL is becoming well known in newsrooms for its distinctive yellow Goof Cards, which are supplied free to SPELL members. Members use them to cite and correct egregious errors in grammar, usage, and syntax. (Obvious typographical errors don't rate a Goof Card). SPELL promotes good English in positive ways as well — by recognizing people for outstanding contributions to better English usage and by sponsoring an annual scholarship-essay competition for high-school seniors.

SPELL's bi-monthly newsletter, *SPELL/Binder*, contains lively articles on grammar, usage, word origins, and other language-related topics. A regular feature, "Murderers' Row," prints some of the most humorous or outrageous "goofs" spotted by members. Another member benefit is the *SPELL Members' Handbook*, which includes a helpful 54-page reference manual, "How to Goof-Proof Your Writing." In the next column on this page begins an illustrative excerpt that deals with the controversial use of the "singular *they*" to replace gender-specific pronouns.

For additional information about SPELL, visit the society's website at www.spellorg.com. Most of the information in this article is derived from that source.

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Western New England College (Springfield, MA)

Washburn University School of Law (Topeka, KS)

Western New England College (Springfield, MA)

Sexism and the Writer[*] [**]

Attention, everybody —

> Will anyone who wants to be labeled as sexist please raise **his** hand.
>
> Will anyone who wants to be labeled as ungrammatical please raise **their** hand.
>
> Will anyone who wants to be labeled as tedious please raise **his or her** hand.

Continued on page 5

[*] Reprinted with permission, *The SPELL Members' Handbook* (3d ed. 1996). For further reading on the generic masculine pronoun, see BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 801 (2d ed. 1995) and Beverly Ray Burlingame, *Reaction and Distraction: The Pronoun Problem in Legal Persuasion*, 1 SCRIBES J. LEGAL WRITING 87, 102-04 (1990).

[**] This is the sixth piece submitted by N.O. Stockmeyer, who encourages other Scribes members to submit excerpts from articles or books would be of interest to readers of *The Scrivener*.

Sexism and the Writer

Continued from page 4

Is there no other choice? Can we not write a simple sentence without being labeled "sexist," "ungrammatical," or "tedious"? Unfortunately, it seems that way.

Anyone is singular. Traditional grammar requires that it be followed by the masculine pronoun *he* when it applies to either male or female, as in the first sentence above. But in the current social milieu, a writer who follows the traditional rule is likely to be labeled as sexist.

The second choice is definitely the most natural way to express the thought, but the writer who pairs the plural *their* with the singular *anyone* probably will be on the receiving end of a Goof Card from some eagle-eyed member of SPELL.

The *his-or-her* solution is a safe, albeit graceless, answer, but it is the first step on the road to tedium. And writers who use *his/her, him/herself,* and the like are not only *being* tedious, but also flaunting the tedium.

Those who view constructions such as *anyone . . . he* as sexist have a good point. Unquestionably, such usage offends many people. We must understand that language has the power to shape our world even as our world shapes language. George Orwell put it this way: "But if thought corrupts our language, language can also corrupt thought."

As our language evolves, there seems to be little doubt that *anyone...their* is destined to become good, idiomatic English although it will be resisted, rightly, by members of SPELL. It is already common in speech, even in the speech of educated Americans. Daily it grows more common in writing. In his delightful little book *Fumblerules*, William Safire derides that kind of construction on page 66 but uses it unselfconsciously on page 86: "Here's the best way to proofread copy: Get **somebody** else to do it. If necessary, do it with **them**, reading aloud to each other . . . [emphasis added]."

Meanwhile, SPELL members are urged either to follow the traditional rule and risk the sexist label or to recast their sentences to avoid the problem. Use *he or she* sparingly and *he/she* not at all. Following are some ways in which the first sentence can be recast:

> "Please raise your hand if you want to be labeled . . . ."
>
> "If you want to be labeled . . . , please raise your hand."
>
> "All who want to be labeled . . . please raise your hands."
>
> "Will all writers who want to be labeled . . . please raise their hands."

Scribes Committees for 2003–2004

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Roger Newman
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Robert Lindefjeld
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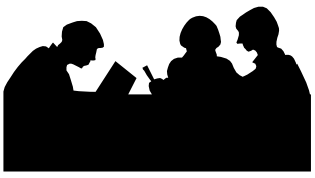

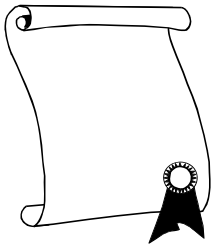

Entries Received for the Scribes Law-Review Award

All the journals listed here have submitted student-written articles in the 2004 Scribes Law-Review Award. Each year, a Scribes committee selects one as the best. If your journal isn't represented here, find out why!

