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Discipline of Clear Expression

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The Discipline Of Clear Expression

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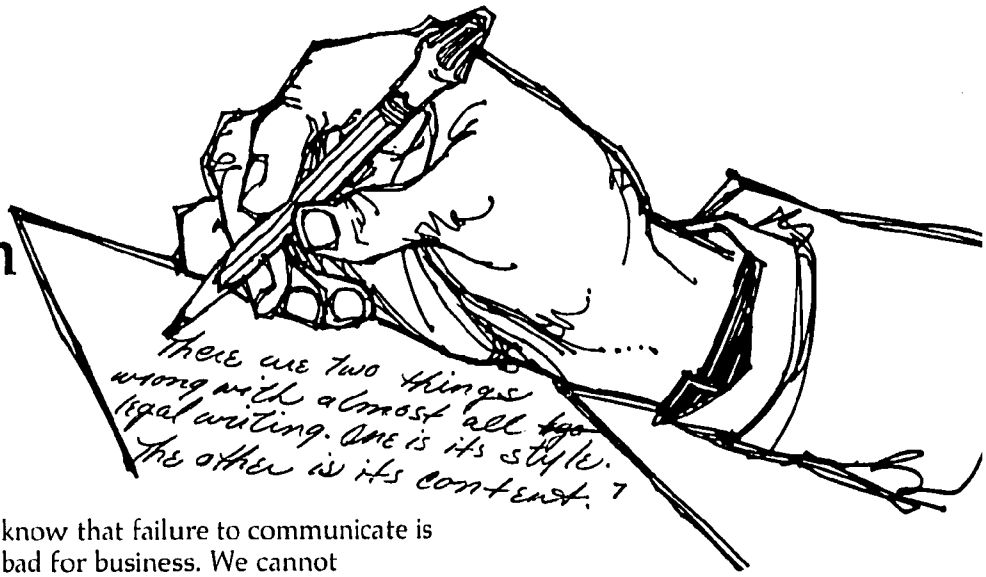
Idaho Court of Appeals



Editor's Note: Judge Burnett will present a seminar on effective communication for lawyers at the Idaho State Bar annual meeting on July 13-15, 1989, in Coeur d'Alene. Here, Judge Burnett offers a sample of the seminar. We hope to see you in Coeur d'Alene for the full course.

We lawyers are professional communicators. We are paid to write and to speak. Yet many of us neglect these skills as we struggle to cope with the technical demands of our work. We are expected to master a prodigious array of legal principles, and to apply them precisely in diverse circumstances. But this struggle is in vain if we muddle our thinking, or befog the minds of those whom we seek to persuade, by failing to communicate effectively.

It should not, and need not, be so. The American Bar Association's Task Force on Lawyer Competency has declared that every lawyer must know how to "write effectively" and how to "communicate orally with effectiveness in a variety of settings . . ."[1] Effective communication is not merely icing on the cake of technical ability. It is an indispensable part of the lawyer's craft.

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We know the value of clear expression. We know that legalese is bad for our profession because it creates the impression that lawyers "use mumbo jumbo to create a phony mystique . . ."[2] We also know that failure to communicate is bad for business. We cannot persuade clients, judges and juries to do what we say if they cannot understand what we mean. But there is another reason — more subtle, and perhaps more important — why lawyers must speak and write clearly. It is that thought and expression are interconnected.

"How do I know what I think," W.H. Auden once asked, "until I see what I say?"[3] Our thoughts are laid bare when we put them into words. Arguments that seemed impregnable when they rested inchoate in our consciousness suddenly become shallow and vulnerable as we write them or hear ourselves speak them. Collateral issues acquire new significance as hidden relationships emerge. Our thoughts change even as we express them.

Clear expression . . . is the testing ground for ideas.

Clear expression, then, is not merely a linguistic art. It is the testing ground for ideas. Through the discipline of putting an argument into words, we find out whether the argument is worth making. Unfortunately, many lawyers take this test too late. Busy litigators write briefs or prepare oral arguments in response to court-imposed deadlines, long after litigation strategies have coaleseed. Similarly, office practitioners conduct negotiations or draft legal instruments under client-imposed deadlines, when client expectations and commitments have become fixed.

