I am happy for this opportunity to share with you some of my concerns about communication in the legal profession. I think that the subject is an important one, because the work of all segments of the profession is performed only through the media of written and oral communication. Communication has been defined as expression that is clearly and easily understood. Much of the present-day communication of the legal profession simply fails to measure up to the definition. This situation deserves your urgent attention and mine, 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 decline in the communications skills of the bar may reflect a problem that exists in the society at large. For example, we are surrounded by doubletalk. Consider these examples, collected from recent newspaper articles:

- 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 a recent dive in the Dow-Jones as a "fourth quarter equity retreat."

United States Senator Orrin Hatch of Utah referred to capital punishment as "our society's recognition of the sanctity of human life."

What I do not understand is why lawyers tolerate doubletalk and inarticulateness in speech and writing. Twenty years ago, the National District 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 at once 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 tht ol' boy 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."

Regardless of the problems of society as a whole, the expressive deficiencies of lawyers in their capacities as counselors, adjudicators, legislators, educators and litigators must be recognized as a serious and growing problem. This indeed is everybody's problem. In Vermont, they tell a story of a New York lawyer who came to a small country store in a crossroads town near Burlington. He thought he would go in for a soda but
saw on a porch a snarling dog with fangs bared. Next to the dog was an old man on a rocking chair. The lawyer rolled down his car window and asked: "Does your dog bite?" "Nope," was the reply. The lawyer got out of the car, stepped onto the porch and immediately was attacked by the dog. He ran back to the car, locked the door, rolled down the window and said to the man on the porch: "I thought you said your dog doesn't bite." "Ain't my dog," was the answer. Communication is your dog and mine; there is no lawyer who can avoid it. Each branch of the profession has its own communication problems with its own particular audience. I examine the problems of each, with particular emphasis on appellate litigators, whose audience includes me.

Counselors. 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 counsel clients with explanations sufficient to permit 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. Professor Fred Rodell said: "There are two things wrong with almost all legal writing. One is form; the other is content." 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 surfaced last year 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 dollar 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 advisors," "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 that a "mouthpiece" must speak through another "mouthpiece." 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. One 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." Unnecessary digressions, the mixing of fact statements with legal opinions, and lack of order in the presentation of arguments have been identified as some of the deficiencies found. The lack of directness and excessive formalism of expression that characterize poorly written correspondence as well as inadequate legal memos are said to be especially apparent among young lawyers.

**Adjudicators.** Those who adjudicate controversies also have an obligation to communicate effectively with their 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 should 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. Most appellate decisions today are too long and have too many footnotes. I always tell my clerks that it is much easier to write a long, rambling opinion than a short, concise one.

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. In the case of a trial judge, jury instruction is probably the most important and the most difficult function performed. Jury comprehension studies generally confirm that
jurors do not understand many of the instructions given to them. The assistance of the bar is particularly important in this regard. Efforts have been undertaken to draft pattern jury instructions that will be meaningful to jurors, but much work needs to be done in this area. 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. In the final analysis, however, 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.

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." Indeed, 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.

Although there is a need for a faster, better way to write opinions, the bar remains opposed to dispositions by summary unpublished orders or by short statements in open court, at least in regard to appellate decisions where the dispositions cannot be cited as precedent. The bar may be right, because each decision of each adjudicator should stand on its own and be subject to
examination by all in the great common law tradition. That great common law judge, Cardozo, admonished that the "sovereign virtue for the judge is clearness." The admonition I have adopted in my own chambers can be applied to all forms of legal expression: Simplify, Clarify, Edify.

Legislators. 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 that are tantamount to incomprehensible. Those who toil in the tax vineyards suffer more than any others. 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 problem more than any other branch of the profession. Nevertheless, we know that legislatures often write vague, complex and difficult statutes so that as many constituents as possible can be satisfied. The legislative representatives then complain that the courts don't interpret these complex statutes properly or don't exercise sufficient "restraint." But courts must do the best they can with what they have, including legislative history and attempts to "divine" the legislative intent. We cannot refer disputes to
committees or commissions for study and report at some day far in the future. We are faced daily with actual cases and controversies involving people whose disputes must be resolved. If legislatures wish to be more specific and give more guidance to the courts, they certainly know how to do it. Some legislative bodies have provided rules, albeit contradictory at times, for the interpretation of their statutes. The Judicial Conference Committee of which I am a member has provided Congress with a checklist of items to be considered in enacting legislation. Attention to such a checklist certainly would avoid problems that might occur later on.

**Educators.** 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 the 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.

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." It is time once again to reexamine legal education in the public interest. Proposals for apprenticeship training beyond law school should be examined. 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.

But even more serious than the failure of the professors to communicate with their students is their failure to teach communication skills. 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. Academics compete for space in the law reviews, but too little attention is given to student writing. With academic tenure, promotion and status dependent on publishing, 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.

Litigators. 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. 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 of courtroom drama culled directly from trial transcripts:

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. Jefferson, 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.

Q. As you were driving your car just before the accident, where was your right foot located?
A. It was located at the end of my right leg!

Q. Do you have any sort of medical disability?
A. Legally blind.
Q. Does that create substantial problems with your eyesight as far as seeing things?

Q. Are you qualified to give a urine sample?
A. Yes, I have been since early childhood.

EXPERT WITNESS

Q. What is the meaning of sperm being present?
A. It indicates intercourse.
Q. Male sperm?
A. That is the only kind I know.

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. 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.
The function of persuasion is not served by Briefs that contain communication deficiencies of the following types [expand and give examples]: 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; discussions of material outside the record; use of slang; inclusion of sarcasm, personal attacks and other irrelevant matters; excessive number of points; lack of reasoned arguments; improper characterization of the case; illogical and unsupportable conclusions; failure to meet adversary's arguments; unnecessary footnotes; and neglect to use the format prescribed by Court rules.

If there is a failure of communication in brief-writing, there is an even greater failure of communication 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."

Here are some of the most common deficiencies I have found in oral argument [expand and give examples]: reading from a prepared text; quoting extensively from a case or from the record; deferring answers to questions; referring to the brief rather than responding directly to the inquiry; lack of familiarity with precedential cases decided since the filing of the briefs; extensive discussion of the facts; lack of familiarity with relevant facts; unnecessary discussion of basic legal principles; unfamiliarity with cases cited; responding with a "guess"; lack of a structured argument; ineffective presentation of the issues; insufficient voice volume; distracting mannerisms such as coat tugging, pencil tapping and note passing; answering questions with questions; attempting to cover too many points; emotional arguments; misuse of rebuttal time; division of argument among lawyers on the same side; extensive explanation of recent decisions of the court.

There indeed is much room for improvement in oral appellate advocacy.

I hope that I have conveyed to you some of my concerns about
communication in the legal profession and that you will turn your
attention to the problem, whatever your area of practice.
Language is, after all, the medium in which we all conduct our
business.

Thank you.