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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

* The *New York Law School Law Review* awarded Judge Miner the Charles W. Froessel Award for Outstanding Contributions to the Development of the Law. This award was established to honor the memory of Judge Charles W. Froessel, who received his LL.B. degree in 1913 and his LL.M. degree in 1914 from New York Law School. Judge Froessel 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 Rogers²

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.³ 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.”⁴ Yet, failure to communicate is near the top of the list of complaints made by clients about their lawyers.⁵ 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,⁶ of offers of settlement in civil matters,⁷ and of proffered plea bargains in criminal prosecutions.⁸ Effective counseling also requires that attorneys explain to their clients the nature and effect of legal instruments,⁹ respond to questions bearing on the legality or desirability of actions proposed and undertaken,¹⁰ review the chances of success in litigation,¹¹ and discuss ar-

2. L. WILDE, *THE ULTIMATE LAWYERS JOKEBOOK* 6 (1987).

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.”).

4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1988) [hereinafter CODE].

5. See Hazard, *Rule 1: Keep Your Client Well-Informed*, Nat'l L.J., June 6, 1988, at 13, col. 3.

6. MODEL RULES, *supra* note 3, Rule 1.4 comment.

7. See CODE, *supra* note 4, EC 7-7.

8. *Id.*

9. See *In re Dalton*, 95 Bankr. 857, 859 (M.D. Ga.), *aff'd*, 101 Bankr. 820 (M.D. Ga. 1989); *Greene v. Greene*, 56 N.Y.2d 86, 92-93, 436 N.E.2d 496, 499-500, 451 N.Y.S.2d 46, 49-50 (1982); see also *In re Baehr*, 242 Kan. 146, 146-47, 744 P.2d 799, 799-800 (1987) (attorney suspended after failure to complete proposed settlement agreement).

10. See *Dalton*, 95 Bankr. at 859; *M & S Bldg. Supplies, Inc. v. Keiler*, 564 F. Supp. 1566, 1570 (D.D.C. 1983), *rev'd on other grounds*, 738 F.2d 467 (D.C. Cir. 1984); Souther-

rangements for the payment of reasonable fees for services rendered.¹² 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.¹³ 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.¹⁴

Much ink has been spilled in the effort to promote the use of plain English by lawyers.¹⁵ Despite all the criticism directed at legalese, however, attorneys continue to employ arcane legal language when counsel-

land v. County of Oakland, 77 F.R.D. 727, 733-34 (E.D. Mich. 1978), *aff'd sub nom.* Southerland v. Irons, 628 F.2d 978 (6th Cir. 1980); 7 AM. JUR. 2D *Attorneys at Law* § 53 (1980 & Supp. 1988).

11. See 520 E. 72nd Commercial Corp. v. 520 E. 72nd Owners Corp., 691 F. Supp. 728, 738 (S.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989); Fleming Sales Co. v. Bailey, 611 F. Supp. 507, 519-20 (D.C. Ill. 1985).

12. Jacobson v. Sassower, 66 N.Y.2d 991, 993, 489 N.E.2d 1283, 1284, 499 N.Y.S.2d 381, 382 (1985); *Southerland*, 77 F.R.D. at 734; see also *Greene*, 56 N.Y.2d at 92, 436 N.E.2d at 499, 451 N.Y.S.2d at 49.

