Communication Strategies for Trial Attorneys

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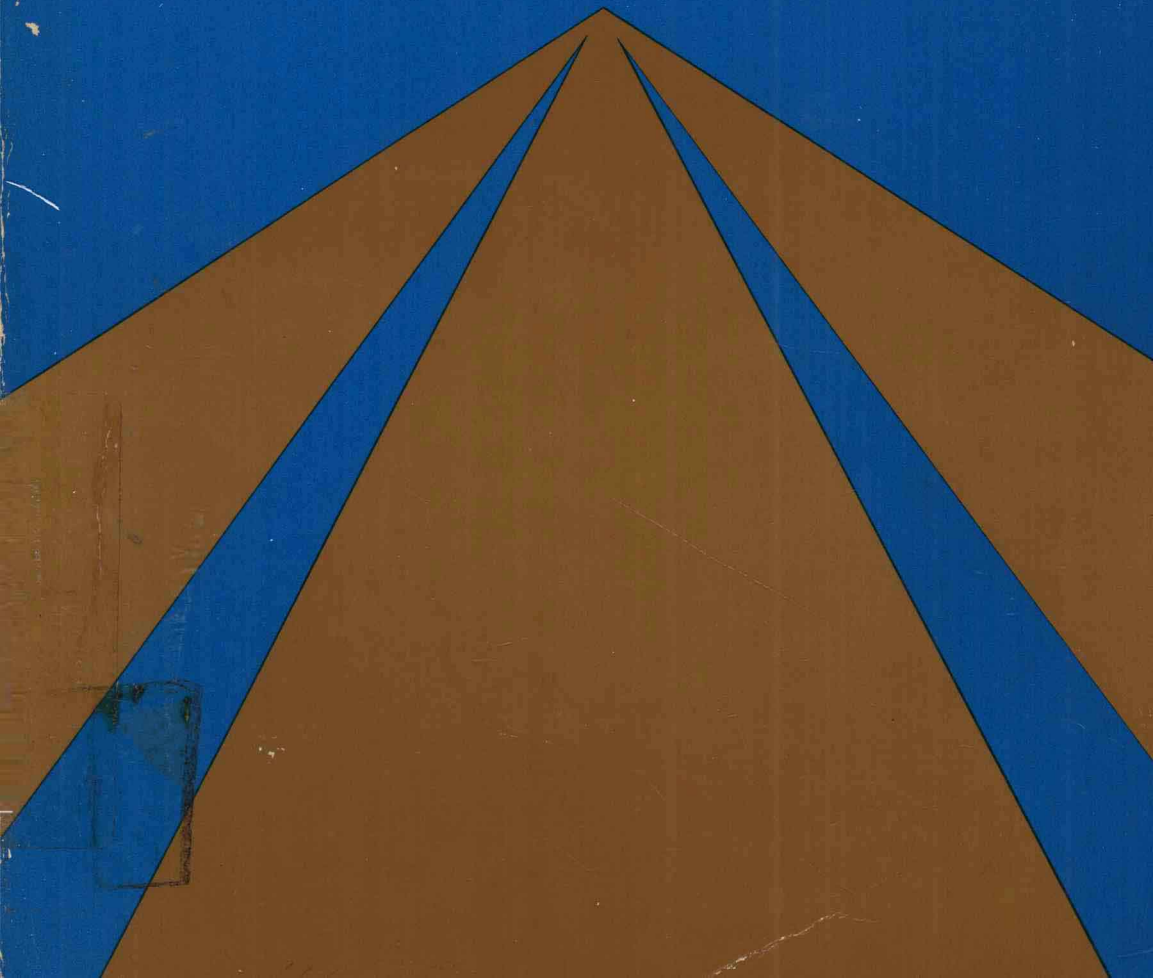

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FOREWORD

This volume is part of a series entitled *ProCom* (Professional Communication), which has been created to bring the very latest thinking about human communication to the attention of working professionals. Busy professionals rarely have time for theoretical writings on communication oriented toward general readers, and the books in the ProCom series have been designed to provide the information they need. This volume and the others in the series focus on what communication scholars have learned recently that might prove useful to professionals, how certain principles of interaction can be applied in concrete situations, and what difference the latest thoughts about communication can make in the lives and careers of professionals.

