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## Legal Writing: Sense and Nonsense

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## **Legal Writing: Sense and Nonsense**

**Douglas E. Abrams**

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# Legal Writing: Sense and Nonsense

By Douglas E. Abrams

In 1992, the Sierra Club estimated that the average California lawyer used a ton of paper each year, a hefty pile indeed in a state that had about 137,000 lawyers.<sup>1</sup> The environmental group urged the state's Judicial Council to enact a rule requiring use of recycled paper in documents filed in the courts, a move that the group estimated would save more than 6,000 trees annually.<sup>2</sup>

Two days later, a *Los Angeles Times* reader penned a letter-to-the-editor with a one-sentence solution of his own. "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."<sup>3</sup>

The letter writer was David Mellinkoff, professor emeritus at the UCLA School of Law and the acknowledged dean of the legal profession's Plain English movement.<sup>4</sup> 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.<sup>5</sup> The difference, according to a 1964 book review by poet (and Massachusetts Bar member) Archibald MacLeish in the *Harvard Law Review*, was that "Mr. Mellinkoff is wittier than Mencken as well as being considerably more civilized."<sup>6</sup>

*The Language of the Law* demonstrated that Americans inherited much

of our legal terminology and descriptions from pre-Norman, Latin, Old and Middle English, Law French and similar sources. Lawyers perpetuated these archaic legalisms with little serious thought about how their contemporary usage often obstructed popular understanding of lawyers' expository writing and legal drafting.<sup>7</sup> In turn, these legalisms helped perpetuate written expression whose overall content and style, by inadvertence or design, often mangled any meaningful bond between lawyer and reader.

"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."<sup>8</sup> "The remaining reasons for a difference are few," he explained years later, "and apply only to the tiniest part of the language of the law."<sup>9</sup>

Mellinkoff's provocative thesis, grounded in his solid historiography about legal archaisms, recalled 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."<sup>10</sup>

By the time Mellinkoff wrote in 1963, disdain for lawyers' writing and drafting was as old as our nation. In 1817, for example, lawyer Thomas Jefferson reflected on his long career and chided 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."<sup>11</sup> "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 to legal writers."<sup>12</sup> By that time, the warning had long gone unheeded.

The national heritage of public disdain for lawyers' written work, whose appearance on the printed page Congress member Maury Maverick famously disparaged as "gobbledygook,"<sup>13</sup> provided Professor Mellinkoff a sturdy foundation. It took his sterling 454-page book, however, to ignite the Plain English movement, whose influence is still felt in legislative halls, courts, administrative agencies, and law school legal writing classes. The movement's adherents argue that, to the extent possible, lawyers' writing and drafting should use language and style reasonably comprehensible to lay readers (that is, to most Americans).

The book's "then startling but now accepted thesis" commanded professional respect because Mellinkoff had credibility as someone who clearly understood the realities and pressures of law practice.<sup>14</sup> For nearly two decades, he had maintained a successful Beverly Hills, California practice representing actress Mae West and a number of other luminaries whose wherewithal enabled them to engage the best counsel they could find. Because he believed that the law thrived on needlessly complex, often unintelligible writing, he closed his law office to research and write *The Language of the Law*, which won the Scribes Award for best conveying the legal profession's true spirit.<sup>15</sup> His was time well spent.

## "IF YOU WISH TO BE A WRITER, WRITE"

In 1982, with his place secure as the nation's "leading figure in legal linguistics," Professor Mellinkoff published *Legal Writing: Sense and Nonsense*, which a commentator aptly called "a concise, practical guide to good writing. . . [.] witty, informative, and, as one would expect, well written."<sup>16</sup> The rest of this article concerns *Sense and Nonsense* and its continuing utility, but the impetus for my belated book review requires a brief threshold explanation.

The shelves of any well-stocked law library today overflow with "how-to" books about basic or advanced legal writing and drafting techniques.<sup>17</sup> Many of these books offer valuable instruction, but even the best ones can carry a lawyer only so far. Critics may be right that the general run of lawyers' written work today could still stand healthy doses of the four fundamentals identified

by Professor Henry Weihofen – precision, conciseness, simplicity and clarity.<sup>18</sup> After a lawyer studies the craft with a discrete number of how-to books during formal education and afterwards, however, the surest way to hone writing skills is to write, and not to scour yet more books about how to write.

