

Watch Your Language

BY MICHAEL McCLORY

Writing to win requires clarity and brevity, a top lawyer demonstrates in a legal classic.

Career Advice

David Mellinkoff was one of the most successful lawyers in America in the 1940s and '50s. With an undergraduate degree from Stanford, a law degree from Harvard, and a lucrative Beverly Hills practice, he was the prototype of what we would today call a “celebrity lawyer”: His clients included Mae West and other Hollywood illuminati.

What was the secret of his success? Mellinkoff adhered to what he called “the principle of simplicity.” He learned early in his career that if “communication is the object,” a lawyer’s language should “agree with the common speech, unless there is a reason for a difference.” He disentangled the web of opposing lawyers’ arguments and judges’ decisions by going to the heart of a case with the strong verbs and direct phrasing that are inherent in the English language. Mellinkoff found that if a brief was “intelligible”—written in “language that fools could not misunderstand and knaves could not twist”—judges could more easily follow his argument, understand his point of view, and rule in his favor.

Mellinkoff’s use of what has come to be known, often simplistically, as “plain English” was so successful that in 1956, at age 41, he was able to shut down his law practice, sell his house, and retire with his wife to the woods of Marin County in northern California. But his was neither an ordinary retirement nor a permanent one. Mellinkoff had decided to take upon himself the task of unraveling the complexities of legal language—dating back beyond the Middle Ages to the days of the ancient Greeks and Romans—in an effort to understand why that language had become a burden, rather than a blessing, and to free lawyers from their dependence on the inveterate “cascade of words” accompanied by the “wandering afterthought.” When he emerged from the woods seven years later, he had completed what stands as the most important book on the law published in the United States in the 20th century: *The Language of the Law*.

After the publication of *The Language of the Law*, Mellinkoff accepted a position at the UCLA Law School, where he further distinguished himself as a teacher and the author of several more books.

The Language of the Law not only traces the development of the many obscurities and absurdities of legal language, but also presents examples of how lawyers might achieve their purposes more effectively by mastering the art of plain English. Although advocating an approach that helped him win scores of high-profile cases, Mellinkoff readily acknowledges that creating a simple, straightforward writing style is hard work, that it is much easier to present an idea through long-winded pontification and layer upon layer of legal jargon.

He also observes that if the members of the legal community—not only lawyers and judges involved in arguing cases, but also those who draft legislation and write government regulations—knew more about English, they would be more likely to communicate in that language and less inclined to rely on its lackluster cousin, legalese.

He is not shy about enlivening his writing with acerbic wit: The lawyer’s yearning to make an impression, Mellinkoff suggests, often leads to an attempt at elegant variation, which in turn can produce a kind of verbal clumsiness. Why, he questions, would anyone want to clarify a point by resorting to an expression “‘like a written instrument’? Is it to avoid confusion with a musical instrument, so that no one will think you are talking about a French horn when you mean a lease?”

Mellinkoff also takes aim at what he calls “contagious verbosity,” a term describing a common linguistic virus (not necessarily confined among the learned professions to lawyers) that compels the writer, in the name of precision, to express an aggregate of ideas in a single sentence. In addition to providing page after page of examples demonstrating that “the long sentence is not precise,” Mellinkoff says that sentences “can usually be made more precise by being chopped up and punctuated.” Here’s one example:

“The White Walnut Coal Co. is a corporation engaged in mining and selling coal, its mines and places of business being located in Pinkneyville, Perry County, Illinois.”

Mellinkoff comments wryly: “[O]nly at the end” of the sentence “is the reader assured that the White Walnut Coal Company is not selling ‘its mines and places of business.’” He

does not rewrite the sentence in question, but the implication is clear: Why not simply stop and start over again?

“The White Walnut Coal Co. is a corporation engaged in mining and selling coal. Its mines and places of business are located in Pinkneyville, Perry County, Illinois.”

