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Whose Case is it Anyway?

The Role of Improvisation in Storytelling in and out of the Courtroom

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Whose Line is it Anyway?

A. Background

- *All the world's a stage,
And all the men and women merely players*

As You Like It, Shakespeare (1623)

If you have ever seen the show “Whose Line is it, Anyway?” you’re familiar with the concept of improvisational (improv) theater. At its core, improv is a theatrical performance where the content is made up on the spot. Improv “is the art or act of improvising, or of composing, uttering, executing, or arranging anything without previous preparation.”¹

“Whose Line is it, Anyway?” featured a panel of actors performing “short comedic scene[s] on the spot based on an audience suggestion.”² While the show is probably the reason that the majority of society today is familiar with improv, improv actually “predates the invention of writing, since long before we started writing scripts human beings were telling stories by acting them out.”³

Improv was extremely popular from the 1500s to the 1700s in the streets of Italy with Commedia dell’Arte performers, but the form’s popularity slowly waned over time.⁴ Eventually two individuals, Keith Johnstone and Viola Spolin, reinvigorated improv in the 20th century and shaped it into the craft that we know today.⁵ Johnstone believed theater “had become pretentious” and introduced improv into his teaching methods, as did Spolin, who is widely considered to be the American Grandmother of Improv.⁶

B. The Benefits of Improv for Lawyers

¹ www.dictionary.com/browse/improvisation

² www.mediationblog.kluwerarbitration.com/2012/02/15/whose-trial-is-it-anway-using-improv-to-help-lawyers-present-more-effectively/

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

- *There are two types of speakers: those that are nervous and those that are liars.*

Mark Twain

When most people think of improv, their first impression is that improv is just a form of comedy. But we all have either seen or heard of jokes falling flat in the courtroom. Take, for example, the knock-knock joke that Don West used in George Zimmerman’s criminal trial in 2013.⁷ West’s joke was met with silence and stares. And, of course, who could forget Jay Floyd’s sexist joke to start oral arguments in *Roe v. Wade*?⁸ The official record shows that there were three long seconds of silence after Floyd’s joke, and Chief Justice Warren Burger “was so furious that he almost rushed right off the bench at [Floyd]. He glared him down.”⁹

Knowing one-liners can, and often do, backfire, why then would an attorney ever want to try to be funny or use improv at trial? The simple answer is that “improv is not just about being funny. It’s about thinking on your feet, storytelling, working as a team, and inspiring your confidence to try new things to improve in day to day interactions.”¹⁰ Those who excel at improv “have an ability to walk onto a stage and connect with an audience effortlessly. It may seem like this is because of their innate acting talent, but that’s only part of it. Improv comedy training allows gives these actors a toolbox of learned skills that allow them to bring their talent to life onstage.”¹¹

Lawyers who have tried improv have also observed that “[t]here are certain aspects of improvisation that are strikingly similar to trying a case.”¹² Indeed, “[i]n both disciplines, the key concept is the creation of a new, temporary reality. In improvisation, the actors must draw the audience into sharing the constructed reality of the stage. Then, and only then, will the audience be able to ‘see’ the objects and characters portrayed.”¹³ Similarly, in a trial, “the lawyer must draw the jury into sharing the re-constructed reality of past events – often times tragic events – such that they ‘see’ what happened, even though they weren’t present to witness the original events.”¹⁴ Improv training “helps an attorney

⁷ www.attorneyatwork.com/learning-improv-lawyers/. West’s opening statement began, as follows: “Knock, knock. Who’s there? George Zimmerman. George Zimmerman who? Congratulations, you’re on the jury.” www.slate.com/news-and-politics/2013/06/zimmerman-knock-knock-joke-defense-lawyer-don-west-began-his-opening-statement-with-a-knock-knock-joke.html. No one laughed, and West later promised not to tell any more bad jokes. *Id.*

⁸ www.salon.com/2013/07/26/8_horrible_courtroom_jokes_and_their_ensuing_legal_calamity/. Floyd, arguing opposite two female attorneys, began by stating “It’s an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.” *Id.*

⁹ *Id.*

¹⁰ <https://theactingattorney.com/generallyspeaking>. As another writer noted, “[m]any confuse improv with stand-up comedy, but the two styles couldn’t be more different. Rather than spending time writing and memorizing jokes, improvisers act out a scene presented to them just seconds before they begin performing.” www.improventures.com/press/lawyers/index.html

