Hearing Myself Think: Some Thoughts on Legal Prose

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The essay that follows is an excerpted transcription of Mr. Sack's comments in a roundtable discussion at the 1993 Annual Meeting of the American Bar Association. The program was sponsored by the Legal Writing Committee of the ABA Section on Legal Education and Admission to the Bar.

I deal professionally with the media and with First Amendment questions. While, as a lawyer, I am involved — as all lawyers are — with the words of the law, the subject matter of my practice, too, is words. Sometimes well-written words, sometimes not so well written, but words, words, words.

None of this makes me an expert. I'm not here because I have written about, or even read about, the subject to which we are addressing ourselves. I'm here, instead, because I find the subject of writing interesting. And, not incidentally, I'm here because I was asked to come. In any event, as an observer, and not an expert, there are three aspects of legal writing that particularly interest me:

First, of course, words communicate. The passing of ideas, the attempt to persuade, always proceeds from a single mind, the writer's, to another single mind, the reader's. One on one. I think people tend to forget that. I hate briefs written by committees. In a brief by committee the sense of one mind addressing itself to another is lost.

Second, writing is a window into the mind of the author. Bad writing is very often not lack of skill, but lack of thought. The first thing I learned as a clerk to a federal district-court judge once

upon a time was that when I couldn't write what I was supposed to, it wasn't because I didn't know how to write it. It was because I didn't know what to say. "Writer's block," I discovered, is actually "thinker's block." The cure is surely not to sit there and try harder. It is to put down your pen — we used to write with pens — and go for a walk and think about what it is you actually want to say. When you figure that out, the writing is easy.

Third, even though some dismiss this notion as being rather parochial, the fact remains that my environment is important to me. From early morning to late at night, our days are filled with words. More time than sleeping, more time than eating, more time than waiting for a plane to push back, we spend awash in words. And when that sea becomes polluted, it becomes a very much less pleasant life to lead. So, bad writing, ugly writing, pollutes the environment in which all of us are consigned by profession to live.

My impression about legal writing — I gather just about everyone's impression about just about everything — is that, yes, things are getting worse. Largely, with notable exceptions here and there, legal writing is not very good writing. It's stilted. It's imprecise. It's inelegant. It's just plain ugly.

Is it worse than it was, say, 20 years ago? Yes, I think it probably is. I remember a Fifth Circuit decision of that era. The issue was whether it was permissible under the First Amendment for a Palm Beach municipal employee who administered the city's public auditorium to refuse to allow the musical *Hair* to be performed there; in effect, to ban it. Most judges today, I believe, would say that he couldn't do that, that it is "flatly unconstitutional." That's what Judge Goldberg concluded in 1972, but it's not what he said. He said, "Finding that subjective authoritarianism in the denial of First Amendment rights is constitutionally intolerable, we conclude that the dictate of the auditorium manager in this case cannot withstand the mildest breeze emanating from the Constitution." What a pleasure to read language so finely wrought. It seems to me far less likely that you would find that sort of music in the opinions of the Fifth Circuit or any other circuit today.

What are the reasons for the decline? The first is obvious but profound: economic pressure. In 1970, as I well know, one could become and stay a partner in a New York City law firm of some note and merit while actually billing fewer than two thousand hours a year. Expectations, now — economics, now — are different. And the leisure that permits craftsmanship has dissipated.

Second, perhaps as a result, there does indeed appear to be less craftsmanship. It takes more time to produce a good letter than one that just gets the job done. There remain those who, irrespective of economics, simply will not send out work product with their names on it unless they think it is well crafted. But there are fewer such lawyers, I fear, today.

The third reason is the curmudgeon factor. I wonder whatever happened to the curmudgeon.

The curmudgeon was the partner who simply would not let me get away with anything. I would draft a letter and it would be returned with a note, "Nice try, Bob. Try again." The curmudgeon would, in the end, throw up his hands and then take a copy of Strunk and White from the bookcase behind his desk and throw it at me, saying, "Here, Bob, read this." (To this day, I never, never begin a sentence with *however*. I don't remember why, but I do remember that Strunk and White said never, never begin a sentence with *however*.)