The secret of clear expression is to start verbalizing early — while there is still time to learn from the discipline of forming ideas into words. You must begin by identifying your client's goal and the issues to be resolved. Each issue is defined by a cluster of facts and a governing legal principle. If you cannot articulate this nexus of law and fact, you do not yet have a grasp of the case.

In simple litigation, the issues will be readily apparent. They may be organized into an outline following the conventional I-A-1-a format. In a more complex case, the relationships among facts and legal principles may not be so clear. The lawyer grappling with a difficult case might benefit from the "issue tree" technique used by many professional writers.[4]

The "issue tree" is a schematic diagram that begins at an apex and works downward. (To an Idahoan, it may look like the root system of a potato plant.) It starts at the top with your ultimate goal, then branches into issues and sub-issues, and branches further into legal principles and relevant facts. After the "tree" is fully drawn, you prune the branches of extraneous issues and consolidate

the branches of related issues. As the "tree" becomes taller and narrower, it visually reflects the tightened focus of your thinking.

Focus begets brevity . . .

Focus begets brevity; and if brevity is the soul of wit, it is also the heart of persuasion. The longer you take to say something, the more your audience will doubt you. The trick is to say what is necessary, and no more. This is not easy. We hate to deprive the world of our wisdom on all points of interest. But the intellectual deadwood must be cleared away, leaving a clean structure. Ernest Hemingway said as much when he described good writing as "architecture, not interior decoration."[5]

Thus, the battle for brevity is largely won or lost before the first draft is prepared. Unfortunately, many of us — particularly those working under deadlines — prepare first drafts without an outline, "issue tree" or other structure. Realizing that we are thrashing about, we may try to achieve an artificial economy by using the fewest words possible. The result is a dense and cryptic mishmash. When you have a clear focus, you can afford to choose words freely. Indeed, William Faulkner likened the first draft to "a man building a chicken coop in a high wind. He grabs onto any board he can and nails it down fast."[6] You can use a dictation unit if you wish. Your predetermined structure will keep you on course. If you find yourself questioning the structure, you probably have discovered a defect in your original thinking. Stop, repair the structure, and then resume.

Editing . . . is mandatory, not elective.

When the first draft is completed, set it aside — even if only for a few hours. Then start editing. This is mandatory, not elective. Nevertheless, some lawyers fail to edit. Their briefs look like chicken coops, and their oral arguments are a cacophony of squawks. Perhaps they think — as novice writers sometimes do — that editing is a sign of incompetence, an embarrassing admission of previous "mistakes." Or perhaps they know better, but do not allow time for editing. A few, unfortunately, simply do not care, but they aren't reading this article anyway.

All writing, including this article, can be improved. Hemingway is said to have written fifty drafts of his famous last paragraph in *For Whom the Bell Tolls*. He wanted the words to be just right. We may not have time to be quite that precise, but we should prepare several revisions. Two or more should be refinements of the first draft. The last revision should reflect comments by a respected colleague.

If you are serious about effective communication, you will always have someone criticize your briefs and oral arguments. This is the only way of assuring that the message you intend to convey is the message your audience will receive. You may be amazed at how often a colleague seems to "miss the point" — meaning, of course, that you have not made the point. You also may be abashed (but ultimately relieved) at the number of mechanical errors and syntax problems your colleague will discover. In the end, the clarity of your expression will vouch for the soundness of your thinking.

Fred Rodell, the iconoclastic professor of law at Yale, once observed: "There are two things wrong with almost all legal writing. One is its style. The other is its content."[7] Through the discipline of clear expression, we can improve both. □

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1 American Bar Association Section on Legal Education and Admissions to the Bar, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools* (1979).

2 R. Goldfarb and J. Raymond, *Clear Understandings: A guide to Legal Writing* (Random House 1982), at xiv.

3 Quoted in M. Shaughnessy, *Errors & Expectations: A Guide for the Teacher of Basic Writing* (Oxford University Press 1977), at 79.

4 L. Flower, *Problem-Solving Strategies for Writing* (Harcourt, Brace, Jovanovich, 2d ed. 1985), at 95-107.

5 Quoted in D. Murray, *Write to Learn* (Holt, Reinhart and Winston, Inc., 1987), at 131.

6 Quoted in D. Murray, *supra*, at 180.

7 Rodell, "Goodbye to Law Reviews," 23 *Virginia Law Review* at 38 (1937).