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Skills Judges Use to Communicate in the Court
[Transcript of oral presentation]

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With a remarkable lack of imagination, the profession where I preside call me *Judge Judy*. Not to be outdone by the nickname I turned on the television to get some idea about what they thought of me, or perhaps expected from me. She's a pretty amazing woman, Judy Sheindlin, and there is no doubt, having watched a few of her shows, that here's a woman who knows how to communicate exactly the message she wishes to convey. I don't intend today to advocate that we all become Judy Sheindlins, far from it, but the point of what I'm saying is that with preparation and planning one can, with very little time, draw on body language to convey a very clear, unambiguous message to the participants in the courtroom.

Not only does the legal profession refer to me as Judge Judy, but not terribly long ago one of the litigants did as well. I had gone to great pains to settle this person, who was appearing on his own behalf. The issue at hand was whether he should be allowed to continue the proceedings or whether he was incapacitated and required a case guardian. So, I'd put a bit of thought into how I would manage the person, who I was expecting to have greater difficulties than most appearing on their own behalf.

In fact, he gave a very good account of himself. He was prepared; the other side was not terribly well-prepared and the proceeding was going, from his perspective, very well and I was pretty happy with it as well. He was seemingly quite comfortable and that's when I discovered he thought he was actually appearing before Judy Sheindlin, because he turned around and said

'So... can I ask you a question?'

Attempting to be relaxed and not overly-excited I went

'Sure...'

And he went

'Are you really *Judge Judy*?'

There was this steely glare from me to the other people at the bar table (because it can only have come from them): heads down, all I could see was furry wigs.

The net effect of it was he'd handled himself very well but he'd seriously misunderstood the mood of the courtroom.

There is a great body of research that tells us that which we probably all know, that the process by which people interpret verbal and nonverbal messages [is] influenced by social context. It is the social context provided by the circumstances and accompanying interpersonal cues that enables a person to attribute meaning to both verbal and nonverbal messages.

The courtroom provides a unique context and a place unfamiliar to the overwhelming majority of its participants, and here I'm obviously talking about the litigants. To the judges and members of the legal profession it has the familiarity of an everyday setting. To the litigants and, where participating, jurors it represents an unfamiliar stage prescribed by ritual and formality. For these people, the comfort we all derive from moving about in a setting, using norms which are understood and applied intuitively, is absent. When discomfort is combined with the probable seriousness of the issue to hand it will surprise no one here that as well as being disoriented litigants are highly anxious.

Managing their anxiety is one of a judge's key challenges as, unless we are able to do this, there is a real possibility, and in most instances almost a certainty, that the attainment of justice may be defeated. Quite simply, the greater the anxiety in the litigant, the greater the risk that they are unable to participate appropriately in the hearing, and we've probably all presided over hearings which we see as very one-sided affairs.

It follows that a judge must be attuned to signs of anxiety in litigants and in some instances also the lawyers. This requires awareness, quite acute awareness, of verbal as well as nonverbal communication. For the judge, it's important to be able to respond in a manner which ensures the intended message is actually received, whether it is a message conveyed by you, or conveyed by others throughout the process. Whether using verbal or nonverbal communication, and in different contexts one will be more important than the other, the information conveyed needs to be as clear and unambiguous as possible.

If it is not, because the social context of the courtroom is so unfamiliar, the received message is likely to be incorrect. Our ability to meet this challenge is largely connected to our own communication skills. Although for all of us here the courtroom is an everyday setting, there are important nuances within these settings which influence a judge's communications skills. Presiding over a jury trial puts a judge in a different setting, for example, than conducting a duty list.

Speaking for myself, sitting in jurisdictions with which I have little prior experience was indeed, and on occasion still can be, anxiety-provoking. Learning to minimise my own anxiety, so that one can move between different judicial settings with relative ease, is an important skill and fundamental to one's ability to communicate effectively out of one's usual comfort zone. What follows is something of a personal reflection upon communication challenges presented to me, and hopefully lessons learned from mistakes made.

Firstly, I intend to focus upon the judge. Perhaps it's heresy to say so, but I was anxious the first time I walked onto the bench. I think of my first six months' sitting as, really, my 'too-terrified-to-speak' phase. That passed, and some of my colleagues might say it was a pity it didn't linger.

