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# Kluwer Mediation Blog

## Whose Trial Is It Anyway? Using Improv To Help Lawyers 'Present' More Effectively

Jeffrey Krivis (First Mediation Corporation) · Wednesday, February 15th, 2012

Picture a group of 30 trial lawyers in an almost empty room, loudly chanting, 'Big Booty, Big Booty, Big Booty!'

Now imagine a pair of them trying to have a conversation without using the letter 'S'.

How about two of them vying for the attention of a third by, at turns, singing, crying, jumping up and down, waving their arms, and even whispering?

Why on earth would a group of highly skilled and experienced attorneys engage in such seemingly childish behaviour?

The answer is simple and surprising: They did it to vault their law practices to the next level; to recognize and rethink old habits; to break through barriers they may not have even known they had, and ultimately to achieve more success.

And how did they go about this? By participating in a class 'Increasing Effectiveness of Litigation through Improvisational Theatre for Lawyers'.

### **YOU MEAN MAKE UP FUNNY STUFF?**

The chief reference point for most people with little exposure to improvisation is the popular television show, 'Whose Line Is It, Anyway?' which completed a long U.S. television run in 2006.

On the show, two or more actors made up a short comedic scene on the spot based on an audience suggestion. Though this show sparked huge popularity for the form, the real truth is that improvised performance is as old as performance itself. It predates the invention of writing, since long before we started writing scripts human beings were telling stories by acting them out.

From the 1500s to the 1700s, Commedia dell' Arte performers improvised in the streets of Italy. And in the 1890s theatrical theorists and directors such as Constantin Stanislavski and Jacques Copeau, founders of two major streams of acting theory, both

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heavily used improvisation in acting training and rehearsal.

After the Commedia died off, improv theatre faded into obscurity until it was separately and spontaneously reinvented in the 20th century by two people who have shaped the craft as it exists today - Keith Johnstone and Viola Spolin.

Johnstone began formulating his theories about creativity and spontaneity while growing up in England, and later brought them into his teaching at the University of Calgary. He felt that theatre had become pretentious, which is why the average man in the street didn't even consider attending it. Johnstone wanted to bring theatre to the people who went to sporting and boxing matches, the same audience that Shakespeare had written for in his day.

Johnstone decided that one approach would be to combine elements of both theatre and sports, to form a hybrid called Theatresports. The trappings of team sports were adapted to the improvisational theatre context; teams would compete for points awarded by judges, and audiences would be encouraged to cheer for good scenes and jeer the judges ('Kill the umpire!').

Viola Spolin can probably be considered the American Grandmother of Improv. In the 1920s and 1930s, she began to develop a new approach to acting instruction. It was based on the simple and powerful idea that children would enjoy learning the craft if it were presented as a series of games.

Her son, Paul Sills, along with people like Del Close and David Shepherd, created an ensemble of actors who developed a kind of 'modern Commedia', which would appeal to the average man in the street. As with Theatresports and the original Commedia, the goal was to create theatre that was accessible to everyone.

Sills started both the Compass Players and Second City in Chicago. Many members of the original cast of Saturday Night Live came from Second City, and the franchise has since produced such comedy stars as Mike Myers, Chris Farley and John Belushi.

## **BACK TO THE (LEGAL) PRACTICE**

But what on earth does improvisational comedy have to do with being a successful litigator or mediator?

The art and technique of improvisation involve the very same tools that serve people well in any professional endeavour. When you think about it, life itself is an improvisation. Every situation is new, and therefore benefits from a fresh perspective and a creative mind. Not only that, but aren't lawyers, in particular, essentially performers and storytellers? What lawyer could not benefit from developing these skills?

It is a common misperception that there is no skill or structure to improvisation - that it simply involves blurting out the first thing that pops into your head. On the contrary, like jazz, there is an art and mastery to it that can be studied and practiced for years.

And the very tools and techniques employed by improvisational performers are just as applicable to practitioners of law.

The study of improvisation fosters the ability to think quickly on your feet. It enhances the capacity to cooperate and collaborate, to validate others' ideas while not abandoning your own.

Improvisation demands the keenest level of listening to and connecting with others. It encourages openness to creativity and inspiration, willingness to take risks, a lack of judgment, and the capacity to say 'yes' more often than 'no'. It's easy to see that you don't have to be an actor to benefit tremendously from all of these qualities.

## FINDING YOUR INNER CHILD

'Genius is no more than childhood recaptured at will'. [Charles Baudelaire]

'Perhaps what we sometimes call "genius" is simply a refusal to altogether let go of childhood imagination'. [Prof. Michael Cibenko]

A sign famously hung in the late Paul Newman's Westport, Conn., office that read, 'If I had a plan I would be screwed'. Newman firmly believed in the benefit of 'creative chaos'. He understood and appreciated that success in today's age depends on how good we are at improvising rather than merely sticking to a script or plan.

