1993

Remarks: Annual Banquet of the University of Pennsylvania Law Review

Roger J. Miner '56

University of Pennsylvania Law Review
3400 Chestnut Street
Philadelphia, Pennsylvania 19104-6204
Telephone 215-898-7060
Facsimile 215-573-2005

Martin Mazen Anbari
Editor-in-Chief

November 5, 1992

The Honorable Roger J. Miner
U.S. Court of Appeals for the Second Circuit
P.O. Box 858
Albany, NY 12201

Dear Judge Miner:

I am delighted to hear from Peter Flocos that you have agreed to speak at our 1993 annual banquet and that one of our suggested dates, March 25, is agreeable to you.

I write on behalf of the Editorial Board of the University of Pennsylvania Law Review to extend to you a formal invitation. We will be honored to have you speak at the banquet.

Attendance at the banquet is by invitation only and has traditionally included editors and alumni of the Law Review and members of the Law School faculty and the Philadelphia Bar. Over the next few weeks, the Law Review will be making the final arrangements for the banquet; we will keep you posted.

The Law Review will of course reimburse for all the expenses that you might incur in visiting Philadelphia. As the time of the banquet draws near, our Managing Editor, Keith Eisner, will be in contact with your office to arrange for your travel and overnight stay.

In the meantime, if I can be of any assistance in answering questions related to the Law Review and the banquet, please contact me at the Law Review.

Thank you very much.

Sincerely,

Martin Mazen Anbari

Roger J. Miner
U.S. Circuit Judge

75th Anniversary Dinner
Cornell Law Review
Statler Hotel, Ithaca, NY
March 8, 1990
7:00 P.M.

COPY

I salute the editors, staff, alumni and faculty advisors of the Cornell Law Review on 75 years of distinguished service to the legal community. Since it began publication in 1915, your law review has acquired an outstanding reputation, nationally and internationally, for the publication of articles, notes and comments on the cutting edge of the law. Accurate, timely, well-researched and well-edited, the pieces published in this law review are a tribute to the editors and staff as well as to the authors. I know from personal experience that those able analyses, dynamic discussions, and comprehensive critiques by the contributing authors would never see the light of day without the significant student contributions essential to the publication of each issue.

My personal experience was as a Managing Editor, a position that I regard, naturally, as the most important on the staff. Almost 45 years have passed, but I ~~remember my experience~~ well. I recall the lead article of my first issue as Managing Editor. It 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 us in a form all too familiar to law review staffers-- all messed up, and with much cite and substance work required. "The Judicial Process in Action" --I have returned to that article time and time again

Many of the incomplete footnotes referred to French and German sources.

during the last 40 years -- not because it has always remained interesting, informative and timely -- not because it has provided me with valuable insights bearing on my work as a judge -- and not because it is a great classic of legal literature. I have returned to that article repeatedly over the course of 4 decades because I never have understood the damn thing!! More about the problem of understanding law review articles shortly. Incidently, there is a quote from one of Pound's books behind the bench in the Cornell Moot Courtroom: "Law must be stable and yet it cannot stand still." I understand it but do not consider it especially profound.

I also remember the first student note I was responsible for editing. The note seems strangely out of date, since it revolved around a 1954 ruling of a Cook County, Illinois Superior Court to the effect that ~~artificial insemination~~ the fertilization of a ~~wife by~~ woman with sperm a man other than her husband constituted adultery and that the resulting child was illegitimate. The note has stuck in my mind all these years because I remember the first line of the piece as it was handed in. It read: "Artificial insemination has only lately come into the public eye." I immediately saw the need for some editing on the first line.

