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How to Write and Speak More Effectively as Advocate, Negotiator, or Counselor – Suggestions to the Budding Lawyer

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January 22, 1980

DRAFT

HOW TO WRITE AND SPEAK MORE EFFECTIVELY AS ADVOCATE,
NEGOTIATOR, OR COUNSELOR--SUGGESTIONS TO THE BUDDING LAWYER

by Arthur Landever*

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Preface to the Law Student

In October 1979, I assigned my first-year, Constitutional Law students the task of writing briefly on "Ways to Improve the Clarity and/or Persuasiveness of Communication." This article grew out of my own reflections upon that subject, as I synthesized² their efforts.

Do not swallow my paper "in one gulp." Instead, peruse it, recalling your communication assignments in law school or in college. Consider how you might have benefitted (or been hindered?), had you employed any of the ideas I present here.

A caution: View this note only as an introduction. In carrying out any communications project in the future, naturally be attentive to its peculiar requirements.

*Professor of Law, Cleveland State University College of Law.

¹Doubtless, I have been influenced by my students' comments, and by my general reading: S.Baker, Your Key to Creative Thinking, 1962; G.Bellow & B.Moulton, Lawyering Process, 1978; D.Binder and S.Price, Legal Interviewing and Counseling--A Client-Centered Approach, 1977; Board of Student Advisors, Harvard Law School, Introduction to Advocacy (2d ed., 1976); N.Brand and J.White, Legal Writing--The Strategy of Persuasion, 1978; H.Edwards & J.White, Lawyer as Negotiator, 1977; R.Flesch, How to Write, Speak and Think More Effectively, 1960; H.Freeman & H.Weihofen, Clinical Law Training--Interviewing and Counseling, 1972; H.Goodrich, A Case on Appeal, 1967; S.Hayakawa, Language in Thought and Action, 1978; J.Jeans, Trial Advocacy, 1975; M.Pittoni, Brief Writing and Argumentation, 1967; M.Rombauer, Legal Problem Solving, 1973; "Symposium: Law, Language and Communication," 23 Case W. Reserve L. Rev. 257-390 (1971-72); K.Turabian, Students' Guide for Writing College Papers, 3d ed. rev. & expand., 1976; H.Weihofen, Legal Writing Style, 1961; F.Wiener, Effective Appellate Advocacy, 1950; R.Wydick, "Plain English for Lawyers," 66 Calif. L. Rev. 727 (1978). It is difficult to attribute ideas or phrases to any particular author. Many of the phrases I use--e.g., "marshalling the facts," "aim for the jugular," "be precise"--are in common usage. However, where I am able to identify a particular source, I do attribute.

²The synthesis ("Ways to Improve the Clarity and/or Persuasiveness of Communication--A Synthesis of Written Comments by Students in Constitutional Law L516-66 (ed. Arthur Landever)) is in my office files.

Introduction

If you are serious about wanting to become an able lawyer, you had better improve your communications skills. An attorney plays three basic roles: advocate, negotiator, counselor. To perform well, he must become adept in employing an array of special modes of communication: witness interview, cross-examination, client letter, negotiation, mediation, motion, brief, oral argument, jury summation, contract draft, statutory proposal, law review article.

In each mode, a lawyer seeks not merely to inform, but to persuade, gauging how a given message fits into his overall strategy. Within even a single communication, he may choose to be clear in discussing one subject (e.g., "Mr. X, these are your rights in this situation: . . ."); vague in touching upon another matter (e.g., "Mr. X, there are other ideas that I will discuss with you if the present negotiations fail."); and diplomatic in considering a third (e.g., "Mr. X, I would rather not dwell on your prior conduct. Instead, I want you to think about proposals that should prevent a recurrence.") Furthermore, he may opt, initially, to be non-directive (e.g., "How can I help you?") and later directive (e.g., "This is what I propose we do now: . . .").

How best to give you some ideas about legal communication? The traditional approach is to focus narrowly upon a particular type, for example, appellate oral argument. My approach is different. I view communication in its total aspect--whatever its general nature (e.g., writing or speech), degree of formality (e.g., brief or office negotiation), or audience (e.g., lawyer or layman). My ideas proceed from a fundamental assumption: As a student you can gain insights about the subject, by first studying the broad canvas. As you then reflect upon any particular mode, it can be set against that background. The suggestions that I offer are not original; but however elementary, they should prove useful.

