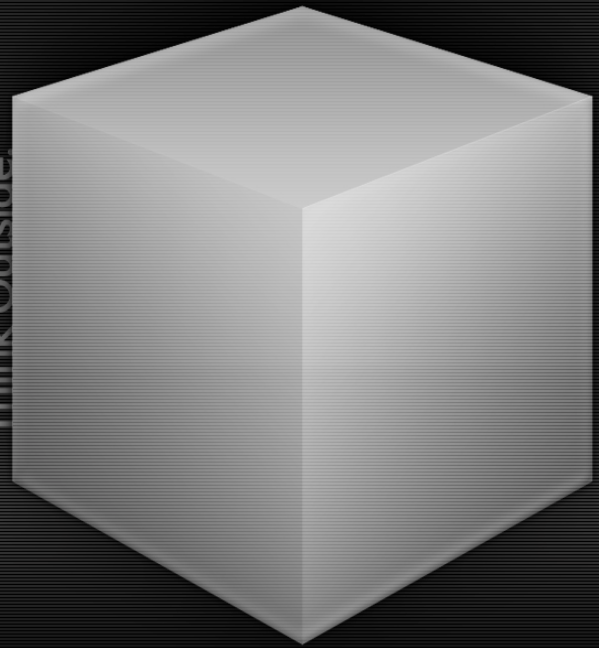


ACTING FOR LAWYERS

(Welcome to the Theater
of the Absurd)

Think Outside.



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the Absurd)**

**Prepared for the
Federal Defender Seminar Middle and Western Districts
May 10-12, 2007
Holiday Inn, North College Street
Charlotte, N.C.**

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ACTING FOR LAWYERS

Welcome to the Theater of the Absurd

"All the world's a stage, and all the men and women merely players. They have their exits and their entrances and one man in his time plays many parts." As You Like It, Act II, ii, 139.

How many years after graduating from law school did it take you to act and feel like a human being again? Too many I fear. Our ivory covered institutions very often take from us the very qualities required to be good communicators: the ability to listen, and the ability to feel. Having been stripped of those attributes, we wallow in litigation anonymity, unable to effectively persuade.

The purpose of this exercise is to rekindle the magic of trial work as a performing act. Learn to be yourself, and in doing so, learn to be others. For it is in this metamorphosis we find the ability to transmit the imagery and essence of the spoken work to the most important audience in the world; the jury.

Our tools; the only ones we possess for this task are the voices and the body. We therefore explore, develop, and utilize their potential to the fullest. To do so, alas, sometimes requires a sublimation of our egos. We are not all blessed with the voice of a Burton; the polished presence of an Olivier; the spell bounding sincerity of a Darrow; or the rapier like wit of a Will Rogers.

However, working within confines of our physical being, we can all create our own magic.

To do so, we must realize that impression are critical to the fabric of the task at hand; the art of persuasion. Jurors all have preconceived notions of what a lawyer should look and sound like. They come to a court room expecting to be guided, entertained, directed and ultimately persuaded. So relax, enjoy, listen and learn.

The old adage "You never get a second chance to make a first impression" is as, if not more, important in the trial of a criminal case than in any other facet of life. Being able to meet twelve complete strangers in the formal setting of a courtroom and to be able to get, and hold their attention is the key to winning in the criminal theater. Persuasion starts when jurors begin to formulate their opinions of you as a person and as a lawyer. In order to do that we first need to understand the dynamics of what things impact on jurors; what captures their imaginations; what evokes a response; what lingers in their memories, and creates a memory.

The opening statement therefore becomes your chance to be the raconteur; to tell the tale. If done properly you will be able to effectively do the following:

- A. Deliver information
- B. Establish facts
- C. Convey Feelings

D. Evoke a Response

E. Create a Memory

It is, in essence, the art of story telling.

ACT I

Trial as Drama

The art of story telling dwindles with every passing generation, and with it goes the power to move; to change; to persuade. To tell a story well is to weave a tapestry of the spoken word with the use of our bodies as instruments. To bring a story to life requires raw talent enhanced by rehearsal, genius, improvisation, and most importantly by the wisdom to know the difference.

The true artist can bring to life the theme or plot of the story in a single line or gesture. A now deceased trial lawyer who tried scores of railroad crossing accident case in his career would begin his closing thusly:

"Ladies and gentlemen; this man
represents steel and steam. I
represent flesh and blood."

