By Irving Younger

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 were its author not Learned Hand. That it is a Learned Hand opinion commends it to all who love the English language.

Observe how the great judge begins:

> *This is an appeal from a judgment entered upon the verdict of a jury, dismissing a petition in an action to recover upon a policy of war risk life insurance. The insured was mustered out on December 31, 1918, and the policy lapsed on January 30, 1919; he died of pulmonary tuberculosis on July 6, 1922, and the question was whether he was permanently and totally disabled when the policy lapsed.*

No throat-clearing, no fanfares, and no preliminary juggling act to warm up the audience. Hand gets right to it, demonstrating that a principal virtue of persuasive legal writing, as of all good expository prose, is directness.

Your eye and mind move effortlessly from the two sentences just quoted, on through the next eight sentences, to the end of the opinion's first paragraph. Having read it, and one reading will suffice, you possess all the complicated facts necessary to understand the rest of the opinion. No effort is required. You come to the second paragraph with resources undiminished, fresh and ready for the difficult legal analysis there presented. This doesn't happen by accident. Clarity being another principal virtue of persuasive writing, Judge Hand has made sure that his first paragraph is clear.

Not counting dates or citations, the first paragraph contains 319 words. Of that total, 7 are words of five syllables (*tuberculosis* twice, *sanatorium* twice, *examination* twice, and *determinative*), 5 are words of four syllables, 35 are words of three syllables, 44 are words of two syllables, and 228—71 percent of the whole—are words of one syllable. A third 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 resolvement 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 in heaven's name 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. ✦

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