Because I joined a newly established court I was in a fortunate position, a position that is denied most of us, in that my early days were conducted at a relatively genteel pace. I had the opportunity to anticipate and reflect upon the judging role as it was unfolding. I was not in the position of having far too much to do and far too little time. I think that's one of the great challenges for new judges and for members of courts settling new judges into their role.

It was not terribly long before that exquisite pleasure of having enough time to do the job became a thing of the past, and the ever-increasing pace became something that I had to manage in order to manage my own ability to communicate effectively throughout the day.

At the outset I reflected upon who I saw as the best judges for the work that I would do, and tried to understand what it was that made them so successful. These unnamed role models were notable for their politeness, preparation, knowledge and control of the courtroom. I'd thought very carefully in these early days, when I had time to do so, about how I saw them apply practices which enable them to maintain politeness when others were being impolite, what it was that enabled them to demonstrate knowledge through preparation, and how they maintained control of a courtroom which at time was a thoroughly unruly place.

As far as possible, I developed the practice of reading and preparing each case thoroughly, including for duty lists, beforehand. I'm aware there's a strong contrary view that this practice can result in an inordinate waste of a judge's time, time that perhaps is better spent working on a judgment. I concede, quite easily, that occasionally time is wasted in preparing for cases which settle at the moment they are due to start. However, in my experience, as mediation etcetera has taken a much greater hold, the number of cases that settle very early are rare and the time wasted, being the time spent preparing for a case that doesn't run, tends to be a rarity.

Focusing upon the advantage of preparation, in the sense of the advantage it gives you in terms of communication, it protects the judge from the anxiety inherent in finding him or herself embroiled in an argument for which you're unprepared. Not only does prior preparation protect the judge from ill-informed comment, it ensures that you have the confidence to properly engage the debate as it unfolds. We can all probably recall examples of judicial officers who use aggressive communication as a strategy to mask their discomfort when surprised by an unanticipated issue or turn of events.

Preparation, in my view, protects you from becoming the apocryphal 'bullying judge'. Because you are less likely to be taken by surprise, you are more likely to remain within your comfort zone. If it wasn't your comfort zone before you started to prepare, it is your comfort zone by the time you walk onto the bench. Remaining within your comfort zone begets politeness, which is the cornerstone of effective courtroom communication.

In my experience, the tone of a courtroom is fundamentally established by the presiding judge. With relatively little effort a judge can and should set the courtroom tone as a place where civility is proffered and expected in return. Once a civil, albeit busy, setting is established your ability to establish a rapport with those at the bar table and the litigants dramatically increases. This is because you have taken the first step towards addressing the litigant's anxiety. You have identified yourself as someone with whom they can engage.

I have found that tone-setting of politeness and civility really does stand you in good stead when dealing with predominantly difficult counsel and the occasional querulant litigant. When I have found myself really, wanting to dress someone down quite sternly for what I see as a lack of politeness to me or to others, I now pause and reflect on what role I may have played in taking the tone from a polite and civil environment into one which has become, plainly, overly robust and perhaps verging on rudeness.

More than once I've thought 'Well, look, I started this and if I'm going to give it I need to be prepared to take it'. So I think now, before I really launch into whoever it is that is addressing me from the bar table, about how I may have contributed to the spiralling downwards of the civil tone that I sought to establish at the commencement of the hearing, whether it be a long one or a short one. When I reflected on what was happening, that I indeed had been at the centre of what had occurred. I put a sticker up, for a little while, on my side of the bench *They're paid to speak; you're paid to listen*. That helped when I'd moved beyond the 'too-terrified-to-speak' phase into the 'They're-going-to-listen-to-me' phase – I have since moved beyond the 'They're-going-to-listen-to-me' phase. The golden rule is 'Don't talk over the top of people'. I've found for me that works and I rarely find myself in conflict in the courtroom any more.

When things have got to the point where you have lost *your* rag, or counsel has completely lost his or hers, a short adjournment is a really timely thing. Not everybody would agree with the notion that you might apologise. I do occasionally. I don't have any difficulty doing so, saying that '...I'm sorry I spoke so sharply, but the point I was wanting to make...' You slip back on track quite easily. Take a little bit of time; if you're calming down so will they.

