Judicial Officers' Bulletin

November 2008 Volume 20 No 10

Published by the Judicial Commission of NSW

Features

Recent decisions

Managing courtroom communication: reflections of an observer*

Joanna Kalowski**

In the highly structured courtroom environment, communication is a strange hybrid with unique features. The following article identifies these and suggests practical interventions for judicial officers to manage effective and courteous communication.

To understand what tips the balance in a courtroom (or an individual) from courteous and receptive to unreceptive or hostile is to consider many factors:

- litigants' expectations of courts, judicial officers and the hearing process
- the quality of understanding they have of their case, of the hearing process, and their role in it
- their level of language competence and confidence
- previous experience of courts in particular, and authority figures in general
- their attitude to winning and losing, whether in or outside court
- the quality of their representation in court.

A litigant's state of mind is also a factor, and while a degree of tension and nervousness is predictable and normal, tension is dramatically higher in litigants without legal representation.

The people central to the purpose of the court (the litigants) are required to speak in a limited and formalised way, and often speak least of all. Those who speak on their behalf are in far more direct communication with the judicial officer than they are, a situation many find frustrating, even when prepared for it — and many are ill-prepared. While legal representatives know the applicable law, parties feel they know the fact situation better than anyone else, having lived it, and can be puzzled and irritated by the omission of details they regard as essential features of their case. This type of mediated communication is unusual in itself, and is usually reserved for people needing the services of an interpreter. In social settings, nothing is quite so irritating as having someone speak for you when you are present and perfectly able to speak for yourself.

The reverse, however, is worse. Unrepresented litigants do speak for themselves, but find themselves saying things inappropriately, either at the wrong moment or in the wrong way; they soon discover that underlying communication in court are some assumptions about process without which they quickly appear bumbling and incompetent.

Bumbling, incompetent, puzzled, frustrated, irritated: these are hardly descriptive of the state in which people do their best, and adults can be reduced to feeling like children. Add to this the shame adults feel when they are out of their depth, and it becomes obvious why comprehension declines in direct proportion to the rise of feelings of inadequacy.

Judicial officers, too, are in the unusual situation — from the communication point of view — of having to gauge levels of understanding without being able to rely

on the usual tools: eye contact, direct interaction, mutual questioning. At best, judicial officers can ask if all is clear; but which adult is going to admit, aloud, in the presence of others who seem at ease with what is happening that they don't understand a process which is ostensibly about them?

It is this reality which provides the backdrop to the reflections contained in this paper, and the basis of suggested approaches, interventions and skills deployment.

Some safe assumptions about litigants judicial officers can make

- People believe legal representation largely evens out power imbalances between parties, and unrepresented parties are keenly aware of the unevenness of power relations, and of their level of disadvantage.
- This sense of being disadvantaged often makes them defensive or aggressive.
- It can also have the opposite effect, silencing them, making them passive in the face of much they do not follow. A feeling of helplessness frequently results, further impairing the capacity to understand and participate.
- Litigants will be anxious, even when represented, but far more so if they are not.
- Anxious people are more likely to seem hostile, even if they don't feel particularly hostile.
- People's capacity to understand and respond is reduced in direct proportion to their level of anxiety, yet litigants not unreasonably expect to understand everything that will happen around them. ("After all, it's my case.") As the case proceeds, and their understanding remains limited or declines, their resentment grows, further fuelling their inability to focus, follow and respond.
- Most litigants are poorly prepared for the court event, whether represented or not. Where lawyers are involved, litigants rely on them and behave quite passively. However, unrepresented litigants' more active participation can be equally unhelpful to the process unless they are among a tiny group of highly skilled and well-informed people who know how to conduct their matter in court.
- Litigants generally have high expectations that the process will be fair, and have preconceived, often unrealistic notions of what fairness entails.
- Their unrealistic expectations include the idea that the outcome will vindicate them, and resentment can grow as they realise it is unlikely to happen. Not knowing how rare it is for a litigant to leave court feeling vindicated, they leave feeling cheated.
- This is the cycle that predisposes such a litigant to be even more difficult to deal with in future court hearings, whether related to the first event or not.

Judicial interventions aimed at reducing anxiety will lower the level of litigants' defensiveness and helplessness and raise their capacity to participate. Among the most effective are introducing the court event with a description of what is to happen on this occasion, and a summary of what happened previously.

What people know before they are familiar with a subject or a setting ("entry knowledge") deeply influences the way they act once they are in the setting or dealing with the subject ("entry behaviour"). Judicial officers and lawyers know the subject and the setting so well that they can easily overlook how strange it can be for litigants: how formal, how artificial, how unusual, how constrained and rule-bound.

Attempts to deal with this sense of strangeness by altering the physical setting have been partly successful, especially where litigants can sit next to their representatives instead of behind them. Doing away with all ceremony, however, may defeat the purpose, since parties to litigation have twin goals, sometimes seen as inconsistent, but in fact quite compatible. They want input into their matter, to be heard and taken seriously, but they want someone else, someone in a position of authority, to take responsibility for resolving their problem.