According to the Cornell Law School catalogue, "[t]he [Cornell Law] Review offers training and experience in legal researching, critical analysis and concise writing." It is no secret that judges, especially of the federal variety, value these skills very highly and invariably hire as their clerks

people who have served on law reviews. Among my colleagues in the Second Circuit, Cornell Law Review members enjoy excellent reputations for their superior scholarship as well for their writing, analytical and research skills. However, I pause here to dispel the widely-held but totally erroneous belief that federal judges could not perform their duties without law clerks. Although clerks are very helpful to a judge, it would be foolish for one with 35 years of experience to accept without question the expertise of one who recently completed three years of law school. When asked how much I rely on the work of clerks, I always remind the questioner of the Biblical story of Methuselah. The Bible says that, at the end of his days, Methuselah "leaned on his staff and died."

Besides the honing of research, analytical and writing skills, law review membership brings with it the experience of collegiality--the opportunity to work with others toward a common goal. This is an important experience, valuable to those who would work in a judge's chambers or in a law firm or in any other legal environment where teamwork is essential. Not the least important part of the collegiality of a law review is the friendship of your fellow staffers. Some of my colleagues from law review are still my dearest friends, even after all the time that has passed. So will it be with many of you.

I am told that there is some interest here in the extent to which use is made of law reviews in the decisionmaking process, particularly in the Federal Appellate decisionmaking process. I

can only speak from my own experience in this regard. In my chambers, we always check to see whether there are any law review articles, notes or comments dealing with the subject of the decisions we are working on. Very often, authors are kind enough to send us reprints of their articles when they see that we are considering a case to which their article bears some relevance. As I noted earlier, the law clerks ordinarily are law review alumni and are in close contact with the law review scene. I like to thumb through the major law reviews when I have the opportunity. We often cite to law reviews. But we find them most useful as compendia--exhaustive and comprehensive collections of cases and statutes on particular subjects. I find the analyses, conclusions and suggested directions interesting but rely on the reviews much less for those purposes. I find the authors' conclusions, very often, off the wall, away from the mainstream and unpersuasive. But keep them coming!

Very interesting to me are law review analyses of decisions I have written. Not too many authors agree with me when they write about my decisions. Either I am wrong most of the time or there is some rule against agreeing with a judge. I often feel like a playwright who gets bad reviews, and I frequently scribble on the articles words like "that's not what I said" or "that's not what the case holds." Two years ago, I wrote a decision in a Title VII sex discrimination case brought by a man who claimed that he was denied promotion to the position of supervising respiratory therapist because the man in charge of hiring at the

hospital preferred the female with whom he was having a romantic relationship. I wrote for a unanimous panel that plaintiff had not been discriminated against on the basis of his sex within the meaning of Title VII. The professor who wrote a 51 page law review article entitled "The Meaning of 'Sex' in Title VII: Is Favoring an Employee Lover a Violation of the Act?" apparently agreed with my conclusion but not with the way I got there. She constructed in her article a "process-oriented framework" for dealing with such cases, including what she called a "reconstructed prima facie case" approach. It was all very elaborate, rich and interesting, but I cannot perceive any practical use for the analysis.

But law reviews are not only for judges and academics. They are important to the practicing bar and to those responsible for the formulation of legislation. The need for the journals to be useful to those segments of the profession ought always to be borne in mind. Most useful to all branches of the profession were some articles appearing in recent issues of a leading law review and dealing with such diverse subjects as the right to confrontation in co-defendant confession cases; the definition of religion in the first amendment; the "work for hire" provision in the Copyright Act; and the regulation of secondary trading markets. The same leading journal, however, in an issue that included a very worthwhile article on the Tax Reform Act of 1986, provided an essay on "the influence of emotions under a retributive theory of punishment." I read in full the conclusion

to that 55 page article:

~~choice of life or death is essentially entrusted to the moral judgment of a few.~~

CONCLUSION

Like most fields of thought, the law has developed its own vocabulary for expressing concepts and promoting values. The language of law is the language of rationality, of the cool and the deliberative. While this insistence upon rationalistic expression has general merit in the elucidation of critical issues, in some instances it obscures more than it reveals. Where, as in criminal punishment, the influence of emotions is too fundamental to ignore or entirely condemn, the law's vocabulary requires expansion to permit emotive discourse.

