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Pandemic communication

A ROUND TABLE DISCUSSION WITH STAGE ACTORS ON THE CHALLENGES IN COMMUNICATING WITH JURORS DURING A TRIAL IN THE LIVE COVID COURTROOM

Katherine – Taking up the challenge

In COVID courtrooms across the country, lawyers are trying cases live in front of juries.

Often, lawyers feel that they are walking right up the side of the mountain because so much has changed. So much is different. So much seems impossible. Lawyers spend lifetimes

learning how to hone courtroom skills with jurors who they always felt were “reachable.” Now the most experienced lawyer can feel like they are trying their first case again and have no idea how to find the way “in” to that magical connection they always had with a jury.

Lawyers are working harder than ever to get justice for their plaintiff

clients in a world filled with masked-up, socially distanced, plexi-glass-walled-in members of the community who have shown up to sit in their trials. Trials that take place in unrecognizable and hard-to-understand courtrooms.

We are stage actors who train lawyers. Skills that come from the world of the theatre are more vital than

ever. We are discovering things we “always knew” as theatre people magically now apply to the law and communication with jurors more than ever before.

Alan: A theatre secret we never shared before – because we didn’t know we’d ever need to!

I toured the United States with a production of Neil Simon’s *Laughter on the 23rd Floor*. I had been in the Broadway production and for the tour, the production team packaged a portable version of the set, the costumes, props and all the essential elements needed to perform the play.

In every city the stage was different. The size, shape and configuration of stage and audience varied. Sometimes our set fit perfectly. Sometimes it didn’t. In one city the stage was so small that part of the set was literally “off stage” in the wings. So, if you sat back on the couch, the audience couldn’t see you. Nor you them. Weird. In one city, part of the audience was behind the actors. In one city, the audience was on all sides of the actors. So, each time we landed in a new venue, we had to go and explore to see what was different, what was the same and what kinds of adjustments we would have to make.

Actors are very aware of having to adjust to different audiences and different configurations of stage, set and audience. Usually though it is an adjustment made from show to show, from production to production. This was the first time, for me, having to adjust with the same show in different settings. We had to be aware of how to change our focus. Did we have to adjust our volume, the way we spoke? Did we have to change how we made eye contact and physical contact with one another to accommodate the show so most of the audience could see and hear us? Did we have to adjust so that when we “cut out” some of the audience for a section of the show, we could “make up for it” by

making ourselves available to other audience sections for other parts of the show?

The more we could learn ahead of performance, the more intel we gathered, the better prepared we were and the more comfortable and successful we could be in performance.

Kimberly – Gather as much “intel” as you can

You have a checklist for the “regular” courtroom in which you normally practice. You have to make the best “checklist” you can for this one. And for each new one you encounter.

First – know your space. Get familiar with the space by walking around it and making it “yours” in the days before the trial. As you walk around, try out your voice in the setting. Where is it dead? Where is it alive?

Sit in the jurors’ seats so you can get their point of view.

Bring your team. Have them sit in the first row of jurors, begin your opening. Then have three of them move to the second row, continue your opening. Finally have two move to the farthest seats in the house... Keep speaking. Do they hear you? Do they understand you? Do they care? Do they feel you are connecting to them...all of them?

Katherine – More than ever it is about the jurors’ point of view, not yours

When I first started working as a trial consultant (Over 40 years ago!), I spent a lot of time working hard to absorb the big “on the job” lessons I was learning from the best trial lawyers in the country about jury trials. My mind was on fire with:

“Always make the jurors believe you are the 13th juror!”

“If you don’t like your client, how do you think you are going to make them like your client?”

“Lawyers *are* demonstrative evidence!”

And then I heard one that baffled me...

“Make sure you find out if you are in a right-handed courtroom or a left-handed courtroom.”

I looked at the very successful silver-haired lawyer who gave that sage advice as though it was manna from heaven. I said, “What do you mean?” He said, “In a right-handed courtroom, the jury is to my right. In a left-handed courtroom, the jury is to my left.”

What I didn’t tell him was what I was thinking. “Oh, as an actor I know that it is not about my point of view looking at them...but about their point of view looking at me. I can play in any number of theatres and the audience can be in front of me, on three sides of me, in the second balcony high above me, in the orchestra seats way below me and what is important is their point of view. Not mine.”

What once seemed an unimportant skill and concept in a pre-COVID world has become a most important skill and concept in a COVID one.

Andrew – Take the venue for a spin

Ask every possible question of your venue while you are practicing. If you can watch another trial there, do. And question the jurors after about their experience:

“Could you hear the lawyers?”

“Could you see their faces?”

“When the lawyer did “this thing” with his hands, could you see it?”

And, importantly:

“Did you like things better on the Jumbotron or Live?”

While we have always been fans of personal one-on-one connection, one of the things we are getting in juror feedback a lot in alternative venues where the jury is spread out and far from the stand is that they find it easier to watch the witnesses on the big screen.

If you can, try simulcasting like a basketball game in your office as part of a new skill you need to develop for some venues and juries.

