

REFLECTIONS ON ADVOCACY AND THE ART OF PERSUASION

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Continuing the theme of the advocate's relationship with the decision-maker, established by Judge Brook in Issue 4 of *The Litigator*, Martin Hunter gives away a few secrets.

"... [an] essential ingredient in performing a successful induction is an ability to create rapport. All good hypnotists and masters of influence do this. Rapport is bonding, the ability to make others feel you understand them. It comes through communication, which is another name for the interaction of energy between people ... establishing rapport is something that most people aim for, although few do so consciously and deliberately. It can be fostered through sharing common ground, or commonality. This doesn't mean that you can have rapport only with people who are like you, because in fact it is perceived likenesses that create rapport ... masters of influence are all experts in creating rapport." *The Hypnotic World of Paul McKenna* (1993, Faber and Faber), pp. 29 et seq.

There can be no doubt that the day-to-day use of rapport techniques is a legitimate and indeed beneficial element in the art of persuasion in ordinary social life, and there seems to be no good ethical or other

All of us engage in one form of advocacy technique or another every day. Young children persuade their parents to buy them sweets; teenagers present arguments as to why they should be allowed to borrow the family car; the parents themselves use sophisticated techniques on each other to influence the choice of holiday destinations; car salesmen are adept at convincing us that the vehicle in their showroom is the one we should buy; and so forth. The function of lawyers in addressing judges, jurors and other tribunals of various shapes and sizes is by no means unique. Most of us learn at an early stage that, in general, we don't get what we want by lying down, screaming hysterically and drumming our heels on the floor. The art of persuasion involves a more subtle process in which we consciously or unconsciously seek to establish rapport with the person or persons we are trying to persuade.

In his recent article on opening statements from the judicial perspective (see [1995] *The Litigator* 229) Judge Sanford Brook of Indiana emphasised the importance for the advocate of building rapport with the judge. What exactly did he mean by this? Dictionaries generally tend to define "rapport" as a relationship characterised by harmony, accord or affinity. The *Oxford English Dictionary* adds: "a state in which mesmeric action can be exercised by one person on another." The veiled reference to hypnotism may be disconcerting at first sight, and it may well be that Judge Brook did not have this usage of the word in mind when he wrote his article. Surely he was not recommending that advocates appearing in his courtroom should try to hypnotise him! But Paul McKenna, the well-known television stage hypnotist who is also an exponent of the more serious aspects of hypnosis, states in his book:

reason for their exclusion from professional situations such as those that exist in hospitals, offices and courtrooms.

The magic of rapport

The ability to establish rapport with a wide range of other people is one of the most important and empowering attributes in life. To be a good friend or parent, a good actor or salesman, a good politician or

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advocate requires a capability to create a response that amounts to a powerful human bond. Rapport skills are largely instinctive, and are most often found in people who are genuinely interested in other people and find it easy to like them. But these skills can also be taught, and

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The key to establishing rapport with another person involves communicating with his or her unconscious mind. This in turn involves the application of two principles. The first is that the unconscious mind does not accept communications in ordinary verbal language. It responds to images. If you are invited to tell your heart in words to beat faster, you can't do it. However, if you visualise a confrontation with a threatening bandit brandishing a knife whilst you are walking down a dark, narrow, alleyway there is a fair chance that your heart will indeed beat faster. Likewise, you may be able to salivate by thinking of your favourite food, but you could not do it simply by telling your mouth to water. These are examples of communication with your own unconscious mind, but the same is true of communicating with the unconscious minds of others. Studies conducted in the United States by Professor Albert Mehrabian have demonstrated that by far the most substantial element of communication between people is non-verbal. Only 7 per cent is communicated through the words themselves, whereas 38 per cent is communicated through tonality and the remaining massive 55 per cent through body language, or physiology (*Silent*

Messages, (1971, Wadsworth), p. 43). The second principle is that a person's unconscious mind will only accept as true those things which that person's belief system permits him or her to accept as true; the unconscious mind is purposive, not logical. I.A.C. Brown states:

"... the main lesson [to be drawn from the present study] ... is how very resistant people are to messages that fail to fit into their own picture of the world and their own objective circumstances, how they deliberately (if unconsciously) seek out only those views which agree with their own." *Techniques of Persuasion* (1963, Penguin), p. 300.

Within this framework, people tend to believe what they are told by people they trust, and they trust people they believe to be inherently like them. We have all heard the phrase "he is on my wavelength". By understanding this mechanism we can achieve an essential insight into the art of persuasion. This is that we must begin by validating something the other person knows to be true and then lead him or her to consider and eventually accept propositions that follow.

How do we apply these principles? The principles are applied by a process described by American psychologists as "matching", "pacing" and "leading". First, with the voice; pitch, speed, pauses, volume, favoured words and phrases are fed back. Similarly, techniques for mirroring breathing patterns, posture, eye movements and gestures are learned. Virtually all elements of physiology can be used, and this kind of "non-verbal" rapport creation is especially powerful because it works on the unconscious mind. This is neither the time nor the place to attempt a full exposition of the acquisition of rapport skills. *Influence: Science and Practice* by Robert Cialdini, Professor of Social Influence at the University of Arizona, is widely regarded as a standard textbook; and Chapter XIII of Anthony Robbins' book *Unlimited Power* provides a condensed and easily accessible guide for relative newcomers. But the essential feature of the creation of rapport is that you enter the world of the person with whom you are communicating and see it through his or her eyes.

