The courtroom as theater: Is the courtroom just another stage?

Just presenting the "facts" of the case may not be enough to reach the jury

Donna Bader

As lawyers, we study facts. Our heads are filled with them – either the facts of the case or legal principles that apply to those facts. And we are all too ready to give an audience such as a jury "the facts." But are we being truly effective? Perhaps we could improve our skills by learning from those who are dedicated to performing in the theater: actors.

I wanted to investigate what courtroom behavior attorneys could learn from non-attorneys, so I decided to observe a workshop put on by two actors: Katherine James and her husband and partner, Alan Blumenfeld. Seven attorneys signed up for the three-day workshop and they came from around the United States, including such places as Louisiana, Boise, Portland and Los Angeles. I selected two of them and followed their progress.

Why would you spend three days working with actors? Because they can teach you things you never learned in law school or from limited trial experience. Important things like connecting with a jury, or communicating more effectively than the simple, and often cold, delivery of facts.

Katherine James and Alan Blumenfeld

If you were to call Central Casting and ask for two actors who could play the part of your "best friends," they would probably send over Katherine James and Alan Blumenfeld. James is a petite blonde who is filled with energy and is quite willing to hug you on a moment's notice. Alan may not hug you, but he can certainly make you laugh with his dry wit and Long Island accent. They will make you feel quite comfortable and are even willing to do all sorts of things for the sake of trial preparation. But you did not sign up for their workshop to hang out with your best friends. You have work to do.

Katherine James, Thomas Boothe and Alan Blumenfeld

James and Blumenfeld are the principals of Act of Communication in Culver City. They are both actors with a long resume of credits. James favors working in the theater. Blumenfeld continues to act in television and film.

They became interested in working with attorneys when a mentor, Ed Hastings, came back from fulfilling jury duty. Hastings reported that he found himself getting lost during the trial and hoped the other jurors could help him fill in the blanks during jury deliberations. But they were lost, too! When they came back with a verdict of "not guilty," the judge sharply rebuked them for their failure to intelligently consider the evidence.

After that humiliating experience, Hastings formed the idea that there was a real need to teach attorneys communication skills. They began doing workshops in the Bay area, then working for ATLA and NITA. In 1978, they started Act of Communication and right away they began working on a national basis, teaching trial advocacy and witness preparation. They also began taking case work and consulted with attorneys on preparing witnesses.

James and Blumenfeld have worked with over 30,000 attorneys and consulted on nearly 900 trials. They offer workshops for law firms, DVD training, and individual counseling. Sometimes they work together, other times separately.

The attorney players

Thomas Boothe, 56, has been practicing since 1980. After graduating in 1978 from Stanford, he spent two years in business before switching to the legal profession. Prior to that, he had a long list of interesting jobs – working at the Portland Zoo, driving a Pepsi truck, modeling ski wear, scrapping barges, selling waterbeds – that gave him a varied background. In fact, he filled out his application to Stanford while on a plane going to South America.

James and Blumenfeld work with student Boothe (center).

Peter Jourhas is coached by Elizabeth Foley.

Boothe practices out of a home office in Portland, Oregon, and focuses on employment and personal injury law. He relies on referrals from other attorneys and has never advertised. His number isn't even listed in the telephone book!

Boothe has tried 20 cases. "I love them. There is nothing more fun. I enjoy the energy and the need to be emotionally open and intellectually focused. I try to stay in the moment but I still need to look ahead," he says.

He agrees that the courtroom is like live theater. "The trial is scripted out as one would write a play. There is the reality of the performance. And you have the decision-makers watching. I feel strongly that I have a duty to represent the clients very well and to make sure the system works. After all, the consequences last long after the trial and can affect people's futures."

In truth, Boothe looks like who people would envision when they think of a trial attorney. He is tall and handsome with short, gray hair. He seems comfortable in tailored suits and expresses himself with confidence.

I asked why he was interested in attending the workshop. "Because you can never master communication," he replied. "I am concerned about my performance and feel you can never be good enough. Since it can never be perfect, then everything can be better."

He admitted that he is nervous as he prepares for trial but not as he goes into trial. "I tell myself, before I walk in, it's a fine day to die. If I am willing to die, what else can happen to me?"

Boothe had met Katherine James many years before and knew her credentials. "I watched her in action and liked what she was teaching."

Peter Jourhas, 47, seems the exact opposite. He is several years younger than Boothe and appears uneasy about trying cases. When I called to talk to him about the workshop, he was busy working on his opening statement. I knew he spent hours on it. He was working on a case involving a handyman who had been electrocuted while trying to remove leaves from his church's roof. The defendant power company was in violation of several codes that required a safety zone around a building, and the wire was dangerously close, resulting in a terrible tragedy for his brain-injured client.

