

Stagecraft for Trial Lawyers

Insights from the Theater World

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Boredom. Boredom. Abject boredom. That was our default state. And my ass was asleep—you know, when your butt is numb, like you're sitting on thumbtacks. Back then, the jurors' chairs were wooden. Not like today's leather upholstery.

The judge sympathized. At a break, she suggested we suck on lozenges. So, the next day, I brought a pocketful of Halls. I doled them out whenever I saw another juror dozing off. And because I was the foreman, my colleagues accepted them without complaint. The menthol shook off imminent slumber.

Yet, in the murky fog of legalese—not “Did you see?” but rather “Did you have any occasion to observe?”—there was a singular ray of sunlight, a Prince Charming who woke us from the prosecutor's somniferous spell. It was counsel for the defense, Mr. Spettacolo. When he rose to speak, he resurrected us. We all sat up. We shuffled off the residue of monotonous words; we exchanged knowing glances. Showtime!

A master of stagecraft, costume, and props, Spettacolo held our attention. No matter the substance—opening statement, objections, even his humble requests for breaks. We the jury listened to him. We actually *listened* to him.

But why?

Well, first of all, he was fun to watch. Each day, he entered impeccably dressed in a double-breasted suit, Italian and hand-cut to his jockey-like frame. Luxurious wool and majestic colors

oozed Venetian elegance. His style was strictly 1940s, yet utterly timeless. He had a seemingly endless supply of suits, shirts, ties, handkerchiefs, and shoes—a sartorial parade. In suspense each morning, we eagerly filed into the jury box for the reveal. Ah, today, charcoal gray with the chalk stripe. An excellent choice, given his Mediterranean coloring.

Second, he used his pince-nez eyeglasses as collaborator and co-counsel. French for *pincer* (“to pinch”) and *nez* (“nose”), his had no side pieces over the ears. The lenses stayed in place because the frames pinched the bridge of his nose. Indeed, in the courtroom, Spettacolo's glasses took on a life of their own. Mostly, they were sheathed in his breast pocket, their extraction signaling something of great moment—whether as a saber pointed at the heart of the witness on cross or resting at the corner of his mouth for a moment of silent argument. He said nothing, but seeing those glasses we all heard the question: “Were you lying then, or are you lying now?” It was savory.

And when he wished to quote from an exhibit, out from his briefcase came the damning document, which he positioned on the counsel table with great fanfare, and out from his pocket came the pince-nez glasses, carefully placed on his nose by his magician hands.

His final ritual? The bow. As if to pay his respects to the emperor, Spettacolo would bend at the waist, hands glued to his

sides, and read in a deep sonorous voice with his nose just a foot from the text.

I'm not making up any of this. It was riveting.

As it happens, his client was convicted on 16 counts and sentenced to 25 years, but that's not the point. I have Spettacolo—and the judge—to thank for my career. You see, he took a chance on me.

In voir dire for this cocaine conspiracy trial, I raised my hand and told them all that my dad was the head of the DEA. "So what?" the judge asked. "Well," I replied, "I thought counsel should know."

"OK," she said. "Now they know. Sit down."

Spettacolo questioned me, learning that I went to Stanford and then became an actor in New York City. He left me on the jury. Perhaps he figured I was smart *and* did drugs. Alas, that was his mistake. But after debriefing the jury post-verdict, the judge told me that, given my theater background, I ought to consider trial law. So I took her advice. Together, the two of them changed my life. I remain forever grateful.

Trials as Showtime

Over a 30-year career in commercial trial work, my theater training has framed how I see trials—as showtime. Some of the lessons theater teaches us about trials are obvious; others more subtle. Let's start with what's apparent.

The jury or judge is the audience; the trial lawyer, a performer. The trial is a contest of credibility in storytelling. At the end, the jury votes—thumbs-up or thumbs-down. Someone's story wins; another's story loses.

The stories are told through each party's cast of characters—lawyers, fact witnesses, experts. In the telling, the actors use props, visual aids, and choreography to engage their audience, to educate them, and to facilitate their ability to remember the story later, when they reconvene in the jury room.

Hence, all the repetition—the advertising of the parties' competing themes; what we trial lawyers call our "theory of the case."

And some less obvious lessons that theater teaches us about being effective trial lawyers? Consider rehearsal, logistics, and improvisation. The neophyte gets off the Greyhound bus at 34th Street in Manhattan, instrument in tow. And lost. Ah, a cop. "Officer, can you please tell me how to get to Carnegie Hall?" "Of course," replies the officer, "Practice, practice, practice."

