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Recommended Citation

Douglas E. Abrams, Legal Writing: Sense and Nonsense, 74 *Journal of the Missouri Bar* 94 (2018).

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LEGAL WRITING: SENSE AND NONSENSE

DOUGLAS E. ABRAMS¹

IN 1992, THE SIERRA CLUB ESTIMATED THAT THE AVERAGE CALIFORNIA LAWYER USED A TON OF PAPER EACH YEAR, A HEFTY PILE IN A STATE THAT HAD ABOUT 137,000 LAWYERS.² THE ENVIRONMENTAL GROUP URGED THE STATE'S JUDICIAL COUNCIL TO ENACT A RULE REQUIRING USE OF RECYCLED PAPER IN COURT FILINGS, A MOVE THAT THE GROUP FORECAST WOULD SAVE MORE THAN 6,000 TREES ANNUALLY.³

Two days later, the *Los Angeles Times* published a letter-to-the-editor from a reader who proposed his own one-sentence solution. "If the Sierra Club would like to save whole forests rather than just a few thousand trees," he wrote, "I suggest that they encourage lawyers to use plain English."⁴

The letter writer was David Mellinkoff, professor emeritus at the UCLA School of Law and a pioneer of the legal profession's plain English movement.⁵ His classic 1963 book, *The Language of the Law*, traced the development of legal language since pre-Norman times and earned a place alongside H.L. Mencken's *The American Language* for its penetrating analysis of the national tongue.⁶ In the *Harvard Law Review* in 1964, Pulitzer Prize-winning poet and writer (and Harvard Law School alumnus and former practicing lawyer) Archibald MacLeish drew this distinction: "Mr. Mellinkoff is wittier than Mencken as well as being considerably more civilized."⁷

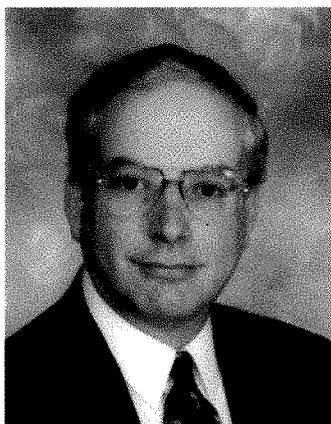
The Language of the Law demonstrated that Americans inherited much of our legal vocabulary and conventions from pre-Norman, Latin, Old and Middle English, Law French, and other centuries-old sources. Lawyers have perpetuated these archaic legalisms with little serious thought about how their contemporary use (and frequent misuse) can obstruct readers' understanding.

"With communication the object," Professor Mellinkoff posited in *The Language of the Law*, "the principle of simplicity

would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference. . . . If there is no reason for departure from the language of common understanding, the special usage is suspect."⁸

"The remaining reasons for a difference are few," he said years later, "and apply only to the tiniest part of the language of the law."⁹

Professor Mellinkoff's provocative thesis, grounded in his solid historiography about law's linguistic antiquities, paralleled Justice Oliver Wendell Holmes' classic challenge to stubborn adherence to timeworn common law doctrine. "It is revolting," wrote Holmes in *The Path of the Law* (1897), "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."¹⁰



Douglas E. Abrams

Heritage of Disdain

Even before Professor Mellinkoff wrote in 1963, stern criticism of lawyers' writing had spanned generations. In 1817, for example, Thomas Jefferson chided his fellow lawyers for "making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means."¹¹

In *Bleak House*, Charles Dickens derided "lawyers' liking for the legal repetitions and prolixities."¹² Philosopher Jeremy Bentham disparaged lawyers' writing as "excrementitious matter" and "literary garbage."¹³

As a Harvard law professor in 1931, Felix Frankfurter assailed "the inevitable lawyer's writing – the dull qualifications and circumlocutions that sink any literary barque or even freighter, the lifeless tags and rags that preclude grace and stifle spontaneity."¹⁴ "Lawyers' language," a prominent New York attorney summarized in 1954, "has long been regarded as the prime example of complex, unreadable, often unintelligible English. Such phrases as 'legal technicality', 'fine print', lawyers' Mumbo-Jumbo, etc. should be a warning."¹⁵

This heritage of disdain, constant for centuries, provided Professor Mellinkoff a sturdy foundation for his sterling 454-page book. The book's scholarly underpinnings sparked the plain English movement, whose influence still reverberates in legislative halls, courts, administrative agencies, law school legal writing classes, and the greater society. The movement's adherents argue that to the extent possible, lawyers should write with language and style that are reasonably comprehensible to

lay readers (that is, to most Americans).