Alan – Costuming

What is your face shield like? Some actors say that they don't discover who their characters are until they try on their costumes for the first time...why would you want to do that for the first time in the alternative courtroom?

Katherine – Rehearse in your new costume

Work with it in your office in front of your team and a video camera. Play back. Critique. Listen to everyone. You are smart. You can adjust. You are good at catching on fast. You need to work harder than ever on your presentations for the jurors – your voir dire, your openings, your examinations, your closing.

Maybe you are used to waiting to rehearse each piece the night before as it comes up. You need to run through the whole thing at least once or twice in the office with everyone there in full costume.

Be as ruthless with yourself as you did when you were first starting out as a lawyer.

Andrew – Making your face shield your best costume piece

Always try to get a face shield rather than a mask for you and your witnesses. It makes it much easier for the jurors to connect with you and with your witnesses. Buy your own rather than relying on the court-supplied apparatus. You will find better “stuff.” Once you have it, you have to be willing to take the time to get to “Know Your PPE.”

Is there glare? Does it fog up? Has this witness tried theirs out? *Your witness may be a heavier breather than you are and so cause more fogging up than you do.* Are these the glasses you/the witness will wear on the day? Are you/the witness suffering from fog in both your glasses and your mask? *Purchase anti-fog solution. Made for hockey players, scuba divers, and other professions and keep it in your courtroom “kit.”*

Kimberly – They need to hear you through the shield

This means you are going to have to work differently, not harder. You need to stop thinking about projection – an old-fashioned term and way of thinking anyway – and start thinking about resonance.

Our bodies are made up of resonating cavities designed to amplify the voice. A voice that resonates moves jurors, even through a shield, because instead of bouncing back at you off the plastic, it fills the space between you and the jurors and reaches them.

Warm up the Resonators and tune yourself up like you would a musical instrument with a few easy exercises:

Release physical tension

- Shake.*
- Drop down your spine.*
- Go through your body tensing and relaxing the muscles.*
- Yawn.*
- Stretch.*

Breathe

- Put your hand on your diaphragm (belly) area.*
- Put your other hand on your back directly behind your belly.*
- Feel your breath fill the space.*

Wake up your resonators

Hum into the natural amplifiers of your body:

Lips, face, skull and chest.

Exercise your “articulators” to make your speech clear

- Move your face around*
- Blow through your lips*
- Stretch your tongue out*
- Play with sounds and range of your voice*
- Tongue Twisters: “Toy Boat” “Unique New York”*
- Repeat “vocabulary” words (terms of art) in your case.*

Andrew – The bigger the space, the bigger the delivery

Now that Kimberly has warmed you up, you need to use that warmed-up and resonant voice for the best effect. You

need to work with your voice so that you can express a variety of emotions while still having the volume you need. For example, use pace, pauses, and inflections to offset the fact that you have less volume variety.

Katherine – Inflections and how to use them

An inflection is the music that you do with your voice at the end of a phrase or a sentence. With lawyers, we traditionally teach three kinds of inflection: Rising, Sustained and Falling.

If I were to rewrite the three kinds of inflection using punctuation to make you understand how they sound, that would look like this:

Rising? Sustained – and – Falling.

The Rising Inflection is associated with questions. It is more imperative than ever during COVID that jurors hear your inflection as actually asking a question when you are questioning them (voir dire) and when questioning witnesses. This is not an easy concept for lawyers. In real life, lawyers, like all human beings, ask questions with a Rising Inflection (“Honey, do you love me???” “Where are my keys?????” “When was the last time you saw the baby?????????”). However, in court they tend to ask all questions with a Falling Inflection (“What is your name.” “Did you see the car coming when you stepped into the crosswalk.” “Did you see that Mr. Smith’s car was stopped when you plowed into it.”)

If you are not already a master of the Rising Inflection, now is the time.

The Sustained Inflection puts lists together. It tells the jurors that concepts or ideas are hooked together. It implies to them there is more to come. For example: “He saw the light was red – He gunned his car anyway – He plowed into Ms. Jones – He kept on going – Fleeing the scene of the accident.”

Do you see that I only put a period after the final phrase?

Here’s how many lawyers mistakenly “unhook” a story by failing

to use a sustained inflection: “He saw the light was red. He gunned his car anyway. He plowed into Ms. Jones. He kept on going. Fleeing the scene of the accident.”

The jurors might have been able to sort out what you meant when you constantly used The Falling Inflection in a non-COVID courtroom. Help them understand what you are saying by using The Rising and Sustained Inflections whenever they better serve them and you.

Andrew – Movement

Now, more than ever before, it is time to use movement in a different way to make what you are saying clearer for the jurors. Speak with your body. More so than ever it is important to open up your posture and use your arms and hands. Especially if you are stuck behind a podium.

Substitute focus and gestures for movements. For example, in a car crash case pre-COVID you might stand in one place for the “bad driver,” one place for the plaintiff, and a third spot between the two for the location of the crash. During COVID you can look and gesture to one spot for the “bad driver” part of the story, another for the plaintiff part, and a third for the location of the crash.