At the negotiating table, improvisation demands that parties deal with the reality they are presented in real-time rather than continually revisiting scenarios of what they believe could or should be. By limiting oneself to a scripted plan, options for solving problems are narrowed and opportunities for solutions are more likely to be missed. Improvising instead of following a script or a plan allows the flexibility to stay nimble, and operate more freely and authentically.

The goal for trial lawyers is the ability to truly be 'in the moment', as it is happening. If we are thinking about how we planned something might go, we are not in the moment and not able to see and adjust to how it actually is going. We have lost the ability to be spontaneous.

People can sense when someone is really in the moment - and when they are trying to recreate something they rehearsed in their head an hour ago. People can sense that disconnect - when the person opposite them is standing outside watching themselves, or are in other ways removed from the discussion.

We can smell the artifice and the lack of authenticity and passion. And we automatically disconnect from them, often without even realizing it. It becomes like listening to a boring lecture in school. We zone out and turn off.

This obviously is a catastrophic problem when your vocation hinges upon your ability to be a compelling communicator, and how well you connect with your audience - that is, read the jurors, the judge, opposing counsel, the deal parties, etc.

The dictionary defines spontaneous as, 'coming or resulting from a natural impulse or tendency; without effort or premeditation; natural and unconstrained'. This describes a state that is the exact opposite of fear. Fear is the biggest obstacle to spontaneity. It separates us from our senses and robs us of our instincts. When we are in fear we cannot really see or listen or react. We become the proverbial deer caught in the headlights.

It often is said that most people fear public speaking even more than death. Even many lawyers fear it, though it is part and parcel of their profession. Studying improvisation can actually help to get past this fear.

A lot of improvisation involves playing games that seem like children's games. People who are in a playful state are more open and receptive, more willing to experiment and to learn, without the fear of judgment. To be sure, much of the work done in improvisation classes is aimed at rekindling a sense of playfulness, freeing up the imagination and fostering a willingness to take risks.

### **'YES, AND ...' IMPROV HELPS**

One of the cornerstones of improvisation is the concept of 'Yes, and ...'.

As two performers develop a scene together, each makes offers; an offer being anything they say or do that helps define the elements, reality or story of the scene they are creating. It is the other actor's responsibility to accept the offers that their fellow performers make - in other words, to assume them to be true and act accordingly, to figuratively and often literally say 'yes' to their scene partners.

Ideally, accepting an offer is followed by adding a new offer that builds on the earlier offer; this process is known to improvisers as 'Yes, and ...'. Every new piece of information added helps the actors refine and develop the action of the scene together. To not do so is known as blocking, negation, or denial. Here is an extreme example of blocking:

Performer #1: Hi, Mom. You don't look well. Are you all right?

Performer #2: I'm not your mother. I've never met you. And I've never felt better!

In this example, the second actor negated everything the first actor offered. Let's see what might have happened if the second actor used the concept of 'Yes, and ...'.

Performer #1: Hi, Mom. You don't look well. Are you all right?

Performer #2: No, honey. I'm worried about your father. He's been working way too hard lately.

In this case the second actor says 'yes' to the first by implicitly agreeing that she is her mother and that she is, in fact, not well. She then adds the information about the father working too hard. That's the 'and' part.

Inexperienced improvisers naturally tend to want to block their fellow improvisers' offers, and usually need coaching to break this habit. Ironically, this is a trap mediators and lawyers often fall into as well. People think if they don't hold on tightly to their notion of what the answer is, that they will ultimately get the short end of the stick.

But if you don't listen to the other person's needs, they completely shut down and the negotiations stall. Mediation experience indicates that if both sides in the negotiation get the opportunity to tell the mediator their story, and made sure they felt listened to and heard, then the mediator has an excellent chance of helping them break the deadlock that had brought them to mediation in the first place.

The trial lawyers who participated in the improv class have found the 'Yes, and ...' concept particularly helpful. 'Recognizing, and then stopping myself, from just "blocking" an opponent and, instead, listening to what they require and attempting to fulfil the need has led to more productive and less frustrating negotiations for me and more successful results for my clients', says Los Angeles attorney Dawn E. Smalberg.

Attorney Lisa Maki, a consumer and employment attorney in Los Angeles, also says she has used 'Yes, and ...' to great effect:

In mediations during and since the class, I have used this method to open up my ability to listen and really understand where the defence and the mediator are coming from, allowing me to pick up signals early on to guide me to a resolution of a case, rather than shutting down and out all of what the defence and mediator are communicating. This principle has also greatly assisted me in truly 'listening', rather than being hell-bent on getting my particular point across, which is essential to my ability to more effectively depose witnesses, interview new clients and even speak with opposing counsel and address the court.

## ONCE UPON A TIME ...

'Myths are public dreams, dreams are private myths'. [Joseph Campbell]

'Everyone is necessarily the hero of his own life story'. [John Barth]

Improvisation takes a scene and generates a story from that scene. Lawyers are

storytellers. A trial can be thought of as an opportunity for two opposing sides to tell the same story from two different points of view. The side that tells the best story wins the case.

