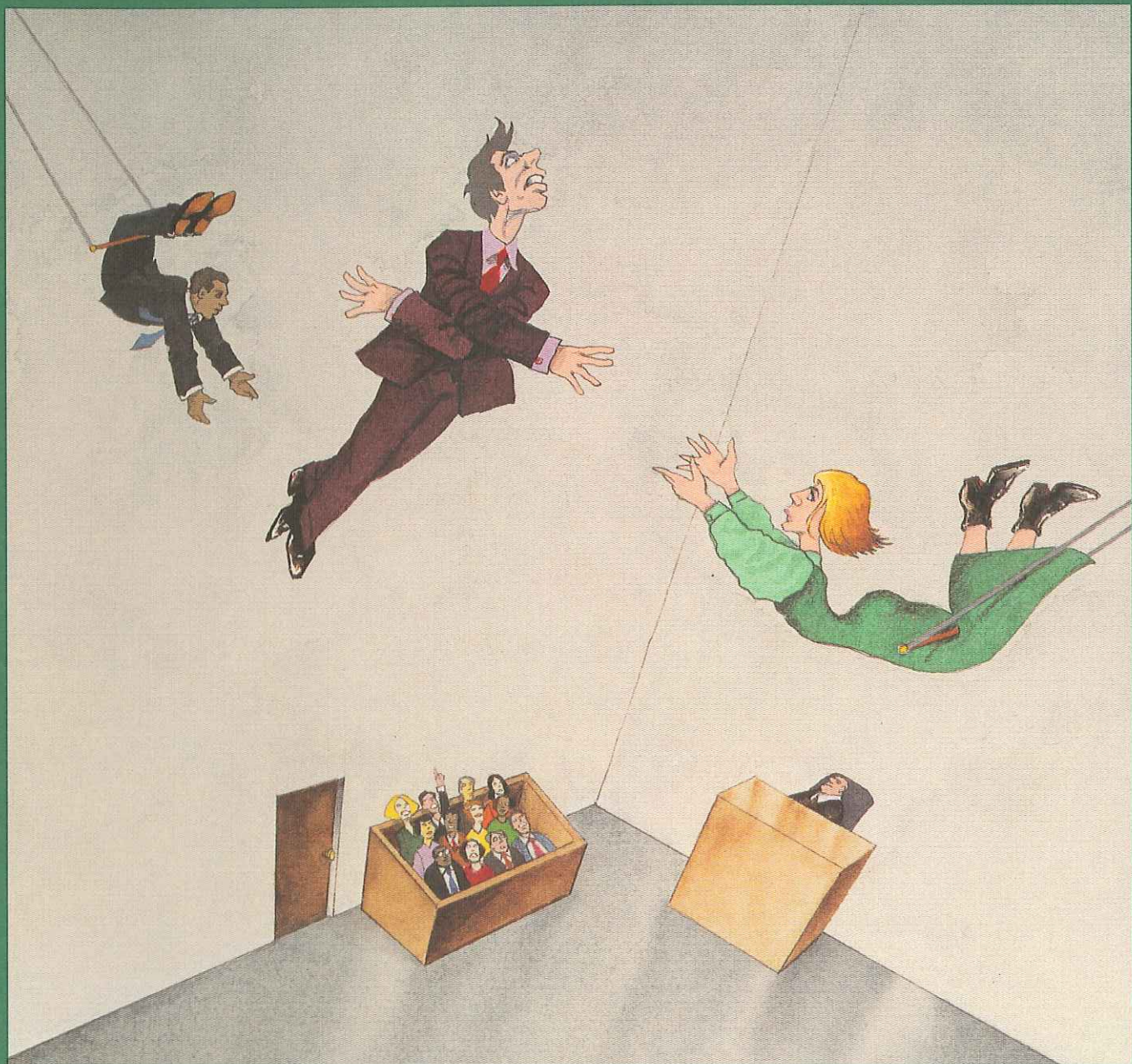


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Communication

More Than Just Words

by Kenneth P. Nolan

Only my mother ever called me Kenneth. I was the Bean, as in string, which somehow later became Beano. My pals were Mo Maloney, Otis O'Dea, Haj Hajjar, Koch Conway, Ferry Ferraiolo, Pick, as in toothpick, was skinny. The Whale was not. Whistler had a lisp. The Pope actually said his prayers. Bingo Young's brother was Bango, and when a cousin visited one summer, she became Bongo. There was Scratch McCann, Sneezzy Sesso, Moon McNally. Deucey Doyle always bragged about his two cousins. You were Lefty or Red or Falcon (his family was from Malta). Even after we married, telephone conversations were "Hello Bitty, this is Pick, is Koch home?" Instead of "Hello Elizabeth, this is John, is John home?"