Albany Law Review

Arkansas Law Review

BYU Law Review

Case Western Reserve Law Review

Cleveland State Law Review

Fordham Law Review

Georgia State Law Review

Houston Law Review

Indiana Law Review

John Marshall Law Review

Journal of the National Association of Administrative Law Judges

Kentucky Law Journal

Louisiana Law Review

Loyola Law Review-New Orleans

Loyola University Chicago Law Journal

Marquette Intellectual Property Law Review

Michigan Law Review

Mississippi College Law Review

Missouri Law Review

Natural Resources Journal

New England Law Review

New Mexico Law Review

Northern Illinois University Law Review

Ohio State Law Journal

Penn State Law Review

Regent University Law Review

San Diego Law Review

Seattle University School of Law

Seton Hall Law Review

Southern California Law Review

St. John's University (American Bankruptcy Institute)

Stanford Law Review

Stetson University Law Review

Suffolk University Law Review

Syracuse Law Review

Tennessee Law Review

Texas Tech Law Review

The Yale Law Journal

Thomas M. Cooley Law Review

Thomas Jefferson School of Law

Toledo Law Review

Tulane Law Review

Tulsa Law Review

UMKC Law Review

University of Illinois Law Review

University of Detroit-Mercy Law Review

University of Cincinnati Law Review

University of Richmond Law Review

University of St. Thomas Law Journal

Valparaiso Law Review

Villanova Environmental Law Journal

Villanova Law Review

Washburn Law Journal

Whittier Law Review

Williamette Law Review

The Best Test of a New Lawyer's Writing*

Joseph Kimble
Professor
Thomas M. Cooley Law School

Let's say that you need to hire a new lawyer. No small decision, and you don't want to go wrong, so you take the usual steps: sort applications, review transcripts, read writing samples, interview candidates, check references, and then pick someone from the short list. You might think that you've covered all the bases, but you would be wrong. You haven't done enough to assess the candidates' most important skill — their writing.

No one, I'm sure, will dispute that lawyers speak and write for a living. In a telling study by the American Bar Foundation, about 1,200 practicing lawyers were asked to rate lawyering skills from a list of 17 different skills. At the top of the list, in a class by themselves, were oral and written communication.[1] The American Bar Association has said the same thing, and in one report after another has encouraged, urged, and pleaded with law schools to improve their legal-writing programs. One report, for instance, says, "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]

To confirm how central writing is, look over the advertisements in legal publications. In a recent issue of the *Michigan Lawyers Weekly*, there were 26 ads under "Employment Available — Lawyer." As varied as these ads were, with many seeking expertise in a specific practice area, 10 of them included statements like this:

- "Excellent writing skills a must."
- "Excellent writing skills required."
- "Only candidates with demonstrated research and writing abilities need apply."

By comparison, "strong academic credentials" is mentioned just three times. And it's the same pattern — the search for the same defining and distinguishing skill — every week in those ads.

The Best Test: A Performance Test

What could be more obvious? To see what the candidates can do, have them do it. Once you have a short list of finalists, have each of them take a performance test. The time and effort required of you and the candidates is piddling when compared with the investment that a decision to hire will entail. You can put the test together in a matter of hours, then reuse it to your heart's content.

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* This article originally appeared in the June 2000 issue of *Trial*.

[1] Bryant C. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 473, 477 (1993).

[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).

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The Best Test of a New Lawyer's Writing

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For the candidate, the performance test will take between two and six hours, depending on which test or tests you choose. At most, the candidate will have to spend a day at your office. If anyone seems to feel degraded or put upon by the test, that in itself might reveal something about the disposition of the person you would be working with.

Now, before turning to specifics, I want to explain that I'm talking mainly about testing a lawyer's ability to analyze and apply law in a clear and coherent way — to think straight on paper (or on a computer screen). At the same time, of course, you can assess the work in a general way for style and grammar. Is the writing tight, readable, and mostly error-free? You can decide how to weigh the different qualities and how much to forgive because of the time constraints. At any rate, you can bet on one thing: give a good performance test, and you will not hire a bad writer. Here are the possibilities.

A closed-world performance test. By "closed world," I mean that the writer does no research; you furnish the legal problem and the legal sources needed to address it.

A good example is the Multistate Performance Test, now administered in about half the states. Candidates get a file — the factual background of a case, including relevant documents — and a library with the authorities they can use to analyze the legal issues. They have 90 minutes to write, for instance, a memorandum, a letter to the client, or a settlement proposal. You can allow more time if you want more polish.

Tests given in years past, along with the "point sheets," or answer guides, can be purchased quite reasonably from the National Conference of Bar Examiners at http://www.ncbex.org/tests.htm. Is it within bounds to use these ready-made tests for your own private performance test? Yes, it is, although the organization is obviously not trying to market its product that way.

