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**Stand-Up and Listen:
Lessons in Trial Work, Advocacy, and Presentations from the
Great Comedians**

Joseph G. Fortner, Jr.

Moderator

HALLORAN SAGE LLP

Hartford, CT

fortner@halloransage.com

Kelly M. Hoffman

NORMAN HANSON & DETROY, LLC

Portland, ME

khoffman@nhdlaw.com

Bill Ireland

HAIGHT BROWN & BONESTEEL, LLP

Los Angeles, CA

wireland@hbblaw.com

Stand Up and Listen¹

One of the most important elements in teaching, conducting, and performing, all three, is listening.

Itzhak Perlman

We have two ears and one tongue so that we would listen more and talk less.

Diogenes

When Shakespeare wrote, “All the world’s a stage, and all the men and women merely players,”² he likely was not envisioning that this “world” would include trials, oral argument of motions, corporate board meetings, and media-enhanced presentations of products and services to clients and customers. He likely also did not think that world would include small spaces where the signature features include a brick wall, a single microphone on a stand, spotlights, maybe a stool, and adult beverages. Still, in each of those settings, a “player” stands before an audience, and must reach and engage its members using his or her words.

A question that confronts all communicators – whether they be trial or appellate lawyers, corporate executives, salespersons, teachers, or stand-up comedians – is how to best reach, hold, and convince the audience. Some may believe that a well-crafted and rehearsed presentation, in which every word, clause, and pause has been carefully chosen, vetted, practiced, and refined, will be most impactful.

While preparation is recognized by all as critical (and indeed it is uniformly suggested that presentations be repeatedly rehearsed in order to be most effective³), most authorities agree that rote repetition of a memorized presentation is not optimal. As one author has stated,

Most of us give presentations more frequently in business meetings, online conferences, and a wide range of small- to mid-size internal and external events. In those typical settings, *writing*, *reading*, and certainly *memorizing* a word-for-word speech is actually one of the most destructive and counterproductive tactics you can take as a presenter.⁴

¹ Materials prepared by Joseph G. Fortner, Jr., of the ALFA International law firm of Halloran & Sage LLP, Hartford, Connecticut

² W. Shakespeare, *As You Like It*.

³ C. Gallo, “Why You Should Practice Your Presentation 10 Times Before Taking Stage,” Inc.com, Nov. 18, 2019 (<https://www.inc.com/carmine-gallo/why-you-should-practice-your-presentation-10-times-before-taking-stage.html>); C. Witt, “Rehearsing A Speech Makes It Better,” <http://christopherwitt.com/rehearsing-speech-important/>.

⁴ J. Schwartzberg, “Stop Scripting Your Speeches,” *Harvard Business Review*, Jan. 27, 2021 (<https://hbr.org/2021/01/stop-scripting-your-speeches>)

Among the reasons offered for not scripting and memorizing speeches are the inefficient use of time; the creation of a presentation which “excludes the audience,”⁵ the building of barriers (including lack of eye contact and emotional connection), the potential for derailment should the speaker lose track during the speech, the lack of flexibility to recover from the derailment, and the loss of credibility when that happens. Presenters reading a set speech without deviation are highly unlikely to listen to the audience or even observe visual cues which reflect whether the audience is receptive and which, if followed, could allow adjustments that would enhance – or even just revive – a presentation. Thus, as is stated in TED Talk Commandment No. 9, “Thou Shalt Not Read Thy Speech.”⁶

For those in careers which require knowing your material, but at the same time not read the presentation, be flexible, and be observant of the audience, there are few better models – for better or worse – than stand-up comedians. To be a successful comic requires far more than just “being funny.” In fact, the practices of successful stand-up comedians in many ways inform how to be a skilled trial lawyer, oral advocate, or corporate presenter.

[What Makes A Good Stand-Up Comic](#)

Various books, articles, and courses (online and in person) try to outline and teach the qualities which make for a successful comedian. While “being funny” is important, what is often cited are:

- Studying and learning. This typically involves watching seasoned professionals, to study their techniques and observe how they respond in live settings. It also involves learning stage presence, joke structure, and set building, whether through classes or by observation of professionals and at local comedy clubs.
- Understanding what is “funny,” what delivers laughs, and what the audience’s expectations are for “laughs per minute.”⁷
- Spending time writing and rewriting your material. Many writers on the subject suggest developing and constantly updating a story or joke bank, from which the comedian can draw when needed. They also note that multiple revisions are the norm until the final form of the joke is set – sometimes as many as 30 or more revisions.⁸ This includes not

⁵ *Id.*

⁶ <https://collectivehub.com/2017/04/the-10-commandments-given-to-ted-talk-speakers/>.

⁷ Comedy instructors frequently talk about “laughs per minute,” and the conventional wisdom for stand-up is that the audience expects four laughs per minute. See J. Nevins, Interview with Stephen Rosenfeld, founder of American Comedy Interview, in “Learning Laughter: An Expert’s Guide on How to Master Standup Comedy,” *The Guardian*, October 4, 2017 (<https://www.theguardian.com/culture/2017/oct/04/learning-laughter-an-experts-guide-on-how-to-master-standup-comedy>).

⁸ See Creative StandUp, “50 Best Stand Up Comedy-Tips,” <https://creativestandup.com/50-best-stand-up-comedy-tips/>.

just the written text, but the mode of delivery, the pauses, and everything else that leads to the desired outcome: laughter.

