April 19, 1989

The Honorable Roger J. Miner
United States Circuit Court Judge
United States Court of Appeals
Second Circuit
United States Post Office and Courthouse
Albany, N.Y. 12201

Dear Judge Miner,

This short note is to acknowledge that you will be receiving the Froessel Award at the Annual Law Review Banquet. As you already know, the banquet will be held at the Grand Hyatt on Thursday, April 27, 1989. Cocktails will begin at 6:30, with dinner following at 7:30 p.m.

Both Dean Simon and Bernard Mendik will make opening remarks. Following their remarks, I will introduce you.

We have reserved a space in Volume 34-1 for publication of your Froessel Award Acceptance Address. If the address is written on a disk, could you please provide that along with the hard copy of the speech? Finally, Brian has agreed to give us a copy of any sources which we may have difficulty locating.

I look forward to seeing you on April 27.

Sincerely,

[Signature]

rey W. Berkman
or-in-Chief
I am happy to accept this Award, not for myself, but on behalf of all those who have served on our Law Review during the 34 years of its existence. I am, of course, very proud to have served as Managing Editor of Volume 1, Number 1, which made its appearance in March of 1955. Many wonderful people devoted their time and talents to the publication of that first issue, and many, many more have contributed over the years to making our Law Review the outstandingly successful journal it is today. I therefore take this opportunity to salute all the alumni of the New York Law School Law Review, as well as the present staff, for a job well done! The Froebel Award belongs to all of you!

I am most heartened by the prospect of modern facilities for the Law Review in the new Mendelsohn Library Building. Proper quarters and equipment are essential if a Law Review staff is to function effectively. Though the walls of memory, I still see those dank, poorly-lit rooms in the basement.
of 244 William Street, next to the Bookstore, when Isaac Newton I was born. The offenses
provided to the Law Review since my day haven't been all that much better, and it is high time
that the situation is corrected. We who are the Law Review alumni should make sure that the needs of our
Law Review always are met. We should also bear in
mind that a Law School is known by the Law
Review it keeps.

Looking back at the first issue of the
New York Law Forum, as our journal then was
named, one is reminded of the ancient proverb: "The
more things change, the more they stay the same."
Consider some of the topics covered
during the student
years: the right to a public trial; the interpretation
of a restrictive clause in an insurance policy; the rights
of sưvientes in legislative investigations; the liability
of a state hospital for an assault committed by a
released patient; the rights of dissenting shareholders;
and comparative negligence. There was an article
On choice oflaw by Professor Juterna of the University of Michigan Law School and an article dealing with evidence of the character of an accused by Dean Prince of Brooklyn Law School. A section of the Journal entitled "The Progress of the Law" noted themoment studies in court delay, criminal law reform and the future of the legal profession. All these topics are just as timely today as they were 34 years ago!

One student piece seems strangely out-of-date, however. It revolved around a 1957 ruling of a Superior Court in Cook County, Illinois that artificial insemination of a wife by a man other than her husband constituted adultery and that the resulting child were illegitimate. The note has stuck in my mind all these years because I remember the first line of the piece as it was originally handed in. It read: "Artificial insemination has only lately come into the public eye." I decided to perform some editing on that first line.
Among the book reviews printed in that first issue was the review of a brand new hornbook published by the Foundation Press called "Hammern on Trusts." The review was written by one of our finest Associate Professors at New York Law School -- Milton Silverman. The lead article was written by that great lion of American law, Roscoe Pound, then Dean Emeritus of Harvard Law School.

The article entitled "The Judicial Process in Action" came to me in a form all too familiar to law review staffers -- all messed up, and with much cut and substance work required. "The Judicial Process in Action." I have returned to that article time and time again during the last 24 years -- not because it has always remained interesting and timely -- not because it has provided me with valuable insights in my work as a judge -- and not because it is a classic of legal literature. I have returned to that article time and time again because I never have understood the damn thing!!
And that, of course, leads nicely to my topic for this evening: "Confronting the Communication Crisis in the Legal Profession." I have been concerned for many years with the fact that lawyers of every variety are becoming more and more unintelligible -- to their clients, to the Court, to the general public and to each other. I therefore have written an article on the subject, which will be published in Vol. 24 No. 1 of the New York Law School Law Review. All 105 footnotes in the article already are in proper form, and no editing will be necessary -- or permitted. I shall not read the article to you. I once read, as a lecture, a law review article I had written, and my wife made me promise never to do it again. I therefore shall give you a one-page review of some of my thoughts on the subject, and refer of you to Vol. 24 No. 1 if you really are interested in the topic.

