

## Taking Cues from the Theatre: Out of the Box Strategies to Win at Hearing

Jenice L. Malecki, Esq.<sup>1</sup>, © 2005

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*Taylor:* Who's this?

*Ella:* He's a buyer.

*Wesley:* Too slow on the trigger, Taylor. Took it right out from under you, didn't he?

*Taylor:* Well, it's simply a matter of going to court then. He doesn't have a leg to stand on. Legally he's a ward of the state. He can't sell the land.

*Ellis:* (waving deed) Look, I checked this deed out at city hall, and everything's above board.

*Taylor:* The deed has nothing to do with it. I'm speaking of psychological responsibility.

*Wesley:* Does that apply to buying the same as selling?

*Taylor:* What's he talking about?

*Ella:* Nothing. Wesley, you give the money back!

*Wesley:* Does that apply to buying dried up land in the middle of the desert with no water and a hundred miles from the nearest gas pump?

*Taylor:* I think you're trying to divert the focus of the situation here. The point is that your father's psychologically and emotionally unfit to be responsible for his own action, and, therefore, and legal negotiations issuing from him cannot be held binding. This can be easily proven in a court of law. We have first-hand evidence that he's prone to fits of violence. His license for driving has been revoked, and yet he still keeps driving. He's unable to get insurance. He's unable to hold a steady job. He's absent from his home ninety percent of the time. He has a jail record. It's open and shut case.

*Ellis:* What are you anyway? A lawyer or something? Where do you get off talkin' like that in my house?

*Ella:* IT'S NOT YOUR HOUSE! THAT'S WHAT HE'S SAYING! CAN'T YOU LISTEN? DON'T YOU HAVE A BRAIN IN YOUR HEAD?

*Ellis:* Listen, lady, I sell booze. You know what I mean? A lot a' weird stuff goes on in my bar, but I never seen anything as weird as this character. I never seen anything I couldn't handle.

*Wesley:* You best take off, Taylor, before it all catches up to you.

*Taylor:* I refuse to be intimidated any further! I put myself out on a limb for this project and I'm met with resistance!

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<sup>1</sup> Long before wanting to be a lawyer, while in grade school, college, law school, working as an attorney and even occasionally now, acting, directing and writing have been part of my life. I use the skills I learned from the theatrical disciplines to be successful hearing attorney. My thanks to Christine Fitzgerald, my law clerk, for her contributions to this article.

*Ella: I'm not resisting.*

*Taylor: You may not realize it, but there's corporations behind me! Executive management! People of influence. People with ambition who realize the importance of investing in the future. Of building this country up, not tearing it down. You people carry on as though the whole world revolved around your petty little existence. As though everything was holding it's breath, waiting for your next move. Well, it's not like that! Nobody's waiting! Everything's going ahead without you! The wheels are in motion. There's nothing you can do to turn it back. The only thing you can do is cooperate. To play ball. To become part of us. To invest in the future of this great land. Because if you don't, you'll be left behind. Every last one of you. Left high and dry. And there'll be nothing to save you. Nothing and nobody.*

*(A policeman appears stage right in highway patrol gear.)*

\* \* \*

*(Ellis grabs money out of Wesley's hands. Taylor sneaks off stage left.)*

*Wesley: (to cop) Hey! He's getting away! That guy's a crook!*

*Malcom: What guy?*

*Wesley: That guy! That guy who just ran out of here! He's an embezzler! A confidence man! Whatever you call it. He sold my old man phony land!*

*Malcom: That's not within my jurisdiction.*

\* \* \*

*Ella: (to cop) He's taking our money!*

*Malcom: Look, lady, your daughter's in jail. I don't know about any of this other stuff. I'm here about your daughter.*

*Ella: WESLEY! WHERE ARE YOU GOING?*

*Wesley: I'M GONNA' GET THAT MONEY BACK!*

*Ella: IT'S NOT YOUR MONEY! COME BACK HERE! WESLEY! Everybody's running off. Even Mr. Taylor. Did you hear the way he was talking to me? He was talking to me all different. All different than before. He wasn't nice at all.*

### **Excerpts from "Curse of the Starving Class," Sam Sheppard.**

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A playwright's objective is to "find the play's reality"<sup>2</sup> and tell the story in a manner designed to communicate the message of the story. As in the above excerpt, the "noise" amongst the competing voices in a room work to tell the story of a perceived con man.