- Accepting and learning from failure, whether it is because a particular joke did not work; the audience that evening is generally nonreceptive; a loss of train of thought; or just generally an “off night.” Comedians must be mindful of Walt Disney’s dictum, “Everyone falls down. Getting back up is how you learn how to walk.” As comedian Paul Merton noted, studying how skilled comedians do such things as turn tough audiences around can be critical.
- Developing presentation and delivery skills, by “getting out” in front of audiences as often as possible. This also helps the comedian learn the format and structure of a comedy club setting, and how to work in that environment.

[How Is This Relevant To Us?](#)

With rare exception,⁹ litigators, corporate executives, and salespersons are not paid to offer 45-plus minute comedy routines. Yet, in most cases, what they need to be able to do is communicate with actual humans, preferably holding the listeners’ attention and being responsive to the “audience’s” reactions. Whether it’s a jury, judge, board of directors, or potential customer, each brings his, her, or their own backgrounds, prejudices, assumptions, and moods. As a result, they may be receptive, inquisitive, a “tough audience,” or unpredictable, and the effective presenter needs to be ready to modify or adjust on the fly.

These are skills for which stand-up comedians can serve as role models or examples. For, while there are stand-up comedians who do little more than repeat their sketches each evening, those who are well-respected instead realize that their job is to entertain the audience which is actually in front of them, and to offer to that audience a rewarding experience.

[Persuading the Audience](#)

Teachers of persuasive writing cite Aristotle for identifying three modes of persuasion – *ethos*, *pathos*, and *logos*. *Ethos* is an appeal from authority – that is, one establishes one’s credibility and expertise on a subject, and then uses that authority to persuade the listener. *Pathos* is, instead, an appeal to emotion, where the speaker seek to “tug at the heartstrings” to gain sympathy for his or her position. *Logos*, finally, is the use of logic and reason to draw the audience to the desired conclusion.

Effective stand-up often relies upon all three, sometimes in unexpected ways. First, to convince the audience to listen and “go along” with the sketch or jokes, the comedian must develop some

⁹ Bob Newhart and Demetri Martin both left law school before finishing. Al Lubel practiced law and stand-up simultaneously. Alex Barnett left the practice to become a full-time comedian. See <http://bitterempire.com/the-top-three-stand-up-comedians-who-were-lawyers/>

reason for listening to him (that is, *ethos*). This can be as simple as offering some experiential information relevant to the sketch, or making observations about the world or current events to which the audience can relate. It can also be reputational. In building the audience's trust, however, neither the comedian (nor the trial lawyer) should operate on auto-pilot, and instead should constantly look for signals as to whether the listeners do, in fact, find the speaker worthy of their time and attention; if not, adjustments must be made or the audience will be lost.

Second, the comedian must reach the audience's emotions (*pathos*), not just by "being funny," but using empathy, antipathy, and other means to appeal. Whether the outcome is an audience which "laughs along" or "laughs at," the comedian tries to "move the audience to see how something is funny from the comic's point of view."¹⁰ The emotion may be humor, happiness, sadness, or outrage, but the goal of is to draw the listeners in more closely.

Finally, the comedian uses *logos* to reach the audience's intellect and reason. In comedy, this can be applied by drawing the audience towards a conclusion which is perfectly "reasoned" and "logical," but nonsensical,¹¹ or through telling a story in a manner where the audience's logic leaves them expecting one outcome, but where the "punchline" is wholly unexpected. Either way, the comedian is relying upon the audience following a "logical" sequence, which becomes amusing because of the outcome.

"The gist of it is that comedy, most of it, enacts a sudden alternative community among listeners, an alterity in academic parlance, and is—very oddly—like religion in this [in evoking shared belief]. This is of value to lawyers because it offers a way of reminding jurors and judges of other ways of thinking 'we' all share in situations, like trials, in which our thinking is often divided." Sammons further suggests: "Next time you listen to a comedian, try noticing the community he or she calls into existence by the comedy. It is always—at least among standups—a claim that 'we' see this differently and, of course, 'we are correct.'" And, of course, Sammons is correct too. Comedy can evoke hidden or embedded subtext. When the audience truly gets it, the recognition may be signaled by laughter.¹²

No matter what, the comedian, like the advocate or business presenter, must be able to command the attention of her audience, lead it through a story, and evoke a response using all

¹⁰ Greene, Grace F., "Rhetoric in Comedy: How Comedians Use Persuasion and How Society Uses Comedians," *The Corinthian*: Vol 13, Article 11 (2012), p. 142.

¹¹ An example might be the logical theorem offered in the "She's A Witch" sketch in *Monty Python and the Holy Grail* (1975), in which through step-by-step logical deduction, it is concluded that if the accused weighs the same as a duck, she is a witch. (Spoiler alert: she does.)

¹² Law Professor Emeritus Jack L. Sammons, quoted in P. Meyer, "Don't Underestimate the Value of Comedy in the Courtroom," *ABA Journal* (2016), https://www.abajournal.com/magazine/article/storytelling_courtroom_comedy

three elements, making the audience “feel as if they are part of the sketch, not just responding to it.”¹³

Lessons From the Stand-Ups

Based upon those who have studied stand-up as a model for public speaking, certain tips stand out.