My discussion treats, in order, ways: to be clear, to be persuasive, to prepare yourself, and to be creative.

(A) To Be Clear

As a lawyer-to-be, how can you make yourself understood—whether in a formal presentation or in an informal message?

You, the Message, the Audience, the Setting

1. Know yourself.

What substantive knowledge do you have? what communication skills? personality traits?

2. Reflect upon the nature of the reality called "law" (with its peculiar language, institutions, social system, and assumptions).⁴

3. Master your immediate subject.

4. Know exactly what message you want to give and why.

5. Consider the nature of the particular message.

What is its complexity? its length?

6. Put yourself in the audience's place.

a. Who are⁵ the audience: judges? opponents? jury? clerk? prospective witness? client? associates?

b. What are their customary language patterns, in speech? in writing? What other patterns are they able to understand?

c. What problems will they encounter in giving you attention?

d. Who are the opinion leaders? swing members? What are the audience members' differing perceptions of their own needs? of your role?

7. Study the setting.

a. What are the subject and format requirements? time and length limits?

b. Is the communication part of a series--taking place concurrently? sequentially?

⁴See student No. 28, supra note 2; "Symposium," supra note 1.

⁵I use plural for "audience" unless the context indicates only one individual.

- c. What general mode or combination of modes is involved: writing? lecture? question-answer? video? chart-talk?
- d. What prior advertising or audience "conditioning?"
- e. What physical environment: auditorium? opponent's office? judge's chambers? open court? What props? What distances separating the interacting parties?

Your Challenge: Getting and Riveting Attention

8. Impel your audience to concentrate upon your message.

Generally focus upon their needs. Select any title and/or introduction with care. Be dramatic; entice; consider employing humor; perhaps even threaten. Ordinarily, weave your ideas and facts into a moving story. To the extent appropriate, make your communication seem like a dialogue. (Anticipate questions or points of interest to the audience; use dialogue forms ((e.g., we, you, us)).)

The Analytical Focus

- 9. Identify a central issue.
- 10. In a formal presentation, make sure your communication has unity and coherence.

Each part (thesis, argument, subargument) should fit into the whole. Each should be internally consistent, and consistent with every other. The presentation should unfold in some logical order, with basic thoughts linked. Ideas and facts should cluster around a fundamental approach--historical, comparative, functional, philosophical.

An Elementary Communication Plan

- 11. If you have a brief point (and your audience is attentive)--get to it at once, identify it, and discuss it.
- 12. In a longer communication--include an introduction (identifying thesis or approach, and plan) and a conclusion.
- 13. Start with the basics; then proceed to the more complex concepts.
- 14. Concentrate upon a few points.
- 15. In telling a story (or giving case facts), proceed chronologically.
- 16. Employ a "number transition" method (e.g., "There are four grounds: First Second").
- 17. Periodically frame questions to focus the discussion.

18. Employ frequent "signposts"⁶ and transitions.

Visual Clarity in A Writing

19. Physically group ideas and words.

Use spacing, periodic indentation, letters or numbers to categorize.

20. Emphasize.

Use underlining, punctuation, CAPS, repetition, range of examples, forceful terms, word placement at the beginning or end of a sentence.

Effectiveness in Speaking

21. Do not ramble or speak in a monotone. Instead--especially in a formal presentation--talk clearly and forcefully, using an elementary structure.

22. Emphasize.

Change volume or tone of voice; pause; vary word rate; use gestures and body language (and appropriate items in No. 20 above).

23. Employ a natural speaking style.

24. Maintain eye contact.

25. Monitor the extent of audience comprehension; encourage audience reactions and questions; in appropriate settings, direct questions at them.

26. In a conversation exchange, periodically restate--in your own words--what the other actor has been saying, to make certain you are comprehending his message.

Paragraph Design

27. Identify a "controlling idea"⁷ around which your discussion takes place.

28. Develop by comparison or contrast, analogy, example, evidence or definitions.

⁶Brand and White, supra note 1 at 15.