Most professionals want to improve their communication skills in the context of their unique professional callings. They don't want pie-in-the-sky solutions divorced from the reality of their jobs. And, because they are professionals, they typically distrust uninformed advice offered by uninformed advisors, no matter how well intentioned the advice and the advisors might be.

The books in this series have been carefully adapted to the needs and special circumstances of modern professionals. For example, it becomes obvious that the skills needed by a nurse when communicating with the family of a terminally ill patient will differ markedly from those demanded of an attorney when coaxing crucial testimony out of a reluctant witness. Furthermore, analyzing the nurse's or attorney's experiences will hardly help an engineer explain a new bridge's stress

fractures to state legislators, a military officer motivate a group of especially dispirited recruits, or a police officer calm a vicious domestic disturbance. All these situations require a special kind of professional with a special kind of professional training. It is ProCom's intention to supplement that training in the area of communication skills.

Each of the authors of the ProCom volumes has extensively taught, written about, and listened to professionals in his or her area. In addition, the books have profited from the services of area consultants—working professionals who have practical experience with the special kinds of communication problems that confront their co-workers. The authors and the area consultants have collaborated to provide solutions to these vexing problems.

We, the editors of the series, believe that ProCom will treat you well. We believe that you will find no theory-for-the-sake-of-theory here. We believe that you will find a sense of expertise. We believe that you will find the content of the ProCom volumes to be specific rather than general, concrete rather than abstract, applied rather than theoretical. We believe that you will find the examples interesting, the information appropriate, and the applications useful. We believe that you will find the ProCom volumes helpful whether you read them on your own or use them in a workshop. We know that ProCom has brought together the most informed authors and the best analysis and advice possible. We ask you to add your own professional goals and practical experiences so that your human communication holds all the warmth that makes it human and all the clarity that makes it communication.

Roderick P. Hart
University of Texas—Austin

Ronald L. Applbaum
Pan American University

PREFACE

The focus of this book is **communication!** Not just communication anywhere, but persuasive communication in the context of the American trial. Trial attorneys are constantly engaged in communication. They search for information—receive it, process it, analyze it, and evaluate it; they design trial strategy, talk, present evidence, argue, listen, plead, refute arguments—all with the intent of influencing the jury to find in their client's favor. All the knowledge of constitutional law, contracts, torts, property, evidence, and judicial procedure is useless to the trial lawyer if he or she cannot effectively communicate that knowledge to the jury.

Because lawyers and communication scientists are separately and differently trained, literature explaining courtroom dynamics from a communication perspective is rare. Lawyers generally lack intensive training and education in the theories and practice of communication. Moreover, those familiar with communication theory and research do not understand the events of the trial and the subtle functions of lawyers in the adversarial context.

In their ambitious work *The American Jury* (1966) Kalven and Zeisel attempted to establish a working partnership between the lawyer and the social scientist. They introduced the tools and perspectives of the social researcher to the courtroom. The aim of *Communication Strategies for Trial Attorneys* is to continue this partnership. In it we have applied the latest available scientific data to an analysis of the

courtroom as a place where attorneys, witnesses, judge, and jury participate in complex communication transactions.

We believe that this book will clarify for experienced attorneys their unexpressed, often intuitive thoughts and feelings about communication effectiveness. It will also enable trained legal minds to explore new possibilities uncovered by scientific research for aiding jurors to understand and act appropriately in trials. Law students and beginning advocates should profit from the introduction to communication principles which they can organize into a methodology for approaching the persuasive environment of the courtroom.

But it is not only attorneys who will gain from this book. If lawyers are unable to communicate and understand the dynamics of complex communication processes, their clients will be ill-served and the public's needs unfulfilled. It is a matter of national concern that trial advocacy skills be increased. The Chief Justice of the United States Supreme Court, Warren Burger, has recognized this need, often urging bar associations and trial lawyers' organizations to provide such training. The bar has responded and is beginning to develop a literature of trial advocacy.