The book's "then startling but now accepted thesis"¹⁶ commanded respect because Professor Mellinkoff held credibility from his years of successful private law practice. For nearly two decades in Beverly Hills, California, he represented actress Mae West and other luminaries whose wherewithal enabled them to engage the best counsel they could find. Because he believed that lawyers' writing too often demeaned the law with roadblocks that thwarted common understanding, he closed his practice to research and write *The Language of the Law*, which won the Scribes Award for best conveying the legal profession's true spirit.¹⁷

"Just Get Started"

In 1982, secure in his place as the nation's "leading figure in legal linguistics,"¹⁸ Professor Mellinkoff published another book, *Legal Writing: Sense and Nonsense*. One reviewer praised the volume as "a concise, practical guide to good writing. . . [.] witty, informative, and, as one would expect, well written."¹⁹ The rest of this article concerns *Sense and Nonsense* and the continuing utility of its practical observations, but the impetus for this belated book review requires a brief explanation first.

The shelves of any well-stocked law library feature an array of articulate, well-conceived "how-to" books about legal writing. But even the best of these books can carry a lawyer only so far. Proponents of plain English correctly maintain that much legal writing could still profit from closer adherence to the four fundamentals that Professor Henry Weihofen identified more than a generation ago – conciseness, precision, simplicity, and clarity.²⁰ After a lawyer absorbs how-to books in the classroom and beyond, however, the surest way to remain faithful to this quartet is actually to write, and not merely to scour yet more books about how to write.

Sports analogies help illuminate the point. A pre-teen tennis player, for example, might read a half dozen books about how to play the game, but sooner or later the youngster enhances skills more by actually hitting the ball on the court than by reading another book about how to hit. A career at the keyboard influenced veteran sportswriter Myron Cope to advise a young colleague: "Sit down at the typewriter and start writing. Just get started. That's how you write."²¹

The advice remains sound, but every so often a how-to legal writing book offers special rewards, even for seasoned readers. Law libraries still catalog *Sense and Nonsense*, and copies appear for purchase on the Internet. For readers without a vintage copy, I write below about the book to convey many of Professor Mellinkoff's practical, timeless guidelines for honing written expression.

"Lawsick" and Its Remedies

"Too many lawyers," said Professor Mellinkoff on the first page of *Sense and Nonsense*, "are long on law and short on English, especially writing it."²² As readers might expect from a prominent voice who (as the *New York Times* put it) "waged fierce and clever battle against lawyerly language,"²³ the book coined a new word to diagnose the state of lawyers' written expression – *lawsick*.

As a noun, Professor Mellinkoff defined, *lawsick* means "a peculiar, English-like language commonly used in writing about law; peculiar in habitual indifference to ordinary usage of

English words, grammar, and punctuation; and in preferring the archaic, wordy, pompous, and confusing over the clear, brief, and simple; persists chiefly through a belief of its writers that these peculiarities lead to precision (written in *lawsick* unclear even to its author)."²⁴

Sense and Nonsense prescribes a remedy for *lawsick* in two parts, capped by helpful appendices. With illustrations and applications, Part One presents Seven Rules summarized below. Part Two ("Blunders and Cures") provides creative exercises that enable readers to learn by doing.

Part One: "Seven Rules"

*Rule # 1: "Don't confuse peculiarity with precision."*²⁵

Professor Mellinkoff's first Rule yields two core lessons: (a) "Do not count on automatic precision by the use of special law words" (such as "said" as an adjective, "same" as a noun, or "therefor") because "[m]ost law words are not precise";²⁶ and (b) "When in doubt, err on the side of assuming that law words are not precise, and explain yourself."²⁷

Consider, explained Professor Mellinkoff, what might happen when two non-lawyers draft a proposed contract. They are likely to begin with a precise statement: "We agree. . . ." But if they leave drafting to their lawyers, law words might intrude: "In consideration of the agreements hereinafter contained, the parties hereto agree. . . ." Peculiar, yes. But more precise? And does "hereinafter" mean "later in this paragraph," "later in this section," "later in this entire agreement," or something else?