As you read between the lines in the natural speech patterns of the characters, you get a sense for their respective levels of education. As they tell you about their family and work, the picture becomes more focused. When you delve into the way they interact, you understand how they fell prey to their unfortunate circumstances. When you see what happens when they report it to the police, you understand how these things happen.

There are many obvious differences between a play and a hearing; a hearing attorney needs to make the truth appear in a cohesive and constructive manner. Witnesses are called in progression and there is always the element of surprise in cross examination, but that is where improve skills come into play.

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<sup>2</sup> Spolin, Viola. *Improvisation for the Theatre*, 3<sup>rd</sup> Edition. P. 298 (1999).

In *Curse of the Starving Class*, Sam Sheppard uses multiple characters to tell different elements of the story, as you should. Certain characters may carry certain themes throughout the piece and their “objective” is generally to have other characters concede their position. The same should be true in a hearing. Certain witnesses should be used for certain parts of the story, but not others. Think about your family and friends, their objectives and agendas, how they carry and tell certain stories and can be relied upon to support one thing over another. Each witness should have an objective, rather than a script, a reason they can clearly vocalize as their reason for testifying. The manner in which they tell the story should be guided by what is necessary to tell the story and should not be unnecessarily repetitive – i.e., don’t beat your audience over the head with the plot or the moral of the story, let the audience discover it themselves. Some things you highlight early in the hearing should have a payoff in the end.

*Before the Show:*

*The Script: The Statement of Claim*

As any good play, a case begins with a good script, a strong statement of claim. It is the blueprint for the production. Your client’s testimony should be outlined there, the characters in play are disclosed and the basic plot line revealed. As in a play, the following elements are in motion in the story as a whole:<sup>3</sup>

- Character: Who is your character?
- Circumstance: What happened and when? Where are we now?
- Relationship: How did the characters interact and why?
- Objectives: What were the reasons the characters acted as they did and what are they now trying to convey?
- Obstacles: What obstacles did your character have when the circumstance arose and what are the obstacles now?
- Action: What action was and is being taken and why?

The statement of claim must be informative, revealing, and able to peak the prospective audience’s interest. A statement of claim that “expresses your vision [while satisfying] the audience’s desire” creates a compelling background for the hearing.<sup>4</sup>

Your statement of claim should through the use of imagery be descriptive and paint a picture of the case for your reader. Imagery is an extraordinary tool that, when used correctly, persuades the reader. By approaching the statement of claim as a writer would a novel or play, your audience will become familiar with the circumstances from your point of view in a way that “flows through the imagination” of the reader<sup>5</sup>.

In a play, there are four “dimensions” to setting the scene that must be addressed here for the reader to see the picture: Period, Duration, Location, and Level of Conflict<sup>6</sup>. As with a play, there is a distinct time frame that the facts can support, it is different in every case. Each separate action can be its own scene towards the building of the story.

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<sup>3</sup> Hagen, Uta. *Respect for Acting*, pp. 145 et seq. (Macmillan 1973).

<sup>4</sup> McKee, Robert. *Story: Substance, Structure, Style, and the Principles of Screenwriting*, p. 8 (1997) [“Story”].

<sup>5</sup> McKee, Robert. *Story*, p. 395.

<sup>6</sup> *Id.* at 68.

Discovery is like rehearsal for the show. In discovery, you learn about your adversaries and possibly more about your own client. Once the discoveries are made, you can discern what needs work, where your characters' weaknesses are, and where the inconsistencies are in the plot. During rehearsals in a play, the director's job is to find the inconsistencies and weaknesses and edit the production to correct them. In a case, the lawyer acts as the director and must work on revealing or minimizing weaknesses and perceived inconsistencies to put together the missing pieces of the puzzle so the truth can be revealed at the hearing.

The pre-hearing conference gives you information about the audience you are playing to and how they will best receive information. In a play, the goal of the performance should be for each member of the audience to relate on a personal level<sup>7</sup>. A pre-hearing conference is like a screening. A small audience watches the production and then evaluates it, so that the director can re-shoot or edit accordingly before the final version is released to the public. If you approach the conference like a screening and judge the panels or judges' expressions, you can evaluate what the audience liked and disliked about your clients, their situation, and the case in general.

Pre-hearing preparation also involves putting an impressive hearing book together, your "characters" biographies and the "scenes" being presented. A hearing book is a more creative form of a playbill; it is informative and gives the audience a guide to the acts and scenes of a play. Your hearing book should itself be revealing and tell a story. Everything needs to relate back to the theme and how each witness and document will advance the moral of the story. The theme is "the thread that links all the separate parts together."<sup>8</sup>

#### Directing: Witness Preparation

Before the hearing, you work with your characters to help them effectively and honestly in their own natural way relay the information they need to relay to move the plotline along. "Practice makes perfect" is a rule that directors in plays adhere to because practice fosters an environment where the actor and the director work together<sup>9</sup>. It is a good rule to adhere to in cases as well, but not practicing lines, just questions, so that the witnesses are more comfortable in what is a very uncomfortable process.