- Become a Master Story Teller

The humorous story is American, the comic story is English, the witty story is French. The humorous story depends for its effect upon the manner of the telling; the comic and the witty story upon the matter.

Mark Twain

While it is true that some successful comedians have essentially strung together a series of one-liners or jokes to develop their routines, typically since at least the 1060s, most comedians instead relied upon narratives – some short, some long – to amuse the audience. These can be stories about themselves or others, observations of current affairs or events, or other subjects. But, in all cases, to hold the audience’s attention, it is critical that the comic develop and then tell a story in a compelling way. By doing so, she appeals to the innate human need for a narrative, something that has more than just “bullet points” and instead which has a beginning, middle, and end.¹⁴ Further, once credibility in the story teller has been established (*ethos*), the story format intuitively relies upon logic and reason (*logos*) to facilitate the narrative, and often uses emotional hooks (*pathos*), as a means to capture, hold, and sway the listeners.

In a trial setting, a compelling, consistent, overarching theme, presented by a credible trial lawyer, team, and witnesses, which is logical yet also reaches the jury’s emotions, can be most persuasive to the trier of fact. That can be especially true when dealing with an adversary whose approach is more purely emotional or dryly factual. Absent a story, the trial becomes nothing more than a sequence of bullets, with no perceived reason for a jury to find in one’s favor when tugged the other way by passionate appeals. Indeed, a well-crafted, logical, and authoritative narrative that includes an emotional “hook” may be one of the best antidotes to adversaries relying primarily upon emotion (such as the “Reptile Theory”).

Similarly, a presentation of a new business initiative must convince the decision makers that a proposal which constitutes a change (and thus, at least to some degree, a risk¹⁵) is something

¹³ Greene, *supra*, at 141.

¹⁴ See S. Handel, “5 Lessons Standup Comedians Can Teach You About Public Speaking,” at <https://www.theemotionmachine.com/5-lessons-standup-comedians-can-teach-you-about-publi-speaking>,

¹⁵ For a classic (albeit comedic) example of corporate risk aversion preventing a decision, William Windham’s performance in the opening scene from *Planes, Trains, and Automobiles* (1987) is hard to top. <https://youtu.be/fXXNrHpaQ3k>

worth embracing and supporting. Merely stringing together a series of data or market research points will likely be less effective than if one weaves that information into a story which includes as its (explicit or implied) punchline: “approve my proposal or purchase my product.”

■ Draw From Your Own Experience

Comics can gain credibility with their audiences when they base their narratives, at least in part, upon what they have gone through in life. Not only does this allow the comedian to build from a foundation that he knows better than anyone else, but the use of experience supports the use of narrative form – after all, interesting events in one’s life typically have a beginning and middle, a conflict, and, hopefully, an end (resolution). This technique is apparent in many of the sketches – short or long – of successful comedians, whether it is the experiential observations of Jerry Seinfeld; or the childhood¹⁶ and other reminiscences¹⁷ of Bill Cosby in his routines from the 1960s.

The use of personal experience as part of public presentations offers the litigator and corporate presenter several tools. First, properly selected and used, the story can help humanize the speaker, creating a connection with the listeners. Second, such stories are easily drawn upon to “improv” when needed. Third, one’s own experiences are unique, and can make the presenter memorable. And finally, connecting through a unique experience can make the facts and overarching theme more memorable.

Of course, the selection of appropriate stories for the trial theme, the moment, and the audience is a critical skill. For these reasons, a collection of stories, many of which are tested out in advance in social and other noncritical settings, becomes important. (After all, one does not want to become known as the trial lawyer who always tells “that story,” whether or not applicable.) Just as comedians who perform in various settings (some family friendly, some less so) will be selective in choosing what experiences to use for a sketch, so the speaker’s reservoir of stories should be developed for multiple purposes and settings.

■ Trim the Fat: Remove Extraneous Material

While narratives and personal experience are important, experienced comedians embrace Shakespeare’s admonition: “Brevity is the soul of wit.”¹⁸ Raconteurs often regale (or burden) family and friends with lengthy stories filled with colorful characters, detailed descriptions of locations, menus, and the other detritus which may lead (depending upon the context of the event and the importance of the narrator) to glassed eyes, nodding chins, or

¹⁶ See, for example, “Tonsils,” from his 1966 album, *Wonderfulness*. <https://youtu.be/IBZmK1EOca8>

¹⁷ Indeed, a master class in using personal experience to develop a lengthy and amusing sketch was Cosby’s 1968 recording “200 MPH,” in which Carroll Shelby’s gifting to him of a Cobra resulted in 22 minutes of narrative story telling, as well as improvised audience interaction on a variety of topics. <https://youtu.be/b4DCECg3rLI>

¹⁸ W. Shakespeare, *Hamlet*, Act 2, Scene 2.

departure. Comedy professionals know that what may be unpleasant in a social setting would be suicidal to one's career.

To "get to the funny quicker,"¹⁹ the comedian must look at material she has written with as objective an eye (and ear) as possible, and ask herself: Does this piece actually contribute to a laugh? If not, why keep it? While this does not mean that every line must be a "punchline," if that section of the sketch is not at least setting up for a larger payoff, cut it.