*Rule # 2: "Don't ignore even the limited possibilities of precision."*²⁹

More lessons appear, including these: (a) "Precise-as-you-can takes longer, and is well worth it";³⁰ (b) "Sloppy writing requires special attention, and usually gets it, in court";³¹ (c) When saying "no," beware of double negatives and similar confusing expressions that may leave the injunction in doubt, and may even indicate "yes" or "maybe";³² and (d) "Beware the twofers," that is, using one word to convey more than one meaning, or more than one word to convey the same meaning.³³ For example, does the "date of the demise" refer to the date of death, of a lease, or of a conveyance?³⁴ Why not write "death," "lease," or "conveyance," as the case may be?³⁵

*Rule # 3: "Follow the rules of English composition."*³⁶

"If it's bad writing by the standards of ordinary English," explained Professor Mellinkoff, "it is bad legal writing. If it's good legal writing by the standards of ordinary English, it is more likely to be good legal writing."³⁷

In his 1964 *Harvard Law Review* essay about *The Language of the Law*, poet, writer, and former lawyer Archibald MacLeish concurred: "[L]awyers would be better off if they stopped thinking of the language of the law as a different language and realized that the art of writing for legal purposes is in no way distinguishable from the art of writing for any other purpose."³⁸

*Rule # 4: "Choose clarity."*³⁹

Professor Mellinkoff offered a few basics: (a) "Clarity depends more on how you say it than on what you have to say";⁴⁰ (b) "[U]se ordinary words of the English language unless there is a good reason not to";⁴¹ (c) "Some law requires technical words. Hardly any law forbids explaining them";⁴² and (d) "Good form

will make clearer whatever is there. Just be sure that something is there to make clear.”⁴³

Rule # 5: “Write law simply; do not puff, mangle, or hide.”⁴⁴

“The only thing about legal writing that is both unique and necessary is law,” Professor Mellinkoff explained. “To simplify legal writing, first get the law right. You can’t simplify by omitting what the law requires or including what the law forbids. The better you know the law the easier to decide what law ought to go in, and what is overkill or window dressing.”⁴⁵

Rule # 6: “Before you write, plan.”⁴⁶

Why am I writing? Who is the likely audience? Do I have a tight deadline? What tone should I adopt? How durable is the writing likely to be? “Talk over the goals with those who know more facts than you do, and maybe even more law,” Professor Mellinkoff advised, “Mull, jot, fret, read, outline. Then write. If you start from a plan, the writing will help your thinking and writing. Unplanned, the flow of words becomes a distraction.”⁴⁷

Rule # 7: “Cut it in half!”⁴⁸

Justice Louis D. Brandeis taught that “there is no such thing as good writing. There is only good rewriting.”⁴⁹ Literary giants without law degrees have said the same thing.

So does Professor Mellinkoff, who advised, “Rewrite. Rewrite. Rewrite . . . until you run out of time or material.”⁵⁰ “Every time you rewrite you will find something to cut. Do not be disappointed if you also find something to add.”⁵¹ The final product should be as tight as possible because “[u]nnecessary words increase the opportunities for you and your reader to go wrong.”⁵²

Professor Mellinkoff complemented Rule # 7 with several hints, including a “cut list” – 15-word clusters whose elimination produces a tighter, more graceful final product. For example, cut old formalisms (“Be it remembered”), worthless Old and Middle English words (“Enclosed herewith”), redundant modifiers (“surviving widow”), coupled synonyms (“null and void”), and footnotes larded with textual material that distracts and ultimately frustrates readers until they begin ignoring the footnotes altogether.⁵³ Footnotes ignored communicate no message.

Part Two: “Blunders and Cures”

Part Two of *Sense and Nonsense* provides hands-on instruction for lawyers who want to apply the Seven Rules and develop an editor’s sharp eye.⁵⁴ “Mellinkoff, a master editor,” wrote one reviewer, “carefully demonstrates how the seven rules of Part One can be used to dissect and reconstruct actual legal documents to make them more understandable and precise. If *Sense and Nonsense* contained Part Two alone, it would be well worth reading.”⁵⁵

As a bonus, *Sense and Nonsense* closes with informative appendices.⁵⁶

Five appendices list legal jargon to avoid; one lists “flexible words” that lawyers sometimes misuse as though the words were

precise; two list ordinary English substitutes for legal argot or legal terms of art; and one lists useful books on grammar, word usage, and punctuation.

