



# The Scrivener

Scribes — The American Society of Legal Writers

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*Summer 2006*

## President's Column

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

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### **The Joseph Marticelli Gavel**

The 2005 Scribes annual luncheon in Chicago was a busy couple of hours. At the conclusion, outgoing president Beverly Burlingame handed me a gavel, we posed for a photo, and it was over. It wasn't until I returned home that I discovered that the gavel was inscribed "The Joseph Marticelli Gavel."

I vaguely recalled that Joe Marticelli was from New York, so I contacted our longtime board member from New York, John Williams, to see if he could shed some light on Joe. I found out that he was a publishing veteran, spending his entire career with Lawyers Co-operative Publishing Company in Rochester, New York. In addition, he was a business-law professor at the local community college and a town justice in the Rochester suburb where he lived.

Joe Marticelli served Scribes in many capacities, including president in 1982–1983. As managing editor at Lawyers Co-op, he was John Williams's supervisor and was instrumental in getting John involved with Scribes. Joe's supervisor, in turn, was Gary Spivey, who was Scribes' president in 1999–2001. It was Gary who purchased the gavel and had it inscribed in Joe's honor. I have it displayed in a place of honor in my office.

The list of our past presidents, published in the last issue, reminded me of another illustrious predecessor, Charles W. Joiner, who was president in 1963–1964. A

charter member of Scribes at its founding in 1953, Charlie was a law professor at the University of Michigan when I was a student there. He went on to become dean of the law school at Wayne State University and a U.S. district-court judge.

Along the way, Charlie Joiner found the time and energy to provide bar-association leadership, including service as president of the State Bar of Michigan. Charlie Joiner was an inspiration to me: a leading law professor who was also a leader of the organized bar. Dedicated individuals like Joe Marticelli and Charlie Joiner have kept Scribes' light burning brightly for more than 50 years.



*President Norman Otto Stockmeyer accepts the Joseph Marticelli gavel from Beverly Ray Burlingame at the 2005 Scribes annual luncheon.*

## Legal-Writing Tidbit

The single most important principle of legal drafting, according to Reed Dickerson, the father of legal drafting in the United States, is consistency. In *The Fundamentals of Legal Drafting* (Little, Brown, 2d ed. 1986), Dickerson called consistency of expression—always expressing the same idea in the same way and different ideas differently—“the ‘Golden Rule’ of legal drafting.” What does that mean? Charles M. Fox (www.foxprof.com) explains the importance of consistency in this excerpt from his book *Working with Contracts* (PLI, 2002):\*

### Consistency: Learn to Love the Hobgoblin

According to Ralph Waldo Emerson, a foolish consistency is the hobgoblin of little minds. However, when it comes to drafting contracts, there is no such thing as too much attention to consistency. Why is consistency so important? Inconsistent contract provisions can be a breeding ground for ambiguity and differing interpretations.

Consider the following two sentences from the same asset-purchase agreement, the first providing for the payment of the purchase price at closing, the second for a post-closing purchase price adjustment payment:

On the closing date, the seller shall pay the Purchase Price to Buyer’s Account in immediately available funds.

The Seller shall pay the Purchase Price Adjustment on the fifth Business Day following the delivery of the Closing Date Balance Sheet.

Under the second sentence, can the seller pay the Purchase Price Adjustment by check because there is no reference to “immediately available funds”? It is unlikely that the parties intended the payment mechanics to be different for these two events. However, the treatment of similar requirements in an inconsistent manner allows the seller to take the position that the second payment may be made by check. The buyer’s protests that there was no mutual understanding that payment could be made in this manner will be unavailing: the plain words of the contract govern.

Inconsistent use of individual words can also create a potential booby trap. Consider these two sentences from the same guarantee:

Guarantor guarantees the full payment and performance when due of all *liabilities* owing by Debtor to Creditor, whether now existing or hereinafter arising.

Guarantor shall not be obligated to make any payments hereunder in respect of *indebtedness* of Debtor to Creditor at any time that Debtor’s Net Worth is at least \$20 million.