Jourhas feels the burden of trying to win for his client. Since 1988, he has practiced as a plaintiffs' attorney in Kansas City and has tried 15 jury trials and 50 to 60 bench trials. He was impassioned in his belief in his case. "I want to make sure I win for my client. I care about my guy. He has no one else to help him win and he has no money. He needs a champion. I need to be able to express what is in my heart to the jury. After all, the defense has tons of money. I can't compete on that level. Everything is on the line in me to be able to be the best advocate I can for my client."

Elizabeth Foley

Besides the actors, the workshop leaders included Elizabeth Foley. Foley is a principal in the Chicago-based trial consulting firm of Zagnoli McEvoy Foley (ZMF). They have been performing trial consulting services since 1977, helping around 20,000 attorneys and witnesses. Her firm consists of 28 employees and she is one of the three founding partners.

The firm designs and consults on visual displays as well as witness preparation and jury selection. They also perform surveys and canvassing in preparation of trial, such as supporting a motion for a change of venue.

Even though attorneys can be controlling, she says "they believe in what I can do and that trial consultants have a value. I rarely hear now, as I once did, that they don't believe in our services. The hardest part for me is that I can't stand up and try the case; it is up to the attorney and most will prepare for trial."

Foley was assisted by Jackie Limbo, 29, a fourth year law student at Lincoln Law School in Sacramento. She will be taking the Bar in July 2008. She presently works for the Public Defender's Office as a legal research assistant in the Major Crimes Division.

She is considering a career in criminal defense although she is interested in trial consulting. As a law student, she has argued motions before the courts. She also worked with a sole

practitioner to prepare a case for a nine-week trial. Limbo also enjoys trial preparation and is interested in becoming a litigator.

She was quite excited to come down to Rancho Mirage to help Foley with the workshop. Limbo notes that younger attorneys are more accepting of trial consults. To her, it is part of the trial experience although she knows that other attorneys still view it with skepticism.

She acknowledged that law school doesn't address the skills taught in this type of workshop. Trial advocacy is offered as an elective in school and teaches the student how to follow the court rules. The classes seldom address communication.

At the end of the workshop, Limbo said she couldn't wait to go back to her fellow students and workers and share some of the techniques she observed. "I was particularly impressed with the concept of using space in the courtroom. The young lawyers I've seen will grab the podium and won't let go. This workshop taught me to use space and come outside of that box. For me, I've always avoided staying behind the podium because I am short, and I was afraid I wouldn't be seen."

She finds watching the attorneys invaluable. "This workshop would be especially valuable for young lawyers. They could learn good habits right away so that it became second nature for them to move around the courtroom. It is an amazing experience for young attorneys to attend a class like this."

Act I

Before attending the workshop, each participant drafted an outline of his or her case and prepared a modified opening/closing presentation, which they would deliver to a panel of mock jurors. The jurors were hired from the community. They filled out a questionnaire, detailing some personal details and their backgrounds. They were not given a description of their tasks until they arrived for work.


Students and staff watch a performance from a sound room.

After listening to the presentations, the jurors would fill out a questionnaire where they could write down their opinions about the case and the attorney's performance. Then they would speak candidly as a group about their impressions.

At first, I was skeptical that they would be honest, believing they might want to flatter the attorney (who had left the room). Oh, yes, they could be brutally honest! The video of their conference was recorded and eventually given to the attorney.

As the presentation and subsequent conference were conducted, the other attorneys and staff could observe what was going on by watching a flat-screen TV and using headphones in a sound room. Once the attorney finished his or her presentation and returned to the sound room, the attorney could hear the comments as they were given. Talk about immediate feedback!

After the presentations were concluded, the staff gathered up the questionnaires and made an assessment of each attorney. The problem areas revealed by the mock panel would form the basis for the next day's exercises. In particular, my subjects spotted some weaknesses in their presentations.

Although the jurors were impressed with Boothe's looks, finding him to perfectly fit the stereotype of what they envisioned a real trial lawyer should look like, Boothe needed to move around a bit more and engage his whole body.

Don't play the end of the scene

Boothe was a natural storyteller, but he also needed to keep some of the story from the jury. As Blumenfeld warned, don't play the end of the scene. Foley also chimed in to note that information should be delivered in chunks so the facts could be absorbed before moving on." She said, "The attorney can go longer than the jury. Don't overlook jury fatigue, which will hurt you if the opposition comes in with a simple response consisting of a few items. Put your facts into small packages."

James offered that Boothe was speaking on the exhale and should speak one word on each beat, often sustaining a vowel. Although Boothe was cautioned about slowing down, he was also told to keep the energy up, or not to mistake pace for passion. In short, he needed to identify the facts and vary their emphasis.