Respect the jurors’ airspace. As already mentioned, if you have freedom to roam, remember that people are less comfortable with shared space than ever. Remember how good you were with “reading” them before when it came to how near or how far with a kind of “sensorium” of feeling? You need to practice this with your team in the office, with your family at home. Make sure you can still feel how near or far people want you to be when you and they are wearing masks.

Alan – Positioning

We recently had a client who was, in his words, “Forced to pick a jury while standing in the center of them.” We were able to translate our experience as theatre

performers and directors who work in “theatre in the round” to help him.

When a show is performed “in the round” that means that there are audience members completely surrounding the playing space that the actors and set are in – 360°. Actually, the audience is divided into four “pies.” Each pie is separated from the two concentric pies by an aisle – so there are four aisles.

If there is a single actor onstage, the director will have the actor position himself first by looking at the pie in front of them. The actor will then turn 180° and address the pie that was formerly behind them, but currently in front of them. A turn of 90° for the next address puts the actor in front of the third pie slice. Another turn of 180° puts the actor squarely in front of the fourth slice. The director then proceeds to “mix it up” randomly with the actor so that there is never a “set” pattern to which quarter of the pie is being addressed.

We helped the lawyer in that case understand that they were to be their own director. They were to ask questions of the venire in that first pattern just like an actor in the first part of a monologue.

But then, where they “flipped” next (be it 180° or 90°) was dictated by one of two “cues.” The first cue is from a member of the trial team standing on the outside of the circle of jurors who saw that someone had a raised hand. The second cue was from that activated “sensorium” that a lawyer has – that “feeling” of someone behind you or next to you who wants to speak.

He was able to accomplish this *voir dire* successfully and got a good result from the jury he “picked.”

Andrew – Where do you stand in the COVID courtroom?

Figure out where you want to position yourself and why. Most lawyers know where to stand for a direct and a cross. Remember why you chose those

spaces in your “regular” courtroom as you look for a new space in the COVID courtroom you are now in. Usually, it is about line of sight. You stand back behind the jury box on direct so the witness has less of a turn of the head to talk to the jury.

What is the equivalent line of site in your new venue? If you’re using the Jumbotron option, what angle gets them looking toward the camera? Do you want focus on an exhibit/demonstrative, you, or the witness in any given moment? Does PPE break the line of site for some jurors? Many courtrooms are using dividers/plexiglass. Sit in *every* chair and have someone play the role of you walking about the well. Can you see clearly when there is a break or seam in the plexiglass?

Katherine – Using the “obstacles” to your advantage

We recently worked with an expert witness who needed to make a specific point about “moving from point A to point B.” In a regular courtroom, he would have had a car in each hand so that he could take advantage of the jurors’ sense of touch when explaining how one car hit the other. We had him trace the impact with his fingers on the plexiglass in front of him, accompanied by “still” shots of the “example” cars on the Jumbotron.

With the correct timing, choreographing the moment by the lawyer and the witness, shifting the jurors’ focus from screen to plexiglass and back again, the jurors got to have that sense-of-touch experience that we knew would mean so much at that particular point of the testimony.

Andrew – Acknowledge the elephant in the room

Sincerely thanking a jury is always important. Now their sacrifice is even bigger. No matter what happens for the

rest of their lives, they will always be “Plaintiff X’s” jury. This is a huge edge we have over the defense. Nobody ever says, “I played a big role in a corporation’s life.” It’s an even bigger thing to say, “I risked COVID to help this person” or “I bound together with some courageous people to be a part of what makes our country great.”

COVID is a great reason for your client to not be present if they are elderly or sick or at risk. You don’t have to work so hard to explain what we are all experiencing. You can say, “She wants to be here so badly, but her doctors said no.” Everyone gets it.

Katherine – Always ask yourself – what doesn’t change?

Every great trial lawyer knows that with a jury “Less Is More.” More than ever, people don’t want to be shut up in a courthouse or alternative venue. Attention spans are lower than ever. Resentment for wasted time is even higher. Help your jury by getting them out of there as fast as possible! Ask questions like these that you have learned *always* to ask yourself:

1. Do I need this on cross? *One point per question with as few questions as possible. Remember?*

2. How many times have I said this? *Remember how much they always hate repetition?*

3. Are these witnesses telling the same story over and over again? *Remember how much more effective you have always been when you bring out different “before and after” stories for the jurors rather than every witness talk about Christmas of 2017?*

4. Have I reduced the story of my case to 10 words? *The famous 10 Word Telegram... Remember that?*

Don’t throw out the years and years of hard-earned wisdom you have gathered about how to try a case just because you find yourself in a conference room at The Hilton rather than the courthouse you’ve always tried your cases in.

Much of it is even more true, even more valuable to you *because* of COVID.

Katherine James, co-founder of ACT of Communication™ (actofcommunication.com) is the author of AAJ Presses’ new book “Harvesting Witnesses’ Stories” (harvestingwitnessesstories.com) She is a trial consultant who coaches witnesses and their lawyers to reach, persuade and activate jurors

using communication skills based in the discipline of theatre.

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