

Subtext

Most people consider themselves to be good listeners. In my experience, however, few truly are. One of the problems is that we seem to recognize good listeners when we speak with them (in other words, when they listen to us), but we seldom define listening skills in detail sufficient to help people improve their skills. Listening skills as a whole is a subject too large to get into here, but mock trial is a very specific environment. In mock trial, what are good listening skills for witnesses? My answer is simple: weigh every word, but listen to more than the words. Hear the *subtext* as well as the words *in our own speech* as well as in that of the attorneys.

First, what is subtext? It is a term that is borrowed from the theater. Subtext is a message which is not stated directly but can be inferred. It is delivered in numerous ways, by the choice of words, tone, expression, posture, gesture, and on and on. Subtext applies in mock trial in that it can show the character and personality of a witness—in a way that adds to the witness's credibility or in a way that detracts from it.

Second, I emphasize listening to the subtext in our own speech because there is often a curious hole in how well we listen. I find that many people, including myself, can be as sensitive as cats to the speech of others, seldom missing a clue or an off tone, but very often do not hear the subtext of our own speech. If you wish to experiment to see if this is true of you, try this. Ask yourself how often you deliver the "You Stupid Idiot" subtext. In other words, how often do you indicate by your tone of voice and choice of words that you are talking down to someone, that s/he is failing to meet your expectations, that s/he is somehow at fault? "You Stupid Idiot" is not in the spoken words (of course not), but tone of voice alone can communicate that thought without words. If your answer is "I don't deliver YSI very often," then ask someone else that knows you very well how often they hear you deliver the "YSI" message. Alternatively, try to count the number of times you hear the YSI subtext during a day, or if you are surrounded by people all day, even in an hour. And evaluate whether the YSI you hear is deliberate and consciously rude on the part of the speaker, or merely unconscious and habitual.

Note that the raw material that student witnesses start with, the witness statements, are chock-full of subtext in the form of loaded words. In other words, the witness statements contain more than the bare facts of what happened. The witness statements also contain subtext, i.e., characterization in the form of word choices. The question for each witness is how to handle that subtext. Here's an example from a mock trial case.

A few years ago, in the Colorado mock trial case of *Sunny Overturf et al. v. Ryanne Seastress*, Sunny's supermodel daughter Keri was shot and killed on the runway during a fashion show by Taylor Overturf, Sunny's twin brother and Keri's uncle. Taylor was shot and killed in turn immediately after by Keri's personal security guard, Jordan Sparkle. Sunny brought a civil suit against Ryanne Seastress, a cutthroat competitor, alleging that Seastress and Taylor conspired in Keri's murder in order to wreck Sunny's business. Taylor's last words were heard by Sparkle, and implicated Seastress. Taylor's last words were also heard by another witness, Pauli Abdone, whose version contradicted Sparkle's and did not implicate Seastress. Here was a factual dispute: who was telling the truth, Sparkle or Abdone?

Sparkle's back story included seven years with the Aspen Police Department, from which he was fired, officially for swiping office supplies, but according to Sparkle because a "new goody two-shoes" in management didn't like ". . . how we detectives were doing things. . ." and framed him with theft. In his witness statement, Sparkle virtually admitted to bending the rules, but he didn't say which rules or how far they were bent. Hence a key issue in any determination of Sparkle's credibility was whether Sparkle was an honorable and honest former policeman, or a fired and discredited rogue cop who would lie about Taylor's last words?

During the first practice of the direct examination of Jordan Sparkle, the question became how best to portray Jordan Sparkle as a credible witness. The student witness testified to Sparkle's background: "I was a cop for the Aspen Police Department for seven years. . ." Regarding Keri's murder and the subsequent killing of Taylor, the witness testified that: "I didn't see Taylor shoot Keri, but I heard the shot, and turned to see Keri down, bleeding all over the place, with Taylor standing over her waving a gun around at the crowd. So I pulled my gun and shot him!" The witness's initial reaction was that the testimony was fine because it was dramatic and consistent with the witness statement. But what is the subtext of the witness's choice of words?

Let me ask you this: would a seasoned, professional, credible law enforcement officer ever refer to him/herself on the stand as a "cop"? Would s/he ever say, "So I pulled my gun and shot him"? What do the witness's words say to you about the professionalism and honesty of the character? During a discussion with the students, it developed that the answers to these questions were "no," "no," and "nothing good." A reputable police officer might testify something like this:

I heard a shot very close by, then saw the fatally wounded victim fallen to the ground and bleeding profusely. I saw Taylor Overturf standing over the victim with a gun in his hand pointing it at the crowd. I saw that there was clearly an immediate and deadly danger to the public safety, drew my firearm, determined that I had a clear shot that did not endanger the public, and took the shot, hitting Overturf.

In contrast, the words “I pulled my gun and shot him,” *sound* unprofessional. In other words, the *subtext* of “I pulled my gun and shot him” says “I am (or might be) a rogue cop. I am certainly not a professional police officer.” In this instance, the student witness’s first effort at testimony was consistent with the witness statement, but the subtext of his choice of words tended to undercut his credibility. Note that the alternative words “I drew my firearm. . .” are equally consistent with the bare fact as stated in the witness statement. The words differ, the characterization of the fact is different, but the fact is identical. In effect, the witness had a choice as to how to play the character, and unknowingly picked a less credible way.

There are additional subtext keys in the witness’s choice of words. In police language, particularly in formal settings such as a trial, police don’t carry “guns” (unless it is a shotgun). In the mind and language of the police, bad guys carry “guns”, which have never been cleaned and are gummed up such that they may not work well, are probably rusty, have been so abused that they rattle if you shake them, and might even be dangerous to shoot. Taylor Overturf (the murderer) used a “gun.” Police, on the other hand, carry “firearms”—for public safety and personal protection, which are lovingly cleaned and maintained after every weekly practice because, after all, lives might depend on them.

Here’s the point. Virtually every word and phrase used by a witness carries a subtext, unheard by some, subliminal to others, and screaming to yet others. Ditto with tone, expression, posture and gestures. Listening skills are more than just hearing and retaining what others say. In mock trial, listening skills are more than carefully listening to the question. Listening skills encompass understanding the diversity of the environments in which we operate, the diversity of our listeners, and sensitivity to how our character will be understood, and may be misunderstood. In short, weigh every word, tone, expression, posture and gesture with subtext in mind.

Bill Carey

Thanks goes to the student in this story, Griff O’Brien, then a freshman, who went on to earn individual witness awards at the Regional and State Tournaments that year, was a star witness at CA for four years, and is now at Duke. Thanks also go to Tia Rebholtz, one of my colleague coaches at CA, for the introduction of the term “subtext.”

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