Aristotle (384 B.C. - 322 B.C.) taught that, "For things that we have to learn to do, we learn by doing them."<sup>19</sup> Greek stoic philosopher Epictetus (55 A.D. - 135 A.D.) was even more specific: "If you wish to be a writer, write."<sup>20</sup>

Sports analogies illuminate this ancient advice. A pre-teen tennis player, for example, might read a half dozen books about how to play the game, but sooner or later he or she learns the most practical lessons from hitting the ball on the court, and not from sitting in some library reading yet more books about how to hit. Perhaps a lifetime in sports influenced the wisdom that veteran sportswriter Myron Cope once imparted to a young colleague just starting out: "Sit down at the typewriter and start writing. Just get started. That's how you write."<sup>21</sup>

Every so often, however, a particular how-to legal writing book offers something special. *Sense and Nonsense* is out of print now, but law libraries still catalogue it and used copies are readily available for purchase on the Internet. I write here about this volume because it still hits a home run as a practical, user-friendly and thought-provoking guide for lawyers who recognize that refining their expository writing style and legal drafting skills should remain a lifelong pursuit.

## "LAWSICK" AND ITS CURES

"Too many lawyers," says Professor Mellinkoff on the first page of *Sense and Nonsense*, "are long on law and short on English, especially writing it."<sup>22</sup> As we might expect from someone who (as the *New York Times* put it) "waged fierce and clever battle against lawyerly language" throughout his career,<sup>23</sup> he opens the book by coining a new word to describe the state of lawyers' written expression – *lawsick*. In its noun form, he tells us, "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)."<sup>24</sup>

*Sense and Nonsense* seeks a cure for *lawsick* in two parts, capped by helpful appendices. Part One prescribes Seven Rules, each illuminated by a trove of illustrations and applications: (1) "Don't confuse peculiarity with precision," (2) "Don't ignore even the limited possibilities of precision," (3) "Follow the rules of English composition," (4) "Choose clarity," (5) "Write law simply," (6) "Before you write, plan," and (7) "Cut it in half!" Part Two ("Blunders and Cures") provides useful exercises that enable readers to learn by doing.

## PART ONE: "THE SEVEN RULES"

"Don't confuse peculiarity with precision."<sup>25</sup> Two core lessons here: (1) "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”;<sup>26</sup> and (2) “When in doubt, err on the side of assuming that law words are not precise, and explain yourself.”<sup>27</sup>

Consider, says Professor Mellinkoff, what might happen when two non-lawyers jot notes about a contract. They are likely to begin with a precise statement: “We agree. . . .” If they had left the task to their lawyers, law words might intrude and the first line would read, “In consideration of the covenants hereinafter contained,

## “How often do we still hear it said that someone ‘writes like a lawyer’? How often do we hear it meant as a compliment?”

the parties hereto agree. . . .”<sup>28</sup> Peculiar perhaps, but not more precise.

“Don’t ignore even the limited possibilities of precision.”<sup>29</sup> More lessons, including these: (1) “Precise-as-you-can takes longer, and is well worth it”;<sup>30</sup> (2) “Sloppy writing requires special attention, and usually gets it, in court”;<sup>31</sup> (3) When you say “no,” beware of double negatives and similar inartful expressions that may leave the injunction in doubt, and may even indicate “yes” or “maybe”;<sup>32</sup> and (4) “Beware the twofer,” that is, using one word to convey more than one meaning, or more than one word to convey the same meaning.<sup>33</sup> For example, does the date of the *demise*” refer

to the date of death, a lease or a conveyance?<sup>34</sup>

“Follow the rules of English composition.”<sup>35</sup> To say that this rule states the obvious is to state the obvious. “If it’s bad writing by the standards of ordinary English, 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.”<sup>36</sup>

In his 1964 *Harvard Law Review* essay discussing *The Language of the Law*, poet-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.”<sup>37</sup>

“Choose clarity.”<sup>38</sup> A few basics: (1) “Clarity depends more on how you say it than on what you have to say”;<sup>39</sup> (2) “[U]se ordinary words of the English language unless there is a good reason not to”;<sup>40</sup> (3) “Some law requires technical words. Hardly any law forbids explaining them”;<sup>41</sup> and (4) “Good form will make clearer whatever is there. Just be sure that something is there to make clear.”<sup>42</sup>

“Write law simply.”<sup>43</sup> “The only thing about legal writing that is both unique and necessary is law,” Professor Mellinkoff explains. “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.”<sup>44</sup>