⁷Turabian, supra note 1 at 58.

⁸Weihofen, supra note 1 at 7.

Sentence Design

29. Usually have only one main thought in each sentence.
30. Prefer action verbs, "active voice," and the order: subject, verb, object.
31. Limit size; vary size and structure to maintain audience interest.
32. In a writing, express your thoughts almost as if you were speaking them. (Unlike in speech, the words alone must bear the full weight of conveying meaning.) Use punctuation to clarify or to regulate word flow. (e.g., The lawyer's communication takes varied forms: brief, client letter, oral communication . . .).
33. In a talk, try to keep most of your sentences down to two clauses or less.
34. Avoid the use of double negatives.

Balance

35. Employ parallel construction.
Balance items (e.g., words, phrases, sentences) of equal importance.

Good Grammar

36. In a formal presentation,
 - a. Follow conventional rules.
 - b. Avoid:
modifiers out of place, split infinitives, pronouns without clear antecedents or in the wrong case or number, subject-verb disagreement, improper tense form, and sentence fragments.

Describing a Phenomenon

37. Tell what the phenomenon is not, how it developed, how it is changing, how it functions, how it is similar to or different from other phenomena.

⁹Id. at 289.

Choosing Words

38. Be precise.
- a. Select a word or phrase that comes closest to transmitting your idea while not carrying unwanted emotion or other distracting cargo.
 - b. When necessary, employ a "term of art"; use it correctly and only in its technical sense.

39. Use plain English.

40. Employ diction "appropriate to the audience and occasion."¹⁰

41. Be concise.

Hone. Repeat only for purpose. Limit use of adjectives and adverbs.

42. Do not use (without explanation) a term in two senses or in an unusual sense.

43. Be cautious in being "tongue in cheek," or in employing British understatement in "Yankee" communications.

Conveying Meaning

44. Define difficult terms.

45. Use familiar, concrete words to describe ideas.

Consider employing analogies, examples (typical and unusual), metaphors, similes, ordinary symbols (e.g., triangle). Set these next to the notions to be explained.

* * *

In sum, to be clear: be well organized, direct, simple, forceful, and concrete.

How do you know if you have been lucid enough so that the particular audience understand? "Break out the champagne" if they are translating your message into their own language forms, sending it back to you substantially intact, and adding their own applications and insights.

¹⁰Id. at 108.

(B) To Be Persuasive

Being clear is only one goal. Often, a lawyer will have other priorities: setting the right atmosphere for an imminent or future message; avoiding discussion of an issue; putting an individual at ease; blocking an opponent's efforts; assessing a situation. Thus he may choose approaches (e.g., engaging in light banter, rambling discourse, silence, or gestures to encourage others to speak) that are not directed at clarity.

Doubtless, in the strategic use of communication, an overriding objective is persuading others. An attorney may seek to have individuals take on any number of fundamental commitments: engaging in tedious labor; sweating over complex ideas; joining into a team; reexamining their basic premises; revealing their innermost feelings or struggling to recall long-forgotten events; remaining silent when they feel impelled to "tell all"; delaying a pet project; taking immediate action. Essentially, the commitments will be three-fold: (1) perceiving an issue in a certain way; (2) endorsing the attorney's approach; (3) obliging themselves to carry out his plans.

How do you, as a budding lawyer, move an initially resistant audience? I would hope that you eschew lying and distorting,¹¹ however successful these techniques might be in a given instance. Suffice it to say that they are morally wrong. What is more, in the long run they will give you an unsavory reputation.

Better to concentrate on employing strategy as an honorable and yet effective lawyer:

You, the Message, the Audience, the Setting

(Refer to the earlier discussion. Here are some additional thoughts, as they relate to persuasion.)

1. Know who your client is.
(e.g., Does a government lawyer represent the agency? the agency chief? some other individual? the general public? Does a corporate attorney represent the entity? the board of directors? the stockholders? the general public?).
2. Assess your long-range and short-range goals, the means available to you, audience options.

How does the particular communication fit into your plans?

¹¹Some puffing in the typical negotiation culture is acceptable.

