



Improv for trial

Be prepared to be unprepared; learn to manage your fear of the unexpected

By Brian Breiter & Joseph Limbaugh

As Attorney Williams stepped into the courtroom, she glanced over her meticulously prepared notes and organized strategies. She felt confident that she was prepared for trial. However, once the trial began she quickly encountered the unexpected. Jury selection did not go smoothly. The trial judge granted several defense motions in limine and precluded important documents from being entered into evidence. Her key witnesses contradicted some of their material statements and the defense scored points during cross-examination. Her painstaking preparation was not enough to prevent her from panicking and her increasing loss of control began to crack her otherwise cool demeanor. Her uninvited stage fright paralyzed her performance.

Confronted by unforeseen circumstances, even the most prepared and confident attorney can begin to tread water in deep and uncharted seas. Hence, it is generally safer to settle a case or mediate it than to try it. By the time a case makes its way to a trial courtroom, all avenues for resolving the dispute have usually been attempted to no avail. The reason for this is obvious. No matter which side you are on and how much you believe in the merits of your case, the courtroom is a risky environment.

Human beings learn at an early age to avoid risk as much as possible. It's a tried and true survival strategy. As lawyers, the need to reduce risk is even greater since our clients' stakes are higher for the outcome of the trial than what they face in most other aspects of their lives. Some legal disputes inevitably have to be tried. When this occurs, we must face the risks our adversarial process presents to obtain the best possible outcome for our clients. It is invaluable to appreciate however, that avoiding risk is not a useful strategy in *every* situation. Sometimes embracing risk is the best choice.

Risky business

The difficulty is being able to practice risk-taking in a safe, low-stakes environment that can give lawyers experience, knowledge and techniques that they can apply to the courtroom. I've found that the best way to teach these skills is by teaching improvisational theater. I've taught, directed and performed improvisational narrative theater for decades and

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could give hundreds of examples of the value of learning improv to be a better communicator, and a better human being, but let me just go through a brief list of how some of these skills specifically apply to trial lawyers and give examples of some of them from actual trials.

First of all, risk is inherent in the activity of improvisation. Performing without a script is by default a risky activity. You are doing something that universally evokes anxiety for human beings (speaking in front of other people) with no preparation, plan, or script. In improvisation the *risk* is the point. The *potential for failure or mistakes* is the point. The skills that improvisers learn to succeed at this activity are the opposite of the strategies most people use in their day-to-day lives, which usually focus on avoiding risk. Improvisers embrace risk, and they learn to accept mistakes and adjust to them gracefully. They also discover that mistakes are sometimes gifts; ultimately, this transforms risk into a valuable resource that should sometimes be embraced.

The untruthful percipient witness

As an example of embracing risk, there was an eyewitness in a case that was 100% against us. I knew the witness was being untruthful, but he showed up at the trial and he told the jury what he saw. It was clearly rehearsed and he said what the opposing lawyer had prepared him to say. However, I knew he wouldn't know what to do if I put him on the spot with something unexpected since his testimony was based on a lie. During questioning he said he observed our client drunk and climbing on a ping-pong table at a bar. The witness said that this went on for three minutes. I asked him if our client was on the table the entire time, and the witness confidently said yes.

So, I said, "OK, let's see how long three minutes is and what you did during that time." I walked over to the jury box, turned my back to the witness, started a timer on my phone and waited. It was risky because I had no idea what would happen, but I had a feeling that the witness would do something stupid, and I was right. The whole time as I waited with my back turned, he made faces, squirmed in his chair and acted inappropriately in front of the jury. He lost all credibility with them and they didn't believe a word of his testimony. I took a risk and it paid off.

Improvisers learn to be effective without planning ahead. No one is going to argue against the value of planning ahead or being prepared, especially when going into trial, but there are some situations where no amount of preparation will serve you. A person trained in improvisational theater sees potential choices, decisions and possibilities that may be better strategies in the moment they arrive than what was planned in advance. This skill is absolutely essential in trial, where things can change unexpectedly and no amount of planning can prepare someone for every possibility. Seeing a road ahead outside of and despite the plan makes a huge difference.