13. See, e.g., *Baehr*, 242 Kan. 146, 744 P.2d 799 (failure to advise client regarding terms of proposed settlement and misrepresentation of facts to opposing counsel); *State Bar of Nevada v. Schreiber*, 98 Nev. 464, 465, 653 P.2d 151, 152 (1982) (failure to explain to clients the nature of services to be rendered and fees to be charged; failure to communicate with and advise clients regarding status of their cases); *McMorris v. State Bar of California*, 29 Cal. 3d 96, 99, 623 P.2d 781, 783, 171 Cal. Rptr. 829, 831 (1981) (failure and neglect to perform fully services for which attorney retained, and failure to respond adequately to clients' inquiries regarding matters of representation); *Martin v. State Bar of California*, 20 Cal. 3d 717, 717, 575 P.2d 757, 758, 144 Cal. Rptr. 214, 215 (1978) (repeated failure to perform duties for which attorney had been retained, failure to communicate with clients, and misrepresentations concerning status of pending legal matters); *In re Loring*, 62 N.J. 336, 342, 346-48, 301 A.2d 721, 724, 726-27 (1973) (failure to keep client informed about status of appeal and to respond to client's request for information and advice concerning case); *In re Rosenblatt*, 60 N.J. 505, 508, 291 A.2d 369, 370-71 (1972) (failing to advise client of dismissal of actions and purposefully ignoring and failing to respond to client's communications inquiring into status of the actions).

14. See R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS § 1.3, at 9 (1988); see also *Dalton*, 95 Bankr. at 860 ("[A]n attorney has an affirmative duty to meet with his or her clients, to counsel those clients regarding the legal significance of their actions and to answer any questions or concerns which the clients may raise."); *Schreiber*, 98 Nev. at 464, 653 P.2d at 151 ("communication with a client is . . . at the center stage of all services"); *In re Loring*, 73 N.J. 282, 289-90, 374 A.2d 466, 470 (1977) ("The attorney-client relationship embodies the concept of the client's trust in his fiduciary, the attorney. . . . Inherent in that trust is the duty to advise the client fully, frankly, and truthfully of all material and significant information."); *Doyle v. State Bar of California*, 15 Cal. 3d 973, 978, 544 P.2d 937, 939, 126 Cal. Rptr. 801, 803 (1976) ("Failure to communicate with and inattention to the needs of a client, standing alone, may constitute proper grounds for discipline.").

15. See, e.g., *Wydick, Plain English for Lawyers*, 66 CALIF. L. REV. 727 (1978); see also *Benson, The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 521 n.7 (1984-1985) (listing works).

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.¹⁶ Professional jargon is meaningless to a non-lawyer, and clients do not hesitate to characterize as "gobbledegook" the opinions of counsel they are unable to comprehend.¹⁷ One author has formulated the following rule for communicating with clients as well as the lay public generally: "Lawyer-to-laity writing should be fully humanized."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.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."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.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.²² The bar performs its public relations function by provid-

16. See Burke & Prescott, *Client Interviews*, A.B.A. J., Jan. 1, 1988, at 120; see also Blodgett, *That #\$\$%* Client!*, A.B.A. J., Mar. 1, 1988, at 9.

17. See H. WEIHOFEN, *LEGAL WRITING STYLE* 205 (2d ed. 1980).

18. R. WEISBERG, *WHEN LAWYERS WRITE* 88 (1987).

19. See H. WEIHOFEN, *supra* note 17, at 215.

20. Johnson, *Hirschfeld Drops Suit vs. Mason*, N.Y. Post, Apr. 5, 1989, at 6, col. 2.

21. See Margolick, *At the Bar*, N.Y. Times, Feb. 24, 1989, at B5, col. 1.

22. See Caher, *Lawyers Want to Change Their Quarrelsome Image*, Alb. Times Union, Feb. 19, 1989, at A8, col. 1.

ing that education.²³

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.²⁴ One commentator has posited “[i]nertia, incompetence, status, power, cost and risk” as “a formidable set of motivations to keep legalese.”²⁵ These motivations, he asserts, “lack any intellectually or socially acceptable rationale” and “amount to assertions of naked self-interest.”²⁶ 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,”²⁷ 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.²⁸ 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 then she should participate in her client’s exercise of that capacity by offering information, legal advice, and . . . other perspectives”²⁹ Since a lawyer’s advice “need not be confined to purely legal considerations,” and often

23. See *ABE Helps ABA Launch Its Most Ambitious Public Education Program*, A.B.A. J., Feb. 1984, at 86 (American Bar Endowment Annual Report, 1982-1983).