First of all, I think that the legal profession merely reflects a communication crisis
in the general society. For one thing, we are surrounded by doubletalk. Consider these examples collected from newspaper reports:

• Doctors at a Philadelphia hospital described a patient's death as a "diagnostic misadventure of a high magnitude."

• 5,000 workers at a Chrysler plant found out that a new "career enhancement program" meant the plant was closing and they were out of jobs.

• A stockbroker described the October, 1987 stock market crash as a "fourth quarter equity retreat."

• (I really love this one) Senator Orrin Hatch of Utah referred to capital punishment as "our society's recognition of the sanctity of human life."

What I do not understand is why lawyers tolerate doubletalk and inarticulateness in speech and writing. Twenty years ago, the National District
Attorney's Association, of which I then was a member, held its annual conference in New York City. During the conference, we had a luncheon speaker who was introduced as a member of the United Nations Legal Staff specializing in criminal matters. I recognized him as a local comedian and double talk artist. About 10 minutes into his meaningless spiel, a procureter from Georgia sitting next to me leaned over and said: "Ah caint under-
stand a lot of what that fella is sayin'." I replied: "You caint understand anything of what he is saying, because he is speaking doubletalk." "Isn't that somethin'," he said, "Ah just that real New York accent."
Confronting the Communication Crisis in the Legal Profession

Roger J. Miner
FROESSEL AWARD ACCEPTANCE ADDRESS*

CONFRONTING THE COMMUNICATION CRISIS IN THE LEGAL PROFESSION**

ROGER J. MINER***

I. INTRODUCTION

If communication is defined as expression that is clearly and easily understood,1 much of the written and oral expression of the legal profession simply fails to measure up to the definition. Inability to communicate afflicts all segments of the profession and is now pervasive enough to be classified as a crisis. It deserves our attention because the effective transmission of information, thoughts, ideas, and knowledge is essential to the efficient operation of our legal system. Ineffective expression in legal discourse diminishes the service of the bar, impedes the resolution of disputes, retards legal progress and growth, and, ultimately, undermines the rule of law. My purpose is to examine the expressive deficiencies of lawyers in their capacities as counselors, litigators, adjudicators, legislators, and educators. This examination is designed to demonstrate that communication failure is a serious and growing problem throughout the legal profession. It is also designed to

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* The New York Law School Law Review awarded Judge Miner the Charles W. Froessell Award for Outstanding Contributions to the Development of the Law. This award was established to honor the memory of Judge Charles W. Froessell, who received his LL.B. degree in 1913 and his LLM. degree in 1914 from New York Law School. Judge Froessell went on to serve in many public service positions, culminating in his elevation to the New York Court of Appeals. This address was delivered to past and present members of the Law Review, assembled for its annual banquet.

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1. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 269 (New College ed. 1976) (communicate: "To express oneself in such a way that one is readily and clearly understood").
suggest that there is a need to clarify, simplify, and edify in all forms of legal expression.

II. Counselors

The minute you read something that you can't understand, you can almost be sure it was drawn up by a lawyer.

— Will Rogers

The attorney as counselor is constrained to communicate with clients, colleagues, and government agencies. Communication with clients—to keep the client informed about the status of a case; to comply with requests for information; and to provide an explanation of matters sufficient to permit the client to make informed decisions—is an ethical obligation. The Code of Professional Responsibility exhorts lawyers to "exert [their] best efforts to insure that decisions of [their] client[s] are made only after [their] client[s] [have] been informed of relevant considerations." Yet, failure to communicate is near the top of the list of complaints made by clients about their lawyers. Frequently, an irreparable breakdown in the attorney-client relationship is occasioned by a lawyer's neglect to impart necessary information to a client clearly and promptly.

Effective counseling requires that clients be informed of the status of negotiations being conducted on their behalf, of offers of settlement in civil matters, and of proffered plea bargains in criminal prosecutions. Effective counseling also requires that attorneys explain to their clients the nature and effect of legal instruments, respond to questions bearing on the legality or desirability of actions proposed and undertaken, review the chances of success in litigation, and discuss ar-