But that was the problem. In my Brooklyn neighborhood of row houses, if your mother screamed out the window, "Time to eat, John" or Robert or Kathy or Mary, 20 kids would turn. Of course, there were more than 100 on my block. And children were usually named after a relative. So we had Big Rita and Little Rita, whose sister was Dolores named after her aunt, who also had a daughter Dolores. Big Rita's son was Jack, named after her brother who also had a son Jack. And Big Rita's husband was Clyde Mooney whose nickname, of course, was Sunny.

So at the age of reason, six according to the Baltimore Catechism, we learned how to grab our audience's attention. If you asked for Jimmy Greushaw, rather than Chin, you were immediately seen as alien, someone not to be trusted. Not only did you have to know the nickname, but you had to know when to use it. Never to his mother, sometimes to his father—okay on weekends, chancey during the week. Never in school, but always in the schoolyard or street.

And that is really all you needed to communicate those many years ago—the nickname, some sense as to when to use it, and a loud voice. Today, of course, it is different. My four

kids and their friends have few nicknames. Sure, one of my daughters is Nols, but only to her soccer teammates. Instead of a million Billys and Susies, every child is individually named—Trafton, Brekke, Reid, Britt.

Maybe at one time a trial lawyer could go a long way knowing the judge's nickname and learning what the jurors were called. A smart suit, an Ivy League education, and white hair and skin were all that was needed to convince the judge, capture the client, sway the jury. But those days are gone. Words are not enough. You must be able to communicate not only to your secretary but to your clients, the jury, the world. The days of rich white boys running the legal system are past. Forget it, it is past. Indeed, the Johnnys of my daughter's P.S. 102 are now Mohammed and Yuri. The bilingual program includes Arabic, and even the local Catholic high school has a room set aside for the Muslim students during Ramadan so they do not have to watch their classmates scarf down veal parmigiana heros. The trinity of my youth, Ireland, Italy, and Israel, has been replaced by the 145 languages and dialects spoken in the New York City school system. Next to the house where I was raised and my sainted mother still lives, the neighbor is not from Dublin or Palermo but from New Zealand. And when the gay couple down the block goes on vacation, my mother waters their plants.

Litigators must communicate to all. And in this global economy, many are women or from places that we once only read about in *National Geographic*. We must deal with different cultures, ethnic backgrounds, and religions not only internationally but in our juries, at our client's headquarters. If you want to win the client, convince the jury, persuade the judge, adapt to a global world, a changing world, a world in which you are no longer in control, you must work at it constantly. It is not as easy as it once was.

Communication is not just talk. Once there was Franklin Delano Roosevelt and John Fitzgerald Kennedy, now it is Bill Clinton and Bill Bradley. Even Al Gore, patrician to the core, would sell his soul if he could just boogie on the dance floor

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or at the lectern. Watch the politicians and their rolled-up sleeves, open collars, and blue jeans. George W. and his good ol' boy twang. Al Gore hires experts and takes polls to determine if voters like brown or beige. Everything is scripted.

Sure, if you are arguing to the Second Circuit, words are all you need—in your brief or from your lips. But not in the real world where perception is reality. How you look is often as important as what you say. Your dress, your manner, your style shout to a public more attuned to the visual than the oral. Al Gore smooched his wife at the Democratic convention—see, I am not Bill, I actually like my wife—and he jumped 10 points in the polls. It is rare that a movie with moving and insightful dialogue grosses \$100 million. Instead, it is trains blowing up, cities being zapped, and dinosaurs stomping a bus. Visual effects sell tickets.

Maybe the decline in the spoken and written word is related to the lack of emphasis in the schools. My kids seem to write more essays than I did, but they have never taken a speech course, which I had to do in both high school and college. Kennedy and Reagan are the only politicians since the end of World War II whose words are historic. And you will never have a memorable phrase from Bill Clinton, except for “Most of the time I wear briefs” or “I did not have sexual relations...” And judges are graded not on their written opinions, but on how many cases are resolved. Speed wins promotions. If a TV show does not immediately enthrall, click to another of the myriad stations. There is always something else. Language is ignored. It takes too long, it is not glitzy. It takes thought. It is in black and white.