We call it the practice of law. But is there really much *practicing* going on anywhere? As in theater, practicing should mean rehearsing—lawyers getting up on their feet and repeatedly going through their opening, closing, or witness examinations in front of others. Trying different approaches; figuring out what works best—for them, for the case, for the audience.

Mock trials and focus groups are designed on the premise of



the experiment. Let's try it and see what happens. But it is only the rare advocate who is willing to rehearse the material over and over, to engage in the repetition of reworking the show in search of what's most effective.

That openness to experimentation, self-critique, and the opinions of others distinguishes the truly great from the elite good and the vast peloton of mediocrity in trial practice. We lawyers know this. We know that preparation matters. But many of us conflate preparation with practicing. We delude ourselves into thinking that preparation means silently reading our yellow pads or outlines, over and over to ourselves in our office, our study, our cubicle, or around the house.

Preparation does not mean just knowing the material—rereading the cases, the depositions, the exhibits. All that is, of course, necessary and important. But it is not the same as practicing. It is not rehearsing.

Just as rereading the script in a dressing room is not a rehearsal, knowing the material is not the same as delivering it in an entertaining way that draws in the audience, educates them about the story, and arms them with the memories they will need

Illustration by Darren Gygi

to recall during deliberations so that they can win others to their point of view.

And by “rehearse,” we don’t mean memorizing the script verbatim, getting up and reciting by rote full sentences committed to memory. We mean knowing the points we want to make and the order in which we want to make them. We mean finding a turn of phrase that captures the imagination. Working with it, turning it over and over so that we speak the speech “trippingly on the tongue” (*Hamlet*, act 3, scene 2). That way, when it is time to invoke the concept, we don’t stumble on our words.

Next, logistics. Consider these military quotes:

- “Amateurs talk about tactics, but professionals study logistics.”—Gen. Robert H. Barrow
- “Behind every great leader there was an even greater logistician.”—James M. Cox
- “You will not find it difficult to prove that battles, campaigns, and even wars have been won or lost primarily because of logistics.”—Dwight D. Eisenhower
- “The line between disorder and order lies in logistics. . . .”
—Sun Tzu

Trial logistics means the coordination and implementation of what and who needs to be where, when, and in what form. Any seasoned trial lawyer knows that trials can be won and lost on logistics. If we don’t have our act together—if we can’t find the exhibit; if we can’t produce the witness when needed; if we don’t have the cite handy—our credibility, and hence our case, suffers.

In the theater, the stage manager handles logistics. Nothing moves without the stage manager’s authority. The actors may say the lines or sing the song, but the stage manager controls who and what goes on stage when and how and in what form.

At trial, it’s the legal assistant or paralegal who manages the stage, or at least it should be. Like the stage manager, the legal assistant should ensure that the stage is properly set at trial. That means the audiovisual equipment has been tested and is working properly each time and every time. The exhibits are where they need to be, in the right form and in the right order. The graphics or boards are preset where they need to be, facing the right way, properly labeled, and in the right order. Every detail of what moves at trial, including the people, falls within the control of the legal assistant.

This leads to an important insight often missed in trial practice. The relationship between the legal assistant and the lawyer managing the case is critical. This is a human interface. It is a mutually interdependent relationship that must be managed. It is a marriage. Neglect it or abuse it and your trial family will suffer. Why? Because honest, respectful, ongoing communication between lawyer and staff is essential to a good outcome. So the lead trial lawyer should devote precious time to face-to-face

meetings ensuring alignment between the legal assistant and the lawyers on logistics.

Our profession loses enormous energy at trial because of dysfunction in the trial team. This is a well-known, dirty little secret. Vast sums of client money are wasted due to the limited leadership skills of lawyers who have no training in how to manage a team under stress. Stagecraft teaches us to honor those who manage logistics. And we know it is superior logistics that wins the toughest trials.

For trials are chaotic. They are unpredictable. We think we know what is going to happen, and we almost always are wrong. We designed our opening statement based on legal premise “A,” but an hour before openings the judge rules that “A” is out. We figured we knew our witness order, and then someone gets the flu and that direct exam we put off preparing is now front-burner but nowhere near ready.