How does the ordinary litigant know what to expect

Judicial officers' use of language is crucial to ensuring litigants' understanding of stages in the hearing, and may also lower tension in the courtroom. The capacity to speak simply and clearly, using accessible yet not simplistic language is a daunting task where technical language is regularly used and widely accepted as the norm. It requires judicial officers to be able to paraphrase and explain common legal expressions, or to suggest others do so for the benefit of litigants.

Communication improves if judicial officers use active rather than passive voice, and avoid talking over parties or lawyers, double negatives and multi-layered questions. Judicial officers report they also propose these techniques as a solution when litigants fail to understand questions from counsel (listening for the "how" as well as the "what").

It is apparent that one aspect of judicial leadership lies in the ability to model the kind of communication that assists both the court and its users.

It really matters for those whose business is language clarity to stop and consider how, when and why they use particular forms of expression, and to choose consciously how they will communicate, and with whom.

English has a rich heritage, influenced by many other languages, but its primary influences are Germanic and Latinate. In workshops I offer judicial officers either a "hearty welcome" or a "cordial reception", and ask which they would prefer. Someone always (correctly) observes that they mean the same thing; and someone else always adds that they feel different — and that is the point. The "hearty welcome" sounds immediate and comfortable, while the "cordial reception" sounds cooler, and more formal. The former is the Germanic, the language of the many, and creates a tone which the latter, in the language of the few, cannot. Only the clergy and the judiciary knew Latin, and used it in ways that reserved meaning and high purpose for a select group.

Those who study and love the language enjoy the by-play English permits, but rarely recognise that it is possible to retreat into unnecessary formality under pressure, because almost everything in English can be said in two "languages". That is not to say there is no place for the use of formal language, but it is unhelpful if the goal is to increase litigants' sense of participation and understanding. When judicial officers reproach parties who are having difficulty understanding an issue that "this is a simple proposition", the outcome can be quite difficult.

Under pressure from high case loads and increasing numbers of unrepresented litigants in complex matters, judicial officers are now faced with reformulating what they say to ensure the ordinary listener — quite literally the average person in the street — can follow and answer, query and respond. For judicial officers, this can be about simply reframing Latinate phrases into everyday English, or persistence in explaining a point to a litigant without feeling that this reflects poorly on themselves. On the contrary, litigants' respect for judicial officers grows in circumstances where judicial officers have gone to some lengths to ensure they understand and can follow the process.

As a stress management tool, it is of unparalleled benefit to judicial officers, too.

Expectations of courts in general and the judicial officer in particular

- The buck stops here: this is the person who will sort it all out.
- The judicial officer is in control, and won't let me be overborne.
- The judicial officer will protect my rights.
- The climate here is serious, and I will be taken seriously.

The adversarial nature of most proceedings ensures that litigants will at times feel discomfort. If they perceive this, rightly or wrongly, as an assault on their rights, anxiety and tension result. At high levels, this can lead to hostile and unproductive behaviour on the part of litigants and tension in the courtroom. Paradoxically, it is sometimes when judicial officers are following due process scrupulously that litigants with unrealistic expectations of what protection of their rights looks and feels like may become aggressive.

It is of great value therefore, if judicial officers can explain procedural steps in simple terms along the way.

Realistic expectations of judicial authority

- direction
- stability
- conflict management
- maintenance of norms.

Authority, defined as the ascribed power to achieve an end or carry out a responsibility through others, is distinguished from influence, the capability to carry out a task **with** others "by recruiting their interest, energy and commitment to a common goal or purpose".

Recruiting the energy of others depends upon the conscious use of active listening skills, and being prepared to attend to a litigant's expression of emotion (obviously without overstepping boundaries) in order to ensure emotion does not swamp reason.

The purpose of an intervention aimed at managing emotion is to return the individual to the state in which he or she can best participate: a rational state rather than an emotional one.

It seems counter-intuitive that attending to a party's emotional state when it is impairing their capacity to participate will actually lower emotion and raise the level of cognition; many professionals ignore emotion in the hope that it will go away. Judicial officers themselves report that a range of interventions, from offering or calling a short adjournment to asking parties whether they feel able to proceed, assists parties to "pull themselves together" and function more appropriately from that point on.

Saving face is not only a cross-cultural phenomenon, but a human one, and is particularly important for adults, whose fear is that they will look foolish (childlike) if they are unable to conduct themselves appropriately in a given setting (like an inexperienced child). Feedback and interviews with litigants reveal that the judicial officer's status is actually enhanced by subtle interventions that restore dignity and confidence. A phenomenon known as "locating people in their expertise" emerges from the understanding that no one knows more about a situation than those who have lived it. Judicial officers who adopt this view find parties are more likely to accept and follow instructions designed to assist them also to understand procedural or legal issues. It is the "also" which is the key here. ("You may understand the facts of the case; now let me help you understand how it will run and why so that you can participate more fully." This may not be stated, but litigants will "hear" it as an enabling message, since it will underpin much of what they experience in court).