Bringing emotions into legal discourse has its risk. We must take care that decisionmakers' personal, nonmoral inclinations do not substitute for legal principles in the resolution of controversies. Thus, where we can devise rules sufficiently determinate to minimize emotional influence, we should do so. When we reach the limits of law, when we enter those areas where rules lose their power to direct us toward just results, however, recognition of and struggle with emotional influence becomes necessary. In these mysterious places we need to reconcile thoughts and feelings.

In the seventeenth century Blaise Pascal wrote in his *Pensees*: "La coeur a ses raisons, que la raison ne connait [pas.]"[178] The heart has its reasons, which reason knows not. In our everyday lives we know what is right not only because we think it, but because we feel it. It is our challenge as lawyers to make the law see the sense of that insight.

178 B. PASCAL, PENSEES 343 (H.F. Stewart ed. 1950). Pascal also wrote: "Two excesses: to exclude reason, to admit nothing but reason." PENSEES 85, ¶ 183 (A. Krailsheimer trans. 1966).

This is from volume 74 of the Cornell Law Review, of course, and I would sum up the article in this way: the influence of emotion in criminal punishment is good and bad. But how about those last two sentences? "In our everyday lives we know what is right not only because we think it, but because we feel it. It is our challenge to make the law see the sense of that insight." I do not understand those two sentences. The author challenges us "to make the law see the sense of [an] insight." I would like to accept the challenge, but I do not know what it is.

I suggest that much of what is written in law reviews is unintelligible, and what is not unintelligible is boring and repetitious to the point of stupefaction. If I see the word "normative" in one more law review article, I shall scream! This leads me to a subject of deep interest to me, and I hope to you -- 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 courts, to the general public and to each other. I even have written, and hopefully will be forgiven for, a law review article to be published shortly on the subject. It is called "Confronting the Communication Crisis in the Legal Profession."

I think that the legal profession merely reflects a communication crisis in the general society. A few days ago, the New York Times reported on the failure of communication between physician and patient. Our public discourse frequently seems to

consist of euphemisms. Consider these examples, collected from recent newspaper reports:

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

* Five thousand workers at a Chrysler plant found out that a new "career alternative enhancement program" meant their plant was closing and they were out of jobs.

* A stockbroker described the October 13th, 1987 stock market crash as a "fourth quarter equity retreat."

* A United States Senator 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 Attorneys Association, of which I was then 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 doubletalk artist. About ten minutes into his meaningless spiel, a prosecutor from Georgia sitting next to me leaned over and said: "Ah cain't understand a lot of what thet ol' feller is sayin'." I replied: "You can't understand anything of what he is saying, because he is speaking doubletalk." "Isn't that somethin'?" he said, "Ah just tho't he had a real bad New York accent."

If communication is defined as expression that is clearly and easily understood, 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. The expressive deficiencies of lawyers in their capacities as counselors, litigators, adjudicators, legislators and educators must be recognized as a serious and growing problem.

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. Yet, failure to communicate is near the top of the list of complaints made by clients about their lawyers. Very 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. Client communication is not merely a device for reassuring the client or avoiding fee disputes; it is the sine qua non of the service provided by the attorney as counselor.

Much ink has been spilled in the effort to promote the use of plain English by lawyers. Despite all the criticism directed at legalese, however, attorneys continue to employ arcane legal language when counseling 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.

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 $10 million counterclaim for services allegedly rendered under a management agreement, said: "I don't know what it says and I don't understand it." 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," "image makers," to speak to the public for them and to advise them on how to deal with the press. 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."

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." 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. 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.

The communication skills of those who initiate lawyer-to-lawyer transmissions also have been found wanting in recent years, especially in respect of legal memoranda for internal law firm use. 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.