“Before you write, plan.”<sup>45</sup> Why am I writing? Who is the likely audience? Do I have a tight deadline? 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. 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.”<sup>46</sup>

“Cut it in half!”<sup>47</sup> Justice Louis D. Brandeis taught that “there is no such thing as good writing. There is only good rewriting.”<sup>48</sup> Literary giants without law degrees have said the same thing.<sup>49</sup> So does Professor Mellinkoff, who advises, “Rewrite. Rewrite. Rewrite. . . until you run out of time.”<sup>50</sup> “Each time you rewrite you will find something to cut. Do not be disappointed if you also find something to add.”<sup>51</sup> The final product should be the tightest product possible because “[u]nnecessary words increase the opportunities for you and your reader to go wrong.”<sup>52</sup>

Professor Mellinkoff offers several hints, including a convenient “cut list” – 15 clusters of words whose elimination will likely produce a tighter final product. For example, cut Old Formalisms (“Be it remembered”) and Worthless Old and Middle English Words (Enclosed herewith), redundant modifiers (“surviving widow”), coupled synonyms (“null and void”), and footnotes loaded with text.<sup>53</sup>

## PART TWO: “BLUNDERS AND CURES”

Part Two of *Sense and Nonsense* provides valuable hands-on instruction for lawyers who want to use the Seven Rules and develop the eye of

a crackerjack editor.<sup>54</sup> “Mellinkoff, a master editor,” said 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.”<sup>55</sup>

As a bonus, *Sense and Nonsense* closes with information-packed appendices.<sup>56</sup> Five list legal jargon to avoid;<sup>57</sup> one lists “flexible words” that lawyers sometimes misuse as though they were precise;<sup>58</sup> two list ordinary English substitutes for legal argot or legal terms of art;<sup>59</sup> and one lists other useful books on grammar, word usage and punctuation.<sup>60</sup>

## CONCLUSION: “THE LANGUAGE BELONGS TO ALL OF US”

How often do we still hear it said that someone “writes like a lawyer”? How often do we hear it meant as a compliment?

“The language belongs to all of us,” wrote former NBC News correspondent Edwin Newman. “We have no more valuable possession.”<sup>61</sup> This precious national endowment includes the language of the law – the building blocks of our civil and criminal systems of justice – and every American has a stake in sustaining the potential of this language for effective communication in lawyers’ expository writing and legal drafting.

Shortly after *The Language of the Law* appeared in 1963, one writer found its pages punctuated by the author’s “fundamental respect for the law, its spirit, its tradition, its moral and ethical utility.”<sup>62</sup> When Professor Mellinkoff died in 1999, four of his UCLA colleagues explained that “Da-

vid 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.”<sup>63</sup>

Old ideas sometimes die hard, but Professor Mellinkoff wrote from optimism for the fabric of the law. “Some lawyers, and many more people,” he said in *Sense and Nonsense*, “have become convinced that it is possible and also important to write law pretty much in English, understandable English.”<sup>64</sup> If he was right that “[l]awsick is on its way out,”<sup>65</sup> lawyers and other Americans owe him continuing gratitude for his gentle but strong medicine.

## ENDNOTES

1 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).

2 Philip Hager, *supra* note 1. See also, e.g., Don J. DeBenedictis, *Saving Trees, Reducing Waste: Two States Consider Rules Requiring Court-Filed Papers to be Recycled*, 78 A.B.A.J. 26 (Oct. 1992) (discussing Illinois and Florida).

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

4 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).

5 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).

6 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 4 (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”).

7 DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW*, *supra* note 5, at vii.

8 *Id.*

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 417-18 (A. Bergh ed. 1907) (letter to Joseph C. Cabell, Sept. 9, 1817).

12 Eugene C. Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 A.B.A.J. 1057, 1057 (1954). See also, e.g., Jay Wishinograd & Douglas E. Abrams, *Book Review*, 1981 DUKE L.J. 1061, 1061-62 (reviewing George D. Gopen, *Writing From a Legal Perspective* (1981)).

13 JOHN B. BREMNER, *WORDS ON WORDS* 177 (1980). See also, e.g., FRED RODELL, *Woe Unto You, Lawyers!* 12 (Berkley Books ed. 1980) (reprint of book published in 1939) (“despite what the lawyers say, it is possible to talk about legal principles and legal reasoning in everyday non-legal language”) (emphasis in original).