Since this may be the first time your client is involved in litigation, prepping them about what to expect will calm their stage fright so they can speak honestly and let the truth be seen. Also, prepares your client and the probing may reveal new information that you need to deal with before the hearing.

#### Preparation: Knowing Everything

"The good will and noble intentions of the unskilled are useless."<sup>10</sup>

Unlike your client, you have not lived in the specific world in which the events took place, so you need to do extensive homework and be prepared. As actors do, you need to research your client's and the brokers' life and circumstances, as well as prepare for what may happen at the hearing: arguments, objections and rulings. You need to know the facts and documents, inside and out. By knowing who your client and the other witnesses are, you will be more effective and persuasive when certain issues come up. You will see and be able to convey more relevance and passion.

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<sup>7</sup> Spolin, Viola. *Improvisation for the Theatre*, p 13.

<sup>8</sup> Spolin, Viola, *Improvisation for the Theatre*, p. 300.

<sup>9</sup> Spolin, Viola. *Improvisation for the Theatre*, 3<sup>rd</sup> Edition. P. 298

<sup>10</sup> Hagen, Uta. *Challenge for the Actor*, p. 289. (Macmillan 1991).

*Getting into the Moment: Relaxation Exercises*

As with an actor, a lawyer needs to clean the slate to be able to react to the many things that go on during a hearing. Yoga, massages, stretching, running, even just a half of an hour of silence lying in bed or on the floor of your office. Actors engage in numerous vocal and physical relaxation exercises so they can be open to the emotions that the events may naturally invoke within them. A lawyer, as an actor, must be physically and emotionally ready and cannot carry their own life into a hearing, or they will not be convincing in their role. A lawyer must be open to the swift and reactive interaction with the other people in the room, no matter what they say. Without taking a step back and relaxing before the hearing, the actor and attorney will also lose their connection with the audience, a key component to persuasion.

*Opening Monologue: Opening Statement*

On the day of the hearing, the show begins. It needs to start with an impassioned monologue, an opening statement, hinting at what is to come, but not revealing everything. While your case should not be a mystery, it helps to hold a few things back that the audience can discover themselves. Monologues, as opening statements, are organized thoughts directed to lead the audience in a direction.

*Scene Work: Witnesses Direct and Cross Examination*

The scenes (witnesses) should be compelling, in the proper sequence and germane. The order of witnesses is crucial to your case as is the order of scenes to a play. A play that jumps around in a disorderly fashion is hard to follow likewise a case that jumps around is confusing. The placement of witness can impact your case and move the audience in a certain direction. For instance, you might want to put a witness that is moving or will make the audience sympathetic to your client last so that those feelings are fresh in the audience's mind when making their decision. Like a play, a hearing should crescendo to the end.

Every good and believable character has to admit weaknesses, but that is what makes them real and makes a panel relate to them. No person is perfect if they admit their weakness in the context of their lives, whether it is that they did not follow up with their financial advisor enough or read their statements thoroughly, then the panel is more likely to believe their story and understand how they were taken advantage of and why.

*Props: Demonstrative Exhibits*

To the extent that a demonstrative exhibit can invoke a feeling or understanding, it is worth using. Overuse, however, will not help you. A good play needs no props; however, as lawyers we are besieged by documents and fear that under inclusion could be the death of the case. To the extent that there are a few gems in the documents, blow ups and projections can highlight them and call attention to the setting, the time and the space in which the drama actually unfolded, a window. Not much is necessary. A simple bar sign would tell the audience that the play takes place in a bar, but lets the actors' dialogue take the main stage; however, overuse is like a glitzy Broadway play, all the actors look alike and the glitter blinds you.

*Emma:* I'm going into crime. It's the only thing that pays these days.

*Wesley:* (looking at roll of bills in EMMA's hand) Where'd she get that?

*Emma:* Where do you think?.

*Wesley:* You're taking her car?

*Emma:* It's the perfect self-employment. Crime. No credentials. No diplomas. No overhead. No upkeep. Just straight profits. Right off the top.

*Wesley:* How come I'm going backwards?