To win the election, you act sincere on Oprah, dress like Regis, and joke with Leno. You are one of the guys, and you love your family. Who cares about plans for Social Security or foreign policy. People vote not on policy issues but on whether she is a good person, is like one of us. My father always voted for Louie Lefkowitz, an old-time pol, simply because he was born on the Lower East Side where my grandmother was raised. What Louie's politics were—who cared? He came up from the streets, he understood.

So it is with us lawyers, too. In a beauty contest, there is not much difference between you and your competitors. You often are successful on the intangibles. Do not forget them. So look the look.

Examine your dress, your jewelry, your business card, your Web site. All will be noticed. The look and feel of your firm brochure, your bio will be judged. One of my partner's clients was sued in a class action and needed a firm that specialized in defending such cases. He referred our client to a 400-lawyer firm, good friends and excellent lawyers. One bio had a typo. Be careful. Most potential clients will see your “propaganda” before they meet you. A recent client complimented me (I think) when she said that whoever compiled our firm literature did an excellent job. I was retained because I hired a professional who tastefully presented our firm. I hope my legal talent played a part in my client's decision, but I did not cross-examine her on the issue. I did not want to know the answer.

And no detail is too small. In the Cali, Colombia, plane crash, the son of the decedent momentarily forgot that he failed to earn a high school diploma. At his deposition, he testified he was starting law school. This statement not only hurt his case but also caused the defendant to move to dismiss his claim and ask for legal fees, which I thought was a bit much. So in my opposition, I attached a copy of the attorney's bio

from the Net, and I ridiculed his somewhat embellished bio and gleefully pointed out his misspelling, “Columbia.”

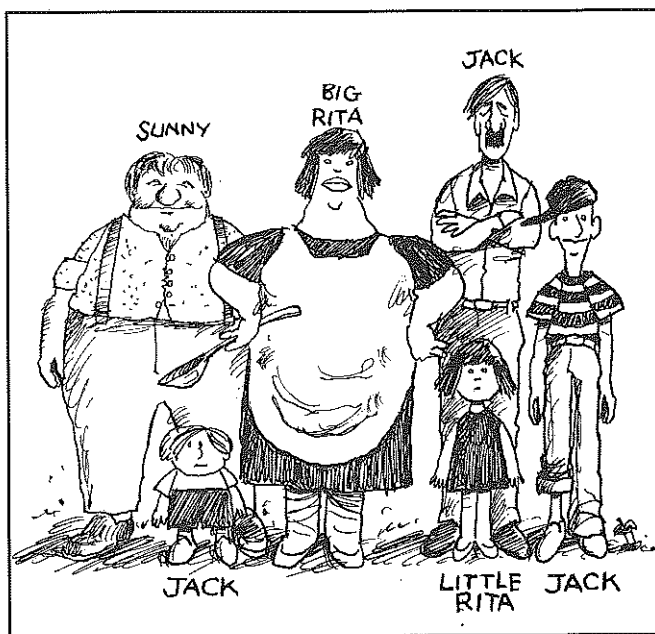
Consider who to send to the beauty contest or the court conference. Everything sends a message. Do not bring the 70-year-old senior partner who cannot turn the computer on to capture the dotcom business. If you do, emphasize his political connections. It is always good to have a few people of varying ages to show experience, vigor, and ambition. Too many is a turnoff. It shows desperation. Rather, take the client around to other offices, show them that real lawyers work there on real legal matters. Youth is always welcome, but experience is invaluable.

Your offices, your personnel, your decorum will be judged. I once wore a double-breasted suit to meet potential clients, and I was informed I was not hired because I looked like I was on *LA Law*. Maybe she was just being kind. But I do not wear those suits anymore.

Know your audience. Growing up in Brooklyn, you learn some truths quite early. Manhattanites think you are big hair and muscle T-shirts, and everyone else in America thinks you are scum because you live in New York City. It took me only five minutes of argument before a judge in Cleveland said, “Mr. Nolan, I don't care how you do it in New York.” And I thought my argument was restrained.

Since my plaintiff's personal injury and wrongful death practice (including representing victims of aviation disasters) is local, national, and international, I know not to walk into a Lubbock, Texas, courthouse without a local lawyer who knows the courthouse and the people. To a Texas jury, I talk funny. And I do not get country music.