Whether preparing an opening or closing statement, an oral argument, a board presentation, or a sales pitch, it is highly likely that the first draft will include material that might seem at first blush to be interesting and needed, but on dispassionate re-reading, clearly does not advance (or does not sufficiently advance) the argument being presented. Asides about fascinating evidence which in fact does little or nothing to convince the trier of fact, or allusions to recently uncovered market data which will not help convince the Board to approve a new departmental initiative will, at best, water down the impact of the presentation, and run the risk of losing the attention of the "decider." Learn from stand-up comedians: trim the fat; and then, trim again.

■ Practice Makes Better: Test Material In Advance

Virtually every article regarding standup includes the admonition that stand-up is not just something done "on the fly," but instead requires hard work, practice, revisions, and then more hard work. This involves writing and re-writing, on a regular basis, culling out good material from bad, developing a "playlist," then practicing, editing, repeated performances, and then more revisions. After each performance with audience feedback, comics revisit their material, and separate the good from the not-so-good. Often, the process even for well-known comedians occurs in multiple "open mikes" or small clubs, with some comedy teachers recommending as many as 2-5 performances a night to try out and refine material before from different audiences.²⁰ Others suggest testing material with friends and family, who can help with discovering what connects with the audience, what causes (or does not cause) laughter, and what will make for a more polished presentation. The host of the "Clean Comedy Podcast" reports that some comedians spend 23 hours to prepare 15 minutes of material.²¹ All of this work has its purpose: to create a joke where the information is given using the right words, in the right order, in the right manner, with the right emphases and pauses, so that, at the end, it all lines up to create the expected audience reaction.²²

¹⁹ C. Canters, "5 Stand Up Comedy Tips to Improve Your Public Speaking," *The C Method*, Episode 157 (2019), <https://thecemethod.com/podcast/member-content/5-stand-comedy-tips-improve-public-speaking-episode-157/>

²⁰ Indeed, comics such as Louis C.K., Jerry Seinfeld, and Aziz Ansari are known to use small clubs and open mic nights to develop new material. See Handel, *supra*.

²¹ J. Creviston, "How Many Hours Do Comedians Work", <https://comedypreneur.com/how-many-hours-do-comedians-work/>

²² S. Kher, "7 Public Speaking Lessons We Can Learn From Stand Up Comedians" (2019), <https://sumankher.com/2019/04/24/public-speaking-tips-standup/>

It should be obvious that no trial lawyer, oral advocate, or business presenter who hopes to successfully advocate in court or in a meeting will do so without preparation and practice. Just as it is true that a comedy audience only sees the 15 minutes of humorous material, not the hours spent preparing, so the jury, judge, and board of directors do not see all the time spent preparing for trial, argument, or meetings. Yet, they *would* “see” the absence of that work were a trial or presentation done without it. Beyond the process of research, and evidence or market data review, a polished performance should be developed, tried out, and refined repeatedly, especially if the goal is to be able not just to recite a script, but to present in a convincing, engaged way, using only bullet points and highlights as the map. Preparing and rehearsing (out loud) in advance will help with the discovery of whether the presentation holds together, how it sounds (as opposed to reads), how to best deliver, and how to simplify.²³

■ Be Prepared to Pay Your Dues

Just as young lawyers or businesspersons should recognize that they will not walk out of law school or college and immediately be first chair trial counsel or the lead presenter of an important initiative to the board of Alphabet, so rising comedians must accept that they have to “pay their dues.” This means “putting in hours on the open mic circuit, working as a door guy for a club, and allowing your work to get second billing to someone more famous before you headline yourself.”²⁴ It is the rare comic who does not have to work beginning with open mikes, small clubs, and similar settings. For comedians, the process of learning and development includes not just writing and rehearsing, but studying what makes up “humor,” learning the process within the market, watching and understanding seasoned professionals, learning how to handle off nights, flubs, and hecklers, and even taking stand-up comedy classes.²⁵ Putting in the time will include writing and performing material that sounded great on paper, but to which the audience is nonresponsive or worse; when that happens, it is an opportunity to learn from the “customer,” and adjust.²⁶

Law school graduates typically enter the profession knowing that they will have to spend years “behind the scenes,” working their way up to a “leading role.” Many choose to do so not within the firm or even practice to which they aspire, but instead in an environment where the work and the other professionals will provide important lessons, experience, and guidance. Similarly, recent business school graduates realize that whether their goal is to work within an established prestige entity, or to “be their own boss,” success usually requires long hours, “years of

²³ Witt, *supra*.

²⁴ K. Curren, “7 Similarities Between Stand-Up Comedy and the Law” (2012), <http://bitterempire.com/7-similarities-standup-comedy-law/>

²⁵ “What Makes A Good Comedian,” <https://comedypreneur.com/what-makes-a-good-comedian>

²⁶ See T. Meitner, “How to Learn Storytelling From Stand-Up Comedians,” *The Writing Process*, <https://prowritingaid.com/art/1430/the-master-storytellers-you-re-ignoring---and-how-to-learn-from-them.aspx>

heartache, rejection, and failure,” tenacity and persistence²⁷ and learning from studying those who have succeeded. For those starting out in the professions, truly successful stand-up comics offer an atypical (and amusing) role model to emulate. Either way, “you begin as an apprentice, and you must put in the time before you can rake in the benefits of being a headliner or partner.”²⁸

■ Embrace Your Nervousness

There are two types of speakers: Those who get nervous and those who are liars.