14 Susan Westerberg Prager, *David Mellinkoff: An Affectionate Tribute*, 33 UCLA L. REV. 1247, 1247 (1986).

15 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 4, at A17. See also DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (1973); DAVID MELLINKOFF, *LAWYERS AND THE SYSTEM OF JUSTICE* (1976); *Legal Writing: Sense and Nonsense* (1982); DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE (1992).

16 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) (reviewing David Mellinkoff, *LEGAL WRITING: SENSE AND NONSENSE* (1982)) (*Sense and Nonsense* is “carefully conceived and persuasive, . . . an important contribution . . . full of solid advice that all lawyers can use in their work.”); Susan Westerberg Prager, *supra* note 14, at 1248 (*Sense and Nonsense* provided “a detailed conceptual framework for testing, improving, and shortening legal writing”).

17 For good lists, see, e.g., Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying*

*the Language of Legal Writing*, 56 ME. L. REV. 239, 244 n.13, 246 n.19 (2004); Marlyne Marzi Kaplan, *Reference Books Make Great Holiday Gifts*, 26 FLA. B. NEWS 22 (Nov. 1, 1999).

18 See, e.g., RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 3 (5th ed. 2005) (“We lawyers. . . use eight words to say what could be said in two. We use arcane phrases to explain commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers.”). See also HENRY WEIHOFEN, *LEGAL WRITING STYLE* 8-104 (2d ed. 1980) (discussing these four fundamentals).

19 ARISTOTLE, *NICOMACHEAN ETHICS*, Book II, Ch. 1 (H. Rackham, trans. 1926).

20 LEWIS C. HENRY (ED.), *BEST QUOTATIONS FOR ALL OCCASIONS* 263 (1964).

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, *LEGAL WRITING: SENSE AND NONSENSE*, supra note 9, at xi.

23 David Mellinkoff, 85, *Enemy of Legalese*, supra note 4, at 37.

24 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE*, 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.* at 32-60.

36 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE*, supra note 9, at 44. See also, e.g., 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.”).

37 Archibald MacLeish, supra note 6, at 490.

38 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE*, supra note 9, at 61-99.

39 *Id.* at 61.

40 *Id.* at 62.

41 *Id.* at 65.

42 *Id.* at 91.

43 *Id.* at 100-113.

44 *Id.* at 100.

45 *Id.* at 114-25.

46 *Id.* at 114.

47 *Id.* at 126-44.

48 EUGENE C. GERHART, *QUOTE IT II: A DICTIONARY OF MEMORABLE LEGAL QUOTATIONS* 462 (1988).

49 JACQUES BARZUN & HENRY F. GRAFF, *THE MODERN RESEARCHER* 34 (5th ed. 1992); Elsie Goth Marshall, 1936: *Red Cloud*, *THE NEBRASKA ALUMNUS* (1936), available at <http://www.unl.edu/Cather/works/nonfiction/bohlke/interviews/1936.htm> (quoting Willa Cather).

50 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE*, supra note 9, at 126.

51 *Id.* at 140.

52 *Id.* at 128.

53 *Id.* at 133.

54 *Id.* at 145-84.

55 Robert P. Charrow, supra note 16, at 1095-96.

56 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE*, supra note 9, at 185-221.

57 *Id.* at 185-96 (Appendices A-E).

58 *Id.* at 197-98 (Appendix F).

59 *Id.* at 199-203 (Appendices G-H).

60 *Id.* at 219-221 (Appendix J).

61 EDWIN NEWMAN, *A CIVIL TONGUE* 19 (1976).

62 See David Mellinkoff, *Attorney Advocated Plain English*, supra note 4, at A17 (obituary quoting 1963 review by *L.A. Times* book critic Robert Kirsch).

63 University of California: In Memoriam, 2000, David Mellinkoff: Los Angeles 181, [http://content.cdlib.org/xtf/view?docId=hb1r29n709&doc.view=frames&chunk.id=div00047&toc.depth=1&toc.id=\(statement of Benjamin Aaron, Jesse Dukeminier, Kenneth Karst and Herbert Morris\)](http://content.cdlib.org/xtf/view?docId=hb1r29n709&doc.view=frames&chunk.id=div00047&toc.depth=1&toc.id=(statement of Benjamin Aaron, Jesse Dukeminier, Kenneth Karst and Herbert Morris)).

64 DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE*, supra note 9, at xii.

65 *Id.*



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