

Introduction

MAKING SENSE OF THE
NONSENSICAL

Aside from those engaged purely in literary pursuits, lawyers probably do more writing than any other professional...

—Judge Benjamin N. Cardozo

Lawyers are professional writers. We spend as much time putting our thoughts into words as do journalists, novelists and poets. Yet we face special problems. “[W]e have a history of wretched writing, a history that reinforces itself every time we open the lawbooks.”¹ A large portion of our job entails squeezing knowledge from law books and guiding our clients through a thicket of court decisions, legislation and regulations—none of which speak to ordinary people. At times, our role is equivalent to an interpreter of foreign languages. We must make sense of nonsensical language from on high. Because the law is forever evolving, we are constantly learning new languages we must interpret for our clients.

Yet, frequently, *unlearning* something is harder than learning something new. My goal is to help you learn how to

communicate effectively in every situation, whether it be with clients, colleagues, or the courts. Your goal should be writing that is direct, simple, brief, strong and lucid.

One of the strongest forces in the universe is inertia, and unless you commit to improving your methods of communicating, your writing will continue to rely upon much of the gibberish you learned in law school. Most of what we learned there, and much thereafter, was through reading the opinions of judges, then attempting to emulate their wisdom. Unfortunately, that emulation comes at a price—prose that can be very dense. Other writers don't suffer from such a handicap in the early years of their profession. As part of developing their writing style, journalists read well-constructed essays, novelists read classic works of literature and poets read great poetry, all providing valuable examples for writing well. Not so for lawyers. In our formative years, we read case law.

Unfortunately, few judicial decisions are inspiring. From my perspective, some of the most obtuse, footnote-laden, god-awful writing can be found in law journal essays and judicial opinions. Many scholarly writings by law school professors and judges are indeed brimming with wisdom, akin to veins of gold waiting to be mined. But most of these authors seem indifferent to the fact that extracting wisdom from their knowledge would be much easier had it been presented in an engaging style.

Indeed, style matters. Take a moment to read aloud an appellate court ruling or a law review article to a friend or family member. You will likely laugh or cry by the end of the second page. Generally, the only people who read these learned primers are other judges, legal scholars and affected lawyers. For many judges and legal scholars, these writings are rarely about simplifying an issue, they are about expounding on the law, layer

upon layer. The more intricate and complex their discussion, including an abundance of footnotes, the better. Though reading such works is unavoidable, mimicking their writing style guarantees you will never be an effective communicator. Few lawyers have such a captive audience. We must communicate not only with courts and our colleagues but, more importantly, with the people who pay our fees, namely clients.

Examine your daily routine and you will see that a large part of your role as an attorney is that of a professional writer, explaining the law to others. With the exception of lawyers on their feet daily in a courtroom, every other attorney conveys most information in written form. As a result, you must think like a professional writer. Clarity, in everything you write and say, must be your primary concern. Your writing must effortlessly impact your readers' thinking or you have failed.

In my years on the bench, I presided over hundreds of jury trials. Before each trial, I reminded the lawyers, "It's not the jury's job to figure out your presentation, it's your job to make yourself understood." That is true of every communication you make as an attorney, whether written or spoken. The more effort invested in your writing, the less required of your reader.

We all have audiences to whom we wish to deliver information. In our profession, we never know with certainty who our audience is. An email, letter, contract, memorandum or brief on a motion may be read by many sets of eyes before its message is delivered to every interested party. As a professional writer in the law, the words used to express your thoughts on any matter must not be misunderstood. Readers must readily grasp your meaning or you have missed the mark.

To avoid frustration with your writing, be mindful of four terms that course through this book: the first three are *precise*,