This text, our present contribution to this literature, has its roots in an investigation of courtroom communication begun in 1974. At that time, David Strawn, then a judge of Florida's 18th Judicial Circuit, and Raymond Buchanan, chairman of the Department of Communication at the University of Central Florida (formerly Florida Technological University), joined forces to study the level of understanding that layman jurors had of the pattern instructions then used in Florida criminal trials. With the help of Phillip Taylor and others in the Communication Department, we discovered that the average comprehension of a typical set of standard instructions was 72 percent. More than half of the jurors tested misunderstood the meaning or correct application of such key concepts as presumption of innocence or circumstantial evidence. Our findings also revealed that jurors who read the instructions while the judge delivers them understand them better. Finally, we found that attitudes toward the law affect juror comprehension and application of legal statutes.

A series of projects developed from our early research. We received Law Enforcement Assistance Administration funding for a major investigation of jury decision making. This reseach suggests that much can be done to improve the application of pattern instructions.

The interest in our research and the practical value of our findings convinced the Florida Board of Regents to establish the Institute for the Study of the Trial at the University of Central Florida in 1978. This research and education center has as its purpose to combine the skills and knowledge of the legal, communication, and behavioral disciplines in order to examine the trial process and maximize the efficiency of this

important forum for conflict resolution. Through its conferences, workshops, and publications, attorneys, judges, court administrators, and social scientists share their knowledge and experience. The response to institute sessions suggests that the potential for interaction between the communication and legal professions is limited only by the creativity and accessibility of those involved.

We express our thanks to Michael R. Buchanan for his helpful research assistance and to the numerous judges, attorneys, and courtroom personnel who provided logistical support and encouragement for the completion of our ongoing research effort. Thanks are also due those who reviewed the manuscript in its final stages: Geoffrey L. Gifford; George T. Felkenes, Department of Criminal Justice, Claremont Graduate School, Claremont, California; Thomas R. Nelson, Partner, Litigation Department, Baker & McKenzie, Chicago; and Allen P. Wilkinson, Attorney-at-Law, Rancho La Costa, California.

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CHAPTER 1

The 2300-Year Precedent

What is a trial? You may have answered—too quickly—"A search for the truth." Although the truth may be incidentally found or demonstrated during an adversary process trial, it may not be noticed by any of the litigants nor recognized by the judge.

The reason is that the principal function of a trial is to resolve conflict. Counsel are advocates—seeking to win. We all hope there is some resemblance between what the judge or jury is told by the evidence and what actually happened. We also hope that the judge or the jury will comprehend the law correctly and apply it appropriately.

Trials can obviously be more than the events that go on in courtrooms or in judges' chambers. An administrative hearing, even an appearance before a city council, can be viewed as a trial, if trials are seen as conflict-resolving devices. A working definition of a trial, in the United States, might be *an adversary process structured by law, to create an abstraction of a past event, primarily through the recalled perceptions of adversarily selected informants and secondarily through tangible things; its purpose is to resolve a dispute in a way broadly acceptable to the employing community.*

For our purposes, it is probably better to examine what trials actually do as a way of defining them, rather than to rely on words about what they should do. Searching for and finding truth is an agreeable criterion for what trials *should* do. However, in view of the disagreement which follows almost every jury verdict, judges' judgment, and the resolutions of every public body, we can be reasonably certain that even if the truth is found, at least half the people involved do not recognize it.

THE NEED—AN ORGANIZED WAY OF THINKING ABOUT TRYING CASES

The law student comes fresh from school with an enormous body of information about legal history and the current state of legal affairs. Then, if the student begins to try cases, he or she will—largely through happenstance—begin to form an organic framework that will help clarify the events of the trial, and her or his role in it. Each of us, in order to reduce anxiety in a new situation which demands a high level of performance, will seek to find an organized way to understand the event, prepare for it, and execute our function in it. We need an organized way of thinking about trials and of integrating our knowledge of the world, the evidence, and the law to satisfy the demands of the events of the trial.

We see that trials are conducted through the use of oral, written, and intentional and unintentional nonverbal communication. And lawyers need to be taught *how* to talk, write, listen, and control and interpret nonverbal communication in the courtroom. Modern lawyers aren't the first people to need communication skills. Thinking about the communication process, and particularly about persuasion, has been going on for a long time. The Sicilian Corax (fifth century B.C.) thought of rhetoric in terms of persuasion, or a discourse designed to evoke a response from listeners. Corax was fascinated with the Greek court system, such as it was. He was the first communication pragmatist because he developed a form of argument which relied on the theories of probability. Corax might well have encouraged his students as modern lawyers to argue as follows: "If you are a person of small stature, and are accused of assaulting a person of larger stature, you should ask the jury, 'Is it probable that a weakling like me would attack a person who is so obviously physically stronger? Presumption would suggest that I would not.'" (Morgan, 1897, p. xv)

This kind of argument was much favored by the early rhetoricians and orators. However, Plato became its first major critic. He believed the practitioners of persuasion found probability to be more valuable than truth. In Plato's words, "In the courts, nobody gives a damn about the truth. . . All they care about is what is plausible . . ." (*Phaedrus*, 272d).