24. See Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1390, 1392 (1984).

25. Benson, *supra* note 15, at 571.

26. *Id.*

27. MODEL RULES, *supra* note 3, Rule 1.2(a).

28. See Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 776-77 (1987).

29. *Id.* at 777.

implicates the "fullness of . . . experience" as well as an "objective viewpoint,"³⁰ 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.³¹ Prompt, clear and concise advice, written and oral, not only serves the decision-making process, but also demonstrates respect and concern for the client,³² 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."³³ 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.³⁴ 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.³⁵ Elimination of "incomprehensible muddles"³⁶ 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.³⁷

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

30. CODE, *supra* note 4, EC 7-8.

31. See Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 783-84 (1987).

32. See Barrette & Kaye, *The Difficult Legal Client*, CASE & COM., Jan.-Feb. 1989, at 26, 31.

33. Skelly, *Verbatim*, STUDENT LAW., Oct. 1985, at 48.

34. *Id.* at 48, 49; Skelly, *Verbatim*, STUDENT LAW., Nov. 1985, at 46 [hereinafter *Verbatim* (Nov. 1985)].

35. R. WEISBERG, *supra* note 18, at 94.

36. *Verbatim* (Nov. 1985), *supra* note 34, at 46.

37. R. LEDERER, *ANGUISHED ENGLISH: AN ANTHOLOGY OF ACCIDENTAL ASSAULTS UPON OUR LANGUAGE* 33 (1987).

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.³⁸ 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."³⁹ 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."⁴⁰ 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*."⁴¹

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.⁴² 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.⁴³ 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-

38. See McElhane, *Litigator's Library*, LITIGATION, Summer 1984, at 51.

39. Shepard's/McGraw-Hill, Inc., advertisement flyer for R. ARON, J. FAST & R. KLEIN, *TRIAL COMMUNICATION SKILLS* (1987 & Supp. 1988).

40. Professional Education Systems, Inc., advertisement flyer for R. CRAWFORD, *THE PERSUASION EDGE* (1989).

41. Compendium Press, advertisement flyer for *Trial Excellence* monthly newsletter.

42. Cf. King, *Verbal Persuasion: What You Need to Know*, TRIAL, Aug. 1988, at 71 (tips on persuasion).

43. See Jost, *What Image Do We Deserve?*, A.B.A. J., Nov. 1, 1988, at 47, 48.

they 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.⁴⁴ Another common failing of inexperienced litigators is the inability to simplify the testimony of their expert witnesses so that the jury might comprehend the nature of the expert opinion.⁴⁵ Communication breakdowns occur also in the opening statement, when counsel promises proof they are unable to deliver,⁴⁶ and in closing argument, when they are carried away by their own rhetoric.⁴⁷ Inexperienced trial counsel convey to the jury the appearance of concealment by frequent objections to evidence,⁴⁸ and a sense of uncertainty by aimless, rambling, and lengthy cross-examination of adverse witnesses.⁴⁹ 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.⁵⁰ 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

44. See McElhaney, *The Paragraph Method*, A.B.A. J., Apr. 1989, at 96.

45. See Hanley, *Confessions of An Expert Witness*, LITIGATION, Winter 1982, at 3, 56.

46. See Lundquist, *Advocacy in Opening Statements*, LITIGATION, Spring 1982, at 23, 64.

47. See Cicero, *Nondefensive Final Argument for the Defense*, LITIGATION, Spring 1982, at 45.

48. See Curtin, *Objections*, LITIGATION, Spring 1982, at 37.

49. See Becker, *Tips for Aspiring Trial Lawyers*, TRIAL, Apr. 1980, at 74, 80.

50. See generally, Kaplow & Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565-615 (1989).

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.⁵¹ 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 unsupportable conclusions; failure to meet adversary's arguments; unnecessary footnotes; and neglect to use the format prescribed by court rules.⁵² Despite the availability of some excellent guides to brief writing,⁵³ 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,⁵⁴ and the time for argument (when it is allowed) has been greatly reduced,⁵⁵ the privilege of speaking to an appellate court con-

51. Wasby, *The Functions and Importance of Appellate Oral Argument: Some Views of Lawyers and Federal Judges*, 65 JUDICATURE 340, 341 (1982).

