# Clarity of Expression
## The Keystone of Successful Advocacy in Dispute Resolution

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Clarity of expression is the essence of legal persuasion. Whether in court, arbitration, mediation, or settlement talks, favorable dispute resolution relies on effective communication.

Yet, in the practice of law, we are often confronted with vague and opaque writing and speech. This opacity has many causes, chief among which are lack of preparation, the abandonment of logic, and the failure to mold the message to the audience. Other causes include a misuse of emotion, lazy delivery, careless arrangement, confusing visuals, and the simple failure to recognize when to stop talking.

There are, of course, countless examples of the lack of clarity in the legal profession. For a small sample, consider the following:

1. Counsel asks a witness in trial: "Do you know Tyra Jackson, and that she is the girlfriend of the defendant?" (*See* STEPHEN SALTZBURG, TRIAL TACTICS 54 (3d ed. 2012).) If the answer is "yes," to what does "yes" pertain? Knowing the girlfriend? Or that she is the girlfriend of the defendant? Counsel should have delineated the compound question into two separate questions.
2. During an appellate court oral argument in a case involving a question of jurisdiction, a judge once asked counsel: "Well, how did you get here?" Counsel responded: "I drove from Baltimore," prompting robust laughter from observers. Replacing "you" with "the case" would have clarified the question sufficiently. (This example calls to mind one of Mark Twain's quips, that "the difference between the almost right word and the right word . . . is the difference between the lightning-bug and the lightning." GEORGE BAINTON, THE ART OF AUTHORSHIP 87–88 (1890).)
3. Contracts often neglect to clarify substantive questions. Consider this boilerplate text from a contract under the heading "Dispute Resolution": "The parties hereto agree that before filing any lawsuit in any court they will initiate and complete mediation in an effort to resolve their differences." The contract fails to clarify what would occur if a dispute were to arise between the parties on the last day before the statute of limitations expires. The term "complete mediation" is poorly defined.

These three examples are hardly unusual. They illustrate just how frequently legal communication leads to misunderstanding. We can always do better. Below I describe a variety of practices that can help you sharpen your oral and written communication, in and out of court, arbitration, or mediation. I hope they may be especially useful to young lawyers, but all of us could use a refresher now and then.



Illustration by Paul Garland

**1. Identify a theme.** Clear expression is the product of clear thinking. A theme can help you organize your ideas. Whether you are in settlement talks or preparing for mediation, arbitration, or trial, develop a theme and adhere to it. The theme serves as the road map for presentation. It keeps you going straight ahead, avoiding rhetorical detours.

Your general theme will be shaped by particulars. Survey the building blocks of your case: evidence, legal authorities, precedents, public policy, the facts, the adversary. What theme do these various elements suggest? Will that theme help you achieve your goals? Once you have identified a suitable theme, you will be in a much better position to develop coherent, well-organized arguments that advance your cause.

**2. Consider the audience.** Remember that clarity is measured only by the extent to which your audience understands you. Terms and ideas that are clear to a judge or another attorney may confuse a jury. If you persistently ignore your audience's particular needs, biases, and habits of mind, it may very well decide against you.

Knowing something about psychology and how people make decisions is essential for litigators. In *Thinking, Fast and Slow* (Farrar, Straus & Giroux 2011), Daniel Kahneman, a noted figure in economics, suggests a two-system approach to judgment: Step one is an automatic or unconscious response toward a decision based on associated memory; step two involves the cognitive thinking that requires the brain to work.

Understanding these principles is challenging but worth the effort. For example, if you adhere to the view that people form opinions quickly by intuition, you might want to take advantage of the doctrine of primacy by beginning your presentation with your strongest point, rather than building up to it. Primacy embraces the idea that we remember best what we hear or see first.

Hence, clear expression is sometimes referred to as "listener-centered." *See* JAMES C. MCCROSKEY, AN INTRODUCTION TO RHETORICAL COMMUNICATION 25 (Allyn & Bacon 1997). To mold the presentation to the listener, it is necessary to understand what elements will most likely influence the listener's decisions. Attitudes and beliefs are two such factors. Attitudes are predispositions to think or behave in a particular way. They are often based on prior experience. A person who has had a bad experience in a hospital, for example, may not like health-care providers. Beliefs, on the other hand, are perceived truths a person applies to a new issue or question; for example, a member of a jury might believe that police are, on the whole, good people who work hard to protect the public. You can speak more clearly and effectively to someone if you know something about your listener's attitudes and beliefs.

There are numerous ways to learn about your audience. You can read about the judge or arbitrator, inquire in the legal community, or, in the case of a jury, arrange focus groups or mock trials.

**3. Use logic and formal reasoning.** Sound reasoning clarifies understanding and thus advances your cause. It is difficult to disagree with conclusions arrived at through logic. When developing the reasoning that supports your presentation, consider deduction and induction, the two types of formal reasoning.

