Legal assessors' hints and tips on case preparation and advocacy: *mind your language*

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The legal assessors in 3PB's Professional Disciplinary and Regulatory Team see examples of both good and bad case preparation and advocacy. In these articles for the Professional Discipline and Regulatory newsletter they share with you hints and tips from their experience.

This edition's hints and tips are the first on the theme **Mind your language.**

Professional disciplinary hearings take place before bodies variously termed tribunals, committees or panels; with some regulators the legal assessor is called the legal adviser; and the advocate presenting the case for the regulatory authority is called by titles such as the case presenter or the prosecutor. To avoid repetition, we have in this article used the words tribunal, panellist, legal assessor and prosecutor.

1. Talk proper English

You will express yourself poorly at times: we all do. There are however usages to which advocates in professional disciplinary proceedings seem particularly prone, and some of them illustrate the principle that loose language leads to loose thought.

One example of what our legal assessors have noticed is the use of *mitigate* instead of *militate*, as in "this factor mitigates against the conclusion that … ". Another is the use of *inadequate* interchangeably with *unacceptable*, as in "the registrant's failings were inadequate". Was the advocate really accusing the registrant of not doing enough failing?

Words which rarely find employment in ordinary speech, or even in normal usage in a court of law, can find themselves inordinately busy in disciplinary proceedings. *Woeful* is one example.

Egregious is another. The fact that it was used once in a judgment does not mean that you have to use it all the time.

2. Don't make things complicated

Avoid multiplying adjectives and phrases for the sake of it. If you use a string of words which seem to mean much the same thing you leave the impression that you are spouting jargon without regard to content.

If your sentences or questions are too long, they are more likely to go wrong grammatically. This will seem unprofessional. However it is not only a matter of image, but also of meaning.

Sort out what you want to say before you say it and speak succinctly and correctly. If your sentences are too long, or convoluted, or wrong grammatically, you risk being misunderstood. If the witness does not understand the question it is possible that the tribunal does not understand it either. If you then get cross with the witness for not understanding, the tribunal may sympathise with the witness rather than with you.

If you are making a number of points, phrase them so that the logic is apparent. Suppose that you make four statements, of which the last is very like the first. It may seem to the panellist that you have started with a free-standing assertion, gone round the houses and returned to where you started. The panellist may think that your argument is circular. If your intention is that the first proposition is a sub-heading, the second and third are the supporting arguments and the fourth is the conclusion, use language that makes this apparent.

3. Caution - informal language ahead

Informal or colloquial language is gaining favour on the grounds that it is more user-friendly and more accessible for ordinary people. Its use in regulatory proceedings however is questionable for more than one reason.

While ponderous language should be avoided it should not be assumed that registrants or witnesses are unable to handle grammatical English, or that they will feel more at home with colloquial language. Registrants usually have degrees or equivalent qualifications and complainants are often educated people. An advocate using colloquial English may be well-

intentioned but risks leaving the impression that he is talking down to the witness or to the tribunal.

Informal or colloquial English may be less familiar to someone whose first language is not English.

Language should also be appropriate to the occasion. A registrant whose professional career is at stake, or a witness whose relative died as a consequence of clinical failings, is entitled to expect language which indicates that the issues are being taken seriously.

Another reason for treating informal language with caution is that it can be ambiguous. “She’s taught resuscitation techniques” leaves the tribunal guessing whether she has delivered the teaching or is receiving it.

You may be thinking that language changes and what was once regarded as colloquial can become standard speech. That is true but there is a risk that, as Ogden Nash put it, usage overnight condones misusage.

4. Don’t rush

It is possible to get carried away when you are making a point, but one tip is to slow down. The members of the tribunal need to make a note of what you are saying for reference later. If they cannot keep up, their note will be incomplete. In addition, they need to follow your argument or the line of your questions at the same time. It does not help you if they are so busy scribbling or typing that they are not following the case.

While, as we have said, everyone expresses themselves badly from time to time, you will do so less often if you avoid speaking too fast. If you have to reconstruct your sentences when you are part of the way through, or you find yourself saying things like *lack of incompetence*, you will probably help yourself as well as the tribunal by a more measured delivery.