Jourhas impressed the mock jurors with his openness and vulnerability. They could keenly feel his passion for his case, but felt he needed more organization. James and Blumenfeld encouraged him to be more of himself and to divorce himself from any structured presentation.

Act II

Now was the time for some hard work. The participants spent the entire day working on their weaknesses and even their strengths. For instance, the use of space was a critical topic. The instructors noted that the ability to move around the courtroom demonstrated more power and showed the attorney

was in control of his or her surroundings. Studies showed that white males used more space, while the elderly, women and children used less (women using even less than children).

We were told that we should not talk and move at the same time and certainly never to show our backs to the jury. They urged us not to be afraid to use space. We might even want to consider anchoring our ideas to specific areas of the room. For instance, if we wanted to talk about our wonderful client, we might stand near to the client so the jury could view both of us. If we wanted to talk about the evil opposing party, we might stand near a blow-up of the accident or in an area that would draw the jury's attention away from the plaintiff.

While the attorney might want to appear powerful during the opening statement and closing argument, that principle did not apply during voir dire when the attorney should take on a more conversational tone.

Act III

On the final day, each participant was to deliver his or her opening/closing using some of the techniques learned during the workshop. Jourhas was voted the "most improved." We knew he worked hard on refashioning and organizing his presentation. He did not sacrifice any emotion, and the jury was struck by his passion for his case. As he had been instructed, he talked about the wrong things the defense had done before talking about his client.

This time was a period of experimentation and with good reason. Jourhas could try a different presentation and not risk any consequences, except poor reviews. He started off with a vivid description of what happens when a person is electrocuted, and it may have been too much for the jurors. They felt there was too much gore and thought he was trying too hard and showed his nervousness.

Jourhas needed to tell the jury about his client because they all had different ideas of what a handyman would know about power lines. One juror, who had some experience working for a power company, thought that anyone could tell the lines were dangerous. Another person wanted to know if the handyman had a background of drug or alcohol abuse. Another juror felt that an ordinary handyman wouldn't know about power lines.

As we expected, the jurors were once again impressed with Boothe. He had learned his lessons of riding on the vowels and telling a story. He had a great approach and presence with the jury. The question arose that if he was the perfect image of a trial attorney, and most people don't like attorneys, did that help or hurt his client?

Another important aspect of this exercise was the lesson that if you, as the trial attorney, do not give the jurors a theme, they will fill it in for you. This was made perfectly clear when Jourhas failed to describe the handyman, opting instead to talk about his horrific injuries. This was also made perfectly clear when Boothe described his client, a professional woman who was being sexually harassed by her boss. The younger jurors couldn't understand why she didn't speak out firmly when the harassment first began, suspecting that she may have invited the flirtation, while the older women jurors, who probably endured harassment before it was acceptable to sue an employer, felt the client was innocent and should be given a large award to teach the company a lesson. Unbelievably, the jurors were willing to award a significant amount of money beyond what they would have given the electrocuted brain-damaged handyman.

What was obvious after listening to the mock jurors was that they had high expectations for the attorneys. They wanted the attorneys to be human and show emotion, but they also wanted them to be more confident and powerful. They expected the attorneys to know the facts, but they believe they are capable of reading facts as well. They wanted something more. They wanted the attorney to show he or she believed in their own case.

Did they want a "show" with all of the bells and whistles? No. In fact, a heavy reliance on PowerPoint worked against the attorneys. Once you have a strong image on the screen, even the attorney tended to defer to the slides and lost the connection with the jurors. The PowerPoint slides should aid the attorney in telling the story but should not become the center of attention.

Eye contact is another important factor. I am not talking about a quick look and then off to the next face. Jurors wanted real eye contact that entailed some acknowledgment of the person.

Check out the program in San Francisco

Four months ago our editor, Donna Bader, wanted an article on improving performance in the courtroom. She'd heard good reports on the Act of Communication workshop profiled here. The article was written and scheduled to run this month when Act of Communication's Alan Blumenfeld contacted us and suggested that they put on a series of low-cost, mini-workshops for our readers (with CLE credits optional). We readily agreed, and the first workshop is planned for Tuesday evening, July 22 in San Francisco. You can get details and register online at www.Plaintiffmagazine.com.

— Richard Neubauer, Publisher

A final thought occurred to me. As attorneys, we can become far removed from what a jury thinks is important because we spend so much time on the details of our cases and on legal research. Presenting our story to a mock jury offers us not only the opportunity to make the case come alive to listeners, but it can also tell us when we've gone too far or not far enough in our presentation. Like actors, we should take advantage of this dress rehearsal because once we enter the courtroom there's no second chance to "get it right."

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