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# Developing Alternative Skills with a Purpose



I imagine many litigators like me, after finishing law school and choosing a litigation path, probably had similar goals. To make a difference in front of a court. To persuade a jury. To try cases and argue appeals. Many of my fellow litigators likely

also then learned the reality—trial work is hard! It takes the best, and learning from the best, to succeed at it.

The typical path to trials and litigation “success” sounds familiar to most litigators. We start by supporting a trial from behind the scenes, conducting research and writing “pocket briefs,” then sitting in the courtroom and taking furious notes and handing things up, then moving to second chair, and then, finally culmi-

nating in that first opening statement—the thing we’ve worked toward and dreamed about for years. Yes, it takes time, but the learning process is itself an invaluable tool that maximizes results.

## Trials Were Dwindling before the Pandemic

Mastering the art of litigation requires repeated trials over time. While trials still happen, they certainly don’t happen to the extent they even did five to ten years ago. In 2012, for example, Pennsylvania state courts hosted 1,036 civil trials (.7 percent of all civil matters disposed of); in 2018 there were only 741 (.44 percent). National Center for State Courts Annual Civil Jury Trials and Rates, <https://www.ncsc.org/>. Even in states where the percentage of trials was unchanged, the raw number of trials continue to drop (for example, California retained

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a .17 percent annual trial rate, but saw approximately 500 fewer trials over the same period). From 2000 to 2019, civil jury trials in the federal courts dropped from 3,404 to 1,377 annually. See Table T-1. U.S. District Courts—Civil and Criminal Trials, by District, During the 12-Month Period Ending September 30, 2000, <https://www.uscourts.gov>; see also Table T-1. U.S. District Courts—Civil and Criminal Trials Completed, by District, During the 12-Month Period Ending September 30, 2019 <https://www.uscourts.gov>.

These statistics are from the years before the current pandemic that has undoubtedly slowed trials to a “virtual” crawl (sorry). And even if a trial is possible, if it makes more sense to settle, we certainly can’t advocate trying the case to train our teams. (We have to leave that to the other side, don’t we?)

### How Do We Sharpen Our Skills?

An additional backdrop to fewer trials overall, in the specific context of complex product liability litigation, is that the cost of case resolutions are not going down overall. On the contrary, for toxic tort litigation involving asbestos, even though filings are down, settlement values are going up (30 percent in 2018 and 25 percent in 2019), and dismissal rates are trending slightly downward. NERA Economic Consulting, Snapshot of Recent Trends in Asbestos Litigation: 2020 Update (June 23, 2020).

There is no doubt that people much wiser than I have opinions and theories on why these trends are moving in the direction they are. That’s not my purpose, however. Instead, the point of this article is to stress that we, as litigators, must still continue to build and hone our skills in order to provide the best possible work product and economic value to our clients. We must sharpen our skills at trying cases, at negotiating cases, and managing complex litigation portfolios.

One way to do that is to focus on non-traditional training. With the number of potential trials dropping, let’s look for ways to sharpen the mind and skills that we can integrate with our practice.

### Now More Than Ever, Let’s Be Better People

It goes without saying that, no matter our social, demographic, or political situations,

we can all recognize that we are in a unique moment in time. It’s our first global pandemic in a century, and we are also facing important questions regarding violence, equality, and fundamental rights.

Wherever we may land on the spectrum of addressing those questions is not strictly relevant; but in addressing them, the hope

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is that we will improve as people and as a society. And certainly, it’s my hope that in addition to finding an amazing sourdough starter, you’ve also had the opportunity to branch out in other ways during these lockdowns.

As we continue to branch out, let’s also consider the following question: does branching out and developing new life skills make us not just better people, but better lawyers? Let me continue by examining one example in particular.

### Let’s Talk Comedy and Wellness

We’re all aware of attempts, artful and lame, to insert comedy into law:

We thought that we would never see  
A suit to compensate a tree.  
A suit whose claim in tort is prest  
Upon a mangled tree’s behest;  
A tree whose battered trunk was prest  
Against a Chevy’s crumpled crest;  
A tree that faces each new day  
With bark and limb in disarray;  
A tree that may forever bear  
A lasting need for tender care.  
Flora lovers though we three,  
We must uphold the court’s decree.