3. See Model Rules of Professional Conduct Rule 1.4 (1983) [hereinafter Model Rules] ("(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").
6. Model Rules, supra note 3, Rule 1.4 comment.
7. See Code, supra note 4, EC 7-7.
8. Id.
rangements for the payment of reasonable fees for services rendered.\textsuperscript{13} In all these things, clarity of expression, written and oral, is essential. Unfortunately, the reports are rife with tales of the disastrous effects that the expressive deficiencies of counselors have had upon clients as well as upon counselors themselves.\textsuperscript{13} Client communication is not merely a device for reassuring the client or avoiding fee disputes; it is the \textit{sine qua non} of the service provided by the attorney as counselor.\textsuperscript{14}

Much ink has been spilled in the effort to promote the use of plain English by lawyers.\textsuperscript{15} Despite all the criticism directed at legalese, however, attorneys continue to employ arcane legal language when counsel-
ing clients. It is no wonder that clients rate lawyers as ineffective communicators and, according to surveys, generally will select one lawyer over another on the basis of ability to communicate rather than technical competence.\textsuperscript{16} Professional jargon is meaningless to a non-lawyer, and clients do not hesitate to characterize as “gobbledygook” the opinions of counsel they are unable to comprehend.\textsuperscript{17} One author has formulated the following rule for communicating with clients as well as the lay public generally: “Lawyer-to-lay writing should be fully humanized.”\textsuperscript{18} This excellent rule of communication should govern oral expression also, since the counsel of legal advisers is most often sought in the course of oral conversation. Indeed, conversational counseling often is a more effective way of advising clients, since it is flexible, tentative, and ongoing.\textsuperscript{19}

An all-too-typical example of attorney-client communication failure recently surfaced in a New York City newspaper report of a pending defamation action brought by a well-known comedian. According to the report, the defendant in the case, when questioned at a deposition about his ten million dollar counterclaim for services allegedly rendered under a management agreement, said: “I don’t know what it says and I don’t understand it.”\textsuperscript{20} The immediate result of that testimony was the withdrawal of the counterclaim, but the long-term result was to reinforce public skepticism of the ability of lawyers to communicate.

The inarticulateness of the bar has brought us to the point where law firms must hire public relations counsel—media advisers or image makers—to speak to the public for them and to advise them on how to deal with the press.\textsuperscript{21} There was a time when some people would refer to a lawyer as a “mouthpiece.” How surprised they would be to hear a “mouthpiece” speak through someone else! One must wonder whether the time is far off when an attorney will counsel clients through the medium of a “communicator.” Nevertheless, public relations is a legitimate institutional function of the bar. It is generally recognized that the erosion of public confidence in the bar has come about largely because of a failure to communicate an understanding of the role of lawyers in society and that much needs to be done to educate the laity in that regard.\textsuperscript{22} The bar performs its public relations function by provid-

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\textsuperscript{16} See Burke & Prescott, Client Interviews, A.B.A. J., Jan. 1, 1988, at 120; see also Blodgett, That #5% * Client!, A.B.A. J., Mar. 1, 1988, at 9.
\textsuperscript{17} See H. Weihofen, Legal Writing Style 205 (2d ed. 1980).
\textsuperscript{18} R. Weisberg, When Lawyers Write 88 (1987).
\textsuperscript{19} See H. Weihofen, supra note 17, at 215.
\textsuperscript{20} Johnson, Hirschfeld Drops Suit vs. Mason, N.Y. Post, Apr. 5, 1989, at 6, col. 2.
\textsuperscript{21} See Margolick, At the Bar, N.Y. Times, Feb. 24, 1989, at B5, col. 1.
\end{flushleft}
The widespread use of legal jargon in discourse with clients is sometimes attributed to bad motives on the part of the bar—escalation of fees, self-promotion, and deception. One commentator has posited "[i]nertia, incompetence, status, power, cost and risk" as "a formidable set of motivations to keep legalese." These motivations, he asserts, "lack any intellectually or socially acceptable rationale" and "amount to assertions of naked self-interest." My own experience has been that only inertia and incompetence drive the excessive use of lawyerisms and legalese in counseling clients and drafting legal instruments. Inertia is represented by the use of the same forms, form books, buzz words, precedent, methods, and practices over the years. Responses to questions and solutions to problems tend to be the same as the ones used in regard to similar questions and problems in the past. Thus there develops in a law practice a sameness and a resistance to change that come to have an effect on the lawyers in a firm and their successors. In this manner, the roots of inertia spread.

Furthermore, incompetence in expression now permeates the profession because of deficiencies in the early education of young lawyers. Modern education seems to provide an insufficient foundation in English grammar, style, and usage. As a law teacher, I have been astounded by some of the inadequacies in written and oral expression demonstrated by the brightest students. It should come as no surprise to educators that lawyers increasingly are unable to communicate with clients.