As an alternative, you can easily create a closed-world test yourself.[3] You must have an office file that you can adapt. Put together a packet modeled on the Multistate Performance Test: an outline of facts, including the question you want answered and the instructions for what to write; perhaps a disputed document, a pleading, or excerpts from depositions; the relevant statutes or rules; and not more than three or four cases. You could, as the multistate test sometimes does, include an irrelevant statute or case. Again, you have to assemble a packet just once. And presumably you have already done the analysis yourself, so you have a good idea of how the answer should go.

A research-added performance test. The only difference here is that you would not provide the selected library of legal authorities. You would provide only the file — whatever facts and documents you want the writer to use — and the writer would do the research, either in the office library or at a public law library. I'd keep the research fairly basic. Adapt a file that you would give to a new lawyer — probably a one-issue state-law problem that does not involve more than one or two statutes and a few cases.

The research-added test should take about four hours, split into roughly three parts: researching, thinking and outlining, and writing. Or you could give it as a take-home exercise if you wanted to put no premium on time.

A test for grammar and style. Conveniently enough, you will find just such a test (complete with answers) in Volume 5 of *The Scribes Journal of Legal Writing*. The test, called "The Legal-Writing Skills Test," was devised by Bryan Garner, a top expert on legal writing and legal language. The test has two parts: an editing section and an essay section. If you give one of the two performance tests described earlier, then skip the essays. The editing section has 35 items, most of them single sentences, that cover a range of skills: grammar and punctuation; correct usage (the difference between *affect* and *effect*, for example); converting the passive voice to the active voice; tightening wordy passages; and eliminating legalese. The editing test would add about 90 minutes.

In the end, you have to decide how important writing is in your practice, how confident you want to be about your decision, and what combination of tests to use.

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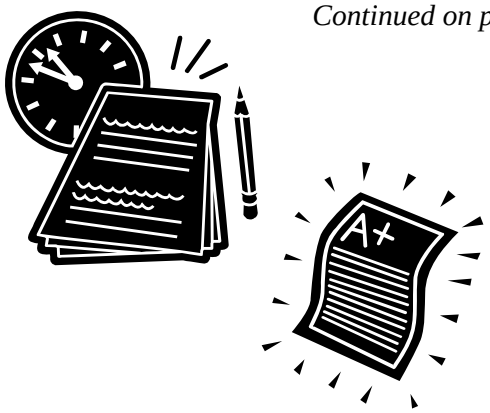

[3] *See* Ritchenya Shepard, *Firm Exam Tests Writing Skills*, NAT'L L.J., Feb. 15,1999, at A16 (noting that the Chicago firm of Connelly Sheehan Moran regards its test as the most important element of its hiring process).

The Best Test of a New Lawyer's Writing

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Other Indicators of Writing Ability

There are traditional, obvious ways to gauge writing: look at what the candidates have already written or at the grades they earned in their required law-school writing classes. These credentials are worth considering, as long as you understand their not-so-obvious limitations.

A writing sample. A 10-page writing sample will probably involve a more complex analytical exercise than a performance exam does, so you can assess the writer's ability to handle a tougher intellectual challenge. Also, because the writer had the luxury of time, you won't wonder whether you should excuse deficiencies, and to what extent. The sample ought to be polished, and you can feel reasonably confident that it presents the writer at his or her best.

The trouble is, the sample may not be the writer's solitary best; it may be, at least to some extent, a collaborative effort. If it came from a legal-writing class, then it was probably critiqued (students would say "ripped") two or even three times: as a first draft, as a final draft, and possibly as a rewritten final draft. Moreover, it's not unheard of for students to ask a different writing professor to "look over" a writing sample before it departs into the real world. I've looked over my share in 18 years.

There's nothing wrong with this. Good writing instruction assumes good feedback, and the final product is still the writer's work, primarily. Just so you know.

A published article. Certainly, an article would be a plus. It tends to show intellectual ability, academic accomplishment, an interest in writing, advanced course work in writing, and the approval of other readers.

Again, though, you can't be sure how much editing the article needed or received from a scholarly-writing professor or from the journal's own editors. A portfolio item is not the same as a live performance.

One other suggestion: if the article inclines toward the plodding and overwrought style of most law journals, ask whether the writer can convert to the plain language that most readers prefer in practice documents.[4] You might even pull a few pages from someone else's article and ask for a rewrite.

A grade in a law-school writing class. An A is good news and a C is bad news, but grades in between are harder to weigh unless you happen to know the program or the professor. Although a B+ looks good, maybe the professor gave no grade, or just a couple of grades, below a B. A C+ looks pretty bland, but maybe the candidate earned a better grade in a second required writing class. Then again, maybe the first professor was an experienced teacher and the second was not. And there are many other variables. I would treat writing grades as one more indicator.