The lawyer who does not grasp the premise that a jury is an audience waiting to be entertained, caressed, wooed, and thereby persuaded, does a disservice to his or her client and to the profession as a whole.

ACT II

When to Open

(NEVER WAIVE OPENING.)

My psychiatrist friends are all in accord that the doctrines of "primacy" and "recency" dictate that we should seize the first, last and every opportunity to address the audience (jury).

If there is a constant in this area, it must be; open at whatever opportunity you may have to maximize impact. If you have a luxury of making the last argument to the jury, do it. Your opening statement will set the tone for the trial as well as acting as a road map for the jury.

ACT III

How to Open

Every lawyer must have a "game plan." An overall strategy emanating from careful pre-trial planning and towards which all other parts of the trial logically lead the trier of fact.

To be consummately prepared for this part of the trial takes hours of painstaking creating, eliminating, adding, changing, and ultimately digesting all facets of the trial into a moving, touching and understandable story worthy of belief. (KISS - Keep it simple stupid).

Preparation

Establish a theme from the evidence presented and incorporate common experiences of the jurors into the theme. Use book titles, song titles, literature references, even T.V. or radio commercials to grab the jury and give them a reference point. Refer to it often. Make it a refrain. Create a trilogy to emphasize it. Give your case some identity.

eg. "Ladies and gentlemen; this is a case of a woman who loved not too little, but too much," or "My friends, this case is the story of a boy in a cage. Not a bamboo or steel cage, but a cage built in his mind day by day, week by week, year by year. And this boy's jailer was his father."

Psychologically you are creating the imagery of a client who is doomed to commit the acts charged, but who is not morally or legally responsible for the consequences.

Body

Having gotten the audience's attention, move quickly to emphasize the evidence (or lack of evidence) that bolsters your theme. Your objective here is to be concise, cogent, and congruent. Give the jury something they can relate to and believe in. Remember, in many cases you may need just one solidifier on the jury to take charge and be your advocate in the guilty room.

Be brief. I frequently tell jurors in multi defendant cases the

following:

"Ladies and gentlemen; I have some good news and bad news for you. The bad news is that you have to listen to me too. The good news is that I am only going to take twenty minutes of your time."

You will see a marked increase in the attention span of jurors who have been subjected to a lengthy opening by the prosecutor from the Sominex Podium. (Remember - The mind can absorb only so much as the butt can endure).

Caveat: Deliver on your promise. If you tell them you are only going to take twenty minutes; then stand up, speak up, and shut up.

Law

If you must speak of the law, speak English. All too often we fall into the trap of parroting horn book law which holds no meaning for jurors. Countless jury interviews confirm the fact that jurors have very little recall or understanding of legal precepts. Make the law come alive. Use anecdotes, analogies, common experiences, anything which reduces the law to understandable terms. Jurors will subliminally react to your coming to their aid in telling them what the law really means. The use of a theory of the case instruction in plain language does wonders to bolster your closing when thereafter the trial judge reads the instructions verbatim.

Conclusion

Finally, tell the jury what they have been longing to hear; that your client is innocent. This is where you must pull out all the stops. "Primacy" and "Recency" dictate that you loop back to your voir dire to emphasize the theory of the case.

eg. "Remember what we discussed in voir dire. Remember how we all agreed that branding someone as a criminal on the word of drug dealing, convicted felon would be a travesty of justice. I would suggest to you that there is one way to tell when Mr. Martinez (Agent 007) is lying. Watch his lips. When they're moving, he's lying.

or

"Remember how the U.S. Attorney in his opening statement talked about letting the light of truth into this case. Well folks, the sun has set on the governments case and they have left you in the dark again."

Looping back gives emphasis, simplicity, and credibility to what you are saying.

Lastly; finish strong. Leave the jury with the knowledge that their decision will impact not only in your client, but on them as well for the rest of their lives.

eg. "Ladies and Gentlemen; we all know that people make mistakes. That's why erasers are on pencils. If I make a mistake, we have a judge to correct me. If judges in our system make mistakes, we have appellate courts to correct them. But if you make a mistake, there

is no eraser. You can't come back to court tomorrow, or next month, or next year and say, 'I made a mistake.' Please don't make the mistake of finding an innocent man guilty."