Since a counselor is required to "abide by a client's decisions concerning the objectives of representation ... and [to] consult with the client as to the means by which they are to be pursued," it is essential that advice as to objectives as well as means be conveyed as plainly as possible. The language of counseling must be respectful of client autonomy so as to avoid unjustified interference in client decision making. According to one commentator, the ideal goal is for a lawyer to "strive to enable her client not only to know what choices await him, but also to reach full decision-making capacity, and ... other perspectives ..." Since a lawyer's advice "need not be confined to purely legal considerations," and often

26. Id.
27. Model Rules, supra note 3, Rule 1.2(a).
29. Id. at 777.
implicates the "fullness of . . . experience" as well as an "objective viewpoint," it is essential that the client be made fully aware of the distinction between legal and non-legal advice. The level of expression may vary, depending on the level of sophistication of the client, but the information imparted must be full and complete. Prompt, clear and concise advice, written and oral, not only serves the decision-making process, but also demonstrates respect and concern for the client, elements sometimes absent in the contemporary attorney-client relationship.

The communication skills of those who initiate lawyer-to-lawyer transmissions have been found wanting in recent years, especially with respect to legal memoranda for internal law firm use. A writer has referred to "the countless hours of expensive legal time that must be wasted every working day, as partners and senior associates try to make use of . . . badly written law memos." Unnecessary digressions, the mixing of fact statements with legal opinions, and lack of order in the presentation of arguments have been identified as some of the deficiencies found. The lack of directness and excessive formalism of expression that characterize poorly written correspondence as well as inadequate legal memos are said to be especially apparent among young lawyers. Elimination of "incomprehensible muddles" in lawyer-to-lawyer discourse will facilitate the work of counselors and redound to the benefit of clients.

III. Litigators

Q. Mrs. Jones, is your appearance this morning pursuant to a deposition notice which I sent to your attorney?
A. No. This is how I dress when I go to work.

Essential to every litigator is clarity of speech in courtroom discourse. Yet trial judges frequently complain of the inability of courtroom lawyers to communicate with witnesses, juries, and the bench itself. This is indeed a strange phenomenon in a day when trial advocacy

34. Id. at 48, 49; Skelly, Verbatim, STUDENT LAW., Nov. 1985, at 46 [hereinafter Verbatim (Nov. 1985)].
35. R. Weissberg, supra note 18, at 94.
36. Verbatim (Nov. 1985), supra note 34, at 46.
is taught in law schools, in continuing education programs, and in books and articles covering all aspects of the subject, from the opening statement through direct- and cross-examination to the closing argument. Lawyers are bombarded constantly with advertisements suggesting the purchase of new books and publications designed to improve expression in the courtroom. A recent example: "Trial Communication Skills is the collaborative effort of three leading experts in the fields of trial practice and communication. Together, these three authors bring you a unique understanding of interpersonal communication and its application in the courtroom." Another: "[The author] is uniquely qualified to write about persuasion approaches for advocates. The basis for the information he presents in The Persuasion Edge has been collected and refined through the years as he's built his reputation in the field of communications and trial advocacy." Yet another: "Trial Excellence is a monthly newsletter, and the only one of its kind. Because it is exclusively about the best and most effective communication and performance techniques specifically for trial lawyers."

The stilted language of the law has no place, of course, in the questioning of witnesses or in the persuasion of juries. The question-and-answer set out at the beginning of this section demonstrates convincingly that legal terms should be avoided if there is to be understanding between lawyer and witness. In my opinion, the expressive deficiencies noted about trial lawyers are for the most part attributable to the lack of trial experience. At an earlier time, young litigators had the opportunity to cut their teeth in trial advocacy by trying simple cases in courts of limited jurisdiction. As more experience was gained, they proceeded to the trial of more complex matters, honing their courtroom skills as they progressed. Thus were learned the lessons needed to master the art and science of persuasion. Today, the economics of law practice make it prohibitively expensive to litigate small claims. The salaries paid to newly-minted lawyers in large law firms are such that the firm cannot afford to litigate any but the most lucrative cases. Even in those cases, courtroom resolution is rare, and it is not unusual to find litigation partners who never have conducted a single trial. In matters where the amount in controversy is small, clients ei-

41. Compendium Press, advertisement flyer for Trial Excellence monthly newsletter.
ther are relegated to some form of alternate dispute resolution or left to their own devices in small claims courts. Thus are experienced trial lawyers becoming an extinct species.