5. At the time of the allegations

In the legislation or governing instruments of professional disciplinary bodies the *allegation* usually means the allegation of impairment or of professional misconduct. The facts set out in numbered paragraphs in a notification of hearing are “the particulars on which the allegation

is based" or some such expression. Often both the parties and the tribunal use *the allegations* to refer to the factual particulars. This is technically incorrect but usually harmless.

The allegation is however the charge not the deed. It is wrong to use it to mean the deed and doubly wrong to use it about an unproven charge as if it were a fact. One hears: "These allegations may be repeated." They will be, in the prosecutor's submissions and the evidence of witnesses. "These are seriously dishonest allegations." That would be a reason for dismissing the allegations, not for suspending the registrant. If misconduct in 2017 came to light as a result of a complaint in 2021, *At the time of the allegations* does not mean in 2017.

6. Which left side?

There are apparently simple expressions which are ambiguous in ways that the speaker often does not realise. Be alive to them. Look out for them in written documents; clarify them before the hearing if possible; or if they arise in oral evidence clarify them then. Frame your own questions and submissions in ways that avoid creating them. Otherwise you distract the tribunal from the issues while the misunderstanding is sorted out, cause unnecessary complications such as recalling witnesses or amending the charge, and possibly affect the result of the case.

The night of 6 February or *the winter of 2018* are equivocal. Night-time begins during one calendar day and ends during the next. Winter begins towards the end of one year and continues into the following year. In one case the complainant said that an incident happened on Saturday night shortly after midnight. In statements from different witnesses the relevant passages all began "On Saturday, (date) at about 0010 ...". The incident was not on Saturday at about 0010, it was on Sunday at about 0010.

Our legal assessors have more than once seen an advocate having difficulty getting a witness to explain which side of the patient someone or some piece of equipment was. The advocates and the witnesses were at cross-purposes about whether *on the patient's left* meant the left of the patient's physiology or the left of the observer's field of view.

Similar ambiguities arise with other descriptions of position, particularly when someone is sideways on to the observer. *In front of X* may mean between X and the witness, or it may mean anterior to X. *Facing to the left* may mean that X is looking ahead (of himself) but towards

the left of the observer's field of view, like the lion in the Scottish coat-of-arms, or it may mean with the head turned, like the lions guardant in the English coat-of-arms.

7. Which Mrs A? - anonymisation and defined terms

For reasons of confidentiality or ease of reference, in regulatory cases there are often defined terms - "the Ward" - or pseudonyms - "Client A". They are found in charges, witness statements and written submissions. This is a sensible practice if done properly: the following cases which our legal assessors have experienced illustrate the difficulties that can arise if it is done carelessly.

In one case the practitioner was alleged to have done additional shifts at other hospitals, overlapping with his hours at the hospital where he was principally employed. The charges defined the hospital where he had a salaried post as *the Hospital* and the other ones as *the Hospitals*. Unsurprisingly defining *the Hospitals* as every hospital in the region except for *the Hospital* produced problems.

In another case the witnesses included the patient, her sister and a neighbour. They were defined as *Patient A, Relative A* and *Friend A*. Whenever someone said "Mrs A" it was necessary to elucidate to whom the speaker was referring.

In a part-heard case the factual charges were grouped in paragraphs not according to the identity of the patient but according to the nature of the error. This is reasonable enough in itself. Thus charge 5 might allege similar errors in relation to a number of different patients. At some stage the identification letters had been changed, either by someone who assumed there was a mistake or by the word-processing software. It was the legal assessor who politely queried whether Patient G had really gone into labour six times in two months.

Sometimes the choice of words used in a conversation matters. If you are eliciting oral evidence of a conversation consider how you are going to deal with anonymised names. To the question "Did you then say to Service User A, 'Here's your cup of tea, Service User A'?" the answer is obviously "No": that was not what the witness said to the Service User.