Mark Twain

Virtually every primer for stand-up warns that comedians are going to bomb, especially when they are just starting,²⁹ and that nervousness is par for the course. In stand-up courses, students performing jokes that that are hilarious on paper discover that once on stage, the audience may not be receptive. Many comics – especially newer ones – are nervous before performing, and may not overcome their nerves.

In fact, experiencing “nerves” can be beneficial. As Stephen Rosenfeld notes, nervousness gives the speaker energy and a degree of focus. They become easier to control once one realizes that the audience cannot see one’s nerves, but only sees the excitement.³⁰ That realization, coupled with recognizing that in almost all performance settings, the audience *wants* you to do well,³¹ can help the fledgling comic get through stage-fright, and perform well while accepting some degree of mental stress. As a result, the audience sees “joyous communication”³² or, in the case of some comics (like Rodney Dangerfield) who appear to “wear their nervousness on their sleeves,” it becomes part of the act. Either way, the speaker’s anxiety becomes a positive aspect of the performance.

Lawyers arguing their first appeals or motions of substance, or trying their first cases, are often understandably anxious going in. Business persons making their first board presentations, or making a pitch which is high profile or upon which there is significant impact from the outcome, can be similarly uneasy. (For some, these nerves never go away completely.) Stand-up comedians serve as examples that:

²⁷ C. Walters, “Want Business Success? Paying Your Dues Is Part Of Making Your Moves” (2021), <https://charlenewaltersphd.medium.com/want-business-success-paying-your-dues-is-part-of-making-your-moves-89c258ca7dbf>

²⁸ Curren, *supra*.

²⁹ See e.g., P. Bromleu, *Breaking Into Stand-Up: 10 Tips for Beginning Comedians* (4/13/2018), <https://www.liveabout.com/tips-for-beginner-stand-up-comedians-801155>

³⁰ S. Rosenfeld in Nevins, *supra*.

³¹ See Patricia Fripp in T. Droste, “Public Speaking Made Easy,” <https://www.monster.com/career-advice/article/public-speaking-made-easy>

³² S. Rosenfeld in Nevins, *supra*.

- You should embrace your nervousness. It can make you more focused and sharp while “in the arena.”
- No one knows how anxious you are (unless you tell or telegraph it).
- You can help build your confidence by over-preparation. Just as comedians rehearse their routines over and over before performing, know the evidence, facts, law, and arguments; and then review them again. Understand the facts behind and the purpose of the presentation being made in the business setting, and then study it again. “Knowing your material will give you greater confidence, and the ability to be more spontaneous with your language.”³³
- If you’re nervous, find ways to handle it. Just as a comedian may hold onto the microphone stand to steady his shaking hands, you can adopt hand-held props (like a pen), certain phrases, or other means, to give yourself an anchor, so long as in doing so, it does not become obvious.
- Focus on what you’re telling the audience, not on yourself and how you think you are coming across. A comedian faced with stage fright needs to not think about what he looks or sounds like on stage, but instead on the audience, the material, what he wants the audience to hear and experience, and the laughter and enjoyment of the audience. Similarly, if when making a presentation or trying a case, the speaker concentrates on the business plan or evidence, how to convincingly offer and explain them to the listeners, and responding respectfully and effectively to their questions or reactions, there will be no mental room left for self-attention or jitters.³⁴
- You should not require perfection. Just as comedians may have off nights, may be faced with an off audience, may discover that a joke that was hilarious on paper or with family is met with silence (or worse) when performed on stage, or may lose their trains of thought, so lawyers can get derailed during an examination or argument, and business presenters may be asked questions for which they do not have a complete answer at their fingertips. Relax. It happens. Rather than let the immediate problem spiral into something worse, both skilled comedians and business and legal presenters try to refocus, quickly get back on track, and not let their nervousness compound the situation.

■ Practice Failing, Falling, and (Hopefully) Getting Up

³³ T. Chilvers, “11 Stand Up Comedy Tips To Improve Public Speaking” (2018), *The Colin James Method*, <https://colinjamesmethod.com/comedy-tips-improve-publicspeaking/>

³⁴ See Creative StandUp, “50 Best Stand Up Comedy-Tips,” <https://creativestandup.com/50-best-stand-up-comedy-tips/>

Just like litigation, performing standup requires resilience. “Not every joke works. Many bomb. . . . It builds character and it teaches you that just because a speech or presentation does not go perfectly, it is not the end of the world.”³⁵ Similarly, examination questions may not get the desired answer, courts may not be receptive to some arguments, and board members may look skeptically at parts of a presentation; regardless, lawyers and business presenters need to put that behind them, and continue with the process of persuasion.