Inexperienced litigators frequently have communication problems during the direct examination of witnesses because they are unable to pose a question that will elicit an answer relevant and material to the case. A question that calls for a narrative statement and results in a rambling, incoherent mass of fact and speculation is one example of such an expressive deficiency. Another example is a series of questions written out in exact sequence. Responses that deviate from the sequence can cause irreparable problems for the rigid questioner. Inexperienced trial counsel convey to the jury the appearance of concealment by frequent objections to evidence, and a sense of uncertainty by aimless, rambling, and lengthy cross-examination of adverse witnesses. Finally, advice to clients regarding their own testimony, which witnesses to call, and what documents to offer, constitutes a selection process fraught with danger in the hands of inexperienced counsel. Apprenticeship and specialization in trial advocacy may be the only way left to restore communication to the trial courtroom.

As a long-time observer of the litigation scene, it seems to me that the communication crisis has affected appellate advocacy even more than trial advocacy. Appellate advocacy comes in two parts, briefs and oral arguments, and its sole object is the persuasion of appellate judges. The brief is the more important part of appellate advocacy, because judges have it in hand both before and after oral argument. It is physically with us long after the argument evaporates and is forgotten. The briefs are the first thing I look at, even before the decision of the trial court or any part of the appendix or record. I refer to the briefs when writing an opinion or before signing off on a colleague's

46. See Lundquist, Advocacy in Opening Statements, Litigation, Spring 1982, at 23, 64.
49. See Becker, Tips for Aspiring Trial Lawyers, Trial, Apr. 1980, at 74, 80.
opinion. Yet in my experience it is the rare brief-writer who seizes the opportunity to employ the clarity, simplicity, and directness of expression necessary to endow a brief with maximum persuasive force.

In the beginning of the Republic, the brief was merely an adjunct to unlimited oral argument. The early briefs were not much more than a list of applicable precedents and authorities, as they are today in England, but the oral argument proceeded at a leisurely pace, with many questions and answers. The sheer bulk of cases in present-day appellate courts makes it impossible to proceed in this manner and it therefore is most important that the brief serve its communication function by imparting the facts and the law to the courts in the most persuasive manner possible. That function is not served by briefs that contain the following recurring deficiencies that I have noted in briefs submitted to me: excessive quotations of the record and authorities; inaccurate citations; typographical and grammatical errors; outdated authorities; disorganized arguments; failure to identify and distinguish adverse precedent; lack of clarity; prolix sentences; excessive use of adverbs; uninformative point headings; inadequate statement of the issues presented; incomplete factual presentation; statement of the facts through summary of witness' testimony rather than narrative; discussion of material outside the record; use of slang; inclusion of sarcasm, personal attacks, and other irrelevant matters; excessive number of points; lack of reasoned argument; illogical and unsupported conclusions; failure to meet adversary's arguments; unnecessary footnotes; and neglect to use the format prescribed by court rules. Despite the availability of some excellent guides to brief writing, the noted deficiencies persist and the end of the crisis in this area is nowhere in sight.

If there is a failure of communication in brief writing, there is an even greater failure in the other part of appellate advocacy—oral argument. Although the opportunity for oral argument has been diminished as the result of the screening process employed by some appellate courts, and the time for argument (when it is allowed) has been greatly reduced, the privilege of speaking to an appellate court con-

52. See Miner, Federal Civil Appellate Practice in the Second Circuit, in Appellate Practice in the United States Court of Appeals for the Second Circuit, at 3, 19-20 (Nov. 18, 1988) (course book for seminar cosponsored by the Committee on Federal Courts and the Committee on Continuing Legal Education of the New York State Bar Association).
55. See, e.g., Committee on Federal Courts of the Association of the Bar of the
tinues to be valued by some litigators. While litigators will engage in the most meticulous preparations for trial, it often seems that the same attorneys do not prepare at all for the argument of an appeal. Among the best oral communicators I have heard are law students in the appellate moot court competitions that I have judged. The students express themselves effectively because they are prepared to do so by reason of study and practice. Real world appellate advocates can learn a lesson from the devotion to duty displayed by moot court advocates. The ability to present a structured argument and to respond to the questions of judges within a restricted time period must be cultivated,
 but only a few seem interested in developing the skills of oral argument. Deficiency in oral expression is more and more noticeable as most litigators, ignoring the opportunity to engage in a Socratic dialogue with the judges about their cases, approach oral argument as if they really would have preferred to "submit." 67
I have published twenty-five suggestions designed to assist litigators in oral communication on appeal. 68 Other judges also have undertaken to point out various deficiencies in oral argument. 69 With judges, including Justices of the Supreme Court, emphasizing the importance of oral argument, 60 it seems strange that litigators should treat it so cavalierly. Oral argument is one of the great traditions of the Anglo-American legal system. It is still a pleasure to see and hear the interchange between British barristers and the appeals court judges before whom they argue. That interchange is characterized by a clarity of expression that is the envy of American appellate judges.