A deductive presentation focuses on a general premise. The reasoning progresses from the general to the specific. If the conclusion follows from a valid premise, without the addition of new information, the reasoning is deductive.

Deductive arguments, or syllogisms, will often strike your audience as undeniable. Imagine you are in mediation and the mediator presses you to advise your client to pay the plaintiff. You respond: "The plaintiff's case is a nuisance. The statute of limitations for the claim is three years; the case was filed five years after the breach of the contract; the case should be dismissed." Is this not as clear as a fire bell in the night?

Another example of deductive presentation includes the use of definition. Here you define a term and illustrate that the conduct of your client falls or does not fall within the term. For example, "Paragraph 24 of this contract reads that amicable resolution includes mandatory mediation. Plaintiff did not seek mediation before filing suit. The case should be dismissed." Again, this airtight syllogism is difficult to refute.

Inductive reasoning, on the other hand, progresses from the specific to the general.

A literary example of induction is Robinson Crusoe's inference from a footprint in the sand that another person is on the island. Other examples include using life expectancy tables to argue the life expectancy of your client or arguing for lost profits based on prior years' experience.

If you try to balance an inference on the back of flimsy specifics, your argument will collapse. For instance, if you base a client's lost profits on only one year's performance, your adversary could claim that you've provided insufficient evidence; the year in question could have been anomalous. Ideally, the facts from which you draw your inference will clearly point your audience to the desired conclusion.

Induction by analogy can also help you communicate clearly. It often comes into play in the application of case law. You may appeal to a judge, for instance, to decide your case based on a decision in a previous case with similar facts.

Causal correlation is a third aspect of induction. You could observe that a group of tourists all became ill after being exposed to a visibly ill tour guide. Thus, you conclude, exposure to the guide caused the group to become sick. An adversary might counter that correlation is not causation. To refute this truism, you will need strong evidence. In the example of the tourists, if only a few of them fell ill and did so after being exposed to a variety of other people, your claim that the guide

was to blame will look flimsy. On the other hand, if you can show that *all* the tourists became sick and were not exposed to other contaminants, you will be on surer footing.

Whether inductive or deductive, sound logic enhances clarity because it takes your listener through the thought process by which you have arrived at the desired conclusion. By taking these steps with you, the listener will more likely grasp their import and feel convinced.

**4. Appeal to emotions.** Emotion can be conducive to clarity, though it is important not to overdo it and to always be sincere. Convey emotions through body language, expression, voice, and pacing.

Often a situation can be so obvious that it would be counterproductive to pound the table or repeat yourself. In such instances, consider the power of understatement and restraint. When discussing a sad event, for example, a skilled advocate may often lower her voice, slow the pace, and clasp her hands in front of her body.

Figurative analogy can also heighten the emotional import of your argument. Whereas induction by analogy requires a comparison between like subjects, figurative analogy involves comparison between unlike subjects.

Many years ago, an illustrious plaintiff's lawyer, Moe Levine, represented a client who had lost both arms. In his closing argument, the attorney stated:

> I could spend a good deal of time talking about what the loss of two arms means to a human being, but I thought this would be an affront to you since you are human beings, and all you need do is think about all of the things that you could not do without arms. But I would like to tell you that I went to lunch with my client. You know, he eats like a dog.

MOE LEVINE, THE BEST OF MOE: SUMMATIONS 229 (Condyne/Glanville and Oceana Publications 1983).

Delivered the right way, this single simile can concisely and memorably reveal the plaintiff's degraded condition and arouse pathos in the listener. A successful appeal to emotion clarifies in a way that logic cannot. Emotion provides strong motivation to decide in your favor. It communicates the deeper purpose at a visceral level.

**5. Perfect your style.** Your style of expression has a tremendous effect on clarity. Using language that is familiar to the audience is a step in the right direction. When steeped in a case concerning an arcane subject, a lawyer may fail to recognize that the terminology could easily confuse a judge or jury.

Daniel Webster, one of America's greatest trial lawyers, once remarked, "In addressing the understanding of the common person, I must use language perfectly intelligible to them. You will therefore, find in my speeches . . . no hard words, no Latin phrases. . . ." LLOYD PAUL STRYKER, THE ART OF ADVOCACY 56 (Corner Stone Library 1956).

His point is well taken, and Latin phrases are not the only culprit. Overly complex sentences can also trip up your listeners. Here is an needlessly complex sentence: "Let us recognize that the plaintiff, my client Mrs. David, has indeed labored in all good faith to fix and rectify the relationship in question." A more effective rephrasing: "Mrs. David has worked hard to repair her friendship." Such simplicity and concision will help your listener follow the argument.

When seeking to condense and simplify complexity, consider figurative language. Metaphors and similes convey ideas and sentiments with force: "Seeing his wife with another man was a dagger to his heart." Another example: "After she was wrongfully indicted, her career went down in flames."