8. Write English, not Computerese

Beware of auto-correct, auto-complete and similar software. It is possible that the registrant's fitness to practise was impacted (by something or other), but you probably meant *impaired*. You may have intended the sentence to end with the word *meaning*, but the computer changed both the sense and the grammar by turning it into *meaningless*.

One habit of such software is to assume that upper-case letters are only found at the beginnings of words. Look out for what this does to qualifications. The tribunal will be amused by Mr James Frics and Ms Li Ma Ceng, but your evidence matrix should inspire confidence rather than entertainment. (Mr James is a Chartered Surveyor. Ms Li is a Master of Arts and a Chartered Engineer.)

If your submissions have numbered paragraphs and sub-paragraphs, check that the automatic numbering is doing what you want it to do.

If your computer software thinks that you are American, disabuse it of this notion.

9. Avoid catchphrases

There are various expressions which have gained currency in regulatory proceedings and which are better avoided. If you are tempted to use them, consider their meaning and whether you could justify them if challenged.

Legal assessors often hear the proposition "If it is not written down it did not happen". This is not true: it is at best an attempt to bamboozle the witness or the tribunal. It is heard in cases where it is obvious that the records are exiguous. It is even heard in cases where one of the charges is inadequate record-keeping, sometimes as an alternative to a charge of failing to do something. If it were really true that what is not written down did not happen, a charge of failing to record some event would be a nonsense.

If it is a fair point, on the particular facts, that X probably would have been recorded if it had happened, this point can be made without resorting to expressions of that sort.

Another formula that one hears in professional disciplinary proceedings but which does not seem to be common elsewhere is "We only have your *assertion* to contradict the *evidence* of A and B." Even if nobody challenges it at the time, the tribunal will recognise this as a slanted

use of language. What the witness has said on oath or affirmation is just as much evidence as what a witness on your side has said. If there is material corroborating your witness's account and nothing to corroborate the other witness's account, then again you can make your point without such phrasing.

Yet another is "I am not interested in what you think", said to a witness who begins an answer with "I think ... ". One of our legal assessors has even heard this said, by an advocate who was making a habit of using the expression, to an expert witness. It is the expert's job to give the tribunal evidence of what he thinks.

However even a factual witness should be allowed to give her evidence in her own words. If the witness is being asked, for example, to remember a conversation which took place some years ago, it is unsurprising that she will not remember it with precision or certainty. Delusions of infallibility are not a requirement of giving evidence. It is proper that she should express herself accordingly, and *I think* is a way of doing that.

If you are an advocate who uses this expression you may seek to justify it by saying that it is the witness who is at fault for using language imprecisely, because *I think* suggests opinion and she should have said something like "To the best of my recollection". That is fencing with words and you will lose the bout. The job of a witness is to tell the truth, not to provide relief from tedium: if you are not interested in what she thinks, it can equally be said that it is no concern of hers whether she is keeping you interested.

10. Get it right, or at least do your best

With written submissions and documents, always proof-read the final draft of what you have written. The tribunal will appreciate that advocates preparing written submissions, evidence matrices and so on do not have unlimited time. It will also appreciate a document that looks like a proper job rather than a rushed job.

Completely avoiding mistakes in written work, even with careful proof-reading, is not easily achieved. It is well known that people see what they expect to see. Sometimes a sentence says the opposite of what was intended, for example "It is not agreed that ..." when what was intended was "It is now agreed that …". The writer reviews the text, but sees what he or she intended to write and does not spot the error.

IF you introduce changes to the text, make a habit of re-reading the sentence or paragraph after you have made the change. If you change *accuse* to *allege*, you need to reconstruct the grammar of the rest of the sentence. If you add a sentence in the middle of a paragraph, words such as *he* or *then* or *as a result* in the next sentence may now appear to refer to a different person, time or cause.

Be careful about homophones such as *effect* and *affect. Would of done* should be avoided. *Practise* is a verb and has an *s*. *Practice* is a noun and has a *c*. Unless the hearing is before the Disciplinary Committee of the Sat-Nav Installers Registration Council, *Route Cause Analysis* should not feature in your submissions.

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