CONFRONTING THE COMMUNICATION CRISIS IN THE LEGAL PROFESSION

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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 suggest that there is a need to clarify, simplify and edify in all forms of legal expression.
I.

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 the client[s] ha[ve] been informed of relevant considerations." 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.

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 arrangements for the payment of reasonable fees for services rendered. 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. 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. 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. 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." 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.\(^1^9\)

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."\(^2^0\) 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.\(^2^1\) 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 recognized generally 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.\(^2^2\) The bar performs its public
relations function by providing that education.\textsuperscript{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.\textsuperscript{24} One commentator has posited "[i]ntertia, incompetence, status, power, cost and risk" as "a formidable set of motivations to keep legalese."\textsuperscript{25} These motivations, he asserts, "lack any intellectually or socially acceptable rationale" and "amount to assertions of naked self-interest."\textsuperscript{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 of problems tend to be the same as they were 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. 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 decisionmaking. 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 decisionmaking 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 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 decisionmaking 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 in respect of legal memoranda for internal law firm
use. A writer has referred to "the countless hours of expensive legal time that must be wasted every waking 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.

II.

Litigators

Q. Mr. 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 are heard to 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 is taught in law schools, in continuing education programs and in books and articles covering all aspects of the subject, from opening statement through direct and cross-examination and 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 in 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.\textsuperscript{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.\textsuperscript{43} Even as to those cases, courtroom resolution is rare, and it is not unusual to find litigation partners who never have conducted a single trial. As to matters where the amount in controversy is small, clients either 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.\textsuperscript{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.\textsuperscript{45} Communication
breakdowns occur also in the opening statement, when counsel promises proof they are unable to deliver, and in closing argument, when they are carried away by their own rhetoric. 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. The Briefs are what I refer to when writing an opinion or before signing off on a colleague's 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 now, 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. Despite the availability of some excellent