In addition to condensing sentiments, such statements arrest attention. Varying sentence structure can likewise cause your listeners to mark your words. Rather than stating "This case is about the defendant perpetrating a fraud upon the plaintiff," invert the sentence structure to begin on a more forceful note: "Fraud is what this case is about."

## Clarity is measured only by the extent to which your audience understands you.

In rhetoric, such unusual sentence structures are known as "schemes." Repetition is a scheme: "How did you feel after the accident?" "Horrible, horrible, horrible." Parenthesis is another: "Defendant's action, *and it is a tragedy*, caused the collision." Playing with sentence structure in this way can be conducive to clarity when it helps you emphasize the facts, ideas, and sentiments you want the listener to act on in resolving the dispute at hand.

**6. Refine your delivery.** When preparing to argue a case, consider the movement, body language, and eye contact you'll use when speaking. If you are arguing that a witness was not wearing her eyeglasses when she claimed to have seen your client committing the crime, you could hold glasses in your hand and point with them to the jury to emphasize the point. This would visually anchor the idea you are conveying.

Body language, however, can just as easily hinder clarity. We often send messages inadvertently by our movements (or lack of movement). Indeed, sometimes your actions may be at cross-purposes with your intent. In the midst of an emotional argument, a careless expression or lack of eye contact can reflect a lack of sincerity. Remember President George H.W. Bush checking his watch during one of the 1992 presidential debates? Similarly, you may suggest to your audience that you disbelieve your client if you never seem to give your client attention.

**7. Structure your presentation.** Clarity of expression benefits from a balanced arrangement of your presentation. All arguments should have a beginning, middle, and an end. This is true for opening statements, appellate arguments, motion hearings, and even examinations of witnesses.

Developing the substance of your presentation within the various parts of the presentation is an art improved by experience. Consider beginning with the most important point to take advantage of the doctrine of primacy. This doctrine holds that we remember best what we hear first. It is often tactical to arrest the attention of the listener by stating at the very outset the action you want the listener to take: "We are asking this court to reverse the judgment below because the Jones Company did not exhaust its administrative remedies." You would only then develop the facts and procedural history.

## Clear arguments are rarely spontaneous.

While crafting the arrangement of your presentation, also consider the "doctrine of recency," which holds that we remember best what we hear last. It is often helpful to conclude your presentation with a major point that you wish the listener to remember. In addition, consider the "doctrine of frequency," which holds that effective repetition helps clarify your message.

The most effective advocates often employ techniques such as "looping" or "incorporation" to have the witness repeat a particularly important point. For example, "Did you *see the collision*?" "Yes." "When you *saw the collision* did you obtain a good look at the driver of the blue car?" Here the questioner wants to emphasize that the witness saw the collision as a predicate for other questions. How you craft your presentation using primacy, frequency, and recency is individualistic. What is most important, however, is that you are aware of these doctrines.

Another technique of arrangement is to use topical sentences: "I am now going to address the issue of the statute of limitations." Or when examining a witness: "Mr. Fox, I am now going to ask you some questions about where you were when the murder occurred."

**8. Take care of the visuals.** While a picture may be worth a thousand words, poor visuals and an overdependence on them can confuse your listeners. When using PowerPoint, be sure you don't crowd the slides with too much information. Ideally, your audience will be able to grasp the import of each slide almost immediately. Large lettering, plenty of white space, and vivid imagery all help, as does the effective use of color. Remember that colors have a psychological impact. While color psychology is not for everyone, and opinions vary on whether the color of blue communicates confidence or yellow optimism, it still makes sense to consider how color relates to the nature of the information presented.

Presenters often give in to the temptation to read from their slides. Do this too often and you will bore the audience. Rather than reading from visuals, paraphrase and elaborate on what they show.

Remember that the visuals are integral to your argument. They should be vivid and memorable. Used sparingly, they can do wonders in elucidating even the most complex information.

**9. Do not reargue your points.** When responding to opposing views, do not reargue points made previously. Instead, identify the topic or issue you wish to refute, then explain why that point is wrong. Conclude by explaining the correct view of the matter.

When rebutting an adversary, attorneys will sometimes meander and confuse their audience. Such drifting may indicate that the attorney was not prepared to respond to an opposing argument. To avoid such mistakes, anticipate your adversary's moves and rehearse brief, clearly phrased rebuttals.

**10. Know when to sit down.** Long-winded talks detract from clarity. Bore your listeners and you risk losing their attention—and their good will.

Each of these 10 pointers underscores the importance of preparation. Clear arguments are rarely spontaneous. While there is a place and time for extemporaneous speaking and improvisation, most attorneys must practice and test their arguments before going to trial. Doing so will help you speak with clarity, the keystone of successful advocacy in dispute resolution. ▪