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).

53. See, e.g., E. RE, BRIEF WRITING AND ORAL ARGUMENT 53 (5th ed. 1983).

54. See generally J. CECIL & D. STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (Fed. Judicial Center 1987).

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,⁵⁶ 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."⁵⁷

I have published twenty-five suggestions designed to assist litigators in oral communication on appeal.⁵⁸ Other judges also have undertaken to point out various deficiencies in oral argument.⁵⁹ 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-

CITY OF NEW YORK, APPEALS TO THE SECOND CIRCUIT 29 (6th ed. 1988).

56. See Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 170-72 (1979).

57. See generally Gould, *Oral Argument Losing Its Appeal*, LITIGATION, Spring 1982, at 3.

58. Miner, *The Don'ts of Oral Argument*, LITIGATION, Summer 1988, at 3.

59. See, e.g., Coffin, *Our Appellate Advocacy—A Unique and Wonderful Institution*, THE DOCKET, Summer 1987, at 1 (Newsletter of the Nat'l Inst. for Trial Advocacy).

60. See L. STERN, E. GRESSMAN & S. SHAPIRO, *SUPREME COURT PRACTICE* 577-83 (6th ed. 1986); Bright & Arnold, *Oral Argument? It May Be Crucial!*, A.B.A. J., Sept. 1984, at 68; M. TIGAR, *FEDERAL APPEALS—JURISDICTION & PRACTICE* 264-65 (1987).

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."⁶² To accomplish this task, the court is authorized to call witnesses on its own motion,⁶³ to interrogate witnesses by whomever called,⁶⁴ and to appoint expert witnesses of its own selection.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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).

66. R. HUNTER, *FEDERAL TRIAL HANDBOOK* 2d § 5.18, at 70-72 (1984).

67. See Schwarzer, *Jury Instructions: We Can Do Better*, *LITIGATION*, Winter 1982, at 5.

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-

68. Report of the Federal Judicial Center Committee to Study Criminal Jury Instructions, Introduction to 1982 Report, reprinted in FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS VII (1988).

69. See NEW YORK STATE BAR ASS'N, REPORT OF THE COMMITTEE ON FEDERAL COMPREHENSION—IMPROVING JURY COMPREHENSION IN COMPLEX CIVIL LITIGATION 28-31 (July 12, 1988); JUDICIAL COUNCIL OF THE SECOND CIRCUIT, REPORT OF THE COMMITTEE ON JURIES 77-89 (Aug. 1984). See generally COMMITTEE ON JURIES OF THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT, FOLLOW-UP SURVEY TO JURY PROCEDURE EXPERIMENTS 1-13 (JULY 2, 1986).

70. See, e.g., *United States v. Victoria*, 837 F.2d 50 (2d Cir. 1988).

71. See Henry, *Prejudicial Judicial Communications*, TRIAL, Aug. 1988, at 54.

72. P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 31 (1976).

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."⁷³ A tall order indeed!

Although there is a need for a faster, better way to write opinions,⁷⁴ 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.⁷⁵ 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.⁷⁶ More than any other writer, the adjudicator must heed the elementary principles of composition,⁷⁷ 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."⁷⁸ 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."⁷⁹

V. LEGISLATORS

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

— Thomas Jefferson (on the U.S. Congress)⁸⁰

73. Francis, *A Faster, Better Way to Write Opinions*, JUDGE'S J., Fall 1988, at 26.

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).

76. See Handler & Ruby, *Justice Cardozo, One-Ninth of the Supreme Court*, 10 CARDOZO L. REV. 235, 235 (1988).

77. See Re, *Legal Writing As Good Literature*, 59 ST. JOHN'S L. REV. 211, 220-24 (1985). See generally J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 114-23 (2d ed. 1986); W. STRUNK & E. WHITE, THE ELEMENTS OF STYLE 14-33 (3d ed. 1979).