Having dispensed with the mechanics of the opening statement, let us now look to the heart and soul of the argument. How to breath life into the spoken word.

ACT IV

What Tools Do I Use

"She speaks, yet she say's nothing."

Romeo & Juliet

II, ii, 12

Speech by itself conveys information. Speech with movement creates interest. Speech with movement and passion creates imagery far beyond the spoken word.

The tools available to us all to create such imagery lies dormant in every lawyer. What we must strive to do is awaken those passions and summon them to our use. It is time to tune the instrument.

A. Voice

Listen to yourself on tape. Have friends listen to you. Do you have a monotonous cadence? Do you speak with a nasal quality? Figure out what, if anything, is wrong with your voice before you try

to fix, or alter it. Take diction lessons, speech lessons, singing lessons. Anything that will get you in tune with what your voice sounds like to your audience.

1. Pitch

We All can and should be conscious of the fact that we can alter pitch to emphasize a particular point. Unfortunately we have been trained to speak in conversational tones which generally translate into a monotone. Monotones will result in lawyers being victimized by the ever present "juro de siesta" (jurors sleeping all the way to the guilty room).

Try exercises involving a piano and modulating your voice to the chromatic scale. Repeat the same sentence using higher or lower octaves and see what your instrument is comfortable with.

2. Rhythm

Machine gun rapidity may let you fill the record with thousands of words. Unfortunately, the jury will probably only remember every tenth word. Likewise, a tortoise like presentation may win the race in Aesop's Fables, but pausing between every word will surely guarantee the "juro de siesta" syndrome (see above).

Try changing the rhythm when you get to an impassioned part of your argument. Create the frenetic imagery of things being out of control by speeding up the rhythm. Try slowing things down and interjecting a pregnant pause when you wish to let a particular point sink in.

3. Volume

Actors talk about filling the theater. We must fill the court room; or at least the jury box. By what I do not mean that we must scream at our audience. Nor are we able to whisper effectively in some settings. To adjust our volume for maximum effect we need to know the size of the courtroom, the acoustic qualities of the room, the size of the jury and the jury box, how close we are permitted to be to the jury, and last but not least, the composition of the jury.

Try putting friends at either end of the jury box and adjust your volume to see if you are too loud or too soft in your delivery to be effective. Positioning yourself before the jury greatly effects volume, but we will talk more of that later.

4. Projection

Speaking from the diaphragm allows you to reach your audience. Projection is inextricably intertwined with volume, but they are not synonymous. Projection allows you to reach your audience without having to shout. It is sometimes referred to as speaking as if you are larger than life. Stage actors can project throughout an entire theater, unamplified, and make each member of the audience think they are being spoken to in a conversational tone.

5. Articulate

The ability to speak precisely, concisely, and to project a

distinct pronunciation of your words is crucial to the art of communication. Jimmy Buffet sings about not being able to pronounce his R's and G's when he's speaking Southernese.

Too often we tend to run words together or slur them if we tend to speak too quickly. We also tend to drop the endings off certain words when speaking in colloquial terms. The effect of which frustrates the jurors ability to comprehend what word you are trying to us.

Try listening to news commentators, Shakespearian actors, or operatic singers to see how they enunciate, and practice with a tape recorder.

6. Color

Words should spring from our mouths like colors from an artists palette. We are, in essence, artists of a kind. The only difference is that we paint on the canvas of a juries' mind. Jurors remember colorful words as much as, if not more than, the color of the tie or suit or blouse we wear. The choice of a single word may very well shape the outcome of the entire case. As such, we should be aware of the range of colors available to us, and to prepare the palette accordingly.

eg.	<u>words</u>	<u>colors</u>
	sexual intercourse	savage rape
	car collision	window shattering crash
	the body	bloody remains

hurt

devastated

left

abandoned.

7. Vocabulary

In selecting words for our canvas we must strive to not only look for color and simplicity, we must also be careful to avoid the "eses". Remember we are creating a sensory environment which permits the jury to see, hear, taste, smell and feel the sensations created by the words we use. Why spoil the imagery with legalese.

We revert back to our carrels in law school and to the familiarity of terms like "Did you have occasion to," or "I submit for your careful consideration." Speak English. We are not trying to impress a debate coach, or even the judge with our extensive legal vocabulary. Let the cops and prosecutors use that vernacular, while we dance circle around them with our new found ability to evoke responses and create memories.