IV. ADJUDICATORS

I have decided to give your spouse $100 per week for temporary support. Thank you, your Honor. I'll probably throw in a few dollars myself. 61

Those who adjudicate controversies need to communicate with va-

61. Attributed to an unknown judge of the New York State Family Court.
rious audiences. Judges who preside at trials must express themselves in a way that can be understood by counsel, witnesses, and the parties appearing before them. Appellate judges must be clear and concise in their questions during oral argument and must render written opinions that are comprehensible as resolutions of disputes at hand and as precedents for future cases. Magistrates, referees, administrative law judges, arbitrators, special masters, examiners, and all those who perform adjudicatory functions of any kind must bring perspicuity to their endeavors.

It is the duty of judges who are bound to conduct trials under the Federal Rules of Evidence to see that adequate information is conveyed to the jury to enable the jury to reach a proper verdict. Federal judges are enjoined to control the interrogation of witnesses and the presentation of evidence in such a way as to "make the interrogation and presentation effective for the ascertainment of the truth." To accomplish this task, the court is authorized to call witnesses on its own motion, to interrogate witnesses by whomever called, and to appoint expert witnesses of its own selection. The trial judge in a federal court, and in many other courts, has the right and responsibility to see that the trial is a fair one and, in doing so, may summarize, comment upon, and draw inferences from the evidence for the benefit of the jury. This is an important communication function and one that is sometimes ignored by judges who believe that the "adversary system" will produce whatever "truth" is needed to enable a jury to arrive at a fair and just verdict. Unfortunately, as noted previously, expressive deficiencies of litigators are not unknown, and the search for the truth may well need some assistance from a trial judge.

Of all the communicative functions of the trial judge, jury instruction is probably the most important and the most difficult. Jury comprehension studies generally confirm that jurors do not understand many of the instructions given to them. Efforts have been undertaken to draft pattern jury instructions that will be meaningful to jurors. The problem was put succinctly by the Federal Judicial Center's Committee to Study Criminal Jury Instructions, in the Introduction to its 1982 Report:

The importance of communicating well with lay jurors is widely acknowledged by drafters of pattern instructions. It is

62. FED. R. EVID. 611(a)(1).
63. FED. R. EVID. 614(a).
64. FED. R. EVID. 614(b).
65. FED. R. EVID. 706(a).
nevertheless clear that most pattern instructions do not do it very well. It is all too easy for the lawyers and judges who engage in the drafting process to forget how much of their vocabulary and language style was acquired in law school. The principal barrier to effective communication is probably not the inherent complexity of the subject matter, but our inability to put ourselves in the position of those not legally trained.68

It is noteworthy that the Committee sought the advice of a journalist who was not legally trained, and considered research in juror understanding when drafting the model criminal instructions. Other experiments have been conducted in an effort to improve juror comprehension, including the use of tape recordings and the furnishing of written copies of the charge.69 Much more remains to be done but, in the final analysis, juror comprehension of the court's instructions is the responsibility of the judge instructing.

A judge must at all times maintain the appearance of impartiality before the jury. While judges have a responsibility to ensure that issues are presented clearly and may interrogate witnesses for that purpose, it is improper to conduct the questioning of witnesses in such a way as to convey the judge's opinion that the witness is not worthy of belief.70 This is an improper form of judicial communication. Nonverbal conduct demonstrating disbelief, untoward actions toward defense counsel, and improper comment on testimony may deprive a party of a fair trial and constitute a prejudicial judicial expression.71 Judges must express fairness and impartiality in both speech and demeanor when presiding at trials; that expression represents the ultimate communication of the trial judge.