3. Recognize your discretion.

Can you make concessions? shift your position somewhat? choose a different audience (e.g., different judge)? a more advantageous time and place (e.g., "Let's meet tomorrow in my office to discuss your proposal.")? a different communication mode (e.g., client letter or oral discussion)?

4. Understand the "culture" within which the audience will hear you.

What are their "rules of the game?" norms of behavior? What kinds of approaches and evidence will they accept? What standards of sufficiency?

5. Assess the likely interactions within and among audience groups.

6. Consider whether to steer your communication to opinion leaders, or to swing members.

7. Take the audience as they are: doubting judge? demanding employer? unstable client? experienced opponent? harried administrator?

8. Determine what content and process will motivate them or particular key members, on a reasoning level? on an emotional level? (e.g., Consider whether to broach controversial subjects indirectly).

9. Identify the phase involved:

- Phase 1--Getting the opportunity to be heard;
 - Phase 2--Communicating to the audience;
 - Phase 3--Adjusting to audience reaction;
 - Phase 4--Audience interaction and deliberation;
 - Phase 5--Decision-making;
 - Phase 6--Seeking reconsideration;
 - Phase 7--Reacting to implementation;
 - Phase 8--Adaptation;
- (Process repeats itself.)

The Basic Message

10. At a minimum, be certain the audience know: what they are to do, how they are to do it; and when it must be done.

11. Illuminate the area and arguments you wish them to focus upon. (See Part A).

Winning an Audience

12. Consider employing this general sequence:
 - a. Be prepared, prompt, respectful.
 - b. Believe in your case and in your ability to move the audience.
 - c. Initially assume their good faith.
 - d. Appeal to their needs and/or to their better nature.
 - e. Use a format they approve.
 - f. Identify matters upon which there already is agreement.
 - g. Treat problems which are easily resolvable.
 - h. Identify the major problem to be considered.
 - i. Perhaps acknowledge its complexity.
 - j. In your discussion, convey the impression that you are being candid and fair, and that you are entitled to fairness in return.
 - k. Lay out the evidence as if it were "speaking for itself." (First, cite that which is uncontroverted; next, offer that based upon authorities the audience trust; finally, demonstrate how the remaining part of your case is consistent, essentially, with such evidence, and grounded upon fundamental, recognized values. Ordinarily, acknowledge defects ((but not in negotiation settings)), while emphasizing strengths.)
 - l. If you can, be flexible in considering alternatives; and encourage your audience to be the same.
 - m. Where appropriate, offer options—perhaps with a package attractive to key audience segments.
 - n. Provide arguments for your audience to use in answering their own critics.
 - o. Thank the audience for their careful attention.

13. Balance your communications, where you have more than one interaction opportunity.

(e.g., "Go for the jugular" at oral argument, and present a comprehensive set of arguments in your brief.)

14. Assign complementary roles to team members.

Establishing Credibility

15. Make a good initial impression as one who is competent, persistent and fair. Strive to maintain that first impression.

The audience should come to believe--and correctly so--that your statement of the facts and issues is proper; your proposal is sound and workable; any threat you make, real; and your offer of help, genuine and meaningful.

Dealing on the Basis of "Intellectual Equality"¹²

16. Command respect.
17. Employ the forms of civility of the particular environment.
18. Assume you are the equal, in dignity, of any audience member.
19. Do not be cowed or act rashly in the face of improper or threatening conduct.

Marshalling the Facts

20. Identify and position (without distortion) the key facts, so that they appear in a light, favorable to your position.

Order them (by time, place, situation). Categorize; capsulize. Together, the facts should form a simple yet dramatic picture.

Capturing the Issue Ground

21. Frame (from your perspective) a central question that exposes the kernel of the legal problem arising from the dispute.

Timing Your Moves

22. Gauge when the situation is ripe:

(e.g., to gain audience attention; to make a concession; to urge a client to take action or forego suit; to shift gears in oral argument, to get a critique of your manuscript; to start negotiations, to investigate.)

¹²Wiener, "Oral Advocacy," in Intro. to Adv. 2d ed., 1976, supra note 1 at 151, 165.