Failing on stage is “one of the most difficult things to get used to.”³⁶ “Becoming proficient at stand-up comedy requires some trial-and-error.”³⁷ Jokes or sketches that bomb are opportunities to learn, both as to what material does or does not work, and also how to move on (rather than freeze³⁸) when you fail on stage. Johnny Carson was known as the “Master of the Save;” as Carl Reiner recalled, “When a joke would bomb, you wouldn't worry because you'd know he'd just make seven jokes out of it. He always had a saver at the back of his head, just in case of emergency.” While other successful comedians may not have that same skill, being able to deal with a tough crowd, the bad reaction to a joke, an off evening, or other adverse stimuli is critical if one is not to wash out.³⁹ As one songwriter said, “A kick in the *** is a shove in the right direction.”⁴⁰

Lawyers and businesspersons may wish that every day will be one filled with success and triumph, but reality has another opinion, and it triumphs. While long-term, learning lessons from the experience is important, it is equally critical in a trial or presentation setting to be prepared to accept the mistake or misstep, and move on in a convincing way. Whether that means smiling when returning from a sidebar conference where the judge has shown disdain for your argument, or being ready with alternative proposals should the board be nonresponsive to your first strategy, as Vince Lombardi said, “It’s not whether you get knocked down, it’s whether you get back up.” Learning to do just that requires both some advanced planning, and experience gaining resilience, preferably in less-critical settings.⁴¹

■ Authentic Delivery Trumps Almost Everything

There are few comedians who have succeeded without having a style of presentation that captures and holds the audience, and is their own. Whether it’s a deadpan comedian like

³⁵ Manner of Speaking, “Stretch Your Speaking – Stand-Up Comedy” (2018), <https://mannerofspeaking.org/2018/01/25/stretch-your-speaking-stand-up-comedy/>

³⁶ Canters, *supra*.

³⁷ Creative Standup, *supra*.

³⁸ An example of an experience comic professional who let this lost train of thought become a total derailment, see Jerry Seinfeld’s freeze up in *Comedian*. See <https://vimeo.com/195895455>

³⁹ A lengthy discussion of reasons for failure on stage, and how to use it, can be found at E. Winter, “Turning Failure Into Inspiration When You Bomb on Stage” (2018), <https://medium.com/s/everyones-a-comedian/turning-failure-into-inspiration-when-you-bomb-on-stage-3e929b4f705b>

⁴⁰ D. Gans, “Shove in the Right Direction” (2005).

⁴¹ For an in-depth discussion, see E. Moss, “Choosing Resilience,” prepared 2018 ALFA International Client Seminar. https://www.alfainternational.com/filebin/Closing_Session- Moss.pdf

Bob Newhart, Steven Wright, Tig Notaro, or Rita Rudner; hyper-active comics like Robin Williams, Sam Kinison, and Bobcat Goldthwait; or others who offer their own unique approaches, all have built “brands” based upon their personalities and style (or styles) of delivery. All have mastered the arts of using the right tone, the right emphasis, pacing, avoiding rushing, pauses, and choosing “funny words”⁴² where others might suffice. Getting there requires study of other comedians, practice, and failure (more about that below), and then developing one’s own “style.”

Stand-up comedy and trial practice involve a similar kind of performance, in that the performer must prepare his written material and then ‘play himself’ by speaking in front of a group. ... Compare that type of performance to one in which the artist utilizes a craft such as acting, singing, or dancing. With those arts, the vulnerability comes from the expression of emotion through art. With stand-up and trial work, the vulnerability comes from being oneself while trying to produce a result from a group of people.⁴³

While professional comics write and rewrite and rewrite their material, they are cautioned against memorizing a sketch and performing work-for-word. Doing so makes the comedian sound robotic. Because a memorized speech, by design, is presented “as is” (regardless of the listeners’ response), it removes the connection (and the *pathos*) that occurs when the presenter is speaking and reacting to the audience. Even worse, if the comedian gets sidetracked (by forgetting words, by heckling, by emotion, or from the myriad of unexpected stimuli during the performance), the likelihood of derailment (and worse) grows exponentially. Instead, comedians are taught to “memorize what you want to talk about . . . and then simply talk about it.”⁴⁴ This can take the form of memorized bullet points or highlights, as well as certain well-tested phrases or short segments that will be part of any performance. This allows the comic to truly and authentically respond to the audience, make them part of that evening’s “presentation,” and also not panic if at some point things don’t go as “scripted.”

While the trial of a case or a board presentation may not be intended to provoke laughter or other outwardly expressed emotions, it remains true that to hold and persuade (rather than distract or bore), the presenter should have (or develop) a style or persona that (a) matches his or her personality, (b) fits the situation, and (c) keeps the listeners interested. Just as in the stand-up world – where there’s nothing to keep the audience entertained but the microphone and the comedian – trial lawyers and business presenters must develop the ability to directly engage the audience, and studying how professional comedians do so can be a rewarding (and fun) way to learn.

■ Be Flexible

⁴² N. Simon, *The Sunshine Boys* (1972).

⁴³ K. Curren, *supra*.

⁴⁴ See Creative StandUp, *supra*.

Unlike actors, stand-up comics do not perform in a closed studio or stage, repeating lines which were scripted for them to recite (in the case of stage actors, each and every evening). Instead, each night they perform before a new audience with its own unique mix of people (many of whom have consumed varying degrees of libations), in a new environment, with a wide array of possible extraneous stimuli (cell phones, malfunctioning tech, loud patrons, kitchen fires, and other distractions). Some jokes may be hilarious one evening, only to crash and burn with the next audience. Some audiences may uniquely find a particular line to be amusing, offering the attentive comedian an opportunity to build upon that point. Other evenings may bring more than the usual number of hecklers or disrupters, who while relatively rare at open mike nights,⁴⁵ can range from incomprehensible drunks, audience members who wrongly believe their banter to be amusing, people who decide to chatter with their friends as if sitting in a restaurant, and other attention seekers who loudly try to shift the focus to themselves.⁴⁶