*Emma:* Because you don't look ahead. That's why. You don't see the writing on the wall. You gotta learn how to read things, Wes. It's deadly otherwise. You can't believe people when they look you in the eyes. You gotta' look behind them. See what they're standing in front of. What they're hiding. Everybody's hiding, Wes. Everybody. Nobody looks like what they are.

*Wesley:* What are you?

*Emma:* I'm gone. I'm gone! Never to return.

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### Improvisation: Bringing the Villain and Audience Along: Cross Examining the Broker & Supervisor

A good play is written to vilify the villain and make the hero more heroic. In a hearing, the hostile witness is playing the villain can be vilified through impeachment and character evidence.

Since a hearing is not scripted like a play, often there are surprising twists in the testimony, usually in cross-examination of the villain. Working with the villain is a bit of improvisation. Intuition is probably the most important aspect of improvisation and an important skill a lawyer needs to develop. When dealing with a hostile witness or a villain, you need to intuitively read the situation, read the villain, and think one step ahead of him/her and do not look back. This also can involve some risk, so pry open what the villain is hiding through discovery and research, some of which you can do through your own client and analyzing what you already know.

There is one basic rule in cross examination: say "Yes! And . . ." to all of your partner's responses. In cross examination, rather than badger the witness, slowly bring her/him down a rosy path s/he does not see. Start off with non-controversial rules, facts not in dispute; however, do so in a manner designed to lead the witness into a trap. Using improvisation techniques, you gain the trust of your subject and get them to open up and, usually, hurt themselves. People want to feel "liked" and this technique will achieve your objective. See EXHIBIT A as an example.

With respect to EXHIBIT A, set up the following scene and visual cues:

#### Characters & Objectives:

**Broker:** At one of the most profitable branches at a major brokerage firm (ego). In my opinion: he is a "good ole boy" and gets most of his clients playing golf in a wealthy suburb; he is more of a "relationship manager," sending most clients off to managed accounts; somewhat attractive and clueless, trying to charm panel (how he got through life), looks like may leave and go play golf or go boating. Objective: have the arbitration dismissed, be likeable.

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Client: Disabled with cognitive issues, sympathetic. Objective: show panel what promises and misrepresentations the broker made to her, what her needs were and why, the trust she had in the broker and why. Get money back.

Lawyer: Female, small stature, tactful use of inflection to comfort the witness into admitting things and (the “of course” inflection technique: if you ask a leading question as if “of course that was what s/he did – making it sound legitimate, they will go along, even if it is not legitimate). Objective: lead broker down rosy path. Win.

Relationship: Smallest client broker has in his office; friend of his largest and most powerful client who referred smallest client.

Circumstance: Broker lost virtually all client’s money, client sues. In a somewhat cramped hearing room. The broker is sitting across from the panel. He has one leg over another. He puts on his “stock” pleasant smile. He is an “adverse witness” for the client, called on direct. I sit next to him, rather than across, with a court reporter in between, who is sitting back so as not to obstruct the communication. I begin the “adverse witness” examination very chatty, as if at a cocktail hour, with easy questions, lulling him into a false sense of security.

Obstacles: Client’s cognitive issues. (Works both ways).

Action: Client subjected to wrongful conduct, reported problems to management, who blew her off. In arbitration.

Set up: Early on: Admits he is responsible for the account and will monitor it while it is Being managed to make sure it is following with her objectives.  
Admits he does not know how to research stocks or bonds.  
Admits client would not be able to follow along with the account.  
Admits client is conservative.

Payoff: Later: Admits he would be able to give no input into assessing positions in Managed account, even though he promised to watch it.  
Admits he believes stock is gambling and the richer you are the more conservative you should be (multi-millionaire = “100 fixed income”, disabled person with cognitive issues = aggressive).  
Admits he has no clue as to the difference between conservative and moderate investment objectives (*did I mark that moderate?*).

Bonus: Volunteers That he believed that account would quickly recover about 25% of the portfolio lost on just one group of bonds sold prematurely, Because no matter what you buy in a down market, it will come back, whether it be equity, bond, and real estate. (Never researched any specifically).

Volunteers (*Trying to be so helpful*) Volunteers that in supervisory meetings, they only talk about lunch, golf and their kids, if there are no complaints, so they don’t even need to do it yearly.