A credible argument could be made that the word “liabilities” has a broader meaning than the word “indebtedness” and that therefore the second sentence suspends less than all of guarantor’s guarantee obligations.

Drafters must also be wary of inconsistency in the use of word strings:

Seller shall indemnify Buyer for all *damages, liabilities, and expenses* to the extent arising from Seller’s breach.

Buyer shall indemnify Seller for all *damages and liabilities* to the extent arising from Buyer’s breach.

The omission of the word “expenses” in the second provision could be quite significant. If Seller is sued by a third party as a result of Buyer’s breach, any damage award against it would be covered by Buyer’s indemnity, but not its legal expenses.

Many transactions involve a number of related agreements that are executed and delivered at the same time. To the greatest extent possible, the drafter should avoid inconsistencies among related agreements of this kind. For example, it will avoid confusion if the parties are referred to consistently. If a party is referred to as “Borrower” in one agreement, “Debtor” in another and “Assignor” in yet another, confusion may be the result.

Another source of inconsistency in the context of related agreements is in their boilerplate provisions. Take an acquisition transaction where the seller agrees to provide transition services to the buyer and to grant an easement in respect of the property to be sold. The drafter chooses to cover these matters in separate agreements. It is not unlikely that the boilerplate provisions, such as those relating to the governing law, notice, assignment, and consent to jurisdiction, will be different in form (and perhaps in substance) in each of the precedents. The drafter should work at making these provisions consistent.

\* This material has been published as pages 78–80 of Chapter 4 of *Working with Contracts*, by Charles M. Fox, available at 1-800-260-4754; www.pli.edu for \$24.95; © The Practising Law Institute. Reproduced with permission. All rights reserved.

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# In Terms of *in terms of*

Joseph Kimble

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I might have called this article “About *in terms of*” or “The Case Against *in terms of*” or (more dramatically) “Down with *in terms of*.” By using the first *in terms of* instead of a clearer, more common connector, I obscured the meaning—and that is my point.

There’s a verbal plague loose in the land, a contagion so strong that it seems unstoppable. So far, it has afflicted American speech more than American writing. Just listen to what you hear on talk shows, in meetings, in courtrooms, in everyday conversation. Everything is *in terms of* this and *in terms of* that. *In terms of* ad nauseam.

In an earlier “Plain Language” column, I said that another wordy phrase—*prior to*—“takes the booby prize for the most common inflated phrase in legal and official writing.”<sup>1</sup> In speech, though, *in terms of* has run away with that distinction.

Both phrases belong to a grammatical category of prepositions consisting of more than one word—variously called compound or complex or phrasal prepositions. In another earlier column, I offered a list of compound prepositions with their shorter and simpler equivalents.<sup>2</sup> I noted that the great H.W. Fowler said compound prepositions are “almost the worst element in modern English, stuffing up what is written with a compost of nouny abstractions.”<sup>3</sup> And the trouble with many compound prepositions (like *in terms of*) is not just that they waste words. They also tend to obscure logical relationships, to muddy the connection between ideas.

Here is what a few leading authorities have said about *in terms of* and its ilk:

- *In terms of* is often indefensibly verbose. Whenever you can replace it with a simple preposition, do so . . . .  
—Bryan A. Garner, *A Dictionary of Modern American Usage*.
- *In terms of* [is] a piece of padding usually best omitted.  
—Strunk & White, *The Elements of Style*.
- Much present-day writing is peppered with the phrase *in terms of*, probably because it has a fine, learned sound. But often it is all sound, signifying nothing. The phrase, properly used, signals a translation from one kind of language to another.  
—Theodore M. Bernstein, *The Careful Writer*.
- In all utility writing today, official and commercial, the simple prepositions we have in such abundance tend to be forgotten and replaced by groups of words more imposing perhaps, but often less precise.  
—Sir Ernest Gowers, *The Complete Plain Words*.