¹¹ www.attorneyatwork.com/seven-business-lessons-lawyers-improv-comedy/

¹² www.deblislaw.com/improv-your-life/

¹³ *Id.*

¹⁴ *Id.*

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meet a jury where they're at, and not overwhelm them with just facts and data."¹⁵ It aids lawyers in moving beyond "talking to" juries and learning how to "talk with" them.¹⁶ Simply put, improv "is about performing in the moment" and "being fully responsive to the world around us."¹⁷

The underlying goal of improv is to take "a scene and generate a story from that scene."¹⁸ At their best, "[l]awyers 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."¹⁹ But stories must evolve, particularly during trial when things don't go as planned. At trial, "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 behavior of those involved in the trial can offer insight that was not available before."²⁰ Improv offers lawyers the skills necessary to adapt their trial stories.

C. The Basic Pillars of Improv

- *The only rule is that there are no rules.*

Del Close

While there are no "hard and fast" rules for improv, there are a number of pillars upon which this artform rests.

1. Yes, and . . .
 - *Just say yes and you'll figure it out afterwards.*

Tina Fey

Improv's primary foundation is "always saying yes to an idea and then building from it."²¹ The magic of improv is "following the yes, building on it, and creating something new."²² In the practice of law, "yes," and" is "essential for creative brainstorming and innovation."²³

2. Listening
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¹⁵ www.attorneyatwork.com/learning-improv-lawyers/

¹⁶ *Id.*

¹⁷ www.attorneywithalife.com/five-tips-from-improv-theatre-for-busy-legal-professionals/

¹⁸ www.mediationblog.kluwerarbitration.com/2012/02/15/whose-trial-is-it-anyway-using-improv-to-help-lawyers-present-more-effectively/

¹⁹ *Id.*

²⁰ *Id.*

²¹ www.attorneyatwork.com/seven-business-lessons-lawyers-improv-comedy/

²² www.attorneywithalife.com/five-tips-from-improv-theatre-for-busy-legal-professionals/

²³ *Id.*

Listening is considered to be “the most important tool of improv.”²⁴ When an improv actor tunes out a member of the team and starts to think about his or her next response, the dialogue suffers.²⁵ The key is being present in the moment.²⁶

3. Make Statements

One of Tina Fey’s instructions for those new to improv is to make statements.²⁷ Indeed, “[a] series of questions is an interrogation. A series of back-and-forth statements is a discussion.”²⁸

3. Team Work

Improv participants must listen to and interact with one another to create an engaging, entertaining sketch.²⁹ One source observed that “[i]nexperienced improvisers naturally tend to want to block their fellow improvisers’ offers, and usually need good coaching to break this habit,” adding that “[i]ronically, this is a trap mediators and lawyers often fell 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.”³⁰

4. Failure

A major component in improv training is learning to improve by experiencing failure. Sketches that bomb can be just as helpful to one’s ultimate success as successful ones.³¹

5. Fear and Discomfort are OK

- *According to most studies, people’s number one fear is public speaking. Number two is death. Death is number two. Does that sound right? This means to the average person, if you go to a funeral, you’re better off in the casket than doing the eulogy.*

Jerry Seinfeld

Most people, even lawyers, are afraid of public speaking. Improv offers a fun way to overcome that fear.³²

²⁴ www.attorneyatwork.com/seven-business-lessons-lawyers-improv-comedy/

²⁵ <https://valawyersweekly.com/2019/09/25/lawyers-find-improv-comedy-skills-help-them-think-fast/>

²⁶ <https://theactingattorney.com/generallyspeaking>

²⁷ www.lawyersmutualinc.com/blog/tina-fey-has-4-rules-to-improve-your-practice

²⁸ *Id.*

²⁹ www.attorneyatwork.com/seven-business-lessons-lawyers-improv-comedy/

³⁰ www.mediationblog.kluwerarbitration.com/2012/02/15/whose-trial-is-it-anway-using-improv-to-help-lawyers-present-more-effectively/

³¹ www.attorneyatwork.com/seven-business-lessons-lawyers-improv-comedy/

³² www.attorneywithalife.com/five-tips-from-improv-theatre-for-busy-legal-professionals/

6. Make Everyone Else Look Good

Building on another's ideas allows your team to have greater success.³³

³³ <https://theactingattorney.com/generallyspeaking>