Aside from playing tricks on the feeble-minded, it is also a matter of turning the situation around. Here's an example:

A female lawyer in a suite walks into a singles bar. She has just won a big case for her firm. She is approached at the bar by a taller male co-worker. The bar is crowded so he is very close, looking steadily down on her, as he congratulates her. Startled, she giggles, avoiding his eyes, and thanks him as her head tilts to the side and her hand goes to her hair. He raises his palm between them to stop the conversation as he signals the bartender and orders Scotch and a Daiquiri. She glances at him, smiling, but looks immediately back at the bar, her head moving slightly right to left. When his hand comes down, she says, "so, uh, you were, uh, in court today?" He says, "Yeah. I didn't think women could handle criminal litigation." Her head immediately straightens and freezes. Turning toward him, she brings her face closer to his. "I didn't think men drank Daiquiris."<sup>11</sup>

Here there is a play on the cultural status assignments, stereotypes. Stereotypes are useful and dangerous for lawyers. The "status" of a situation is defined by the characters and status can be transferred from one player to another by the alert participant who is open, listens and analyzes the situation so as to turn the table without closing the door or offending the audience. The above is an improvisational status transition technique that can effectively be used by a lawyer cross or adversely examining a witness. Status transfers can help show who was in control and why, as well as help define the villain and the victim theme. Again, it is also a technique that helps the audience discover the truth themselves, without beating them over the head with a theme they may not see. Here you clearly see that this female has been stereotyped, but to prove her point, she simply turned the stereotype on him to clearly illustrate it's absurdity in a way that by here directly stating: "you're a bigot" would not have worked and could have turned off the panel.

#### *The Prologue: The Closing Statement*

The closing monologue should sum up a lesson for the audience and make it human. Explain why the conduct was wrong, given the characters at play, and how that wrong can be righted. Why we cannot treat each other the way things happened in the case and the consequences that it had on the parties and will have on the parties. The conclusion of a play relates everything that happened to the characters back to the moral or theme of the play, a good closing argument should do that for your case. Many lose sight of the ultimate goal of a closing monologue. Instead, you want to keep it brief and concise while still moving your audience and getting your point off clearly.

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*Wesley: Anybody know how to cut up a chicken?*

*Ella: Well, there's special bones you have to crack.*

*Wesley: What's so special about it?*

*Ella: The anatomy is what's special. The anatomy of a chicken. If you know anatomy, your half way home.*

*Emma: THERE'S NO CONSIDERATION! IF I'D COME ACROSS A CHICKEN IN THE FREEZER I WOULD HAVE ASKED SOMEONE FIRST BEFORE I BOILED IT!*

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<sup>11</sup> Diggles, Dan. *Improv for Actors*, p. 40, (Allworth 2004).



*Ella:* NOT IF YOU WERE STARVING!

*Emma:* NO ONE'S STARVING IN THIS HOUSE! YOUR FEEDING YOUR FACE RIGHT NOW!

*Ella:* So what!

*Emma:* SO NO ONE'S STARVING! WE DON'T BELONG TO THE STARVING CLASS!

*Ella:* Don't speak unless you know what you're speaking about! There's no such thing as a starving class!

*Emma:* THERE IS SO! THERE'S A STARVING CLASS OF PEOPLE AND WE'RE NOT PART OF IT!

*Ella:* WE'RE HUNGRY, AND THAT'S STARVING ENOUGH FOR ME!

*Emma:* YOU'RE A SPOILED BRAT!

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### Conclusion

Perceptions are a big part of your case and a play. Managing and molding perceptions are important to your case, as in Sheppard's play, which highlights how people see things differently. Understanding your audience is important. Understanding people and working with stereotypes are a large part of what a lawyer has to do to convey the story. Clearly, there are differences between a play and a case. A good play attempts to convey truth and so should your case. Know what you need to prove.

This is all principally a metaphor. Facility with yourself, witnesses, documents, the panel and the law is crucial. A good lawyer constantly needs to think of theme and moral while working on the also very important technical aspect of the case. Your case is really won in the hearing room. The manner in which you tell the story has a definitive impact on what happens. The plotline, props and characters are necessary to put the matter in context and tell a story that will not put the panel to sleep, but instead compel them to listen, engage and learn (or at least sympathize/empathize).

Use this article as an excuse to see more theatre, take an acting class or read up on the subject. It will certainly help.

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*Charley:* Willy was a salesman; and for a salesman, there is no rock bottom to the life. He don't put a bolt to a nut, he don't tell you the law, or give you some medicine. He's a man way out there in the blue, riding on a smile back – boy, that's an earthquake. And the you get yourself a couple of spots on your hat, an you're finished. . . . A salesman is got to dream, boy; it comes with the territory.

Death of a Salesman, Arthur Miller.

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