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## Submit Your Articles

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

### Deadlines

Fall	October 15
Winter	January 15
Spring	April 15

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## In Terms of *in terms of*

(continued from page 3)

About a year ago, during several weeks, I collected some examples that I happened to hear or read. These are not all the examples I ran into during that time—just the ones that I remembered to jot down:

- Since May, we have been dry in terms of rain [we haven't had any? much? rain]. (weather announcer)
- The writer had a complete understanding of ~~the case in terms of~~ the facts and the applicable law. (judge)
- I've been away so long, I'm behind in terms of [on] culture. (radio caller)
- Do we know anything about X in terms of his background [about X's background]? (radio commentator)
- After 70 years, a little structural problem on the best house ever designed doesn't strike me as something that raises any kind of revisionist issues in terms of [about] Mr. Wright's career. (college professor)
- We can still make progress in terms of [on] racism. (conference representative)
- We're trying to take Luther's game and expand it a bit, especially in ~~terms of~~ how he rushes the quarterback. (football coach)
- I can't tell you the timetable in terms of [for] opening up this issue. (radio psychologist)
- Fundamentals in terms of [such as? especially?] earnings remain weak. (financial adviser)
- Our emphasis will be more in terms of [on] prevention. (health official)
- Strategic Income Fund gives me more flexibility in ~~terms of~~ trading. (financial adviser)
- We will give the President what he wants, in ~~terms of~~ both resources and authorization. (political leader)
- Housing starts, a key indicator ~~in terms of~~ the housing market, were down 7 percent. (financial commentator)
- Afghanistan is basically destroyed in terms of [by the?] fighting. (radio commentator)
- Intercollegiate athletics is great in terms of [for] engendering spirit. (football coach)
- We're trying to paint a picture that's black and white in terms of [about?] good and evil. (radio caller)

- You ought to read David McCullough's book in terms of [about? before?] embarking on a presidency. (TV host)
- We've heard stories ~~in terms of~~ how prepared the terrorists were. (television commentator)
- There are so many variables at play regarding departures (of visitors) that it creates problems in ~~terms of~~ monitoring people. (government official)
- The trail has run a little cold in the United States in terms of active participants. [The trail of active participants in the United States has run a little cold.] (television commentator)
- I have some information that I think would be helpful to them in ~~terms of~~ running the city. (public official)
- Do you think the food will make a difference in ~~terms of~~ how the Afghan people respond? (radio host)
- I would be very cautious in terms of [about] drawing long-term conclusions. (economic analyst)
- There has been collateral damage in terms of [to?] postal workers. (radio commentator)
- This was the only purchase I made in terms of appliances. [This was the only appliance I bought.] (home decorator)
- The Patriot Act is an extremely dangerous law in terms of [because of] the very expansive definition of "terrorism." (immigration lawyer)
- When you're unsuccessful in terms of winning [When you're not winning], you always look for things to adjust. (basketball coach)

Although we can, of course, make some allowances for speech, *in terms of* has become a bad habit. In the examples above, notice how often it functions as a loose, all-purpose coupler, one that seems to introduce a tacked-on idea.

Down with *in terms of*.

### Endnotes

- <sup>1</sup> *A Modest Wish List for Legal Writing*, 79 Mich. B.J. 1574, 1577 (2000).
- <sup>2</sup> *Plain Words* (Part 2), Mich. B.J., Sept. 2001, at 72, 72; now in *Lifting the Fog of Legalese: Essays on Plain Language* 170–71 (2006).
- <sup>3</sup> H.W. Fowler, *A Dictionary of Modern English Usage* 102 (Sir Ernest Gowers ed., 2d ed. 1965).

This article originally appeared in the November 2002 "Plain Language" column in the *Michigan Bar Journal*.

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## Books Nominated for the Scribes 2006 Book Award

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The books below and on page 6 were submitted by publishers and considered by the Scribes Book-Award Committee for the 2006 award. This year's winner, *Insincere Promises: The Law of Misrepresented Intent*, by Ian Ayres and Gregory Klass, was officially announced at the annual meeting. More details will appear in the next issue. In the meantime, a member of the Book-Award Committee, Steve Sheppard, has prepared short reviews of most of the books nominated. His reviews appear on [www.scribes.org](http://www.scribes.org). (Click on "Book Award.")