We spent days preparing to cross-examine a key witness we were sure was coming to testify live. But instead, despite our objections, the judge is going to let them call that witness by video designation. So no drama of live cross. We are stuck with that video deposition in which we decided to save our best stuff for trial. Ouch.

Improvisation

To help manage chaos, theater offers an entire genre of entertainment based on the skill of performers who don’t know what is going to happen next: improv. In 1963, Viola Spolin published *Improvisation for the Theater*, and her son Paul Sills used it as the foundation for the work of the now famous Second City troupe, which Sills founded with several other pioneers of improvisational theater. Second City has spawned generations of the most famous comedians in America.

Many subscribe to a fundamental misconception—that improv is about being funny or clever, or exhibitionistic, or thinking fast on your feet. Actually, not so much. Rather, at its core, the skill of improv is the ability of the player to free himself or herself of preconceptions, filters, assumptions, and plans, and instead to focus attention on immediate physical reality to see what is actually happening in the scene. Paying attention to the other players and the audience is critical to effective improvising.

In the theater, being in the moment is important. Same for us at trial. So often, we trial lawyers get preoccupied with our outlines and arguments. We are self-absorbed. We don’t notice what’s happening around us. We have trouble seeing and hearing what’s going on in the courtroom.

We saw this at trial in Baltimore. Our team represented the defendant. Throughout the trial, we used strong visual narrative in multiple media. Our adversary, the plaintiff’s lead lawyer, did a very short closing argument without graphics, so that he could

load up his rebuttal closing, supported by all his visuals. He anticipated a strong last word and hoped that his visuals would supplant ours.

We shared a big, rear-projection screen that we set up right in front of the jury box. Those screens are great because you can walk in front of them and point at the screen without getting a face full of projection image, as when you use a front-projector and a classic screen.

Sure enough, as anticipated, our closing featured strong visual narrative.

Trial then moved straight from our closing argument into the plaintiff's rebuttal closing, without any break. So our adversary's tech person simply flipped the switch that plugged his laptop into the court's system, including the projector for the rear screen, but the tech did not test our adversary's PowerPoint show to make sure everything was working properly. That's a big mistake. Complex court projection systems are fussy. They don't always like it when someone switches from one laptop to another. Failing to run a test to ensure that the slides are showing up correctly is a huge risk.

Upon completing our closing, we asked the judge if we could sit in the corner by the jury box so that we could watch the plaintiff's rebuttal closing from the jury's perspective. As with his initial closing argument, our adversary had his technician run the rebuttal PowerPoint show from counsel table, while he read at the lectern from his yellow pad.

As expected, opposing counsel's rebuttal show had all this fancy PowerPoint motion animation in it. But due to a resolution conflict, the rear-screen projector was showing only three-quarters of each PowerPoint slide. Worse, whenever there was custom animation, the object flew off the screen.

The jury was giggling and biting their lips, but our adversary was so wrapped up in his yellow pad that he gave his entire rebuttal argument without realizing that the joke was on him. No one on his trial team interrupted; no one reset the AV. We couldn't tell whether the problem was that the plaintiff's trial team failed to see what was happening in the courtroom or whether there was a cultural prohibition on interrupting its lead advocate.

The Baltimore trial provided an extreme example of the oblivious trial lawyer. But how often do we see trial lawyers fail to listen to the witness's answer on cross? Or miss seeing the witness's body language because counsel's eyes are looking down to read the next question in the outline? Trial lawyers trapped in preconceptions and assumptions?

When we cannot see accurately and hear accurately, we cannot take effective action to seize an opportunity or to address an immediate problem. Instead, we doggedly adhere to what the observer knows is a broken game plan. Later, we deny and protest. Instead, what we should do is notice what's happening, accept current reality, and work with it.

This is what is meant in improv by "Yes, and"—what some call the great premise of improvisation. It is based on the concept of accepting the reality of what your partner in the scene presents. If your partner says "Not a cloud in the sky, please pass me the sunscreen," don't reply "What are you talking about? It's cloudy and raining."

That doesn't mean we have to agree with an adverse witness. It means we should actually see and embrace the reality of what the other person participating in that moment of trial is saying and doing. We are not oblivious or in denial. We are present.

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To do this, we must focus our attention on our scene partner at trial to notice what he or she is saying and doing. We must surrender our preconceptions and roll with the punches. It is this open, agile, and present mind-set that is so helpful to improvisers and has much to teach to us as trial lawyers.