Types of Legal Communication: Some Introductory Sketches

23. Inter-Office Memorandum of Law

Be sure you understand exactly what questions your employer wants you to answer, as well as the background out of which those questions arose. Determine what kind of memorandum he deems acceptable. (Look in the files). Be thorough. Give a balanced account in resolving the issues, treating the concrete situation before you. (Deal even with peripheral matters if such treatment will help your employer comprehend the dimensions of the problem). Identify and evaluate the evidence you considered. State also what evidence you did not check. Consider the options available, noting their advantages and disadvantages. Urge and justify a particular course of action. Be cautious in predicting results.

24. Initial Interview of a Client.

Ascertain beforehand the general nature of his problem, in order to ask your prospective client useful questions. Provide a comfortable setting. Explain your role, the confidential nature of the communication, your manner of recording the session, your fee. Ordinarily, first draw him out by open-ended questions (e.g., "How can I help you?"). Follow up by narrow questions directed at clearing up ambiguities or at getting responses in relevant areas not yet mentioned. Project a close attention and concern. Note what the interviewee believes he wants. Ascertain what he probably really wants. Reflect upon what might be in his best interest to have.

Seek a detailed, ~~step-by-step~~ chronology of events.

Attempt to identify possible causes of action, defenses, remedies, problems in proof or collection. Determine what other individuals have relevant information, what important documents are available. Tell what happens next: decline to take the case? follow-up interview? examination of documents? interview of others? legal research? referral to other lawyer? referral to agency? disposition (e.g., "I suggest you forget it. The matter is not worth pursuing"). Seek feedback to test whether the other person understands.

Your role, essentially, is to help a client make his own decision, bringing to his attention: his rights, obligations, range of options (together with likely and potential consequences of particular ones) and your recommendation. Relevant will be factors both legal and non-legal (e.g., rewards and costs in health, interpersonal relations, time, money). Approaches in interviewing and counseling naturally will be affected by the client's nature: frightened? unstable? deceitful? forgetful? mature and prepared?

25. Law Review Article.

Choose a question of keen interest to some segment of the legal community. Do not assume that all prospective readers will have the same level of knowledge about the chosen subject. Unless you make clear that you are presenting a partisan "case for . . .", employ a scholarly design (i.e., objectively state issues, pick categories, select and weigh the evidence). Urge a position that follows from a reasoned assessment of the evidence. Seek to make a further contribution: useful doctrinal analysis, new way of looking at a problem, statutory proposal, synthesis, new administrative guidelines.

26. Negotiation Setting.

Recognize the assumptions and process of the particular negotiation culture: ordinary personal injury claim? substantial products liability dispute? medical malpractice case? small contract or property disagreement? squabble among community groups? negotiation involving government? collective bargaining?

Understand your authorization, your settling point, overall and session objectives, degree of flexibility. Assess the advantages and disadvantages of your position, and deal realistically. Learn about your opponent's approach. Timing your moves, present the range of options available to him; emphasize the difficulties he faces. Demonstrate how your solution (perhaps with some modification) will benefit him (or at least will provide him with a less disadvantageous outcome than one he is likely to get if he pursues his present course). Make it clear that you are familiar with customary practice. However respectfully, show that you "mean business" (i.e., you fully intend to carry out your responsibilities). Neither be bullied, nor be deceived by flattery or enticement. Yet be ready where appropriate to grant favor for favor. Allow your opponent to "save face" if he cooperates.

27. Mediation Setting.

If you are chosen as mediator, be sure you come to be viewed by the disputants as impartial; and as willing and able to carry out any appropriate assignment. Understand the pattern of the parties in earlier controversies. Learn about the particular negotiators. Let them "blow off steam" so that they will be in a position to listen to you. Probe to determine the extent of "give" in each party's position; and plot strategy to move conflicting parties toward a "second best" position.

Understand to whom they have to answer. Break the problem into manageable segments, addressing the least emotional ones first; then, step by step, work your way toward the tougher ones. Time your meetings and suggestions with care, at each point, gaining the cooperation of the bargainers. (Develop skill and judgment in employing a range of approaches: passive observation, indirect encouragement, forceful pleading, direct pressure). Be supportive: offer suggestions as to how the negotiators might respond to their peers, their constituents. Avoid making value judgments or critical comments, publicly.