Rapport skills and the advocate

Where does application of the principles described lead us so far as the advocate is concerned? A threshold question of ethics must be addressed. Obviously, it would be inappropriate to try to hypnotise the judge or jury even if it were possible. But what about *manipulation*? It depends what meaning we give to the word. If we mean the use of unscrupulous methods to take an unfair advantage of another person then this is plainly unethical. If, however, we mean the skilful deployment of the art of communication and persuasion, and appealing in an appropriate manner to other people's predispositions to achieve a beneficial outcome for the client then, surely, this is not only ethical but squarely within our professional duty. There is no doubt that the techniques and resource skills described in the literature can be used for the purposes of harmful manipulation. Tyrants have so used them over thousands of years. But equally they confer on the user the power to do enormous good.

The ritual of the courtroom creates a special scenario for the student of rapport techniques. The wigs and the gowns, the standing advocate and the seated judge, amongst other things make it difficult to rely on the basic elements of matching physiology. However, High Court advocates have developed—largely instinctively, no doubt—highly sophisticated ways of entering the judge's world and seeing it through his or her eyes. Stylised language and tonality are employed to great effect. Announcements such as "If your Lordship pleases", "I apprehend that your Lordship will wish me to return to this issue after the short adjournment" and "unless I can assist your Lordship further ..." play right into the judge's comfort zone. The advocate is sending signals to the judge's unconscious mind that they are members of the same fraternity; that they understand each other; and that the judge can trust him or her. It is also quite common to see experienced advocates sending subliminal messages to judges before whom they have previously appeared, to the effect that "you and I have been down this road before". Another technique is to research (if they are not known already) the judge's interests or hobbies, and to use language and

analogies that are likely to strike positive chords in his mind. The fundamental principle of reinforcing the other person's self-esteem can also come into play in the courtroom. It is a joyful experience to watch the most skilful advocates in the appeal courts, leading judges down a path at the end of which one of them will believe that he has himself discovered the proposition the advocate is seeking to advance. Similarly, stories are told of the great advocates of earlier generations "picking off" jurors one by one.

One of the most fascinating exercises in the creation of rapport arises in connection with appearing before tribunals in international arbitrations, where there are usually three arbitrators who come from different cultures. Here, physiology can be used to greater effect than in the courtroom, because all the players are seated at tables and are dressed in ordinary clothes. It follows that matching techniques can be used more systematically. Does the chairman of the tribunal sit back? Or forward with his elbows on the table? Does he play with his pen? and so forth. And individual arbitrators often have different levels of understanding of the language of the arbitration. It is not easy to make a presentation at a pace which will retain the interest of the quickest without losing the comprehension of the slowest. As with jurors, focusing on each of them individually at different times is often the best strategy. The experienced advocate attempts to engage each one in dialogue in turn. It is also useful to evaluate the internal dynamics of the arbitral tribunal. It may be possible to discern a division of roles, especially when only one of the arbitrators is qualified in the applicable substantive law, or is a specialist in the particular branch of law relevant to the issues. There may be a non-lawyer arbitrator on the tribunal, with specialist technical expertise. The advocate will wish to consider all these things when deciding on how to establish rapport with the tribunal as a whole and with its individual members. Many advocates in international arbitrations will start by focusing either on the chairman or on the arbitrator nominated by his own side. There is nothing wrong with that. But it is also usually well worthwhile to establish a relationship with the arbitrator nominated by the other side. Show that you trust him, and value his contribution to

the work of the tribunal; this will reinforce his or her sense of independence and self-esteem and lead to the creation of rapport. None of this will win a hopeless case, of course, but skilful and appropriate use of rapport techniques may help to win marginal causes and may assist in achieving a better solution for the client where there is a wide range of possible results. To be avoided at all costs, even if it is against the express wishes of the client, is pressing at interminable length a point or argument which the tribunal clearly believes to be flawed. This will destroy the opportunity to create rapport more completely than almost anything else other than indicating by your conduct that you think that the arbitrators are idiots.

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Last word

Some readers may think that the suggestions made in these perhaps somewhat whimsical reflections display an inappropriate note of cynicism. This is not intended, for an unhealthy degree of cynicism is one of the most pervasively destructive characteristics of human behaviour. No amount of mere ingratiating conduct will establish rapport, and manifest insincerity on the part of an advocate will invariably prove to be counter-productive. The true masters of influence have learned to be at peace with themselves, and with the universe as it unfolds around them; and, in general, they have a genuine liking for their fellow men and women and are sincerely interested in entering *their* worlds. It should be possible to sail through life, from one haven to another, without encountering more than a handful of other human beings with whom it is totally impossible to establish rapport. And so, the message for advocates is that it is entirely legitimate and appropriate for them to enhance their rapport skills by learning and adopting the methods developed by American teachers; and that the goal should be that judges, jurors or arbitrators will move towards thinking "this person is on my wavelength".