Each of these situations requires a different flexible response. In addition to learning how to address (and perhaps even benefit from) negative interruptions,⁴⁷ the best professionals constantly observe and listen to the audience as the routine progresses, in order to see what is, and is not, working. In doing so, they find that lines which they thought were nothing more than transitional or throw-aways may generate some chuckles or other responses within the audience. This creates an opportunity for the comic to stop the narrative, and explore and embellish upon that topic or line, creating more laughter where it had not been planned.⁴⁸

Stand-up comedians also need to be ready for anything, and to be ready to “call an audible” and switch material when jokes do not work, or when the circumstances change.⁴⁹ This can include talking to individual members of the audience, trying to get one person to laugh, or otherwise working the room.⁵⁰ None of that is possible if the comedian is reciting and repeating verbatim a scripted performance written with great care in advance.

While it is unlikely that a drunken juror will badger trial counsel in the midst of closing argument, or that glasses will crash to the floor in the middle of a marketing presentation, interruptions and less-than-optimally engaged (or worse) listeners are part of both litigation and business. Whether it is because one’s tech decides to malfunction, because the business target gets a call part way through the pitch, because one of the board members dismissively speaks over the presenter, because the court is hearing arguments running counter to its expectations, or because the court has sustained objections regarding evidence which counsel planned to cite

⁴⁵ To a large degree, that is because the audience at these “minor league” clubs is often predominantly other comedians waiting their turns to perform. L. Carter, “Dealing With Hecklers In Stand-Up Comedy” (2022), *Basic Comedy*, <http://basic-comedy.com/dealing-with-hecklers-in-stand-up-comedy/>

⁴⁶ *Id.*

⁴⁷ Carter offers specific tips for dealing with hecklers, for instance, that avoid alienation and escalation.

⁴⁸ Examples include Cosby’s interactions in “200 MPH” cited above, and Tig Notaro responding to the audience’s reaction to an introductory line while describing talking to her cat. See <https://youtu.be/E99vMPQLB74>

⁴⁹ S. Rosenfeld in “Learning Laughter, *supra*.

⁵⁰ *Id.*

during closing, presenters need to be prepared to adjust, preferably not just without looking disrupted but in a creative, positive manner.

Moreover, by monitoring how the jury or business audience is reacting, the presenter may find an unexpected opening to hammer home a point in her presentation (or, on the other hand, to pull back on a subject that is clearly alienating). Just as Ms. Notaro used soft audience chuckles as a signal that she should halt her narrative about her conversation with her cat to offer an amusing aside about a figure of speech she had adopted,⁵¹ so watching for jury (or judge) responses to questions or arguments, or a customer's especial interest (or lack of interest) in a facet of the services being presented, may warrant adjustment, whether by enhancing or shortening that element of the presentation, or offering more foundational information. Being prepared to proceed and convince when the projector refuses to show the PowerPoint slides, or when the trial presentation software goes askew, is both the hallmark of experience, and helps build credibility with the audience.

When next watching a professional comedian, listen to how they listen, and use that as a guide to being flexible on trial or in meetings.

■ Use Humor, But Judiciously

A person without a sense of humor is like a wagon without springs. It's jolted by every pebble on the road.

Henry Ward Beecher

While trials and presentations are, by definition, serious matters, they are also part of life's experiences for all engaged in the undertaking. Still, there are experienced trial lawyers who strongly admonish against humor in any litigation setting (including depositions, briefs, and trials).

Any dispute between parties that has become so rancorous that the court's intervention is required is inherently not funny, at least to the parties. Jokes at your opponent's expense are inflammatory. Jokes at the expense of your client are reprehensible.⁵²

Ms. Kole cautions that the use of humor may alienate others, shows bad judgment and a lack of decorum, and poses the risk of angering, alienating, or at least confusing others. Thus, it is Ms. Kole's advice, "Don't be funny. Your clients' problems are serious, at least to them."⁵³

⁵¹ See link in footnote 48, *supra*.

⁵² J. Kole, "Litigation is No Laughing Matter to Your Clients," *ABA Journal* (2015), https://www.abajournal.com/magazine/article/litigation_is_no_laughing_matter_to_your_clients

⁵³ Kole, *supra*.

In contrast, Philip Meyer (a professor of law at Vermont Law School also writing in the *ABA Journal*) takes a different approach, stating that “the edge of a sense of humor can be a useful litigation tool.”⁵⁴ Professor Meyer continues,

Purposeful comedy can defuse tension, evoke a shared humanity, engage a judge or jury and, most important, provide an alternative narrative perspective. While courtrooms are not comedy clubs, shrewd and strategic use of humor can be powerful and effective.

Whether you accept Ms. Kole’s approach, or that of Mr. Meyer, off-the-cuff or otherwise misapplied efforts at humor are risky at best, and disastrous at worst. As the U.S. Supreme Court warns in its *Guide for Counsel*: “Attempts at humor usually fall flat.” Even worse, however, is that if no one “gets” the joke, it may alienate the audience. Worse, if the joke itself is offensive or inappropriate,⁵⁵ if it “comes at the expense of the weak, the victimized, the vulnerable or the disempowered,”⁵⁶ any connection that may have been established with the judge, jury, or corporate audience will be lost, one’s credibility may be irrecoverable, and it can be disastrous to one’s case or cause.