28. Appellate Oral Argument.

State how the case came to the tribunal and what remedy you seek from the court. As appellant, convey the urgency of rectifying harmful error committed by the lower court. As respondent, in a more restrained presentation, call for due deference to the judgment rendered by that lower body.

From a thorough knowledge of your case, explain the facts simply. Be "scrupulously accurate,"¹³ yet marshal them, identifying the nub. State the issue that the court now faces.

Present your key arguments, giving the strongest one first. If you can, argue that your position is consistent with precedent--or at least in accord with the "basic" line of cases. (Perhaps, it entails only a logical extension). Naturally, if your position requires a departure, be forthright in saying so, and then offer substantial justification.

Disclose your authority (e.g., applicable case law? constitutional clause? statutory provision? administrative regulation? historical or current practice?) Then draw upon the values that underlie such authority (e.g., faithfulness to framer (and ratifier) purpose, instrument's nature and language? tradition, stability and certainty? interests in equality, fairness, and human dignity? utility? custom?). Suggest your approach as reflecting a sound balance of relevant principles; and as being workable and consistent with court role.

In making your argument, be candid. Call the judges' attention to important adverse precedent and to patent limitations in your own authorities. Yet take care to weave such comment into your basic presentation, drawing meaningful distinctions; and emphasizing the superiority of your position, notwithstanding such limits. Avoid ad hominem remarks.

¹³ Weihs, supra note 1 at 179.

Encourage the judges to react to your presentation and to pose questions. Respond promptly and fairly, being sure to deal with matters that have caused confusion or unease. At the same time, place your answers within the context of your general statement. Recognize which questions may be answered readily; and which others require deftness in providing responses which are both appropriate and still avoid a trap of inconsistency or damaging admission.

Through your presentation, convince the judges to study the briefs from your perspective. Provide bench supporters with arguments to counter any opposition at conference.

Close forcefully.

(C) To Prepare Yourself

This section is part "pep talk." It speaks of the importance of positive self image, commitment, discipline and careful work.

Your Self Image

1. Imagine yourself an able lawyer. Strive to fulfill that dream.
2. Believe in your potential, no matter your present skill level. (The faith will help you to begin, and to keep moving toward achievement of your goals.)
3. Select past and present models to copy. Seek to surpass any mentor.

Commitment and Discipline

4. Be persistent.
5. Look upon interaction situations and frays as challenges.
If you see them as things to be dreaded, you had better force yourself into the feared settings and practice.
6. Commit yourself "to sweat." There is no shortcut.
7. Develop total concentration, when called for.
8. Hunger for victory; learn from your failures.
9. Develop high standards.
10. Learn to control your emotions. Be able to withstand unfair or "tough" criticism.
11. Channel your emotions.

(e.g., How one expresses righteous indignation depends upon whether he is making argument to an appellate court, to a jury, or to an opponent in a negotiation setting).

Sensitivity

12. Try to be sensitive to the needs and feelings of others.

Some Good Habits

13. Evaluate objectively your past writings, oral presentations, and informal interactions.
14. Practice writing and speaking at every opportunity. (Regularly engage in role playing.)
15. Observe others in communication settings. Study examples of good writing and transcripts of effective interactions.
16. Organize your time and force yourself to keep to schedule. Give yourself "lead time."
17. Organize your files and records.
18. Become skilled in researching.
19. Be diligent in carrying out your tasks and expect the same efforts by team members.
20. Study "boiler plate" sample communication forms.
21. Seek help: from mentor, spouse, trusted friend, colleague, audience.

Understand the risks. Some (e.g., "devious" associates) may use your request to your disadvantage. You must assess from whom, how and when to seek a critique. Evaluate its worth in terms of the bias and expertise of the critic. (Expertise depends, not upon advanced learning, necessarily, but rather upon knowledge that relates to the particular question involved. ((e.g., A juror is expert on the question whether he understood what you were talking to him about)).)

Making an Outline

22. For each project, make an outline, noting your objectives, general strategy and step-by-step plan. For a formal presentation, also list thesis and/or approach, basic arguments and evidence, and the logical sequence of ideas.