What has happened to the curmudgeon? The curmudgeon, I think, is too busy — he or she is not in the office when the draft letter comes in or the final one goes out. The curmudgeon is in court, or in a meeting, or out of town, or just plain exhausted, but not there to nitpick.

Or the curmudgeon was not busy enough. So he or she has retired early. Production, money produced, wasn't up to snuff.

I'm not sure. Maybe it's just that no one listens to curmudgeons anymore.

Wherever the fault lies, if fault there is, I do not suggest you seek it principally in the law schools. A law firm, a decent law firm, certainly a fine law firm, is supposed to be something like a teaching hospital — teaching its associates like young doctors, one

on one. What is an associateship if not a residency, where close supervision is required for seven or eight years before the young lawyer is allowed to exercise responsibility on his or her own? Senior lawyers are teachers in this process, and they have seven or eight years with their students. (Eight or nine if you include the associates' summer sojourn with the firm, although as far as I can tell summer associates mainly have lunch.) That's where the real training ought to come. Largely, I fear, it does not.

Lawyers, as writers, therefore now tend to be self-taught. The way they teach themselves is to write the way they think lawyers probably write. They write so it sounds as though they are writing like lawyers. And thus their writing too often reads as though it were a parody of legal writing. In a sense it is a parody of legal writing. It is an imitation of an imitation of an imitation of something that probably didn't exist in the first place.

As a result, when I get back to my office today, I assure you that I will have on my desk letters, from other law firms and even from my own, that refer to the "above referenced" or the "above captioned," when almost always the word *this* will do. Someone will tell me that he or she has enclosed "herewith," or more likely, ask me to "find enclosed herewith," when in either case the word *enclosed* would suffice. (My personal reaction is my own typical cover letter: "Here it is. Best regards," because that gets the job done. And I'm not sure the *best regards* is necessary.)

A letter on my desk will also refer to "the said" something, which is a redundancy, as my favorite curmudgeon used to remind me. *This* is probably enough, *said* if you must, but not *the said.* And one of my regular correspondents will doubtless thank me in advance for my courtesy, although he means to say "please."

On my desk will be a document extensively defining terms the meaning of which are perfectly obvious even to me. It will say "XYZ Corporation (hereinafter 'XYZ')" or "(hereinafter sometimes 'XYZ')" when no reader would have any doubt what is meant anywhere in the letter by an unidentified "XYZ." Define-a-mania gets so bad, at times, that there may well be a document on my

desk that defines a term and never uses it again, or one that defines the same term twice. Nobody, I fear, is paying much attention.

It is certain that there will be, in at least one document, an instance of my favorite term, *and/or*. The modern drafter, a person who may even work with me, would doubtless rewrite the First Amendment. It would begin: "Congress shall make no law respecting an establishment of religion, and/or prohibiting the free exercise thereof, and/or abridging the freedom of speech, and/or the press." And if I remonstrate that that is inelegant, my colleague will reason patiently, "If you don't say 'Congress shall make no law abridging the freedom of speech, and/or the press,' if you just use the word *or*, plainly the First Amendment will permit Congress to make a law that abridges both freedom of speech and freedom of the press. You have not covered that eventuality."

That's nonsense, of course. *Or*, in that context, includes *and*. *And/or*, too often, is an excuse for not thinking through whether *and* or *or* is meant. So the writer says both, instead, and moves on.

Lawyers are not listening to themselves. I do mean "listen." When one receives language, written or otherwise, it seems to me that what one does is to listen to it, not to see it. It does not enter the perceiver's mind through the eyes; it enters through the ears.