Affirmed.

*Fisher v. Lowe*, 122 Mich. App. 418, 419, 333 N.W.2d 67, 67 (1983) (cited to include a legal decision in this document).

I do not have the body type for yoga. I do not have the time to memorize a script and act in a play. All of my cooking is more art than science. I gave up poker. But I do love to laugh.

Good thing, too, because lawyers are a difficult group of people to stay centered and “up.” As has been repeatedly observed, lawyers are the most frequently depressed occupational group in the U.S.—3.6 times more likely to suffer from depression than non-lawyers. Dave Nee Foundation, Lawyers and Depression, <http://www.daveneefoundation.org>. Attorneys struggle with substance abuse at high rates, as well. Patrick R. Krill JD, LLM; Ryan Johnson, MA; Linda Albert, MSSW, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 Journal of Addiction Medicine 46, 46 (2016). Stress, overwork, and negativity contribute to make balance, or even just a genuine smile, harder.

One way I’ve dealt with the stress of a legal practice in an increasingly troubling world has been to laugh. About six years ago, I began to enter the world of improv comedy. Rather than grab a mic and talk about airline peanuts, I wanted to be part of a group that made comedy together. But let’s define the term:

Improvisation, or improv, is a form of live theatre in which the plot, characters and dialogue of a game, scene or story are made up in the moment. Often improvisers will take a suggestion from the audience, or draw on some other source of inspiration to get started. Improv is unique in that if you see a performance, that’s it... there will never be another show exactly like it ever done again. Improv is different every time. Improvised shows can differ between different improv troupes, depending on their training, their goals, and their style. Sometimes improv is purely comedy-based, while other times it can be a mix of both comedy and drama, or just drama. Like scripted theatre—without the script, with the actors acting, directing themselves, writing the plot, and interacting with each other all at the same time without previous planning.

Hideout Theater, What is Improv, <http://www.hideouttheatre.com>. Thankfully,

above and beyond stress release and focus, training in improv comedy also provides some great toolkits for litigators.

### Yes, And

Improvisers learn immediately that good comedy is found in agreement and building a shared “reality.” If your partner is holding up a bank, you’re in a bank, too, and now you’re making sure your bandana is tight so your officemate in line doesn’t recognize you (and, well, COVID).

Improvisers seek agreement first, so that where there is conflict, everyone knows why and is on the same page. Further, improvisers typically work without any props other than a couple of chairs; agreement and building a world together serves to let the audience understand what’s going on and visualize everything themselves. Without that agreement, the audience will be lost and confused.

In litigation, this concept of agreement and world building serves to help trial lawyers build a case theme or a strong opening statement and avoid jumping straight into terms of art and scientific concepts. The key is to build rapport with a jury brick by brick. Establishing this rapport while developing your case theme lends itself to sequential arguments and logical progressions with witnesses.

### Listening (Picking up Your Head)

In order to build a scene that will bring laughs and appreciation, a good improviser also needs to be listening.

If an improviser misses something, even if they are waiting on the “sidelines” and not acting in the current scene or game, it becomes difficult or impossible to help build a reality that will result in humor (audiences, like jurors, will almost always feel that disconnect between the participants).

Active listening also leads to greater observation overall. For example, body language speaks volumes, too, even over videoconferencing, and can be played to great comedic effect.

The lesson here is obvious. We serve our clients better when we are looking up from our outlines and notes and really listening to what witnesses or judges are saying. There is also a lot to be gained from observ-

ing a deponent or a juror—how they carry themselves can demonstrate a lot.

### Reacting Rather than Inventing (Thinking on Your Feet)

One important aspect of good comedy improvisation is staying “present.” The funniest scenes result from someone reacting to

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the last thing that was said or done rather than inventing something completely new. If someone in a comic scene fires a ray gun, let’s react to that, not suddenly crash the ship. Unless they hit something sensitive, of course. That could be pretty funny.

An audience wants to relate to the characters in front of them, even the ones they hate—reacting in the moment lends to that. And this is true in the courtroom and the conference room, too.

Think of the struggling appellate lawyer trying to address an unexpected question from a judge, or the depositor who really expected the witness to agree with his or her last statement.