Moreover, at trial, the threshold battle is to hold the jury's attention. This begins with volume, because if the lawyers can't be heard, then being the deciders is beyond frustrating. And if we can be heard but the deciders can't understand us, then it's next to impossible for them to vote for our story.

As the sign on the desk of legendary Broadway composer Frank Loesser says, "LOUD IS GOOD." When presenting to any audience, we have to be loud enough that everyone in the venue can hear us easily. That includes those judges and jurors whose hearing may not be so great anymore.

There are, of course, those of us who are loud enough but mumble. The audience expends energy just trying to figure out what words are being said. How annoying a challenge. Sophisticated law firms try complex cases with huge exposures. Yet, sometimes we sit at counsel table and are left to wonder: "With a billion dollars at stake, one would think that this lawyer could learn to enunciate." But no. Emotion carries the day and people mumble. Judges and juries wish we wouldn't, but we do.

Instead, we should enunciate sufficiently so that everyone can understand us clearly, without making our audience conscious of the fact that we are enunciating. We can't be pedantic or change

who we are or how we talk, because if the audience is preoccupied with our elocution then we're stealing focus from our story.

Practicing elocution off-hours can and will clean up poor speech hygiene. Reciting tongue twisters out loud is a great warm-up before any show, whether an audition, a play performance, a meeting, an executive suite briefing, a public address, or an argument to judge or jury. Actors have favorites—for use in the shower, during the cab ride, or on the walk over. Some love Theophilus Thistle; others Betty Botter; still others Peter Piper. Find your own, and use them.

Sounds so simple, still sadly seldom seen, since sluggish speech supersedes suitable Shakespearian skill.

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Many speakers, standing literally or figuratively in the spotlight, experience the problem of the adrenaline dump. We can't always control for the blood chemistry, which affects, among other things, our perception of time. It's like the fight-or-flight thing. In our perception at the moment, the action seems slower than it is. Afterward, the performing lawyer asks how it went. "You were talking awfully fast." The lawyer disagrees—"What? I was talking normally!"—oblivious to the role of adrenaline, which made "fast" feel as if it were "standard."

So slow down. "Loud and slow." That's the theater world's vocal watchword.

Sometimes—though we can be heard and understood, and though our logic can be followed—we are so darn boring that no one can sustain paying attention to us. At times we are boring because we are reading our words, rather than talking to people as if we cared about them and about our subject.

Reading interferes with our connection with an audience. Of all the elements of stagecraft related to connecting with an audience, the most important is eye contact, as eyes are the window to the soul. A good presenter will look a real person in the eyes, deliver a sentence or two, make a point, then move on to another person. Make eye contact; make the point; move on. A weaker presenter will spray the audience with an unfocused gaze, often looking at the back wall over their heads, or have shifty eyes that move back and forth between focal points. And the worst offenders will read, looking down more than up.

It happens every day. But just as in the theater, when it's show-time there should be no reading. Unless, like Mr. Spettacolo, we are making a show of reading a quote from an exhibit or, in an argument to the bench, from a case, we should be looking at our audiences when we speak to them. It makes all the difference in the world, not only to them as they listen to us, but also to us as we strive to relate to and communicate with them.

Another offense is our reliance on PowerPoint slides with text, as if being a trial lawyer were a variation on being a newscaster who reads a teleprompter. Reading text from a packed screen of words is ineffective and often counterproductive. Better to show short concepts or phrases and use them merely to prompt our own words, spoken from the heart, meaning that we have rehearsed so many times we don't need to read text because we already know what we want to say.

One exception is reading quotations on a screen. As not all jurors are great readers, we should read those quotes out loud—again, loudly and slowly. Some think that creates conflict because the audience may be reading ahead or behind us, but reading aloud is useful for the audience nonetheless, as well as for the appellate record.

And in the case of a quote from a document that is an exhibit, we are letting the jury see exactly what the document actually says, not just telling them so. That builds our credibility. Second City training says, "Show; don't tell." Just as in theater, showing the evidence and letting the jury reach its own conclusions is the best approach. We are at our strongest when we don't tell them we are right, but instead show them the evidence that we are right and let them reach their own conclusions.

