A Good Example and a Bad

Go to 112 Federal Reporter Second, and at page 538 you will find Meaney v United States, in which the court of appeals for the Second Circuit held that a patient’s statements to his physician describing past physical symptoms are admissible despite the bar of the rule against hearsay.

No one but a zealot of the law of evidence would be concerned with the opinion whose author is not Learned Hand. That it is against hearsay.

A second principal virtue of persuasive writing, as Judge Hand’s opinion shows us, is simplicity of vocabulary, the use of those short and exact words that are the glory of English and the joy of every skillful writer.

For a contrasting example, turn back in 112 F2d to page 163, where a judge of the court of appeals for the Third Circuit starts an opinion as follows:

We think it fair to say that the resolution of the case at bar depends upon the judicial stigmatism of the court deciding it. The learned district judge and ourselves are required to appraise facts in relation to, first, causation and, second, a standard of care. Our appraisal happens to differ with his and we find the same difference in the “books.” It is an application of facts to a point of view. We should begin, therefore, with a statement of those facts.

Since faithful readers of this column know by now how to spot bad legal writing, I do not need to put a label on the quoted paragraph.

It is not direct. Why impose on our patience with introductory curlicues serving no purpose? Had the judge omitted his first paragraph, he would have produced a better opinion.

The quoted paragraph is not clear. Read it; read it a second time. Do you know what its author is trying to say? You can guess, perhaps, but legal writing that leaves the reader guessing at its meaning is invariably unpersuasive.

The quoted paragraph is not simple. Its first sentence alone contains an unnecessary clause, We think it fair to say (if the court thought it unfair, the court wouldn’t say it), an awkward and unusual word, resolvement (perhaps a slip of the pen for resolution); and an out-of-control metaphor, judicial stigmatism. Look up stigmatism in the dictionary and try to figure out what is the judge wants to convey. I think it’s something like, “It all depends on how you look at things.” If so, stigmatism is the wrong word, and the thought is excessively trite, even (with all respect) by the inexigent standards of judicial philosophizing.

A fourth principal virtue of persuasive legal writing is wonderfully illustrated by comparing another aspect of our two examples. Judge Hand’s paragraph, for all its excellence, never clamors for attention. It is modest and quiet, confident that its merit lies partly in the art by which the author has concealed his art. The other judge’s paragraph is different. It promises handstands and backflips, shouting, “Look! See how clever I am! Admire me!” When the attempted acrobatics become a pratfall, the embarrassed bystander can only look the other way. One might say that persuasive legal writing should be like a triple-dry martini—colorless but powerful.

“Plain Language” is a regular feature of the Michigan Bar Journal, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. The assistant editor is George Hathaway. We seek to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, PO. Box 13038, Lansing, MI 48901. For more information about plain English, see our website—www.michbar.org/committees/penglish/pengcom.html.

This article originally appeared in the March 1987 issue of the ABA Journal and is now included in a collection called Persuasive Writing, published by The Professional Education Group, Inc. It is reprinted with permission from the ABA Journal and from The Professional Education Group, Inc. (800-229-CLE1).

Irving Younger, now deceased, was a professor at the New York University School of Law and the University of Minnesota Law School.