Aristotle was able to think about persuasion without being caught up in the questionable ethics of Corax' pragmatism or the pristine reaction of Plato to the existence of persuasive technique as a legitimate part of the judicial process. Aristotle's *Rhetoric* made it clear that he saw no magic formulas or recipes and no tricks of the trade that would be applicable to case after case. He saw persuasion as a process in which the persuader constantly examined each communication in its context in order to determine the aspects of the situation which would facilitate persuasion. Aristotle believed that the effective persuader demonstrates "the power of discovering in the particular case what are the available means of persuasion" (Cooper, 1932, p. 7). Though one purpose of this book is to identify the various persuasive options available to a communicator, a more important goal is to aid you in developing your capacity to find "the available means" in each trial and hearing.

PERSUASION TODAY

While many twentieth-century theorists have relied heavily upon classical resources, recent researchers have studied persuasion from the point of view of behavioral research in the social sciences. From this perspective, persuasion is viewed as an act which influences behavioral outcomes. The emphasis is not so much on speech craft or a method of speech making, but rather on understanding through experimental research those factors inherent in humans which affect how they select a given course of action.

From the standpoint of courtroom communication, what does it

EXHIBIT 1.1 The First Trial Lawyers

In Athens the law always required the citizen to plead his own cause . . . but the letter of the law had never obliged him to compose his speech himself. As soon as the suitor, or the aspirant for the honors of the assembly, found that there were people who could write a better speech for him in his need than he could hope to compose for himself, he naturally turned to them for aid. . . . He was quick to realize that an honest suitor with a good cause, but without the help of rhetoric, ran the risk of being defeated by an opponent whose cause, although it might be weaker, was made to appear the better by the rhetorical aid which he had purchased. . . . The suitor, therefore, had recourse to the speech-writer just as we go to our lawyers—but with this difference—the speech-writer's duties ended with the beginning of the trial of the case in court. He only wrote the speeches necessary, and perhaps gave his client some instruction in delivery.

From M. H. Morgan, *Eight Orations of Lysias* (Boston: Ginn and Co., 1897), ix.

mean to be persuaded? From a practical point of view, there are at least three types of persuasion. First, there is the concept of *attitude formation.* Usually, jurors come to the jury box with no established beliefs concerning the particulars of the case. In theory at least, their minds are a *tabula rasa*—a clean slate devoid of preconceived notions or outside impressions. The major function of a trial is to impress upon the jury those facts in the case which will shape their thinking and verdict. While this is an informative act, it serves a persuasive function in that it conditions jurors to respond in a certain way, depending upon their backgrounds and how they process the information.

The second type is *attitude reinforcement.* Every trial operates within the context of attitudes and beliefs already held by the jurors. Certain constitutional and legal concepts—the right to a fair trial, presumption of innocence, reasonable doubt, preponderance of evidence, maintenance of an open mind, right of a defendant not to testify—are inherent in the trial process. Yet messages are aimed at citizen jurors in an effort to reinforce these concepts. If these concepts become more strongly entrenched and, consequently, affect later deliberation behavior, then persuasion has occurred.

The third type of persuasion—typically found in every trial—is *attitude and/or response changing.* That is, in the courtroom overt attempts are made to change one's mind. Since trials in this country are adversarial proceedings, points of view and theories of how things happened are clearly opposed. The state, or plaintiff in a civil case, presents what is called a prima facie case based on presumed facts. The presentation of evidence may cause the jury to form certain beliefs. While the defense is under no obligation to present a case, the defense usually attempts to rebut the state's case. The strategy in the case is aimed at changing the beliefs and attitudes of the jury in the defendant's favor. This is the classic meaning of persuasion—to induce change from one set of attitudes and behaviors to another.