Essential to every litigator is clarity of speech in courtroom discourse. Yet trial judges frequently are heard to complain of the inability of courtroom lawyers to communicate with witnesses, juries and the bench itself.

The stilted language of the law has no place, of course, in the questioning of witnesses or in the persuasion of juries. In my opinion, the expressive deficiencies noted in trial lawyers are for the most part simply attributable to their lack of trial experience.

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 or because they just confuse the witness. Take these actual examples collected by a Court Reporter:

Q. Doctor, did you say he was shot in the woods?
A. No, I said he was shot in the lumbar region.

Q. Now, Mrs. Johnson, how was your first marriage terminated?
A. By death.
Q. And by whose death was it terminated?

Q. What is your name?
A. Ernestine McDowell.
Q. And what is your marital status?
A. Fair.

Q. What happened then?
A. He told me, he says, "I have to kill you because you can identify me."
Q. Did he kill you?
A. No.

Q. Are you married?
A. No, I am divorced.
Q. What did your husband do before you divorced him?
A. A lot of things that I didn't know about.

Q. At the time you first saw Dr. McCarthy, had you ever seen him prior to that time?

Q. Now I am going to show you what has been marked as plaintiff's Exhibit No. 2 and ask if you recognize the picture.
A. John Fletcher.
Q. That's you?
A. Yes, sir.
Q. And you were present when the picture was taken, right?

Q. Mr. Jones, is your appearance this morning pursuant to a subpoena which was served upon you?
A. No. This is how I dress when I go to work.

Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?
A. Oral.
Q. How old are you?
A. Oral.

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. In my experience, it is the rare briefwriter who seizes the opportunity to employ the clarity, simplicity and directness of expression necessary to endow a Brief with maximum persuasive force.

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. While litigators will engage in the most meticulous preparations for trial, it often seems that the same attorneys have not prepared at all for the argument of an appeal. Among the best oral communicators I have heard are law students in 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. 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." It is still a great 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.

Those who adjudicate controversies need to communicate with

various 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.

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. 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. Much more remains to be done but, in the final analysis, jury comprehension of the court's instructions is the responsibility of the judge instructing. Judges of course must express fairness and impartiality in both speech and demeanor when presiding at trials, and that expression represents the ultimate communication of the trial judge.

It is the written opinion in which the skills of the adjudicator find their most perfect (or imperfect) expression.

According to one teacher of judicial writing, 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! 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." I have formulated my own admonition: Simplify, clarify and edify in all forms of legal expression.

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 tantamount to incomprehensible.

It seems beyond cavil, however, 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.

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.

Law students comprise the primary audience for legal educators. The secondary audience is comprised 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. Some law teachers are becoming less interested in teaching professional skills and professional subjects than in interdisciplinary studies and other academic pursuits. A recent newspaper dispatch described a certain law professor as "one of the most sought-after legal academics in the country" by reason of his expertise in dispute management in Medieval Icelandic society.

But even more serious than the failure of the professors to communicate with their students is their failure to teach communication. Thus do law students fail to acquire the oral and written skills necessary for the survival of the profession. Comprehension also suffers. A government agency recently published a notice of legal positions available to recent law graduates. The notice required the submission of writing samples with the applications for employment. A large number of applications were accompanied by handwriting samples. The misuse, abuse, and incomprehensibility of language represents a true crisis for us, because language is, after all, the medium in which the profession conducts its business.

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. Of the deterioration of the abilities of lawyers -- counselors, litigators, adjudicators, legislators and educators -- to communicate with these audiences, there can be no doubt. I urge you to join me in focusing the attention of the bench and bar on the critical problem of legal communication. Such an effort, accomplished on your part through the publication of articles or a symposium issue, would be in the same tradition of service that has characterized the Cornell Law Review for three-quarters of a century. Having now had the opportunity to meet with all of you, I am confident that the tradition will endure and that your future will be even more glorious than your past.

Happy 75th Birthday, and Thank You.