In the written opinion, the skills of the adjudicator find their most perfect (or imperfect) expression. In regard to appeals, it has been said that "[t]he integrity of the [appellate] process requires that courts state reasons for their decisions."72 In point of fact, the integrity of any adjudicatory process is promoted by reasoned opinions. While courts of first instance resolve controversies, appeals courts may establish prece-

70. See, e.g., United States v. Victoria, 837 F.2d 50 (2d Cir. 1988).
dent in the process of resolving controversies. Consequently, the audiences for various judicial opinions may be different. According to one teacher of judicial writing, however, adjudicators share common goals in desiring their written opinions "to be clear, concise, precise and complete, fair, reasonable, just, balanced and dignified" in order to serve a number of purposes: "to decide, dispose of and record cases; persuade, exhort, order, teach, inform, explain and reason with audiences ranging in legal expertise from litigants and the media to courts of appellate review." A tall order indeed!

Although there is a need for a faster, better way to write opinions, the bar remains opposed to dispositions by summary order or by short statements in open court, at least in regard to appellate decisions where such dispositions cannot be cited as precedent. The bar may be right, because each decision of each adjudicator should stand on its own and be subject to examination by all in the great common law tradition. While the opinions of most adjudicators rarely will be classified as literature, even a one-page ruling on a topic as arcane as trademarks can sparkle with its clarity and brevity. More than any other writer, the adjudicator must heed the elementary principles of composition, because a "judicial opinion in what may seem an ordinary case, phrased in language that expresses an honest and genuine passion for social order and justice, may be remembered, at least by those affected, long after the popular play or novel has run its course." As a communicator, the adjudicator can do no better than to remember Justice Cardozo's admonition that the "sovereign virtue for the judge is clearness."

V. Legislators

That one hundred and fifty lawyers should do business together ought not to be expected.

— Thomas Jefferson (on the U.S. Congress)

74. Id.
75. See New York State Bar Ass'n, Report of the Committee on Federal Courts—Survey of the Bar 52 (June 29, 1988).
78. Re, supra note 77, at 224-25.
Those in the legal profession whose responsibility it is to formulate and draft legislation often are faulted for fuzziness of language. Indeed, every lawyer has had to wrestle, at one time or another, with statutes, especially of the tax variety, that are nearly incomprehensible. Yet we are told by a legislative lawyer:

If bills suffer from any of what Professor Dickerson has labeled the “diseases of language; ambiguity, overvagueness, overprecision, overgenerality or undergenerality,” they do so either by intent, in the case of a planned vagueness, or as a result of what Justice Frankfurter and others have characterized, somewhat exaggeratedly, as the inexact nature of words. Only infrequently is an enacted bill sloppily drafted.81

We are told by the same author that much legislation is the product of compromise, the process of majority building, and problems of foreseeability.82 Finally, we are instructed, with just cause, that courts should exercise more self-restraint in statutory interpretation and that legislative history is not a very good indicator of legislative intent.83

It seems beyond cavil that legislative bodies know what plain English is. Many states have adopted laws requiring the use of plain English in consumer contracts, insurance policies, and similar documents; Congress itself has adopted a number of statutes containing plain English requirements.84 The New York law establishing “Requirements for use of plain language in consumer transactions” is a paradigm. It simply requires certain defined agreements to be: “1. Written in a clear and coherent manner using words with common and everyday meanings; 2. Appropriately divided and captioned by its various sections.”85 The statute has the beauty of simplicity,86 and, while it must be conceded that the constraints of the legislative process generally do not permit laws to be written in this manner, the contrast with most legislation is stark. Perhaps there is a middle ground.

Legislatures cannot have it both ways. They cannot write vague, complex, and difficult statutes and complain that the courts fail to interpret them properly or fail to exercise sufficient “restraint.” Courts are faced daily with actual cases and controversies involving real-life

82. Id. at 652-59.
83. See Benson, supra note 15, at 572.
people whose disputes must be resolved. They cannot refer those disputes to committees or commissions for study and for report at some day far in the future. Courts must do the best they can with what they have, including legislative history and attempts to "divine" the legislative intent. Some legislative bodies themselves have provided rules, albeit contradictory at times, for the interpretation of their statutes. More guidance for the courts is required in order that both branches may perform the roles assigned to them.

Despite all the legislative constraints, it can be said that legislator-lawyers have, by attention to plain language laws affecting consumers, recognized the depth of the communication crisis more than any other branch of the profession. We can only hope that this concern for plain language will extend to other types of legislation as well. It is heartening to note that a recent seminar sponsored by the Indiana University Institute for Legal Drafting and held in conjunction with the National Conference of State Legislatures, attracted fifty-seven legislative draftsmen from twenty states, American Samoa, and the Virgin Islands. The Director of the Institute stated that "the goal of the seminar was to provide professional draftsmen with the tools to produce understandable and readable versions of what the legislature wants."