“The Language Belongs To All of Us”

“The language belongs to all of us,” wrote former NBC News correspondent Edwin Newman. “We have no more valuable possession.”⁵⁷ This precious national endowment includes legal language, the foundation of the civil and criminal justice systems and the cornerstone of rights and obligations. Shortly after *The Language of the Law* helped blaze the plain English trail in 1963, one writer found the book punctuated by the author’s “fundamental respect for the law, its spirit, its tradition, its moral and ethical utility.”⁵⁸ When Professor Mellinkoff died in 1999, four of his UCLA colleagues explained that “David loved the law, but his was a tough love that recognized the absurdities and plain stupidities in the language of the law perpetuated in legal parlance and judicial opinions.”⁵⁹

Old ideas sometimes die hard, but Professor Mellinkoff remained optimistic. “Some lawyers, and many more people,” he observed in *Sense and Nonsense*, “have become convinced that it is possible and also important to write law pretty much in English, understandable English.”⁶⁰ If he was right that “[l]awsick is on its way out,”⁶¹ lawyers and other Americans owe him continuing gratitude, not only for his careful diagnosis, but also for his gentle but strong medicine. 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books. Four U.S. Supreme Court decisions have cited his law review articles. His latest book is *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* (West Academic Publishing 2016).

2 See Philip Hager, *It’s Lawyers vs. Recyclers In Scrap Over Paper*, L.A. TIMES, Nov. 29, 1992, at A3 (Sierra Club estimate); *Bar President*, SAN FRANCISCO CHRONICLE, July 26, 1993, at A12 (editorial) (137,000 lawyers). See generally Douglas E. Abrams, *Legal Writing: Sense and Nonsense*, 3 PRECEDENT 23 (MoBar Fall 2009).

3 Philip Hager, *supra* note 2.

4 David Mellinkoff, *Legalese*, L.A. TIMES, Dec. 18, 1992, at B6 (letter-to-the-editor).

5 David Mellinkoff, 85, *Enemy of Legalese*, N.Y. TIMES, Jan. 16, 2000, at 37 (obituary); David Mellinkoff, *Attorney Advocated Plain English*, L.A. TIMES, Jan. 4, 2000, at A17 (obituary).

6 DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); H.L. MENCKEN, *THE AMERICAN LANGUAGE: A PRELIMINARY INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* (1919).

7 Archibald MacLeish, *Book Review*, 78 HARV. L. REV. 490, 490 (1964) (reviewing DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963)). See also, e.g., David Mellinkoff, *Attorney Advocated Plain English*, *supra* note 5 (quoting 1963 review by L.A. Times book critic Robert Kirsch: “It is to Mellinkoff’s credit that he practices what he preaches. This volume, which easily could have been pedantic and pedestrian, turns out to be a superb piece of writing, lucid, witty, meticulous in scholarship and unfailingly interesting”).

8 David Mellinkoff, *supra* note 6, at vii.

9 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* xi (1982).

10 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

11 17 WRITINGS OF THOMAS JEFFERSON 417-418 (A. Bergh ed. 1907) (letter to Joseph C. Cabell, Sept. 9, 1817), quoted in DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING: A GUIDE FOR STUDENTS AND PRACTITIONERS* 4 (West Academic Publishing 2016); and in Douglas E. Abrams, *What Great Writers Can Teach Lawyers and Judges: Wisdom from Plato to Mark Twain to Stephen King (Part I)*, 5 PRECEDENT 21, 22 (MoBar Winter 2011).