Body Language

There is also the world of our human visuals—that is, our nonverbal communication. We've all heard the statistic: 93 percent of communication is nonverbal. That comes from the work of Albert Mehrabian in *Silent Messages* (Wadsworth 1971) and *Nonverbal Communication* (Aldine 1972). His research showed that communication "impressions" break down as follows:

7 percent = word elements (textual content)

38 percent = vocal elements (tone and delivery)

55 percent = nonverbal elements (body language)

Combining the "vocal" and "nonverbal" components, we see that an astounding 93 percent of the impressions we make derive from everything *other than* the words we say! So our body language dominates our communication. Yet, few law schools, law firms, or legal departments offer training in either controlling our bodies or reading the body language of others. Here, the world of theater is way ahead.

To be effective as trial lawyers, we need to be able to control ourselves and to read affect in others. Reading affect in others means noticing their physical state and drawing inferences about

their emotions from what we observe. Self-control and noticing affect are fundamental theater skills. In practice, this means asking ourselves:

What am I doing with my body and voice?

What impression am I creating with my posture, visual focus, costume, hair, makeup, accessories, and props?

What am I seeing in the other's demeanor? What cues does the other deliver?

Before we address noticing what others are doing, let's start with controlling ourselves, physically.

A first principle: Don't cross; stay open. Nerves have a funny way of causing us to cover up by crossing our arms, our legs, or our feet. Or we cover our privates with our hands, protecting ourselves from attack both in front and behind.

But we want to connect with our audience, not protect ourselves from them. So it's good to stay open. We have to avoid cutting ourselves off from them and putting up barriers between us and them. Staying open is not the same as manspreading. It is not showing off our armpits. It's welcoming; not offensive, aggressive, or intimidating.

We trial lawyers also need a strong base. We need both feet firmly planted on the ground and apart so that we don't sway and twist in the headwinds of trial. We need to stay grounded physically so that we are grounded in our communication.

So, while we're open and planted, where is our center? With what part of our body are we leading?

Groucho was famous for leading with his chin. We picture him crouch-walking with his cigar. If he were crossing the finish line in a footrace, the first body part to break the tape would be his chin!

Not so with Detective Columbo. The infamous disheveled investigator led from the forehead. You can picture him saying, "Oh, that reminds me, one more thing. . . ."

And Elvis? From the pelvis. "Jailhouse Rock." Superman and Wonder Woman lead from the chest. The "power pose," with arms akimbo. Strong.

Those were their respective leading centers. Everybody has one. Where is yours? Is your center sending the message you want to send?

A good place to start is an aligned center. If you were to look at yourself from the side, in profile, an aligned center means you have ankle, knee, hip, shoulder, and ear all aligned vertically with your chin level. To get in this position, imagine a rope is pulling up the back of your head, keeping shoulders relaxed, down, and back (not hunched up or rolled forward). Feet should be shoulder distance apart, weight evenly distributed between the balls of your feet and heels. That is a good ready position for life and court.

What should we do with our hands? Most people are not comfortable talking to an audience and leaving their hands quietly down at their sides. They need a ready position or a prop. Some

people interlace their fingers with their hands at belly height. That works, but it is important to break that state to gesture.

When you gesture, do so broadly and fluidly. Take up space both horizontally and vertically. That means your gestures are not all in the same plane. If you say "There are three reasons," you can extend your hand out and above your head with three fingers out. Working in multiple planes is good. Just don't overdo it.

Also, for the audience to be able to get a good look at us, we need to get out from behind the lectern. Given that we shouldn't be reading from notes anyway, that is not the issue. Some judges require us to anchor at the lectern, but others are more open-minded.

Look for opportunities to get away from the lectern. During openings and closings, use the well of the court. Don't pace. Don't wander. Instead, think of the well as having three sections: Start center, make eye contact with an individual juror, make a point or two. Then, at a logical moment, move to another, left or right. Make eye contact; another point or two. Work the room.

You don't have to move far to establish three zones. A few feet are all that's necessary. If you can't remember what comes next, it's OK to go back to the lectern and glance down at the short phrases on your outline. But then return to looking at and talking to the jury.

Look for opportunities to get away from the lectern.

So now you have a clean vocal delivery; a strong, aligned ready position; and good nonverbal communication skills. But when you speak, how do you speak? Do you interrupt yourself? Do you have a bunch of parenthetical clauses? Do you speak in long sentences? Use jargon and legalese? Have verbal tics?

At our best, we speak in short, simple declarative sentences. We sound like normal people; we avoid legalese. We can quietly transition between sentences or phrases, without saying "um," "uh," or "like."

These fundamentals of stagecraft strengthen our presentation strategies and enhance our effectiveness. Good luck out on the boards, and break a leg! ■