

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.¹ 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.²

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."³

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.⁴ 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.⁵ 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."⁶

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.⁷ 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."⁸ "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."⁹

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."¹⁰

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."¹¹ "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' Manbo-Jumbo', etc. should be a warning to legal writers."¹² 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,"¹³ 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).

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