Not only must you know what you can do, but what you cannot. Suppress your ego. Your high school French really sounds like high school. Employ a good translator, preferably one who was born in the country of your clients. Learn the customs, traditions, the do's and don'ts, whether in Tuscaloosa or Tokyo. After lunch with my German co-counsel, I grabbed the check. He became very embarrassed, and the woman at the next table began to laugh. What is a ritual in the United States was rude in Germany. Talk to local lawyers.



With only six degrees of separation, you can always connect with someone who knows the ropes. Read local newspapers. They are all on the Net.

If you are trying a case in a different jurisdiction, spend a few days watching the judge, the clerks, the jurors. Eat at the local diner and eavesdrop on conversations. Stop by the sports bar; stroll through the mall. Open your eyes and ears to local concerns.

Use mock juries. Hire a jury consultant, and gauge your strategy against real people, not just your partners. Watch them tear apart what you thought was best. Tailor your trial to what works. Sure, your adversary's case is a piece of garbage, and truth will prevail, but a jury trial is a contest. The loyal, hard-working mother of two is often dumped and stiffed by her husband who cares only about himself and the other woman who looks like she stars in *Sex and the City*. The righteous sometimes lose. And do you wish to win in the courtroom or in your mind? Even Jack Kennedy, while preparing for his first debate with Nixon, told Richard E. Goodwin, later a White House assistant, "Remember, Dick, I don't want to make policy, I

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want to make votes." If you wish to make policy, do it in your summary judgment motion or on appeal. At trial, win votes.

The Net is a wonderful tool and should be used. Run the judge's name, learn where she attended college, her family background, her extracurricular activities, articles written, speeches given, the gossip, the eccentricities. Research not just the legal opinions but everything you can find. Talk to the local bar. Discover the intangibles—irascible or serene, a stickler for decorum or loose. Tailor your argument, your papers accordingly. Do not be so proud that you ignore the judge's tendencies. After all, you want to win. And despite all the politically correct rhetoric about "it's how you play the game that counts," winning is a blast. Ask any eight-year-old kid playing tee ball.

The same applies when you are competing for business. Use the search engines to learn as much as possible about the corporation and the persons interviewing you. Find an outside interest—antiques, travel, family, golf—that you share. Subtly mention it during your conversation. Do not be a sycophant, but obtain information and then use it to your advantage.

Know your stuff. All style without substance loses sway after 10 minutes. If you believe the public relations materials strewn about the reception area, no one has ever lost a case, and every victory was smashing. Sometimes fake wins, but rarely. In the world of the educated consumer, whether client, judge, or jury, knowledge is imperative. Without it, you lose. You have to know the law, the facts, the witnesses.

Years ago, I was trying my first big case, obstetrical malpractice involving a severely brain-injured girl. My opponents

were two seasoned lawyers, and the hospital attorney was particularly smooth, with an excellent reputation. After jury selection, the hospital settled for more than I expected (or demanded, but that is for another article). After openings, the attorney for the doctor also settled and, as we were walking down the corridor, said, "You know, we could have done a job on Frank (the hospital lawyer). He didn't know the medicine." I then realized that even though I was a bit green, knowledge beats experience time and again. Frank knew how to try a case, but without the requisite knowledge, I would have been more effective because I knew the file and the medicine.

So, there is no substitute for preparation, the mind-numbing work of poring through documents, memorizing depositions, researching the law. And you have to know it all. Sure, you need assistance, but if you are taking the deposition, trying the case, your adversary will immediately know if you have not mastered the facts. This is true even in ADR. Why would your adversary settle a case fairly if you are fumbling for documents or cannot refute a point by quoting deposition testimony?

Juries are rarely fooled. They want to do the right thing—decide cases on evidence, not argument. A well-organized presentation with interesting and pertinent demonstrative evidence will be influential, but if your client's position is not credible, you lose. After a loss, it helps the ego for a juror to tell you that you were better than the other guy: "I wanted to help you, but what could I do?" Any hesitation in knowing the case reflects on your credibility. Jurors expect you to be prepared, to know the facts and law. If you are not, they will question even further the merits of your defense.

