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The “Why” and “How” of
Oral Decisions
for Trial Court Judges

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Why We’re Here...

- ❖ Why a program on oral decisions
 - What are they?
- ❖ How we got to this program
- ❖ Recent attention from Vermont Supreme Court
- ❖ Burgeoning research on procedural fairness and how delivery of oral decisions is *critical*

Overview

- Legal footing and VSC perspective
- Procedural fairness and oral decisions
- The reality of oral decisions and why they are positive for many audiences
- Suggestions for structuring oral decisions
- How to deliver oral decisions effectively
- Developing templates: why and what
- Individual sessions tomorrow

Key to Any Communication, Oral or Written: Who is/are your audience/s?

- ❖ Appellate court
- ❖ People/groups specific to the case
 - Litigants (esp. losing party)
 - Victims, family, friends
 - Attorneys, witnesses, jurors
 - Press covering case, observers
- ❖ General interest: Other legal professionals, the public

The Appellate Perspective: Our Vermont Supreme Court

Thank You for Your Support!!

Really: *State v Allen*
145 Vt 593 (1985)

“Oral findings ... can expedite the process of decision-making. ***This approach benefits the litigants, who receive a prompt decision, and allows the court to render its decision when the evidence is fresh in mind.***”

V.R.C.P. 52(a)(2); V.R.Cr.P. 47(c); V.R.F.P. 1 & 2

And 28 years later: *Hanson-Matayer*
2013 WL 1490322 (4/2013)

“We are ***not*** criticizing the practice of rendering oral decisions on the record, ***particularly where a timely result is important.....***”

But Not Quite Carte Blanche...
Hanson-Matayer

... ***but*** we are stressing that any oral decisions should be of sufficient quality and completeness to stand on their own without a subsequent written decision.”

The Appellate (VSC) Published Perspective on Oral Decisions

Oral Findings/Decisions

For parties and trial court: can be beneficial

Expedites process - Prompt disposition

Issued when facts fresh in our mind

For Appellate Court review purposes:

Prefer written – easier to review and understand, but oral ok as long as we do it right: sufficiently cover the necessities

Why: Procedural Fairness

- ❖ Fairness & the perception of fairness
 - ❖ Primary issue shaping views about legitimacy regarding justice system:
 - ❖ If authorities are seen as exercising power in fair ways: procedural fairness
- ❖ Interpersonal treatment--communication behaviors: particularly strong role

Doctor-Patient Communication: Medical Malpractice Suits

- Never-sued vs. sued at least twice
 - ❖ Never-sued: +20% time, “orienting” statements, active listening, “humanized”
- Four ten-second slices of conversations
 - ❖ Content-filtered: intonation, pitch, and rhythm intact; no words
 - ❖ Rated: warmth, hostility, anxiousness, and dominance

Following Orders: *Compliance*

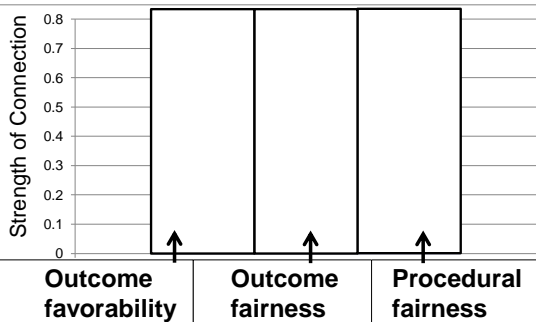
- Major improvement **if** doctor:
 - ❖ Clearly explained why and how (reasons and explicit directions)
 - ❖ Emphasized importance
- Major improvement **if** judge:
 - ❖ Clearly explained orders

Procedural Fairness: Key Components

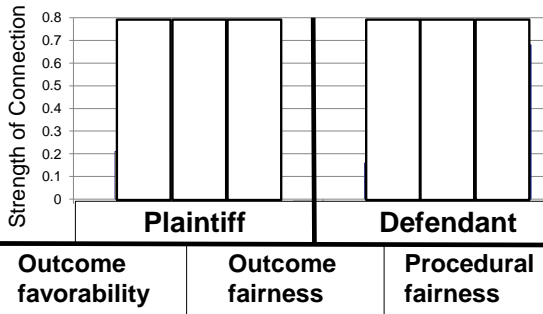
To a large degree, court users evaluate fairness based on whether they felt that:

- They were treated with respect
- They had an opportunity to be heard
- They understood what was happening
- The judge was trying to be fair

Improves Decision Acceptance



Improves Decision Acceptance



Improves Compliance

- Tyler Studies: 1650 CA citizens with justice system interaction:
- Procedural fairness increases compliance with orders
- Increased compliance means:
 - Reduced criminal recidivism
 - More defendants complete court mandates

Numerous Studies Show Procedural Fairness Impacts *Outcomes*

- ❖– Increased decision acceptance (maintained over time)
- ❖– Increased voluntary compliance
- ❖– Fewer violations
- ❖– Diminished anger/defiance: authorities
- ❖– Improved trust and confidence

Bennington - IDV Experience

Research Reports released 12/11 & 2/13

Three year study period (2007-2010)

- ❖ New DV Offense: 4.3% (42% decrease from statewide)
- ❖ New Violent Offense: 6.4% (38% decrease from statewide)
- ❖ New Violation of Crt Order: 5% (no statewide data)

Bennington - IDV Experience

And what was completely unexpected:

Those DV defendants who resolved in IDV were more than **50** % less likely to commit any new crime over 3 year study period than similar DV offenders statewide

**Cost/benefit analysis in the works*

Why--Oral Decisions: Efficiency

- Can promotes a more efficient hearing
- Better use of resources: less post-trial burden on participants
- Reduced delay; timeliness

Justice Delayed Is Justice Denied

"A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people ... [one of three things which] could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value...."