The closing and baking a cheesecake

As an example of doing something in the moment that I could not have planned, in the defense's closing argument, the lawyer was going on and on about how well my client recovered from her injuries, that she was able to go back to her daily activities and do everything she wanted to do. My client, a young woman and single mother, wanted to be a professional baker (she had no experience outside of cooking at home for friends and family). However, the jury really couldn't appreciate how difficult it was for her to work in the kitchen like she did before because there was no video or even witnesses to talk about it.

During my rebuttal closing, I did my argument and responded to the defense positions while "baking a cake" doing pantomime. I set up the room, using spacework, an improv technique, and as I was talking to the jury, I mimed everything that goes into making a cheesecake. I never said what I was doing, I just acted it out. I was constantly using my hands, carrying, mixing, breaking eggs, etc. I saw the jury was nodding along and they were with me. They could now see how difficult it was for my client. After all, everyone in that jury knew what it was like to be in a busy kitchen and now they got to "be in the kitchen" with my client.

I didn't plan this, it came to me when the defense lawyer said, "She'll still be able to bake her cakes just like before." It wouldn't have been as effective if the defense hadn't set me up like this, and there was no way I could have known he was going to say this. By reinforcing for the jury how difficult and complicated the simple task of making a cake is, how much we take it for granted, and how the defense trivialized this experience that was so important to my client, I was able to support the multi-million-dollar verdict that I asked the jury to return.

Nonverbal cues

Human beings are constantly communicating with each other using nonverbal cues, and although there are many teachers and systems for expressing this secret language available to those who would like to leverage it, only improvisers make the study of these nonverbal communications a cornerstone of their skill set. Improvisers need to both be able to notice and understand these subtle behaviors, and to alter their own behavior to best suit the situation and person they are interacting with. This secret nonverbal language is extremely complicated, and it can't just be boiled down to a few simple concepts or techniques. The only way to learn it is the same way you learn any language, by putting yourself in a situation where you are forced to speak it so you can increase your vocabulary, fluency, and understanding of these cues. Improvisers call

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this secret language "status," and it's too large a concept to explain in a short article, but it is essential for telling stories, communicating in a compelling way, regardless of the audience you are speaking to, and connecting with other human beings.

As an example of the importance of observing, being fluent in, and communicating through nonverbal means: There was a case that was about to come to a conclusion, the jury was in deliberation for the verdict and my partner and I were very confident that we were going to receive an eight-figure award. The deliberation was almost complete, but it was the end of the day and the judge decided to reconvene the following morning. I noticed two of the jurors who were very sympathetic to our case leaving the courtroom, and they were very upset. It appeared that they had been crying.

I told my partner that we should meet with the insurance adjuster for the defense, who had been at the courtroom throughout the trial and had made several attempts to meet with us and come to a settlement. We met with him that night and were able to agree on a high-low. My partner was extremely skeptical that this was a good idea, no one else had noticed the two distraught jurors but myself, and no one else might have known how important that detail was. When the verdict was revealed, it was a defense verdict. The low was $3,000,000.

When defense counsel wants a fistfight

As another example, in a case against Terminix, the defense attorney was loud, pushy, and intimidating. He wanted me to "fight with him" and lower myself to his level. I refused to get involved in this sort of conflict. Instead, I took the high road and connected with the jury by finding things we had in common (during voir dire) and showed them that we didn't need to fight with the defense; instead, my client and I connected with the jury and told them his story, allowing them to empathize with my client's situation.

My client had lost his sense of smell and taste because of incorrectly applied pesticide. Every day during the trial, the judge would bring out a big bowl of candy and pass it around to each of the jurors and even the lawyers. The defense attorney, a big guy, would grab a big handful of candy every day. My client, of course, would just sit in his chair and look sad, wishing he could enjoy the taste of the treats.

