

ASKING *the* RIGHT QUESTION



PHILIP BROWN *considers the skills required by tribunal members to enable them to communicate effectively with parties and their representatives.*

In the last issue of this journal (Volume 9 Issue 1), Hazel Genn and Godfrey Cole described the framework of competences being developed by the Judicial Studies Board for the training of tribunal chairs and members, and the way in which the performance of those individuals might be measured. Communication will be a key component of any competence-based approach to the training of judicial office-holders, and this article outlines some of the skills and attributes required to ensure that communication in all its forms is effective during a tribunal hearing.

What do I need to be good at?

In order to demonstrate effective communication skills, chair, specialist and lay members need to be able to listen actively. Chairs and specialists will have, in addition, to ask appropriate questions and ensure that those appearing before the tribunal have understood not just what has been said but also the whole nature of the proceedings.

Active listening

Listening actively means far more than establishing that you are able to hear what is being said. Many methods of communication do not involve the spoken word at all. One inappropriate look (whether an expression of boredom, disinterest or lack of enthusiasm) can send a misleading message to those appearing in the proceedings.

What is important when listening to a case is a demonstration of attentiveness to what is being said.

Body language is an important communication tool. One colleague I worked with in training lay magistrates used to refer to a bench of three members as a 'trinity' of decision-makers, each of whom had a role in demonstrating effective verbal and non-verbal communication. The speaking part was the role of the

person chairing the proceedings, while colleagues divided their roles into analysing what was being said through effective note-taking and devising questions that could be asked of the parties, through the chair, at the appropriate times.

Translate this to a tribunal of three members where, for example:

- A legally qualified chair conducts the proceedings and makes the pronouncements.
- The specialist member assists with issues connected with that specialist's expertise.
- The lay member ensures that any questions of fact which require clarification are brought to the chair's attention to be put to the witnesses.

And it might be said that the 'trinity' of decision-makers holds good in many tribunal hearings.

Non-verbal communication

Effective non-verbal communication should demonstrate to all those appearing before a tribunal that the members of that tribunal are actively involved in the proceedings. Look interested by maintaining appropriate eye contact. Examine, read and be seen to read any

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documentation that is handed in. This demonstrates that you really are listening to what is going on and that you will be in a position to ask, or suggest through the chair, relevant questions at an appropriate stage in the proceedings.

Not everybody appearing before a tribunal will have the same, or even similar, communication skills to those of tribunal members. This is true of witnesses, parties, and sometimes their lay or legal representatives. It is therefore essential that the tribunal member who has a speaking role establishes that everyone is correctly identified and understands the nature of the proceedings.

The introductory process is not something to be brushed aside in the interests of 'getting on with the case'. The first issue is to ensure that everyone is clear about the names of those appearing before the tribunal. It really helps at the outset to be aware of the names of the parties, witnesses and representatives and, more importantly, the name by which they wish to be addressed during the proceedings. Get this right, and the tribunal is immediately on a wavelength. It sets the hearing off on the right track.

Asking questions

At tribunal hearings, reasons for posing a question may be many and various. Many will surround issues of clarification from parties and witnesses. Sometimes it will be necessary to ask a question in order to obtain relevant information or to confirm information already available to the tribunal. Aside from clarification, it will sometimes be necessary to obtain additional information which is supplemental to what has already gone before. The purpose behind this type of question is to enable the tribunal to make an informed decision.

While the above may state the obvious, it is important to remember that the question which you may wish to ask may take varying forms.

The open question

The open question is always a good question to begin with because it requires the subject to produce an answer that has not been suggested by the question itself. Sometimes it will be important for the tribunal to allow a party to express himself or herself freely. It also concentrates the mind of the individual concerned. Open questions are also particularly useful during the initial stages of the hearing. They can promote a good atmosphere or set the scene for subsequent questions. Sometimes it will be useful to ask an open question to introduce new topics later in the hearing or provide an

opportunity to investigate in more detail matters already raised in evidence. One such question from my jurisdiction might be: 'What would be the effect on your business if I revoked your operator's licence?' The beauty of open questions is that they do not suggest a 'yes' or 'no' answer or any other type of monosyllabic response.

The closed question

Sometimes of course it will be appropriate to ask a closed question. Many examples abound, but generally this will be for clarification or to ensure that the tribunal

understands the basis upon which evidence is being given or submissions have been made. For example: 'Do you accept that you have no reasonable excuse for your actions?' does rather suggest a 'yes' or 'no' answer, but it does put the subject on the spot. Be careful here not to put words into the subject's mouth.