78. Re, *supra* note 77, at 224-25.

79. Cardozo, *Law and Literature*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 338, 341 (M. Hall ed. 1947).

80. R. WARNER & T. IHARA, 29 REASONS NOT TO GO TO LAW SCHOOL 72 (rev. ed. 1984)

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

(quoting from Jefferson).

81. Lane, *Legislative Process and its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 650 (1987) (footnotes omitted) (quoting R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 43-53 (1975); citing Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528-29 (1947)).

82. Lane, *supra* note 81, at 650-51.

83. *Id.* at 652-59.

84. See Benson, *supra* note 15, at 572.

85. N.Y. GEN. OBLIG. LAW § 5-702 (McKinney Supp. 1989).

86. Cf. Younger, *In Praise of Simplicity*, 67 MICH. B.J. 518, 519 (June 1988).

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.⁸⁷ More guidance for the courts is required in order that both branches may perform the roles assigned to them.⁸⁸

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.⁸⁹ 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."⁹⁰

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'Connor⁹¹

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.⁹² According to a recent newspaper dispatch, "many

87. See, e.g., N.Y. STATUTES §§ 71-343 (McKinney 1975 & Supp. 1989).

88. See R. Miner, *Preemptive Strikes on State Autonomy: The Role of Congress*, The Heritage Lectures No. 99, at 7-12 (1987).

89. Cf. Benson, *supra* note 15, at 573 (plain English statutes should have legalese-oriented lawyers looking over their own shoulders).

90. *Indiana Hosts Legal Drafting Institute*, SCRIVENER, Winter 1989, at 3, col. 2.

91. F. O'CONNOR, *The Nature and Aim of Fiction*, in MYSTERY AND MANNERS: OCCASIONAL PROSE 63, 84-85 (1969).

92. See Hugg, *Core Legal Abilities Must Be Taught*, CASE & COM., Jan.-Feb. 1989, at

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."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.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.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,"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.⁹⁷ Academics compete for space in the law reviews,⁹⁸ but little attention is given to student writing. With academic tenure, promotion, and status dependent on publishing,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.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.¹⁰¹ Academics are not exempt from the disease

8, 11.

93. Rothfeld, *What Do Law Schools Teach? Almost Anything*, N.Y. Times, Dec. 23, 1988, at B8, col. 3.

94. *Id.*

95. Middleton, *Legal Scholarship: Is It Irrelevant?*, Nat'l L.J., Jan. 9, 1989, at 1, col. 2.

96. Margolick, *At the Bar*, N.Y. Times, Jan. 13, 1989, at B6, col. 1.

97. See Carrick & Dunn, *Legal Writing: An Evaluation of the Textbook Literature*, 30 N.Y.L. SCH. L. REV. 645, 646-47 & nn. 9-10 (1985).

98. Rosenkranz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 868-69 (1988).

99. Adams, *Writer Gives Advice on Footnoting One's Way to Professorial Tenure*, Nat'l L.J., Jan. 11, 1988, at 4, col. 3.

100. Bomage, *To Write or Not to Write*, ALC NEWS LETTER, Feb. 28, 1964, at 7, excerpted in *A True Professional*, N.Y. ST. B.J., Feb. 1989, at 67.

101. See Getman, *Colloquy: Human Voice in Legal Discourse*, 66 TEX. L. REV. 577 (1988).

of legalese and often add confusion and uncertainty to the law by introducing new legal theories that have no relation to the real world.¹⁰²

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."¹⁰³ It is time once again to reexamine legal education in the public interest. Proposals for apprenticeship training beyond law school should be examined.¹⁰⁴ 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.¹⁰⁵ A remedy must be found for the deficient communication of legal knowledge and skills.

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.

102. D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 21-22 (1983).

103. Kramer, *Scholarship And Skills*, Nat'l L.J., Jan. 9, 1989, at 15, col. 1, 16, col. 2 (quoting Judge Edwards).

104. *Id.* at 16, cols. 2-3.

105. 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.

