

Thought leader

Successful ADR depends on improvisational skills

By Jeffrey Krivis

I recently had the pleasure of watching a live taping of the long-running television show "Whose Line Is It, Anyway?" On the show, several actors make up a short comedic scene on the spot based on an audience suggestion. Inspired by the creative genius of the show, and recognizing that every litigated case presents a new situation that benefits from a fresh perspective, I offer a primer on the value in adapting the techniques used by improvisational actors to ADR.

The foundation of improvisation involves storytelling and listening skills, the same tools lawyer's use when trying to influence decision makers. It involves the ability to think quickly on your feet as opposed to sticking to a pre-composed script. It enhances the capacity to cooperate and collaborate, to validate others' ideas while not abandoning your own.

Improvisation demands the highest level of not only listening to, but actually connecting with others. It encourages openness to creativity and inspiration, willingness to take risks, a lack of judgment about a person, and the capacity to say "yes" more often than "no."

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. To the contrary, like jazz music,

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



there is an art and mastery to it that can be studied and practiced for years.

Mediation unfolds in real time

At the mediation table, improvisation demands that parties deal with events unfolding in real time. A completely different skill set is needed than that which occurs in trial, where the scenarios have been rehearsed and analyzed in depositions and focus groups and become primarily scripted dramas for the jury. Scripted mediated negotiations narrow options for solving problems, causing missed opportunities for settlement. Improvising allows the flexibility to stay nimble, and operate more freely and authentically.

The goal for trial lawyers using improvisational techniques in an ADR setting is the ability to truly be "in the moment," as the drama is unfolding. People pay close attention when they sense that a lawyer is operating in the moment – as opposed to when they are trying to re-create something they rehearsed in their head earlier. People can sense that disconnect – they can smell the pretense and the lack of authenticity when the person opposite them is standing outside watching, or is in other ways removed from the discussion.

This obviously is a disastrous problem when your vocation hinges upon the ability to be a compelling communicator, and connecting 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. Improvisation allows lawyers to move past their fears and onto a productive stage.

The concept of "Yes, and…"

A key technique of improvisation is the concept of "Yes, and . . ." Consider the mediation room as the stage and the lawyers as the performers. As two performers develop a scene together, each makes an offer; an offer being anything they say or do that helps define the story of the scene they are creating. It is the other person'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. Saying "yes" does not mean agreeing to their price or position. It's simply a method to keep the negotiation moving forward without putting the brakes on too quickly.

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 added information 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. Ironically, this is a trap lawyers often fall into. 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 an advocate who is mediating a litigated case doesn't listen to the other person's concerns, the other side can completely shut down and the negotiations stall. Mediation experience indicates that if both sides get the opportunity to convey their story, and sense they have been heard, there is a high likelihood of breaking the deadlock that had brought them to mediation in the first place.

Respected trial lawyer Brian Breiter led an improv class for trial lawyers a few years ago. Those that participated in the class found the "Yes, and. . . ." concept particularly helpful. One member observed: "Recognizing, and then stopping myself, from just 'blocking' an opponent and, instead, listening to what they require and attempting to fulfill the need has led to more productive and less frustrating negotiations for me and more successful results for my clients."

Lawyers are storytellers

Improvisation takes a scene and generates a story from that scene. A trial or mediation 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 gets the best result.

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 must incorporate new information and adapt the story as he or she presents the case. Witnesses might give unexpected testimony, new information and evidence can be revealed, and the observation of the behavior of those involved in the mediation or trial can offer insight that was not available before.

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



A lawyer is called upon to continually adapt the version of the story as this new information becomes illuminated. The lawyer who can 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 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

Using storytelling in mediation and trial can challenge conventional wisdom, but seems to resonate when key decision makers are asked what influenced them. A juror's perspective: "One particular trial stands out in my memory, especially the difference between the prosecuting and defense attorneys. The defense attorney spoke first. He was calm, relaxed, looked the potential jury members in the 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 three 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."

Consider the "shifting status" of the players

Improvisational expert 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." Status is a type of pecking order in a story. The person with the lower status defers to the person higher in status. The most successful scenes in a courtroom or mediation drama involve several status changes between the parties. The more subtly you can do this, the more successful the outcome.

The point of status is to focus on social skills and behavior. 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.

Consider the workers' compensation lienholder who sits in a separate mediation room unattended until the end of the day when the litigator needs him to make a deal. Having decided early on that the workers' compensation lawyer was 'low status' makes it difficult to get an appropriate trade-off. Shifting and elevating the status of the workers' compensation lawyer early on creates opportunities for proper bargaining when it is truly needed. The same would hold true of a human-resources professional in an employment case, a claims adjuster in a personal injury matter, or a corporate financial officer in a class action.

Advocates are frequently placed in a position of higher status or 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.

Learning and observing status techniques is an effective way for lawyers to become aware of their behavioral habits and to improve their problem-solving skills by intentionally shifting status in a mediation or trial.

Improvisation is a major tool in the arsenal of litigators. In addition to improving communication, it encourages new possibilities for problem-solving, 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 endeavor.

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


Krivis

Jeffrey Krivis has mediated thousands of cases since 1989. He and his partner, Mariam Zadeh, are the principals of First Mediation, *based in Encino. He regularly handles cases in San Francisco and Carmel/ Monterey. Krivis is the author of two books: "Improvisational Negotiation: A Mediator's Stories of Conflict About Love, Money and Anger — and the Strategies that Resolved Them; and How to Make Money as a Mediator and Create Value for Everyone" (Jossey-Bass).*

Copyright © 2019 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**