A quick self-assessment using the four factors (direction, stability, conflict management, maintenance of norms) after a tense session in court can help judicial officers to identify whether today's difficult litigants were and possibly remained confused, and to reconsider the techniques used to manage them. More often than warranted, people jump to the conclusion that litigants behaving aggressively are querulants in the sense used by Lester et al.[1] More often than not, they were merely being difficult.

Considering what was done to create a sense of direction and stability, and what kind of interventions were used to manage conflict and maintain norms can reveal interesting gaps. Remembering that litigants, especially unrepresented litigants, are unfamiliar with the norms of conduct and procedure in court presents a raft of possibilities for intervention by the judicial officer. However, it goes without saying that not all judicial officers will feel comfortable with all possible interventions, and will probably deploy mostly those with which they are most comfortable themselves. The trick is to expand judicial officers' own comfort in order to acknowledge and manage the discomfort of litigants. This

is best achieved by discussion and exchange of views among judicial officers themselves, not just skills training or practice.

A judicial educator, herself a judicial officer, identifies four factors which assist in maintaining the tone of communication in court:

Preparation + *Knowledge* lead to *Politeness* + *Control*

Preparation, she asserts, goes a long way to protecting judicial officers from being taken by surprise and assists judicial officers to remain in their comfort zone. It is fear of loss of status which may cause some to respond aggressively to a surprise issue, although undoubtedly such issues will arise, regardless of the level of preparation. If civility is a by-product of preparation, it will enhance both the function and the tone of the court, and prevent that downward spiral so difficult to reverse. (Here again, the same judicial officer says that if she feels herself losing her temper, she takes a short adjournment and on return apologises for speaking sharply — a good way of reframing the outburst and restoring calm).

At the heart of effectiveness in this area are some self-evident skills:

- awareness of the importance of managing people in all situations
- ability to define and describe a task and set limits up front
- ability to build confidence and manage risk
- capacity to stay with ambiguity for a time — easier for the judicial officer than for the litigant, who wants and expects everything to be clear from the outset, and can become agitated if this does not happen.

Anxious litigants can't manage themselves, are unfamiliar with the process and the judicial officer and his or her role, and they usually don't know the nature of the task or its limits. Building litigants' confidence in the process as it runs its course is one role the judicial officer plays: it is all but imperceptible to everyone in the courtroom, including many judicial officers who, upon hearing favourable observations, regularly express surprise that they achieved them, and in what ways they did so.

Key communication skills revisited

- communicate clearly and simply
- use accessible yet not simplistic language
- involve litigants in the process — eyes and words
- create a climate conducive to "participation" by
  - maintaining a focus on the issues
  - ensuring there is clarity about process
  - maintaining courtesy in the courtroom
  - listening, summarising, paraphrasing if necessary
  - asking questions, not statements disguised as questions
  - avoiding talking over litigants or lawyers
  - avoiding double negatives and multi-level questions
  - using active rather than passive voice

Interventions to settle litigants down

- Make opening remarks which indicate how the case will proceed today.
- Acknowledge litigants as well as their representatives.
- Tell unrepresented litigants what is expected of them, what they can and can't do.
- Assure them they will be heard.
- Let them know they will have a chance to speak, and indicate when and in what ways at the outset and as the case proceeds.
- Use as wide a range of interventions as you comfortably can.

Six interventions defined by their purpose

1. Prescriptive: purpose — to be directive, for example, "You must answer yes or no to the question."
2. Informative: purpose — to instruct, make an observation, for example, "You look uncertain about that."
3. Confrontative: purpose — to challenge, give direct feedback, for example, "Please remain silent while X is giving evidence."
4. Cathartic: purpose — to acknowledge and normalise tension, for example, "Question may be unpleasant, but you have to answer it as best you can."
5. Catalytic: purpose – to encourage analysis, for example, "Where does this line of argument take us?"
6. Supportive: purpose — to express empathy "I know you have left your patients waiting to be with us today, Doctor."

Manage tension

- Give yourself a break if you need one, and the timing permits it.
- Give litigants a break if emotion is getting in their way, or offer a break or ask if they feel able to go on.
- Mutualise comments on emotion in order to neutralise them, for example, "There are moments everyone feels ..."
- Work on your own comfort with conflict and emotion: both are to be expected, especially in the court setting.
- Saving face is valued by all, and does not diminish your standing.
- Talk with your peers: exchange insights and ideas.

Endnotes

* Edited version of an address presented to the National Judicial College of Australia Communication in the Courtroom Conference, 10 November 2007, and the Local Court of NSW Annual Conference, 2 July 2008.

** Joanna Kalowski is a judicial educator who served eight years as a Member of the Administrative Appeals Tribunal and three on the National Native Title Tribunal. She has observed judicial officers across Australia in many courts, and runs workshops here and in Europe and Asia in communication, dispute resolution and cross-cultural aspects of both.

1 G Lester, B Wilson, L Griffin, PE Mullen, "Unusually Persistent Litigants", (2004) 184 *British Journal of Psychiatry* 352; "The Vexatious Litigant", (2005) 17 *Judicial Officers' Bulletin* 17.