- Advice and Consent: The Politics of Judicial Appointments*  
Lee Epstein and Jeffrey A. Segal [Oxford University Press]
- The Black Laws: Race and the Legal Process in Early Ohio*  
Stephen Middleton [Ohio University Press]
- By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority*  
Holly Brewer [The University of North Carolina Press]
- The Case for Gay Rights: From Bowers to Lawrence and Beyond*  
David A. J. Richards [University Press of Kansas]
- The Chicago Black Renaissance and Women's Activism*  
Anne Meis Knupfer [University of Illinois Press]
- Chocolate on Trial: Slavery, Politics & the Ethics of Business*  
Lowell J. Satre [Ohio University Press]
- Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*  
Lindsay G. Robertson [Oxford University Press]
- Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830*  
Daniel J. Hulsebosch [The University of North Carolina Press]
- Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts*  
Lynn M. LoPucki [The University of Michigan Press]
- Courtroom 302: A Year Behind the Scenes in an American Criminal Courthouse*  
Steve Bogira [Random House, Inc.]
- Crimes Against Children: Sexual Violence and Legal Culture in New York City, 1880–1960*  
Stephen Robertson [The University of North Carolina Press]
- Darkest Before Dawn: Sedition and Free Speech in the American West*  
Clemens P. Work [University of New Mexico Press]
- David Hackett Souter: Traditional Republican on the Rehnquist Court*  
Tinsley E. Yarbrough [Oxford University Press]
- The Detection of Deception in Forensic Contexts*  
Pär-Anders Granhag and Leif A. Strömwall [Cambridge University Press]
- Disabling Interpretations: The Americans with Disabilities Act in Federal Court*  
Susan Gluck Mezey [University of Pittsburgh Press]
- Divided by God: America's Church-State Problem—And What We Should Do About It*  
Noah Feldman [Farrar, Straus and Giroux]
- The Encyclopedia of Forensic and Legal Medicine*  
Roger Byard, Tracey Corey, Carol Henderson, and Jason Payne-James [Academic Press]
- Exploring Tort Law*  
M. Stuart Madden [Cambridge University Press]
- Eye for an Eye*  
William Ian Miller [Cambridge University Press]
- Form and Function in a Legal System: A General Study*  
Robert S. Summers [Cambridge University Press]
- From Madness to Mutiny: Why Mothers Are Running from the Family Courts—And What Can Be Done about It*  
Amy Neustein and Michael Leshner [Northeastern University Press]
- The Gift of Science: Leibniz and the Modern Legal Tradition*  
Roger Berkowitz [TriLiteral LLC (Harvard University Press, MIT Press, Yale University Press)]
- God vs. the Gavel: Religion and the Rule of Law*  
Marci A. Hamilton [Cambridge University Press]

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(continued on page 6)

- Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy*  
John W. Johnson [University Press of Kansas]
- HERS, His, & Theirs: Community Property Law in Spain & Early Texas*  
Jean A. Stuntz [Texas Tech University Press]
- How the Indians Lost Their Land: Law and Power on the Frontier*  
Stuart Banner [TriLiteral LLC (Harvard University Press, MIT Press, Yale University Press)]
- Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From*  
David Skeel [Oxford University Press]
- In the Shadow of the Law*  
Kermit Roosevelt [Farrar, Straus and Giroux]
- Indian Gaming and Tribal Sovereignty: The Casino Compromise*  
Steven Andrew Light and Kathryn R. L. Rand [University of Kansas]
- The Informant: The FBI, the Ku Klux Klan, and the Murder of Viola Liuzzo*  
Gary May [Yale University Press, New Haven and London]
- Insincere Promises—The Law of Misrepresented Intent*  
Ian Ayers and Gregory Klass [Yale University Press, New Haven and London]
- Jim Crow Moves North: The Battle Over Northern School Segregation, 1865–1954*  
Davison M. Douglas [Cambridge University Press]
- Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism*  
Stuart Streichler [University of Virginia Press]
- Law Without Nations? Why Constitutional Government Requires Sovereign States*  
Jeremy A. Rabkin [Princeton University Press]
- The Limits of International Law*  
Jack L. Goldsmith and Eric A. Posner [Oxford University Press]
- Lowering the Bar: Lawyer Jokes and Legal Culture*  
Marc Galanter [The University of Wisconsin Press]
- Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime*  
Stuart P. Green [Oxford University Press]
- Making Medical Decisions for the Profoundly Mentally Disabled*  
Norman L. Cantor [The MIT Press]
- The Medical Malpractice Myth*  
Tom Baker [The University of Chicago Press]
- A New Deal for the World: America's Vision for Human Rights*  
Elizabeth Borgwardt [TriLiteral LLC (Harvard University Press, MIT Press, Yale University Press)]
- Nimrod: Courts, Claims, and Killing on the Oregon Frontier*  
Ronald B. Lansing [Washington State University Press]
- Plain English for Lawyers, Fifth Edition*  
Richard C. Wydick [Carolina Academic Press]
- Protecting Liberty in an Age of Terror*  
Philip B. Heymann and Juliette N. Kayyem [The MIT Press]
- The Rehnquist Legacy*  
Craig Bradley [Cambridge University Press]
- Revolution by Judiciary: The Structure of American Constitutional Law*  
Jed Rubinfeld [TriLiteral LLC (Harvard University Press, MIT Press, Yale University Press)]
- Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution*  
Calvin H. Johnson [Cambridge University Press]
- Saving Our Environment from Washington: How Congress Grabs Power, Shirks Responsibility, and Shortchanges the People*  
David Schoenbrod [Yale University Press, New Haven and London]
- The Torture Papers: The Road to Abu Ghraib*  
Karen J. Greenberg and Joshua L. Dratel [Cambridge University Press]
- The Tyrannicide Brief: The Man Who Sent Charles I to the Scaffold*  
Geoffrey Robertson [Chatto & Windus]
- When Affirmative Action Was White*  
Ira Katznelson [W.W. Norton]
- Yale Law School and the Sixties: Revolt and Reverberations*  
Laura Kalman [The University of North Carolina Press]

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## New Members

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## News from Members

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**Michael B. Hyman**, a member of the Scribes Board of Directors, is now The Honorable Michael B. Hyman. He was recently appointed Judge to the Circuit Court of Cook County. His new address is 265 Graemere Street, Northfield, Illinois 60093.

**Roger Miner**, Senior Judge, United States Court of Appeals for the Second Circuit, announces that he recently published an article, *The Last Civilian Court-Martial and Its Aftermath*, in the *Ohio State Law Journal*. Judge Miner, who was a U.S. Army Reserve JAGC officer, writes in a postscript that his final rank was just shy of one that would have made him "Major Miner." Find the article at 67 Ohio St. L.J. 401 (2006).

**Stuart Shiffman** recently published an article in the May–June issue of *Judicature*. The title of the article is *The Constitutional Debate*. You can find it at 89 *Judicature* 326 (2006).

**Professors Nancy Soonpaa** at Texas Tech and **Sue Liemer** at Southern Illinois have started a blog for legal-writing professors: <http://lawprofessors.typepad.com/legalwriting>. Their blog includes news about legal writing and the teaching of legal writing, links to related websites and blogs, and an occasional book or article review.

**Gary D. Spivey** was appointed to the Board of Editors of the *New York State Bar Association Journal*. He is State Reporter and head of the New York State Law Reporting Bureau, the agency that publishes the New York Official Reports. Gary is a life member and former president of Scribes.

Another blogger in our midst is **Ray Ward**. Ray announces that his legal-writing weblog may interest fellow Scribes members. The blog is called "the (new) legal writer"; the web address is <http://raymondward.typepad.com/newlegalwriter/>.

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