Here's proof: take a great soliloquy from *Hamlet*. It is equally moving when read if it's finely bound and printed or if it comes in a cheap little paperback. How the eye perceives it does not much matter. If, on the other hand, a great actor speaks it, that counts a great deal — because we listen to words, we care about how they sound, not how they look. Even lawyers' written words, then, are heard, and I don't think many lawyers are listening.

In this pursuit, a curmudgeon is wonderful. It's a great help to have somebody who will take the time to listen to your words and say: "That doesn't make any sense; that doesn't hang together; that doesn't sound right."

I think, too, lawyers should be taught to listen to themselves; we are not teaching them to do that. If nothing else, a lawyer should read his or her written words aloud before an important

document leaves the office so that the author knows how it sounds.

You have all had a recent experience in which you have decided to read to someone, during the course of a telephone conversation, something you have just drafted. The draft looks fine, you pick up the telephone, and begin to read it aloud. What happens? Invariably, as you're reading it, you take out your pen, and start to rewrite what you're reading — because you are hearing it for the first time, and you have begun to realize that it doesn't sound right.

I urge lawyers, as a last resort, to get ahold of their pet cocker spaniels and read them draft briefs before they are filed. The dog may or may not have useful suggestions, but the lawyer will have heard, perhaps for the first time, what he or she has said.

One of the two great curmudgeons in my life clerked for Justice Oliver Wendell Holmes. And Holmes, he told us, would read aloud to his law clerks all of his opinions before they were issued. He did not care, surely, what his law clerks thought about them. He wanted to know, not how they read, but how they sounded.

On the other hand, of course, I understand that some words have technical meanings and that sometimes those "words of art" must be used no matter how they sound. They have a particular meaning and you have to stick with them.

Let me give you an example of a mandatory use of words from a nonlegal context. Many newspapers — and it tends to drive lawyers a little crazy — but many newspapers insist on saying that a defendant "pleaded innocent"; they will not report that he or she "pleaded not guilty." I've gone to clients for many years and said, "That's wrong. People don't plead innocent; they are not found innocent. They plead and are found 'not guilty.'" Now I realize that newspaper writers live in perpetual fear of the word *not* either being dropped by a printer or being changed from *not* to *now*. Therefore, wherever possible, they shy away from the word *not*, even at the expense of strict accuracy. Similarly, even in newspapers as formal as *The Wall Street Journal*, you often see the use of

a contraction — *doesn't* instead of *does not*. The reasoning is the same. Using the contraction avoids use of the dangerous word *not*.

The lesson is simply this: Before you dismiss others' workmanship, do understand why they have said what they have said; there may be good reason for it.

Lastly, a subject no member of the panel has raised, to my surprise: What about computers? Do they help good writing or do they not? In response, I'm reminded of the science-fiction movies we all saw as kids. A profound voice is heard portentously describing some invention, device, or discovery: "It is a power for good or it is a power for evil." That's kind of where I come out with computers. They are only tools. It's a question of how you use them.

I was introduced to my first computer three years ago; and I adore it. It enables me to push things around, to take a phrase and put it first into one paragraph and then into another, then to rephrase the idea, then to abandon it, and to continue fiddling around until long after most secretaries would have either gone home or quit. It allows me to pull up stuff that I've used elsewhere and use it again. And the spelling-checker is nifty, though not flawless.

So, I think the computer is a great tool to use in sculpting a document — and in doing it much more quickly than you could with old-fashioned pencil drafts, typing, and endless redrafting. Indeed, I might point out, with some misgivings given Judge Mikva's warnings, that a computer is particularly handy when creating footnotes — even if you're writing an article for a law review that's entitled *Goodbye to Footnotes* and your sole footnote reads: "U.S. Circuit Judge, D.C. Circuit."[1]

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[1] Abner Mikva, *Goodbye to Footnotes*, 5 U. COLO. L. REV. 647, 647 n.1 (1985). [Editors' Note: Judge Abner Mikva, of the United States Court of Appeals for the District of Columbia, was Mr. Sack's co-panelist who argued against the use of footnotes.]