The Three Drafts "Rule"

23. As a general rule, make at least three drafts of a formal writing. With each subsequent draft, seek greater clarity or persuasive power. Be sure to proofread; check for completeness; and consider getting critiques.

Preparing an Oral Communication

24. Reflect upon possible scenarios, and plan approaches and responses. Expect surprises, as well.
25. Visit the environment, to study the surroundings and the actors. Look for problems that might confront you.
26. Expect "butterflies." (These are symptoms of the body's preparation for extra effort.) Nervousness must be eliminated, however, if it is projected to the audience or otherwise makes you less effective. (To eliminate it, try to relax your muscles, take deep breathes; and of course, practice more in the future).
27. Rehearse a formal talk several times.

Talk in front of a mirror; tape the speech. Get a friend to play the "devil's advocate." Do not memorize word-for-word. Prepare file cards or notes for ready use. Include a full-blown "dress rehearsal" in a setting as close as possible to the actual one. Yet do not over-rehearse a talk. (You want to convey freshness, vigor, sincerity.)

28. Come to the fray early, supremely confident, and with emotional energy in reserve.

"Rest and Recuperation "

29. Periodically seek diversions. Return to your tasks refreshed and perhaps able to see new implications.
30. Do not push yourself beyond your emotional limits.

(D) To Be Creative

An attorney often faces a major strategic problem: adverse precedent, doubting jury, reluctant witness, desperate client too anxious to settle; surprise maneuver by an opponent. How does a lawyer go about finding a solution? Non-lawyer S. Baker¹⁴ offers a useful six-step approach to creativity, in general:

1. "Develop [a] Creative Attitude."¹⁵

Include in your structure, time (and quiet surroundings) for reflection; time for immersing yourself in the facts of the problem; and occasions for involvement in stimulating settings (e.g., lectures, performances, conversations). Read about creative individuals and about diverse approaches to problem-solving in law,¹⁶ as well as in other fields. Draw upon fiction as well.

2. "Analyze each Problem to Focus on the Wanted Solution."¹⁷

List your objectives and their priorities. Subdivide your problem into manageable units. Note what characteristics your solution should possess.¹⁸

3. "Seek out and fill your mind with facts."¹⁹

Pace yourself in absorbing facts. (Do not overwhelm your capacity by trying to digest a "flood").

List every fact that is arguably relevant to the problem. (e.g., How did the problem arise? How is it likely to change? What is its nature? What are the similarities with and differences from other problems?)²⁰

4. "Write down ideas, sensible and seemingly wild."²¹

List every solution applied in similar situations or in somewhat different ones. Note the advantages and disadvantages of each such idea, possible applications, likely impact. Debate with yourself on paper. Discuss your problem and possible solutions with others.²²

¹⁴Supra note 1.

¹⁵Id. at 36.

¹⁶Id. at ch. 4.

¹⁷Id. at 57.

¹⁸Id. at ch. 5.

¹⁹Id. at 76.

²⁰Id. at ch. 6.

²¹Id. at 93.

²²Id. at ch. 7.

5. "Let the facts and ideas simmer in your mind." and set a time for evaluation.²³
6. "Evaluate, recheck, settle on the Creative Ideas."²⁴

Identify the idea that appears best to you (i.e., the one that is simplest, most practicable, and will arouse the fewest difficulties). Get other²⁵ persons to react to it. Refine and settle on your choice.

Summary and Conclusion

Reflect beforehand about the nature of the particular message, the audience, and the setting. Get your audience's attention and hold it fast. Employ a structure, language and presentation that will make your message clear, if clarity is what you seek. Move your audience to see the problem as you do, and to follow your guidance.

Commit yourself to careful preparation, countless drafts and rehearsals. Understand the role of emotion and commitment in achieving your goals. Establish and seek to surpass your own standard of high quality work.

Seek creative solutions.

* * *

The road to effective communication is a long one, but I hope that this paper has started you on the journey.

"Anyone knows an ant . . . can't . . . move a rubber tree plant. . . . Oops, there goes another rubber tree plant."²⁶

Good luck!

²³Id. at 128.

²⁴Id. at 150.

²⁵Id. at ch. 9.

²⁶S.Cahn & J.Van Heusen, "High Hopes" (song).