Everyone uses the Net, including clients. Just like you will use it to research, so will even unsophisticated clients. Your writings, cases, media coverage are all there. General counsel will verify if you are indeed the specialist that your Web site trumpets. Potential clients will call former ones. A recommendation from a friend or attending college with the CEO helps, but not if your expertise is all fluff. The stakes are too high, the decision too crucial.

The requisite beauty contest no longer relies on pedigree. You will be quizzed, issues raised, statutes discussed. Your answers will be checked, and if you do not know who wrote the leading case, you will be caught. Clients, judges, and juries love competence—and, above all, competence means knowledge.

Tell the truth. It is too easy to embellish, reassure, promise what we cannot deliver. And there are plenty who do that and more—they lie. Anything to have that retainer signed. Worry about the consequences later, if at all. Little thought or care is given to the client whose trust is shattered when promises are not kept. But in my personal injury and aviation practice, it occasionally works on the less educated, the vulnerable, the greedy. The videos and glossy brochures boast that he alone tried and won the Pan Am Lockerbie case when he was not even in the courtroom. I never mind (at least not too much) when I lose a potential client to other competent counsel. But I hate when the vultures prey on the needy, the weak.

But in this intimate world, truth is not only proper—dispensations, of course, to all politicians—but good business. It is tough to tell a client that she could lose. But the last time I looked, both sides strive to win. So unless you have a slam-dunk, admit weakness in the law, the venue, the facts. And then detail your strategy to deal with these problems.

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More Than Just Words

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Hyperbole and lies will haunt when you try to settle. Unrealistic expectations fueled by promises made during courtship will result in trial or a forced settlement, leaving the client bitter and resentful. And when another contacts her about your credibility, the recommendation will be words primarily of four letters.

At argument or trial, be the first to reveal the damaging information. Tell the judge before your adversary rises and proclaims, "Ms. Loewinger's argument was very persuasive, Your Honor, but she deliberately omitted a crucial case." Tell the jury during selection or at opening. Of course, do not admit problems of which the other side is not aware. But if she is on to you, do not hide it. Admit it, explain it. It will hurt, but all dislike a sneak who is caught. And the jury will punish you.

In the quiet of your office, force your client to tell the truth. Discover the skeletons early so you can deal with them if they arise. For the most part, what clients believe is harmful is often innocuous. Some lie for no reason, like the one who exaggerated his education. And when I handed him his settlement check, he told me that this incident had made him realize that his pattern of lying was harmful, and he was now a changed man. I did not believe him, but I hope I was wrong.

Have a theme. Synthesize your argument into a single sentence, and string it

throughout the presentation. It can be as simple as "the defendant valued money more than safety." And then prioritize your evidence to prove your theme. In the age of speed and flash, use demonstrative evidence. Juries are used to the visual, and you are really not all that spellbinding. Do not be afraid to use charts, film, and photos in oral argument to a judge or in emphasizing your capabilities to a potential client.

If others are participating, make sure you have a unified theme. Elicit criticisms. Be flexible. Consider the what-ifs. Listen to the witness's answers. Notice body language. If your argument is faltering, change tactics. But a good theme should rarely be abandoned.

Care. When I first began the practice, I was shocked at the large number of litigators who do not like people. You cannot escape them. They are clients, clerks, judges, witnesses. Then again, when I taught high school, most teachers hated students. But they were teenagers, and they earned our enmity. To be a successful litigator, you must enjoy people, even the nasty and arrogant. And some are your clients. I have had many sleepless nights caused by the biased judge or scheming adversary, but I revel in the battle. I have wished terrible evil on many, which I sometimes later regret. But for some I continue to scan the obits for their names.

You must care about your clients especially when they do not deserve it. And it is tough to put in that extra time when they are evil. But most are decent and entitled to your best. Phone, e-mail, fax, meet. Keep them informed. Tell the good and bad. And listen to their goals. Spend the time to explain the process. In a recent mediation before a federal judge, I represented a child of the decedent by a first marriage. Another attorney represented the widow of the executive who died in a plane crash. That lawyer did not meet the widow to explain what she should expect. The woman was visibly disturbed by the callous treatment, "I know what's best for you. Just sit there and nod your head." The case settled, but the woman left the judge's chambers in tears because her lawyer did not take an hour to explain what would happen. Not only did she lose her husband, but the litigation left her bitter and depressed. The lawyer was just too lazy to care.

Litigation is tough, grinding work. It takes a lot more than words, but the

right words at the right time still go a long way. □