National Judicial College of Australia
Communication in the Court Room Conference
Sydney
10 November 2007

Managing courtroom communication: reflections of an observer

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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, judges and the hearing process;
- The quality of understanding they have of their case; and 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 present tendency to describe litigants as self-represented veils the real state of affairs: 'self-represented' is a euphemism for 'unrepresented'. Judges now find themselves dealing with unrepresented litigants in many matters where the complexity of both fact and law combine to make representation essential.

Communication in the court is a strange hybrid, and has some unique features. It takes place in a highly structured environment which few have previously experienced, and which differs greatly from the usual settings in which people communicate.

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 judge 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.

Judges, 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 judges 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.

1. Some safe assumptions judges can make about litigants' state...

- *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 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"). Judges 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.

The idea of judicial control and authority is fundamental. A litigant can go to mediation or informal negotiation processes at any time. But when they go to court, they like and value the ceremony, the novelty, the formality and the authority. If they understand it, they value it more.

Thus in my view judges should not be concerned with making court processes less ceremonial but making them more understandable. We have lost so much ceremony in modern society. Having a bit of ceremony (people standing, silence in court), having a bit of drama is important and creates a very different environment - that environment is useful if the litigant understands what goes on within it: 'the climate here is serious and I will be taken seriously'.

I am sometimes asked by judges in workshops "is it it OK if I crack the odd joke to lighten the mood in the court room ?". Nearly always when a joke is made, it is the judge and legal representatives who laugh. If a litigant is unrepresented, he/she feels left out of 'the club'. Spontaneous humour in which all can join is a different thing.

To some extent, litigants are a little like the audience at a play, even though in principle they are on the stage. Their understanding of the case and its progress towards determination is seen as if from the wings, and if they can settle back and follow it, they leave with a sense of having participated in it fully, even if they have spoken relatively little. This sense of participation is the successful outcome of a well-

conducted hearing, whether a litigant wins or loses, and parties may even attribute that success to qualities in the judge. In a recent study, judges were described as "...supportive, correct, observant... wise, helpful, eased the confusion, listened, encouraging, very polite, respectful." (p. 34, Report of Jennifer E. McIntosh, PhD: The Children's Cases Pilot Project, March 2006).

2. Sources of information, or how the ordinary litigant knows what to expect...

- *Citizens don't generally inform themselves about courts and the law: they know what they see around them.*
- *What they see on TV news programs, read in newspapers or, more likely, see in TV courtroom drama, much of it American, is far more likely to shape perceptions. A 2004 Queensland study estimated 50,000 Queenslanders did not know the emergency number 000, and half that number confidently stated it was 911.*
- *Court registries make valiant attempts to produce information on websites or in written form, but it is often written so cautiously to cover so many eventualities, and in language so unusual for the reader, that it cannot be widely understood.*
- *The reading age of the average Australian is 13 years – so-called "Women's Weekly English". Unless an article is written as if for publication there, it is unlikely to be readily or widely understood.*
- *As a result, most litigants understanding of their matter is limited to what happens around them in court on the day.*

Judges' use of language is crucial to ensuring litigants' understanding of stages in the hearing, and will 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 judges to be able to paraphrase and explain common legal expressions, or to suggest others do so for the benefit of litigants.

Observation suggests communication improves if judges use active rather than passive voice, and avoid overtalking parties or lawyers, double negatives and multi-layered questions. Judges 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 their ability to model the kind of communication that assists both the court and its users.

3. Expectations of courts in general, and the judge in particular...

- *The buck stops here: this is the person who will sort it all out.*
- *The judge is in control, and won't let me be overborne.*
- *The judge 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, unproductive behaviour on the part of litigants and tension in the courtroom. Paradoxically, it is sometimes when judges are following due process scupulously 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 judges can explain process steps in simple terms along the way.

4. Realistic expectations of authority in general, and judicial authority in particular: four factors involving the interplay of authority and influence

- *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 on a preparedness 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. Judges 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 a given setting, (like an inexperienced child). Feedback and interviews with litigants reveal that the judge'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. Judges 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 judges 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 querulents in the sense used by Lester et al (Unusually Persistent Litigants, British Journal of Psychiatry, 2004:). More often than not, they were merely 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 judge. However, it goes without saying that not all judges 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 judges' own comfort in order to acknowledge and manage the discomfort of litigants. This is best achieved by discussion and exchange of views among judges themselves, not just skills training or practice.

A judicial educator, herself a judge, 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 judges from being taken by surprise and assists judges 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 judge 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 judge 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 judge 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 judge plays: it is all but imperceptible to everyone in the courtroom, including many judges who, upon hearing favourable observations, regularly express surprise that they achieved them, and in what ways they did so.

5. Key communication skills revisited

The capacity to:

- 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 overtalking litigants or lawyers
    - Avoiding double negatives and multi-level questions
    - Using active rather than passive voice

In addition, 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.

Interventions fall into six groups, and are defined by their purpose. They are:

1. Prescriptive: Purpose – to be directive, e.g.
"You must answer yes or no to the question."

2. Informative: Purpose – to instruct, make an observation, e.g.
"You look uncertain about that."

3. Confrontative: Purpose – to challenge, give direct feedback, e.g.
"Please remain silent while X is giving evidence."

4. Cathartic: Purpose – to acknowledge and normalise tension, e.g.
"Question may be unpleasant, but you have to answer it as best you can."

5. Catalytic: Purpose – to encourage analysis, e.g.
"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, yours and theirs:

- 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, e.g.
  "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.

It is inevitable that a degree of tension always exists in the courtroom setting, but with judicial leadership, it will be of the kind that is a spur to performance, not a barrier.

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November 2007