When it was time for his testimony after about four days, I asked him what the hardest part of the trial had been so far. He said, not being able to enjoy having the candy with everyone else. He said he wasn't mad, just the opposite, he was happy that the jurors got so much joy from a simple thing like a bite-sized Snickers. He was even happy for the defense attorney since he obviously loved the candy so much he would grab several of them at a time and gobble them down. It was at that moment, that the jury, each looked at our client and were able to feel what it was like to be left out, and how devastating it is to lose the ability to smell or taste. It's also an example of something that I could not have planned for, I didn't know the judge was going to bring candy to pass out at the trial, but noticing things like this and connecting them to the message you are trying to communicate is a skill taught specifically in improv class.

Stories

Storytelling and story structure is also essential to improvisers since they must learn to create a narrative in real time as they are performing that same narrative. This is invaluable to lawyers since they need to tell the story of their client to the jury or judge in the most impactful and compelling way. A story is much more than a dry recitation of a series of events. The order in which each development is revealed to the audience, the pace of how a story is told, and decisions about who is recounting which part of the story are all things that a lawyer can have a say over during trial, and that make a huge difference in the effectiveness of the story itself and the ability of those who are receiving it to understand and empathize with the subject of the narration.

We are telling the client's story from the moment the jury walks into the courtroom. The questions we ask during voir dire should be connected to our client's journey. This is a way of dropping bread crumbs, hints, and ideas that each juror will hopefully connect later on in the trial. This allows them to feel a connection with our clients so that they can justify and feel the verdict is merited because they are now part of the story.

For this reason, I always try to weave in the things I find out about the jurors into my client's story. For instance, I had a juror who had told me that she had gone through in vitro fertilization. Although it wasn't a big part of my client's damages, he and his wife also had in vitro procedures to conceive their son. I made sure to bring this up since I knew it would have a strong impact on this juror because they had a similar journey. You can't do this in every case, but when you can, it's very powerful. To use this technique effectively you need to be keenly aware of the information that jurors give you from the moment you enter the courtroom and especially during voir dire, and use opportunities later to connect these details to your case.

Managing fear

Techniques for conquering a fear of public speaking is probably one of the most sought-after requests I get from students. This makes sense, fear of public speaking is the number one fear people express when polled, above fear of death. It's also the heart of improvisation, and it doesn't have a simple answer. I am suspicious of any cure-all for stage fright or those who purport to know that it can be removed 100% with a breathing, visualization, or meditation technique.

If that technique works for someone, that's great, but I've never encountered

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an easy or quick solution. The ultimate goal of improvisation is not to be completely fearless. Performing improvisation, like taking a case into a courtroom, is an openly risky thing to do. Fear helps us to be aware when we are heading into danger, but we should also be aware that everything we do as humans is risky and it is the degree of risk we take that matters. Managing fear for performers is aided by training and rehearsal the same way building endurance and ability for athletes is related to practice and exercise. Putting yourself in a situation where you must perform without a script on a regular basis is the best way I know of to overcome fear of public speaking in other venues.

It's also important to emphasize that the only way to learn these skills is by practicing them in a class or workshop setting. You can't really learn this skill set from a book or lecture, any more than you can learn golf from a pamphlet. I hope your next trial goes well, and I hope you are able to embrace the knowledge that not everything will go as planned in a positive light. All the world is a stage, and so is the courtroom.

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Joseph Limbaugh has over 30 years of professional improv and theatre experience. He was one of the original founders of Dad's Garage Theatre in Atlanta, Georgia, and was the head of the improv school and sketch program at the ACME Comedy Theatre in Los Angeles. He has created workshops with Brian Breiter and Jeffrey Krivis, teaching improvisational theatre techniques to lawyers and has taught professionally at NYFA (The New York Film Academy) in Los Angeles.

Breiter and Limbaugh are the creators of Improv For Trial. Check out ImprovForTrial.com for more information.


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