In summary, persuasion is attitude formation, attitude intensification, and attitude change, all of which are important in the courtroom.

COMMUNICATION AS PROCESS

Our analysis of what it means to be persuaded leads us naturally to an examination of the total *communication process.* Obviously, persuasion does not occur in isolation. It involves a series of complex interrelationships which are not static but changing. The association of the word *process* with communication is not incidental. It is absolutely necessary to the meaning. A typical definition of *process* suggests that it is a natural phenomenon, characterized by gradual change and moving

EXHIBIT 1.2 What Do I Need to Know to Be a Persuader?

What does it mean to *persuade?* There are at least four fundamental possibilities:

1. Find someone with beliefs and attitudes generally agreeing with your own, and reinforce them. Then, specifically focus their agreement on your problem. (You'll have to work harder than this to call yourself *persuasive.)*
2. Find someone with no beliefs or attitudes about your selected subject, and persuade them to adopt your beliefs and attitudes. (This is worth a black belt in lawyer circles.)
3. Find someone with an adverse opinion and persuade them to change their minds. (Aristotle will be elated.)
4. Since the last category is *so difficult,* settle for persuading them that your situation is not the same as the one they have adverse attitudes and beliefs about. (Long live Corax!)

toward a particular result. As we consider communication theory, we must envision it as PROCESS—an ever changing entity. People who talk and listen change. The words we use change. Channels for communication vary depending on the message and the audience. Nonverbal codes shift from culture to culture. Even courtroom environments, static as they appear, evolve and change.

The environment forms, varies, and powers the process of communication. It consists of people *(senders)* being stimulated to communicate to others, formulating *messages,* creating meaning, and choosing media of transmission *(channels)* for messages. Other people receive or choose not to receive messages from senders. These *receivers* interpret with their own mental equipment the messages sent and accepted. All of this occurs in a physical and emotional setting which can further complicate the process. Finally, senders may monitor their communication by looking for *feedback.* We unconsciously rely heavily on it in all our communication affairs. Feedback is defined as a response issued by a receiver as a result of the signal transmitted by the message sender or source. It adds another element to the communication transaction. Because of the transactional nature of the communication process a sender can simultaneously become a receiver, and a receiver, issuing feedback, simultaneously becomes a sender. When a feedback signal is received by a source, he or she may use that information to adjust subsequent messages, clarify intent, or completely change the message goal. Thus, feedback serves a corrective function. It helps determine the ultimate course of the total communication transaction.

If the preceding analysis was not enough to convince you of the complexity of communication, consider these further variables:

1. Individuals probably vary in the way they are stimulated to communicate and then mentally symbolize information. Therefore we are likely to differ in the ways in which we mentally formulate an idea that we wish to send as a message.
2. Clearly, individuals will not always choose the same words to send similar messages. In addition to choice of words, there will be choices of gestures, expressions, intonation, and inflection, as well as other verbal and nonverbal cues about the message.
3. Individuals may vary in their choices of communication media. Salvadore Dali paints. Ansel Adams takes photographs. Most lawyers will choose words. They then must select letter, face-to-face, telephone, video, or another medium of transmission.
4. The message formulated and sent may evoke in the receiver a mental image different from that held by the sender. Try this: get a friend to relax, and "clear her mind." Then formulate in your own mind the image of a flower. Say the word *flower* aloud and ask your friend to immediately tell you what she "saw" in her mind. It probably won't be the same flower you saw.
5. The message may not become a part of memory. Obviously, if you have said something forgettable, you will have difficulty relying on it as a persuasive element. And you cannot control the receiver's memory. A horn honking suddenly at the time you say something important, or the judge dropping a book as the witness testifies about the color of the traffic light could be devastating to your case.

A MODEL OF COURTROOM COMMUNICATION

We have introduced the basic components of the typical communication transaction: sender or source (encoder), message (verbal and nonverbal), channel (system or medium), receiver, and feedback. However, this explanation does not fully illustrate the dynamics of courtroom communication. The courtroom environment involves a multiplicity of complex, interacting factors, some of which one can control and others which are clearly beyond control. Every factor has the potential to affect the communication transaction. The following model of courtroom communication (Exhibit 1.3) illustrates the multiple senders, receivers, and channels that fill the courtroom.