He stresses the importance of punctuation not only in limiting the length of sentences, but also in shaping the message to deliver the writer’s intended message. In *The Language of the Law*, Mellinkoff makes more references to “punctuation”—at least 70—than to “statutes” or “intelligibility” or any area other than “law language” and “lawyers.”

Unfortunately, because of the well-publicized inadequacies of our educational system, most lawyers nowadays, like other professionals with advanced degrees, find themselves saddled with little more than subjective clichés (e.g., “put a comma where you hear a pause . . .”) when it comes to punctuation.

OUT OF THE PAST

“Hearing” pauses is essentially a medieval concept, a carry-over from the days before the advent of the printing press, when oral arguments were the only arguments. Court scribes simply copied down the words as best they could, adding marks here and there in an attempt to capture the vocal inflections and modulations of the various speakers. Only a tiny percentage of our population today is capable of “hearing” pauses and translating them accurately into commas or semicolons—just as only a gifted few can learn how to play the piano “by ear,” without having to learn how to read a musical score.

Acknowledgment of punctuation as an aid to visual comprehension has been around since the days of Noah Webster, who graduated from Yale in 1778, studied law, was admitted to the Connecticut Bar in 1781, and founded the first daily newspaper in New York in 1792. Mellinkoff points out that the “ancient oral bias of punctuation as an aid to speakers and listeners—with ultimate appeal to the ear— has yielded to punctuation directed to the eye. Punctuation for pause accepted by Noah Webster [in 1828] is displaced by punctuation for meaning in the unabridged edition [in 1840] of his famous dictionary.”

The “old untruth that ‘punctuation is no part of the statute’ has been directly and repeatedly challenged,” Mellinkoff says, giving specific examples of court rulings that cite misplaced punctuation as responsible for unintended ambiguity. What’s more important, perhaps, is that he recognizes the importance of avoiding the self-defeating “wandering afterthought.” By breaking up long sentences into clauses and phrases that are “intelligible,” lawyers need not “be reluctant to compose a paragraph with more than one period.”

At the same time, Mellinkoff is not hung up on short sentences as the beginning and the end of legal discourse: “A master craftsman may so weave a one-sentence paragraph that it becomes a thing of precision, clarity, and even beauty,” he says, adding that “it is possible” to come up with “one good, long sentence, so that an afterthought does not wander, or may even appear to be a forethought. But many have failed in the attempt.” Mellinkoff is careful to distinguish between “composing time and reading time. It takes more time to write briefly than verbosely. . . . The time-saving of brevity comes in the reading, not the writing.”

While the discussion of subjects such as punctuation’s changing role—from the days of the old oral legal tradition to the present-day practice of mostly written proceedings—is at once informative and entertaining, *The Language of the Law* has two distinct shortcomings.

First, Mellinkoff does not explain anything about specific punctuation techniques or how to apply them. The 20 or so fundamental punctuation practices that seasoned professional editors in America’s publishing industry use to achieve a reader-friendly style are never identified. This is a particularly unsettling deficiency because the publication of *The Language of the Law* in 1963 coincided with the free fall in standards at every level of our educational system. Critical study of the relationship between grammar and punctuation, an integral part of the English curriculum when Mellinkoff was in school in the 1920s and ’30s, was being phased out in the ’40s and ’50s—and virtually eliminated in the ’60s, ’70s, and ’80s. So Mellinkoff’s advice to use punctuation to shape the argument and ease the burden on the reader must necessarily fall on the deaf ears of a generation that lacks the know-how to practice it. Many prominent American newspapers, in response to the reality that most of their young reporters and aspiring editors lack an understanding of how the English language works, have instituted in-depth training programs in the fundamentals of writing. Few law firms and fewer branches of government—whether executive, judicial, or legislative—have followed their example.

Second, *The Language of the Law* is out of print. Copies are still available through amazon.com, with prices starting at \$160, but at least in the foreseeable future, you won’t be able to pick one up at your local bookstore.

Michael McClory, director of the Write Smart program in Arlington, Va., provides writing training and editorial services to law firms, law students, educators, and government agencies. He can be reached via the Internet at www.writesmart.com.