Coming back to my theme of preparation by pre-reading, it gives you advance notice of particular communication barriers you may need to address. You've got the chance to think about it beforehand. For example, do the documents disclose that you're going to have cultural issues which may affect a litigant's ability to engage the trial process? Is there one, or more than one, interpreters involved? Is there an obvious power imbalance between the litigants including, quite simply, whether one side is represented and the other one appearing on their own account? You think about the strategy of the trial very carefully when these issues are likely to arise, and if you've thought about them in advance you're obviously going to be better able to deal with them as they unfold.

When cultural issues and language issues arise, I think these throw into stark relief the communication skills that we all need to have. They give us the tidiest example of how to best to conduct a courtroom.

I think you'd all agree that working with interpreters creates a particular dynamic. Not all of us, surprisingly, have the opportunity to work with interpreters terribly often; there are still places within Australia which are predominantly single, Anglo culture, and the frequency with which interpreters participate in hearings is relatively small compared to other locations.

If interpreters aren't part of your regular fare, and the opportunity arises to sit in a location where you can expect to be dealing with people from other cultures – people using interpreters – I'd suggest you take it because I think it's a very good opportunity to hone skills which are essential, but also which are really very useful to you in conducting hearings that don't involve interpreters.

It's my assumption that the litigant who requires an interpreter is likely to be even more anxious than most. Not only is the language foreign but there is a real possibility that the person is unfamiliar with our legal concepts and may have quite erroneous expectations, including fears of you and the court process. I'm particularly conscious, if I discover that a person is a political refugee, that it may well be that they have had quite horrendous prior experience of courts and law enforcement agencies, a circumstance that makes establishing rapport with them that much more difficult.

You can expect that the interpreter is an NAATI Grade 3 although that is not always the case. I think it's fundamentally important and it's easy to forget, when you're busy, to ensure that you take the interpreters card, that it's recorded, and you know what grade interpreter you're actually dealing with. At the outset I emphasise to counsel, whoever it is that's appearing, that I expect the pace to slow down. I encourage them to resist negatives. I ask them to speak in the active voice and, obviously, emphasise the importance of short questions. I explain at the outset that I will be taking more frequent breaks than would normally be the ritual of the day, simply because an interpreter can't be expected to interpret for hours on end. If they're going to stay up to the mark, they need regular breaks.

I ask the litigant, once they've been settled in with the interpreter, how they want to use the interpreter. Quite often people have reasonable English language skills but are quite afraid of the more formal, high level language that's going to be used in the courtroom. So although they may have lived in Australia for quite some time they're out of their comfort zone and are conscious that they're going to need to be able to do more than simply use the language that enables them to move about the community.

But, with everyone paying attention to trying to use relatively simple language, the person can discover quite quickly that they are indeed managing the process in English, and they will use the interpreter when the language becomes a little more formal when concepts are introduced that they don't have. So, quite often, although the person has an interpreter, they, as the process unfolds, say 'Look, I don't need to use the interpreter'. Make sure you give them the opportunity to make that decision.

Body language when using interpreters becomes even more critical. That is because people who have that filter of the interpreter are probably more suspicious, suspicious of you. If they perhaps aren't having the most highly skilled interpreting coming back to them, maybe what's coming back to them seems a little bit discordant to the comments, to the evidence, that they've been giving. You need to show that you are actually tuned in to the litigant, while simultaneously keeping an eye on the interpreter.

Warning bells, for me, go off when you hear a detailed exchange from the witness and the answer comes back 'yes' or 'no'. The interpreter who never makes a note when quite complicated questions are being recounted, and they never make a note of what they're translating; that worries me. If you know that the dialect – although language is the same the dialect is different – I think you need to be even more careful about what seems to be the exchanges between the interpreter and the litigant, and be aware that in some of those settings there may be cultural animosities that can make the ease of communication between the interpreter and the witness a little more difficult.

Beware the interpreter who stops interpreting when the person leaves the witness box. The evidence-taking process is but part of the hearing; the person needs to have the whole of the process interpreted. Quite often you see the interpreter and the litigant leave the witness box and the interpreter simply stops. You'll see that; most others won't; they're sitting behind the lawyers so counsel won't know that their client is no longer hearing or understanding what's taking place.