12 CHARLES DICKENS, *BLEAK HOUSE* 14 (1953) (Oxford Univ. Press ed. 1976).
 13 David Mellinkoff, *supra* note 6, at 262 (quoting Bentham).
 14 Felix Frankfurter, *When Judge Cardozo Writes*, THE NEW REPUBLIC, Apr. 8, 1931, <http://www.tnr.com/article/politics/when-judge-cardozo-writes> (visited Jan. 10, 2018), *quoted in* DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING*, *supra* note 10, at 4.
 15 Eugene C. Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 A.B.A.J. 1057, 1057 (1954). *See also, e.g.*, Jay Wishingrad & Douglas E. Abrams, *Book Review*, 1981 DUKE L.J. 1061, 1061-62 (reviewing GEORGE D. GOPEN, *WRITING FROM A LEGAL PERSPECTIVE* (1981)).
 16 Susan Westerberg Prager, *David Mellinkoff: An Affectionate Tribute*, 33 UCLA L. REV. 1247, 1247 (1986).
 17 *See University of California: In Memoriam, 2000, David Mellinkoff: Los Angeles* 179, <http://content.cdlib.org/xtf/view?docId=hb1r29n709&doc.view=frames&chunk.id=div00047&toc.depth=1&toc.id=>; *David Mellinkoff, Attorney Advocated Plain English*, *supra* note 5.
 18 Susan Westerberg Prager, *supra* note 16, at 1248.
 19 Robert P. Charrow, *Book Review*, 30 UCLA L. REV. 1094, 1094-95 (1983) (reviewing DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* (1982)). *See also, e.g.*, Matthew B. Seltzer, *Book Review*, 68 MINN. L. REV. 1101, 1102, 1106 (1984) (same) (*Sense and Nonsense* is “carefully conceived and persuasive, . . . an important contribution . . . full of solid advice that all lawyers can use in their work.”).
 20 HENRY WEIHOFEN, *LEGAL WRITING STYLE* 8-104 (2d ed. 1980) (discussing these four fundamentals).
 21 Myron Cope, *One of Pittsburgh’s Natural Resources*, in *REMEMBER ROBERTO: CLEMENTE RECALLED BY TEAMMATES, FAMILY, FRIENDS AND FANS* 404 (Jim O’Brien ed., 1994).
 22 David Mellinkoff, *supra* note 9, at xi.
 23 *David Mellinkoff, 85, Enemy of Legalese*, *supra* note 5, at 37.
 24 David Mellinkoff, *supra* note 9, at xii.
 25 *Id.* at 1-14.
 26 *Id.* at 2.
 27 *Id.* at 13.
 28 *Id.* at 1.
 29 *Id.* at 15-43.
 30 *Id.* at 15.
 31 *Id.* at 16.
 32 *Id.* at 28-38.
 33 *Id.* at 20-27.
 34 *Id.* at 21.
 35 *Id.*
 36 *Id.* at 32-60.

37 *Id.* at 44. *See also, e.g.*, DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING*, *supra* note 11, at 9; Douglas E. Abrams, *What Great Writers Can Teach Lawyers and Judges: Wisdom from Plato to Mark Twain to Stephen King (Part 2)*, 5 PRECEDENT 21, 21 (MoBar Fall 2010); Jay Wishingrad & Douglas E. Abrams, *The Lawyer’s Bookshelf*, N.Y.L.J., Dec. 12, 1980, at 2 (reviewing RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (1st ed. 1979)) (“[T]here are only two types of writing – good writing and bad writing. Good ‘legal writing’ is simply writing in plain English about a legal subject.”); Jay Wishingrad & Douglas E. Abrams, *Lawyer’s Bookshelf*, N.Y.L.J., July 12, 1982, at 2 (reviewing DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* (1982)) (same).
 38 Archibald MacLeish, *supra* note 7, at 490. *See also* Douglas E. Abrams, *What Great Writers Can Teach Lawyers and Judges: Wisdom from Plato to Mark Twain to Stephen King (Part 1)*, 4 PRECEDENT 16, 16 (MoBar Fall 2010) (quoting MacLeish); DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING*, *supra* note 11, at 43 (same).
 39 David Mellinkoff, *supra* note 9, at 61-99.
 40 *Id.* at 61.
 41 *Id.* at 62.
 42 *Id.* at 65.
 43 *Id.* at 91.
 44 *Id.* at 100-113.
 45 *Id.* at 100.
 46 *Id.* at 114-125.
 47 *Id.* at 114.
 48 *Id.* at 126-144.
 49 Eugene C. Gerhart, *QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS* 462 (1988), *quoted in* DOUGLAS E. ABRAMS, *EFFECTIVE LEGAL WRITING*, *supra* note 11, at 75.
 50 David Mellinkoff, *supra* note 9, at 126.
 51 *Id.* at 140.
 52 *Id.* at 128.
 53 *Id.* at 133.
 54 *Id.* at 145-184.
 55 Robert P. Charrow, *supra* note 19, at 1095-96.
 56 David Mellinkoff, *supra* note 9, at 185-221.
 57 EDWIN NEWMAN, *A CIVIL TONGUE* 19 (1976).
 58 *See David Mellinkoff, Attorney Advocated Plain English*, *supra* note 5, at A17 (quoting 1963 review by *Los Angeles Times* book critic Robert Kirsch).
 59 *University of California: In Memoriam, 2000, David Mellinkoff: Los Angeles*, *supra* note 17, at 181 (statement of Benjamin Aaron, Jesse Dukeminier, Kenneth Karst, and Herbert Morris).
 60 David Mellinkoff, *supra* note 9, at xii.
 61 *Id.*

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