Despite these concerns, however, properly used humor offers unique possibilities. It can help connect the presenter with the audience, serve as a means to recover from rough spots, and sometimes be a “hook” in the narrative that will make it even more memorable. Indeed, if expertly applied, a humorous response may be the best way to softly turn a “heckler’s” challenge into a net positive, with the rest of the “audience” and sometimes even with the heckler.

Still, just as professional comedians write, re-write, rehearse, test, and re-write before offering jokes to an important audience, so litigators and presenters should think closely well in advance of the actual event about what humor might be interposed, when and how it could be used, and whether there is any risk given the audience.

■ The Beginning and End are ... The Beginning and End of It

Regardless of whether it is a concert, a political speech, a sales pitch, a closing argument, or a one-hour comedy routine, the most important parts are the start and the finish. It has long been recognized that because of the “serial position effect,” people are most likely to remember the first and last items in a list, and to recall the middle items the least.⁵⁷ This, in turn, is considered to be the result of two different elements: the tendency to recall earlier words

⁵⁴ Meyer, *supra*.

⁵⁵ Ms. Kole offers several examples from U.S. Supreme Court arguments that should be cautionary.

⁵⁶ Meyer, *supra*.

⁵⁷ The serial position effect has been the subject of discussion and analysis since the 1913 studies by German psychologist Hermann Ebbinghaus. A discussion about and research documenting the serial position effect can be found at S. McLeod, “Serial Position Effect” (2008), *Simply Psychology*, <https://www.simplypsychology.org/primacy-recency.html>; see also K. Cherry, “What Is the Serial Position Effect?” (2017), at *Explore Psychology*, <https://www.explorepsychology.com/serial-position-effect/>

(known as the primacy effect), and the tendency to recall later words (the recency effect). Notwithstanding all the effort that might be made, the middle part is simply not recalled as well.

When writing a musical set list, performers are advised to open with a strong song to grab the audience, and finish with a memorable and exciting number.⁵⁸ Not only does this help the audience leave with favorable memories, but opening with one's best material establishes credibility and draws the audience in.

Comedians (and other performers) are thus taught: "start strong and finish even stronger." Beginning with jokes or sketches that are well-tested and reliable creates a first impression that will make the audience more receptive as the set goes along, and establishes the comic's credibility. Then, finishing with material – whether it be a sketch, a one-liner, or some other form of joke which has proven to be hilarious – will leave the audience with a positive note to remember. Thus, it has been recommended to use the second-best joke at the beginning, and the best joke at the end.⁵⁹

Many counsel begin their trial statements and oral arguments with "boilerplate" language (such as "May it please the court"). They may also start off with generalized references to the law or a 35,000-foot view of the case. Similarly, a business presentation may lead off with a general overview of the speaker's company, or the two companies' relationships, or other information or statements that are not specific to what is being urged.

While these approaches may be considered the "norm," following that form is to miss one of the two most important opportunities to reach the audience with something memorable. Just as comedians should lead off with some of their best material, the beginning of an argument, a statement, or a board presentation may be one of the best opportunities to interpose a critical theme or fact, to capture the listeners' attention, and to have them remember. There is always time in the middle of the trial, argument, or presentation to go back to the expected but less important language or material. Opening with something compelling, which is both notable and captures the audience's attention, can establish a connection and a memory that will carry throughout the remainder of the time with those listeners. Similarly, finishing with one's strongest arguments, or with the most compelling reason why to agree with the speaker, not only leaves the listeners with positive impression, but because of the recency effect, it is likely to be the part of the presentation best remembered.

Conclusion

Search out and watch professional stand-up comedy, whether live, online, or through various recordings or services. (After all, who said learning can't be fun?) But, do so in a purposeful way

⁵⁸ See D. Keyes, "How to Write A Set List For Your Next Live Gig" (2021), *DK Music Business Academy*, <https://www.dk-mba.com/blog/how-to-write-a-set-list>

⁵⁹ Handel, *supra*.

which likely differs from past experience: not just as a passive (and amused) audience member, but as if you are taking classes on interactive and effective trial and business presentations.

Focus on how the comedian begins her show, and how she tries to immediately engage and build credibility with the audience. If the comedian uses narrative or longer form, what kind is it, how does it build, how often does it elicit laughs, and how does the comedian keep the audience's attention until the punchline. As the routine continues, listen to and watch both the comedian and the audience, to see whether the latter gives signals (intentional or not) picked up by the comic, and how she uses those signals to modify what she is doing.

When a joke fails, does the comedian do a Carson-esque "Save," does he use some other approach to keep the show going despite the "bomb," or does he get thrown off track? If someone heckles, or if an unexpected external stimulus is presented, does the comedian ignore it, address it, or even integrate it into the show?

Consider the ending. If the comedian builds to a strong finish, how does she do so? Does she build up to a crescendo, or is it a humorous final joke that on its own leaves the audience laughing?

Finally, when the show is done, look back on how it played out. Did it appear that the comic was simply repeating – albeit with great skill – lines written and memorized? Or, did she create a unique performance that evening by using the stories and points developed with great effort, and then, through well-honed presentation techniques, involving the audience so that what occurred over 60-75 minutes was entertaining, engaging, convincing, and memorable?

After all, isn't that what we, as trial lawyers and business presenters, are hoping to offer our "audiences?"