An obvious sign to be concerned about is when the answer is completely unresponsive to the question; where it is obviously incongruent you need to start being concerned that the level of interpretation is not really up to the mark. If you need to stop the hearing because you have an inadequate interpreter then you stop the hearing. More and more, I think, we're seeing challenges to the adequacy of interpretation. We have seen, for example, in migration hearings that inadequate interpretation can be seen as jurisdictional error. We certainly are seeing, in the Family Court, arguments on appeal that the evidence given does not relate to the material interpreted. So, although the cost of aborting or delaying a trial is likely to find no favour with court administrators, the cost of a rehearing because the trial was so unfair through lack of interpretation is more costly again.

There's a nexus between interpreting and cultural issues, but I won't take you through those in any detail except simply to say to be very aware that people from different cultures have very different experiences of courtrooms.

The balance, I think, is between how far you allow the interpreter to speak about cultural matters when their skill is in interpreting. They may have vast personal experience of that culture but they may be completely unqualified to speak of it. You would be in difficulties if you allowed them to become an expert witness. But there is no difficulty with receiving some information from the interpreter that will assist the language that's used in the courtroom

Particular issues arise when working with members of the Koori community. You need to think very carefully about the courtroom setting and in those situations, I often think, having a person accompanying the witness, if necessary into the witness box can be the difference between them being able to give evidence and not being able to participate in the hearing at all.

Obviously, you adjust the setting for people with disabilities; be conscious that deaf people are probably lip-reading and blind people are going to need, in many instances, some quite sophisticated equipment in the courtroom. My theme of preparation means that you're attuned to all of this, and alive to the issues before you start.

Duty lists throw up particular issues simply because of the pressure that the volume of work creates. If you're dealing with forty, fifty, sixty cases in a day you've got five or ten minutes - you've got to do it very, very quickly. Body language, eye contact, preparation. I find a simple greeting takes but a nanosecond; greet the lawyers but also greet the litigant. It is probably as much as you can do but it's surprising how frequently the litigants themselves are overlooked in duty lists. If you've read everything beforehand you can make the points that you need to make up front, and you're not forgetting to engage the litigants because you don't have the time to engage the litigants.

I've talked about the judge talking. I now need to talk briefly about the judge listening. If we subscribe to the view that counsel's task is to persuade you then we need to be open to persuasion. We need to be obviously listening although in New South Wales you only have to listen to the important bits.

I think here is where personal honesty is terrifically important; you do neither yourself nor the process any favour by pretending you know everything. I have certainly found it far easier for myself, if I don't understand the gravamen of an argument, or suddenly people are talking about the Oyster Act - I'm a family lawyer; I can't be expected to know that; - I say 'I don't know it; persuade me, tell me'. Generally counsel seems to prefer that.

When do you interject? I'm not talking here about controlling the courtroom but when submissions are unfolding - do you interject as you go? Do you save the matters that you want raised and deal with those after counsel's had the chance to make the arguments to you that they need to make? I prefer the latter course and I suspect that's what counsel prefers as well. But I know that's not a view that a lot of other people hold; they like to keep the debate going.

Finally, think about the language you use. There's a great deal written about how we can turn the formal language of courtrooms into far more accessible language more likely to achieve the rapport and effective communication we want. There's a terrific little book published by Federation Press, *Plain Language for Lawyers*. Although it's concerned about writing, the communication principles used and described in that text apply very well to the communication required in the courtroom.

In simple point form the principles, I think, we keep at the forefront: active voice; short sentences; speak using the positive; avoid double negatives at all cost; avoid synonyms and stay away from archaic words.

The final piece of communication, of course, is the judgment. I'm not going to talk here about the written judgment but an oral judgment. I am perplexed about when do you, in giving an oral judgment, tell the litigants the outcome. Do you tell them, as I probably tend to do, at the beginning 'this is what I am going to do, and now I'd like you to listen to me tell you why'. The winner tends to sit back and stop listening. The loser is likely to say something unkind and leave the courtroom. The majority probably sit there and listen to some of it. It avoids the agony, which I think is at times quite inhumane, of a reasonably long judgment where the ebb and flow – I've won; I've lost; I've won; I've lost – you see the agony and then they get the answer. I don't know which approach gives the message to the litigants that you want to give and I'd be quite interested about the different approaches people have.

The above is a personal snapshot of some ideas that I have about communicating in the courtroom.