There is also value in asking a closed question when a specific confirmation of fact is required ('Now Mr Jones, you are the transport manager for this operator?') The moderate use of the closed question will also be appropriate where it is necessary to obtain specific items of information or to test out hypotheses that have arisen out of a period of questioning. On occasion, it will be necessary to bring the proceedings back to the realms of relevance where a witness has 'gone off the rails'.

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Other questions

It is not unusual for evidence which has been given not to be entirely clear. Where this is the case, a *clarifying question* will be appropriate. This also assists the tribunal in gaining a fuller understanding of what has been said.

Apart from asking questions for clarification purposes, it will sometimes be necessary to further explore and prompt a full answer from the subject through an *extending question* ('Tell me more about that...') Sometimes it will be necessary to restate or paraphrase what has been said by a witness in order to ensure a better understanding of what a witness means or feels ('Tell me how you have changed your maintenance arrangements...')

Inappropriate questions

Unfortunately, it is possible that inappropriate questions may be asked of a witness or a party to the proceedings simply because that question is on the tip of the questioner's tongue and may follow naturally from what has just been said in evidence. For example: 'So you have never appeared before a public inquiry of this nature before?' That is a *leading question* and anticipates the answer. While this type of questioning has its place, it can be dangerous.

Another type of question to avoid is the question that begins by addressing one issue but then goes on to address two or three others. Such a question is not designed to obtain a clear answer from a witness and will often serve to confuse the subject as to exactly what it is you are seeking an answer to. The answer will inevitably be unclear and at best will only address the last question that you have asked. Double-barrelled or *multiple questions* are not to be recommended.

Creating an understanding

A question that needs to be asked frequently at some hearings is whether everyone understands what is going on. The tribunal will, but what about the unrepresented party? An outline of the nature of the proceedings and the procedure to be adopted is always likely to be essential in the case of unrepresented parties, followed by a question to ensure an understanding of what has been said and what is about to happen in the case.

Ensuring that everybody before the tribunal understands each step in the procedure and stage in the process itself

is fundamental to the skills of effective questioning and active listening.

'Reflecting back' can be an effective method of demonstrating that the tribunal has a grasp of what is being said and that the subject can confirm, in a straightforward way, his or her evidence. For example: 'From what you say, you seem to have taken steps to rectify matters. How confident do you feel that the problems which you have encountered in the past will not be repeated?'

If adopting this approach, be careful to restate the other person's evidence in your own words. Sometimes witnesses may

express feelings in a confused or contradictory manner. Be careful to restate feelings that are actually expressed in evidence.

Similarly, the tribunal may summarise back to the witness. This is designed to encompass all key points that have been made and is not limited to what has just been said. It can also:

- Clear up ambiguities by inviting the subject to consider the summary which the tribunal has made.
- Indicate that the tribunal understands what has been said.
- Move questioning to new areas.
- Close the questioning.

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Blocks

The various blocks and bridges to effective communication in a tribunal setting are listed here for the sake of completeness. It is easy to lapse into some of the pitfalls, particularly when you do not sit as a full-time member of a tribunal. Remember that a failure to listen actively and accurately will inhibit a tribunal's ability to be effective in its decision-making.

For obvious reasons, avoid technical 'jargon'. The 'bag of bias' that every individual carries about on his or her back should be left outside the hearing room. In other words, discard the notion of stereotyping, labelling, and biased perceptions of people and situations before you even read the case papers, and demonstrate both to the parties and to colleagues that bias does not form part of your considerations.

Another block to effective communication is underdeveloped interpersonal skills. If you are not a natural communicator, training is always available.

An overall strategy

There are some very easy pointers which might be commended to all tribunal members. They are designed to assist in developing an effective communication

strategy in a tribunal hearing. They are sensible and simple to adopt.

Engage with the person appearing before the tribunal by giving that person your full attention, getting on a wavelength at an early stage through the use of simple, direct language, appropriate eye contact, and displaying open body language.

As the case proceeds, look out for non-verbal clues (but be careful about the conclusions you draw), make notes, seek clarification on what is being said and display sensitivity and respect for the party, witness or advocate. Give everyone time to think before they speak.

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Finally, no part of this article is designed to be prescriptive, but do refer to the points outlined here on each occasion that you pause to think about your role as a communicator in a tribunal setting and to consider the question: 'What do I need to be good at?'

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Race and the Courts

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