guides to Brief writing, the noted deficiencies persist and the end of the crisis in this area is nowhere in sight.

If there is a failure of communication in brief-writing, there is an even greater failure in the other part of appellate advocacy -- oral argument. Although the opportunity for oral argument has been diminished as the result of the screening process employed by some appellate courts, and the time for argument (when it is allowed) has been greatly reduced, the privilege of speaking to an appellate court continues to be valued by some litigators. 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. Real world appellate advocates can learn a lesson from the devotion to duty displayed by moot court advocates. The ability to present a structured argument and to respond to the questions of judges within a restricted time period must be cultivated, but only a few seem interested in developing the skills of oral argument. Deficiency in oral expression is more and more noticeable as most litigators, ignoring the opportunity to engage in a Socratic dialogue with the judges about their cases, approach oral argument as if they really would have preferred to "submit."

I have published twenty-five suggestions designed to assist
litigators in oral communication on appeal.\textsuperscript{58} Other judges also have undertaken to point up various deficiencies in oral argument.\textsuperscript{59} With judges, including Justices of the Supreme Court, emphasizing the importance of oral argument,\textsuperscript{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.

III.

Adjudicators

I have decided to allow your spouse $100 per week for temporary support.

Thank you, your Honor. I’ll probably throw in a few dollars myself.\textsuperscript{61}

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.

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

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

The importance of communicating well with lay jurors is widely acknowledged by drafters of pattern instructions. It is 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. It is noteworthy that the Committee sought the advice of a journalist who was not legally trained, and considered research in juror understanding in 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. 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.

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. 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. Judges 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. In regard to appeals, it has been said that "[t]he integrity of the [appellate] process requires that courts state reasons for their decisions." 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 precedent in the process of resolving controversies. Consequently, the audiences for various judicial opinions may be different. According to one teacher of judicial writing, however, adjudicators share common goals in desiring their written opinions "to be clear, concise, precise and complete, fair, reasonable, just, balanced and dignified" in order to serve a number of purposes: "to decide, dispose of and record cases; persuade, exhort, order, teach, inform, explain and reason with audiences ranging in legal expertise from litigants and the media to courts of appellate review." A tall order indeed!
Although there is a need for a faster, better way to write opinions,\textsuperscript{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 the dispositions cannot be cited as precedent.\textsuperscript{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.\textsuperscript{76} More than any other writer, the adjudicator must heed the elementary principles of composition,\textsuperscript{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."\textsuperscript{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."\textsuperscript{79}

IV.

Legislators

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

Thomas Jefferson (on the U.S. Congress)\textsuperscript{80}

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. 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 compromises, of the process of majority building and of 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 section." 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 don't interpret them properly or don't exercise sufficient "restraint." Courts are faced daily with actual cases and controversies involving real-life 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. In this connection, 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

V. Educators

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

Flannery O'Connor ⁹¹

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. 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 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.\textsuperscript{94}

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

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

Moreover, many academics, by virtue of their disdain of law practice, have succeeded only in imbuing their students with the ability to express themselves in professional jargon without
communicating the human voice of the law.\textsuperscript{101} Academics are not exempt from the disease of legalese and often add confusion and uncertainty to the law by introducing new legal theories that have no relation to the real world.\textsuperscript{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."\textsuperscript{103} It is time once again to reexamine legal education in the public interest. Proposals for apprenticeship training beyond law school should be examined.\textsuperscript{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.\textsuperscript{105} A remedy must be found for the deficient communication of legal knowledge and skills.

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, therefore is 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. Of
the deterioration of the abilities of lawyers -- counselors, litigators, adjudicators, legislators and educators -- to communicate with these audiences, there can be no doubt. It seems to me that the deterioration now 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 presentation will serve to focus some attention on the critical problems of legal communication.