Testing Yourself

Speaking of indicators, let me ask a few questions that I hope will not give you pause. But talented new lawyers do tell discouraging stories about the attitudes and practices of some supervisors.[5]

Do you resist, and maybe resent, the idea that lawyers ought to write in plain language? Do you regularly strain against the page limits that courts impose? Do you try to raise every issue imaginable, rather than settling for just your best ones? Do you wait a few pages before stating the issues and then state them superficially, rather than putting the deep issues up front?[6] Do you give a lengthy analysis of most cases, use lots of block quotations, and take few pains to make clear how each new case connects and moves the analysis forward?

Do your sentences average more than 25 words? Do you favor the passive voice and commonly turn verbs (like *consider*) into abstract nouns (*give consideration to*)? Do you end affidavits with "Further affiant sayeth naught"? Do you end contracts with "In witness whereof the parties hereto have affixed their signatures"? Are you fond of *prior to* and *in the event that* and *hereinafter*?

If you answered *yes* to any of these questions, you might look into a good book or seminar on legal writing — to help you judge writing smartly and mentor well.

[4] *See* Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 19-31 (1996–1997) (summarizing a number of studies showing that plain language is clearer and more effective than legalistic style).

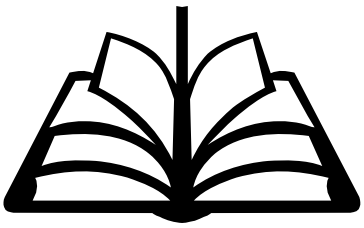
[5] *See* Symposium, *The Politics of Legal Writing*, 7 SCRIBES J. LEGAL WRITING 29 (1998–2000).

[6] *See* Bryan A. Garner, *Issue-Framing: The Upshot of It All*, TRIAL, Apr. 1997, at 74.

Writing Experts — On Writing

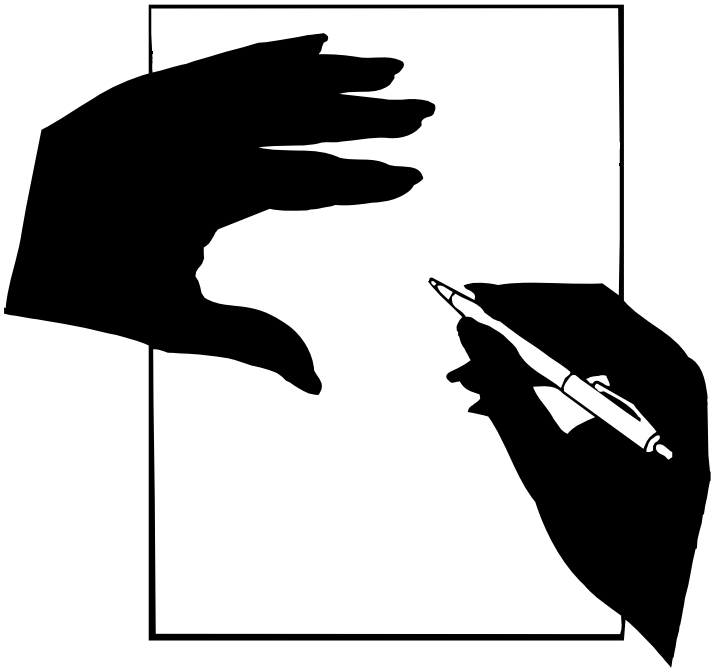
"Nothing comes from nothing. Quality writing is done by people of quality. Robert Pirsig, in *Zen and the Art of Motorcycle Maintenance*, says quality depends on three things: self-reliance, integrity, and gumption. If you are self-reliant, you will not blame your boss, or your mother, or your journalism teacher for the kind of writing you do. Second, you have to like who you are and what you do. If you feel good about what you write, it will show. Third, no matter how many prizes you have won or how much criticism you have received, you have to have the gumption to give it your best, one more time. When Frank Lloyd Wright was 76, someone asked him what his best-designed building was. Without hesitation he replied, "My next one."

— George Kennedy, Daryl R. Moen & Don Ranly, *The Writing Book* 133 (1984)



"When writing, you should imagine yourself sitting across from your most important reader. Write your paper as if you were talking to that reader. This doesn't mean that your writing should be informal. Rather, it means that you should rid your writing of needless formality. The purpose . . . is to inform, not to impress."

— Michael Alley, *The Craft of Scientific Writing* 40 (1987)



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— Bryan A. Garner, *The Winning Brief* 361-62 (1999)

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