VI. Educators

Everywhere I go I'm asked if I think the university stifles writers. My opinion is that they don't stifle enough of them.

— Flannery O'Connor

Law students comprise the primary audience for legal educators. The secondary audience consists of the practicing bar, other academics, and the general public, including those interested in the books and learned articles of law professors. There is evidence of a growing estrangement between the professors and their primary audience. Law teachers are becoming less interested in teaching professional skills and professional subjects than in interdisciplinary studies and other academic pursuits. According to a recent newspaper dispatch, "many
law professors are paying less attention to the legal doctrines that occupy the thoughts of most practicing lawyers and judges, and instead are turning to more abstract disciplines like economics and political theory.\textsuperscript{93} Included in the dispatch is a reference to a law professor who is described as "one of the most sought-after legal academics in the country" by reason of his expertise in dispute management in medieval Icelandic society.\textsuperscript{94}

The changing focus of academics, from doctrinal scholarship to interdisciplinary studies, promises serious consequences for the legal profession. Academics are communicating more with each other and less with their students or the profession of which they are such an important part.\textsuperscript{95} The upshot is that new lawyers are less equipped to handle the demands of modern law practice than those of a previous generation. With legal education "schizophrenic" and law faculties "factionalized,"\textsuperscript{96} the profession suffers.

But even more serious than the failure of the professors to communicate with their students is their failure to teach communication. Teachers of legal writing courses do not receive the academic recognition they deserve, with poor writing skills of graduate lawyers as the immediate consequence.\textsuperscript{97} Academics compete for space in the law reviews,\textsuperscript{98} but little attention is given to student writing. With academic tenure, promotion, and status dependent on publishing,\textsuperscript{99} professors turn the bulk of their attention to writing rather than teaching. Thus, law students fail to obtain the oral and written skills of expression necessary for the survival of the profession. Language is, after all, the medium in which the profession conducts its business.\textsuperscript{100}

Moreover, many academics, by virtue of their disdain of law practice, have succeeded only in imbuing their students with the ability to express themselves in professional jargon without communicating the human voice of the law.\textsuperscript{101} Academics are not exempt from the disease

\textsuperscript{93.} Id. \textsuperscript{94.} Id. \textsuperscript{95.} Middleton, *Legal Scholarship: Is It Irrelevant?*, Nat'l L.J., Jan. 9, 1989, at 1, col. 2.
of legalese and often add confusion and uncertainty to the law by introducing new legal theories that have no relation to the real world.\footnote{D'Amato, \textit{Legal Uncertainty}, 71 \textit{Calif. L. Rev.} 1, 21-22 (1983).}

Judge Harry T. Edwards, my colleague on the United States Court of Appeals for the District of Columbia, and a former law professor himself, has said that “the profession can no longer afford the curriculum of law schools [to be] isolated in a world of its own.”\footnote{Kramer, \textit{Scholarship And Skills}, Nat'l L.J., Jan. 9, 1989, at 15, col. 1, 16, col. 2 (quoting Judge Edwards).} It is time once again to reexamine legal education in the public interest. Proposals for apprenticeship training beyond law school should be examined.\footnote{Id. at 16, cols. 2-3.} If law educators continue to be of the opinion that law schools do not have a mission to prepare students for the practice of law, then post-graduate training may be the only alternative.\footnote{New York Law School has established a post-graduate “writing workshop designed for lawyers wishing to improve their ability to write sharp, clear prose, to edit their own and others’ writing, and to become more comfortable with the art of composing and organizing written material.” New York Law School, advertisement flyer and registration form for May/June 1989 Legal Writing Program.} A remedy must be found for the deficient communication of legal knowledge and skills.

\section*{VII. Conclusion}

The various branches of the legal profession perform their work through the media of written and oral expression. Communication, defined as expression clearly and easily understood, is, therefore, essential to the effective functioning of the bar and, ultimately, to the maintenance of our legal system and the perpetuation of the rule of law. The bar is constrained to communicate with such diverse audiences as clients, colleagues, judges, witnesses, juries, administrative bodies, law students, academicians, and the public at large. There can be no doubt of the deterioration of the abilities of lawyers—counselors, litigators, adjudicators, legislators, and educators—to communicate with these audiences. It seems to me that the deterioration has reached the level of a crisis that must be confronted. Until the crisis engages the attention of the legal profession, however, the process of confrontation cannot begin. It is my hope that this article will serve to focus some attention on the critical problems of legal communication.