Staying in the moment and focusing on the “last thing said” contributes to effective advocacy by allowing you to react on the spot honestly and earnestly. Staying present promotes genuineness and true responsiveness. In-house counsel and adjusters reading this, you can stop nodding so violently. I hear you.

This also lends itself to an interesting additional concept from improv—if that is true, what else is true? If a character in our scene keeps scratching her leg, she may have a rash. If that is true, it’s also true that she interacted with something like poison ivy, and it’s also true that she’s been in the woods (or a jungle) lately.

Whether we realize it as we’re doing it, we naturally want to make connections like

these as we process things around us. It’s one of the reasons why conspiracy theories are popular despite a lack of supporting evidence: they explain by making connections we all crave. Judges and jurors also long for these connections, and the more our litigation strategies live in a consistent “world,” the more they will have appeal and persuasive power.

### Spinning Plates (Keeping Multiple Concepts and Processes Moving)

As improv comedians are agreeing, and listening, and reacting, something remarkable happens. The patterns in the scenes begin to merge and interact. Harry from scene 1 might later meet Sally from scene 3. The best improv comedians are therefore able to keep all of those plates spinning at once so that when everything comes together, it looks like it was all scripted from the start. Not only did Harry meet Sally, but they’re celebrating a wedding anniversary by the last scene (and Leia from scene 2 is the officiant)!

This skill set, of course, is useful in trial as the various demands of judge, jury, witness, and client crash into each other.

Of course, litigation also goes beyond the periodic trial. Particularly in complex, class action, and/or toxic tort litigation, there is invariably a case inventory that must be managed. One case is dormant, another is on the heels of trial. Settlement histories and case valuations must be assessed and compared to overall spends. We must task associates, partners, and paralegals appropriately. Some of the most rewarding and valuable work I do is in connection with national coordination of these case inventories—the ability to keep plates spinning has helped immensely. And success at this skill also avoids the pain of having to call a client with an unanticipated problem even though “no surprises” was the stated goal.

### Teamwork and Support (for Our Firms and Our Clients)

Finally, improvisers are among the most supportive people I’ve ever met. By focusing on keeping everyone together and on the “same page,” a group of improvisers can more easily anticipate what’s next. When improvisers are supportive and attentive,

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they can make the comedy look like it was rehearsed for weeks, when in fact it's all made up on the spot. It's like magic.

Of course, team spirit in a law practice stimulates innovation through collaboration. Further, teamwork is contagious, and something jurors and others can pick up on and join. And if we're all on the same team, our clients get a better product and receive that message.

Think of it this way, our clients' legal departments could spend 50–75 percent of their budgets on outside legal expenses. See Norton Fullbright, 2019 Litigation Trends Annual Survey 14 (2019); Association of Corporate Counsel, 2016 Chief Legal Officers Survey 15 (2016). Doesn't that massive amount of spend demand a massive amount of teamwork and support?

### Concluding Thoughts: Find Your "Funny"

Vincenzo A. Sicari, the lawyer, may be free to pursue a parallel career as an actor and comedian. Once he chose also to serve as a municipal court judge, however, he became subject to the *Code of Judicial Conduct*. Once he chose to serve as a municipal court judge, his conduct outside the courtroom became subject to a higher standard. He may not pursue any activity that has the capacity to demean his judicial office or causes anyone to question his impartiality.

*In re Advisory Letter No. 3-11*, 215 N.J. 495, 515, 73 A.3d 1244, 1256 (2013).

Performing onstage over the last few years has made it clear to me that, much like Judge Sicari (but perhaps for different

reasons), I can't quit my day job. Instead, I have, gratefully, been able to apply some of the skills from a beloved hobby to help me improve my day job, while also improving my quality of life.

Even if comedy may not be for you, consider: what *is* for you? Is it intramural athletics? Is it coordinating outdoor outings for "city slickers"? Is it fostering rescue dogs? Is it playing in an orchestra? Whatever it is, what matters is that we make a point of getting out from behind our desks (or coffee tables) and into the world.

Let's all get out there and find our funny. Let's broaden our horizons, face our fears, and become better people who naturally will be better lawyers, too. Our clients will value our flexibility and our humanity. 