The best story isn't necessarily the most entertaining, but it might be the most resonant, or the most honest, or the most accurate. The connection between the improviser and the lawyer becomes clear when you realize that, like an improvised scene, a lawyer has to incorporate new information and adapt the story as he or she goes forward. Witnesses might give unexpected testimony, new information and evidence can be revealed, and the observation of the behaviour of those involved in the trial can offer insight that was not available before.

A lawyer is called upon to continually adapt the version of the story as this new information becomes illuminated. The lawyer that is able to incorporate this information into his or her version of the story and adapt it will be more successful.

It takes time to learn to create an acceptable story while playing this game, and the challenge lies in the cooperation. Improvisation isn't just creating a story from scratch, it is creating a story from scratch cooperatively with other performers. It is this added challenge that makes it a specialized skill. Improvisers must learn to accept and incorporate the story additions of their partners on stage, and in some cases the audience. This is what makes improvisation such a specialized form of storytelling.

## **CHALLENGE THE STATUS QUO**

A juror's perspective: 'One particular trial stands out in my memory, especially the difference between the prosecuting and defence attorneys. The defence attorney spoke first. He was calm, relaxed, looked the potential jury members in they eye and smiled. I liked him immediately. The prosecutor spoke next and barely looked at us. He stuttered. He frequently referred to his notes. He was fidgety and uncomfortable and tense. "Oh boy", I thought, "this guy is going to lose his case". He was obviously prepared, he was organized, and it seemed that he was following a plan for the trial. He was also impossible to listen to for more than a minute. Here was someone who spent six years in law school, passed the bar, earned his legal degree, and yet he didn't have the communication skills to back it up. He was like a surgeon that couldn't hold a scalpel steady'.

Improvisers have their own craft-specific vocabulary. Improvisational guru Keith Johnstone was frustrated with the robotic stiffness of some performers when he realized they were not using the natural social skills on stage that they used in life, such as a concept called 'Status'. Johnstone defines status as 'the conscious manipulation of our level of dominance ... Status is not confusing so long as we understand it as something we do, rather than our social position; for example, a king can play "low status" to a servant, while a servant can play "high status" to a king'.

Status is taught by encouraging students to focus on specific physical or verbal behaviours. A teacher will direct one group of students to maintain eye contact at all times, while another group tries to make eye contact, but immediately looks away if

they actually catch someone's gaze.

This focus on behaviour when teaching and learning status is important, because status is behaviour. Most people only have a narrow range of status strategies that they have learned to be effective, and that have been reinforced by their environment or those around them.

In addition, there are many people who are mistaken about how they are presenting themselves. Having a greater and more fluid understanding of status allows people to adapt to more situations, and to be more aware that they are presenting themselves as intended.

In a recent class, one of the trial lawyers objected to learning the concept of 'status' as a means to persuade. He felt that learning status techniques felt artificial and insincere, and that the point of learning these skills was to pretend to be some one other than himself.

It was illuminating to him when the instructors explained that these skills are not for pretending to be someone else, but to allow participants to more accurately present who they really are.

Many people are unaware of how they present themselves, and it is difficult to get accurate feedback from those around us. Status forces us to become aware of the face we are presenting to others, and by making it into a game students become aware of the strategies that have become habits, and are able to learn new strategies.

Being aware of the status one is projecting is especially important for lawyers. The lawyer is frequently placed in a position of authority over their clients. Most people don't deal with lawyers on a regular basis, and when they do need a lawyer it is usually because they are faced with difficult circumstances that only the lawyer with his or her specialized knowledge can help them with.

This creates a status gap between the lawyer and his or her client that can be more easily overcome by someone who is trained to observe the status another person is presenting and to match it.

A trial lawyer is called upon to perform. Lawyers work hard to be certain they are armed with the most accurate and substantial facts and logic before presenting their case. When they do present their case, however, they must perform. They must communicate their point of view clearly, effectively, and in some cases sympathetically.

There is a danger for any person who performs regularly that one's performance starts to be shaped subconsciously by their audience. Learning and observing status is an effective way for lawyers to become aware of their status habits. These habits might serve a lawyer well in their career, but it is always better to be aware and to have a range of choices.

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This article describes how basic improvisation concepts can be modified, and by creating new games and exercises, and tailored for the practice of law. The authors' Pepperdine theatre class provided a laboratory to work on trial attorneys' unique challenges in a safe and supportive environment, without the high stakes of an actual trial or negotiation.

The students have had practical opportunities to role play - for example, to present mock opening statements, conduct voir dire, and cross-examine difficult 'witnesses', all in a classroom setting. Afterward, through discussion and coaching, the students gained valuable insight into how they come across.

Who knew improvisation had so much to offer the legal profession? It improves communication and creative problem-solving skills, encourages thinking outside the box, helps to overcome fear and stumbling blocks, builds dynamic presentation and storytelling skills, increases authenticity and spontaneity, nurtures innovation, reduces negativity, and increases cooperation. Not bad for a seemingly silly endeavour.

So perhaps the next time you're in a trial, mediation or deposition, instead of saying 'No, but ...' you might try saying 'Yes, and ...' instead and see where that leads you.

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