B. Physical Instrument

As we may be constrained by the type of voice we have; so are we constrained by our size and stature in the courtroom. But just as we have learned that there is much we can do about our voices; so too is there a great deal that we can do with the physical instrument to enhance our presentations.

1. Positioning the Instrument

Understanding that we have a full range of the courtroom to use, why not place our physical instrument in the most

advantageous position in every given situation? The most effective position is a full front 3/4 side view of our body so that the jury is left with the impression that we are addressing all of them. Conversely, the least effective position is that of placing our backs to the jury when trying to make a point.

While seemingly simple in principle, the above information needs to be well thought out and applied constantly during all facets of a trial. For instance:

- a. When examining a witness you wish the jury to hear -- place yourself at the back of the jury box during the questioning. This has the effect of taking you out of the limelight; focusing attention on the primary target, the witness; and making the witness speak up loudly enough for all jurors to hear while maintaining eye contact with the entire jury panel.

- b. Conversely if you wish the jurors not to have the intimate relationship with the witness, then position yourself away from the jury box so that the witness will effect a weak body position having his or her back to the jury.

- c. When examining a witness that you wish to intimidate; invade their space. Take the opportunity to hand them a document and hover over them while you continue to examine. You may even wish to stand behind them while you examine to add to the pressure. The effect can be devastating.

- d. When examining a witness who is unworthy of belief, position yourself in front of the jury box, ask the questions with sarcasm, surprise, disbelief, etc. As you get the answers, let your body and facial expressions register to the jury so that they are more impressed by your reaction than by the answer.
- e. When using demonstrative aids such as easels, blackboards, charts, etc. make sure that all jurors are able to clearly see the focus of your presentation. A 3/4 stance to one side or the other and using a pointer allows the jurors the unobstructed view of the aid emphasized by your commentary
- f. When arguing to the jury, make use of the whole courtroom. Perhaps begin a safe distance from the jury box, but gradually work your way closer to them, and then perhaps range back and forth with your head, eyes and hands. A simple step to one side or the other from center stage may be all you need to reach all the jurors. Remember, this is not a tennis match, so don't run from one end of the box to the other thinking you need to address every juror personally.
- g. In argument the full range of the courtroom. When you wish to emphasize what a witness said, walk to the witness stand and recreate the examination as if the witness was on the stand. If emphasizing what opposing counsel may have said or not said, position yourself in front of his or her table and challenge them to

answer the allegation.

- h. Be creative. Use props to enhance your argument. Lay on the floor, sit in a chair, do anything that emphasizes the spoken work.

2. Gesturing

Gestures command attention; they emphasize the spoken words; they create an atmosphere; they entertain; and they enlighten. Used to excess, they distract the jurors attention and distract your presentation. Economy of movement must therefore be rehearsed and employed.

Dont's

- walk back and forth incessantly
- look away or down when talking to jurors
- fold arms or waive arms
- play with facial hair or hair
- play with change in pockets
- toy with pens, pencils, pads, etc.
- keep hands in pockets
- use notes or the podium

Do's

- use one hand or the other to gesture
- use palms open for friendliness
- pause for emphasis
- drink water (1/2 cup only) to break up argument

- make eye contact with every juror
- use facial expressions to show concern, pity, anger, disappointment, sincerity, and strength.

3. Epilogue

Every actor experiences the butterflies that go hand in hand with opening night. To overcome that stage fright remember the five P's: Prior Preparation Prevents Poor Performance. That equates to knowing your case inside and out. Preparation coupled with rehearsal will overcome all the anxieties that accompany a stage performance.

Remember to tune up the instrument beforehand. Take a drink of water, a few deep breathing exercises, dry your hands and concentrate on the first grabbing words you intend to utter. All else will follow smoothly.

IT'S SHOWTIME!

BIBLIOGRAPHY

(For the compulsive among us)

1. Herring v. New York
422 U.S. 853 (1975)
2. United States v. Stanfield
521 F.2d. 1122, 1125 (9th Cir. 1975)
3. Government of Virgin Islands v. Turner
409 F.2d. 102, 103 (3rd Cir. 1969)
4. United States v. Dinitz
424 U.S. 600, 617 (1976)
5. United States v. Breedlove
576 F.2d. 57, 60 (5th Cir. 1978)
6. ABA "Standards Relating to the Defense Function", §4-7