Justice Warren E. Burger

Why: Decision Making

- Quality of attention increased during proceeding
 - ❖ When will use the info soon
- Quality of attention increased during oral decision for many audiences
- Limitations of memory
 - ❖ How much is remembered
 - ❖ How "contaminated"

Memory

- ❖ More reconstruction than reproduction
 - Compressed, broken in chunks, "unnecessary" bits edited out
 - Brain fills in/invents details (make sense)
- ❖ Supplementing —still some issues
- ❖ More time: more issues
- ❖ Easily contaminated

Why: Principles of Communication and Psychology

- ❑ **Immediacy:** In-person communication has a bigger impact
 - ❖ Increased attention, motivation, and understanding (if...)
 - ❖ Opportunity to clarify and/or amend
- ❑ Behavior change--more effective when consequences closer to behavior, expectations clear

SJI-funded Study on Effectiveness of Courtroom Communication (Greacen Associates 2008)

“In all the cases we observed, the process was enhanced for the litigants when the judge announced the decision at the close of the hearing.”

(continued)

The judge was able to:

- Ensure losing party knew the court had heard and considered his or her arguments in ruling the other way, and
- Use nonverbal behavior to show attentiveness to both litigants

“And the parties had an opportunity to seek clarification of points in the order that the judge may have overlooked or that one of the litigants did not understand....”

**Suggestions: General Structure
for Oral Decisions**

- Start strong: Introductory elements
 - ❖ [Greeting], identify parties, issue(s)
 - ❖ Give a roadmap (overview of structure)
- Structure the body of the decision
 - ❖ Clear structure: headings, subheadings; concise, clear transitions and signposts
 - ❖ Lay out relevant facts, law
- Give reasons for conclusions

Oral Decisions

- Obviously:** Do it right as far as sufficiently covering the legal necessities (Clear law, legal requirements for the ruling, how the facts you have found establish the legal basis for your ruling)
- Don't forget to focus on the rest of the job**

**Some Organizational
Strategies: Pre-Hearing Prep**

- In advance of hearing
 - ❖ Submissions: what each side is trying to prove, what each wants
 - ❖ Review of file
 - ❖ Review of relevant law
 - ❖ Plan note-taking
 - ❖ Others

Organizational Strategies During Hearing: Note-Taking

- ❖ Use submissions
- ❖ Outline
- ❖ Chronological
- ❖ Relevance
- ❖ Elements: aligned with evidence
- ❖ Aggravating/ Mitigating factors
- ❖ TEMPLATES!!

Reasons for Templates

“In complex, high-pressure environments, experts always come up against two main difficulties:

- It's easy to overlook routine matters under the strain of pressing immediate demands;
- People can lull themselves into skipping steps even when they remember them.”

Atul Gawande: *The Checklist Manifesto*

Reasons for Templates

They make basic necessary steps explicit and verifiable: A disciplined approach leads to higher levels of performance across professions

- Medicine
- Aviation
- Construction
- Etc.!

Another Reason for Templates: Decision Fatigue

- Recent studies
- More choices: harder for brain, more likely to use (unconscious) shortcuts
 - ❖ Act impulsively &/or
 - ❖ Be influenced by implicit biases &/or
 - ❖ Default to status quo
- Best decision makers build in controls

How to Deliver Oral Decisions

- General Delivery Styles:
 - ❖ Impromptu—little or no prep
 - ❖ Some preparation; mostly not word-for-word (mostly bullet points with key words/phrases; verbatim where necessary)
 - ❖ Fully scripted (attention to “humanizing”)
- Helpful for any style: Develop clear explanations for legal terms/ concepts

How to Deliver Oral Decisions

- Verbal Elements of Effective Delivery
 - Clear, dignified, and humanized
 - ❖ Some formality with immediacy
 - Use of names/ titles
 - ❖ Understandable level of language
 - ❖ Descriptive, not accusatory; respectful
 - ❖ Appropriate amount of information

How to Deliver Oral Decisions

- Nonverbal Elements of Delivery
 - Engaged, impartial, and dignified
 - ❖ Eye contact
 - ❖ Vocal tone, strength, and variety
 - ❖ Facial expressions
 - ❖ Pace; pauses
 - ❖ Posture; gestures
 - ❖ Other

Delivering Oral Findings: Taking A Break Before (Or Not)

- Immediately
- After short adjournment
- After longer adjournment

Depends on --Your confidence & comfort level re: the law & the arguments;
--The context; --Perceptions of others;
--Nature of the proceeding/issue
