'PRODUCER' LAWYERS VERSUS 'ACTOR' LAWYERS:

READY FOR YOUR OWN CLOSE-UP?

Judge Mary Thornton House

Outside of the United States, many countries establish a formal separation of talents, so to speak, in their attorney ranks. England's *Barrister Versus Solicitor* distinction is deeply embedded: Barristers appear in court, Solicitors have office jobs. England is not alone; even Hong Kong, Japan, and Korea also maintain a form of this division of labor. Here, there's no licensed or State Bar sanctioned act of separation, but specialization, stress, and rigors of the practice of law have created de facto categories that define themselves in various formats such as senior partner/junior associate, first chair/second chair, referral attorney/specialist firm and so forth. One would think that when the founding fathers chose to deviate from the mothership's way of training attorneys, that they did it for a reason. Thus, is the current trend that seems to reinstate it -- albeit informally -- a good thing? Please permit the suggestion that it is not.

From a judge's perspective, one can only hope that our de facto American 'Model' is as beneficial as in the entertainment and auto industries where the blurring of distinct roles adds strength to all. In the movie industry, many participants start as actors, then decide to produce and act, and then star, produce and direct or do it all. To compare to popular cars, they are hybrids. For the most part, these hybrid roles potentially add much to the betterment of the entertainment product, gas mileage and ending global warming. But, even though not all actors can direct, not all producers can act, and not all lawyers can try a case or write a perfect summary judgment motion, the introduction and attempt to stretch their respective talents enriches all roles. It's kind of like the saying, 'you don't appreciate your parents until you become one.' So, are you stuck in one kind of role, i.e., an attorney who *only* tries cases and/or the attorney who *only* prepares them? Where do you rate on the scale of the embodiment of the 'actor' lawyer versus the 'producer' lawyer?

A SELF-ASSESSMENT TEST

The below, exceedingly unscientific 'self-test' is designed to highlight the glaring differences and subsequent disconnect between attorneys who try cases [actor lawyers] and those who prepare them [producer lawyers]. Use the following ranking to respond to the below statements as they apply to you:

1 = Never 2 = Rarely 3 = Sometimes 4 = Often 5 = Always

1. _____ I *live* to write demurrers to poorly drafted complaints.
2. _____ I haven't appeared on a Motion to Compel Discovery in a very long time, if ever.
3. _____ I routinely demur to affirmative defenses.

4. _____ I dream of discovering the perfect way to respond to valid discovery requests that avoid production but will allow introduction of the withheld documents at trial without penalty.
5. _____ I won the office pool for getting the most motions in limine granted in a trial with a four day estimate.
6. _____ The evidence code is my work bible; I read sections every night right before falling asleep.
7. _____ Evidence Code? That pesky tome! It only concerns me if I can't put a spin on some particularly damaging evidence the judge has declined to exclude.
8. _____ I read jury instructions only upon command of my senior, senior partner who has lost her bifocals.
9. _____ I practice explaining complex legal theories to bright 13 year olds.
10. _____ During religious services, I wonder if I can co-opt the spiritual leader's pithy but poignant story as a trial analogy without running into plagiarism accusations.
11. _____ I view the neighborhood summer barbeque gathering not as a social, but focus group, opportunity.
12. _____ My spouse tells me that NOT every argument between us translates into a 'story' to explain client behavior to a jury.
13. _____ I research the judge assigned to my case through all databases available to me.
14. _____ I do reconnaissance on the judge assigned to my case by sitting in his or her courtroom, watching how they conduct their trials.[1]

Concerned about your score? Well, there's nothing inherently wrong about being out front as an actor lawyer or a player behind the scenes as a producer lawyer. But just like you should always play to your strengths, it's important to figure out what kind of attorney you are and go in the opposite direction. Yes, the OPPOSITE DIRECTION. Why? Because from this judicial officer's perspective, there's an increasing disconnect between the two types, when working to be a capable hybrid is the superior option for both the justice system and the client.

To be fair, it's really the extremes that create the problem -- not just for judges, but to anyone part of the litigation experience. For example, the extreme producer lawyer attacks pleadings left on her desk like a lapsed vegetarian eats steak: with gusto and a scorched barbeque objective. She throws every single discovery device at her opponent like a chef throws spaghetti on the wall to see what and if the requests will stick. She brags that a 'good' day in court is when the judge throws up her hands and says, "I'm crying uncle and sending you all to a discovery referee." She doesn't know that judges can't stand it when, during law and motion, she approaches counsel table and puts her briefcase on the table to haul out

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[1] If you answered questions 1, 3, 4, 5, 6, 8, 13 with a score between 15 and 25, you are predominately a 'producer' attorney type. If you answered questions 2, 7, 9, 10, 11, 12, 14 with a score between 18 and 30, you are most likely the 'actor' attorney type. If you are under 20 for both, you are probably a hybrid. (And, if you think there's any scientific validity to this, there's oceanfront property for sale in Colorado.)

documents.[2] A producer attorney's version of an Oscar winning performance comprises three (and exceedingly rare) simple words: Summary Judgment: GRANTED.

The actor lawyer likes dramatic –and usually 'surprise'-- entrances. After months of wrangling in law and motion, the unsuspecting judge sees him for the first time at the final status conference. The actor lawyer has 'lucky' trial suits and so advises the judge and jury. The actor lawyer tries to make it all about the drama while forgetting that the evidence code was designed to make a trial fair by regulating the introduction of only admissible evidence, not innuendo. He has no sense of the history of the case, so, motion in limine rulings are perceived as 'guidelines' rather than orders. His summary judgment motions or oppositions thereto never conform to the applicable rules. He ignores the tugging of his suit sleeve by his junior associate/second chair – waiving off their concerns to his peril because, well, sometimes the 'by-the-book' lawyer who is erudite with string cites, local-local rules and the responses to requests for admissions can add a lot to a trial.

So, if these de facto categories that only work to bring out the worst in each create issues for judges, juries, and justice system stakeholders, what can be done to soften the edges, engage in cross-training, and inject the empathy (or lack thereof) into those attorneys who need it? Set in no particular order of importance, the below 'hybrid principals' are intended to remedy the lackluster performances of those of you who suffer from extremism and hopefully, even if you do not, they will provide some beneficial insight to working towards the best lawyer you can be.

ACHIEVING THE BALANCE BETWEEN ACTOR AND PRODUCER: THE 'HYBRID' PRINCIPLES

►Start, continue, and end with a **trial** strategy. *Trial*, NOT LITIGATION. It will be the duty of the trial/actor lawyer to tell a story, to present evidence to support that story, and to persuade the trier of fact, be it judge or jury, or arbitrator.

Successive demurrers that merely knock out a few causes of action appear to most judicial officers as busy work. Why not just substitute with contention interrogatories that ask for "all facts related to ¶12 of the complaint and/or the 2nd affirmative defense?" There's also a theory out there that filing and arguing a summary judgment motion will 'educate' your judicial officer, so, even if denied, the judge is better prepared at trial. If that motion is simple, straightforward, and directed clearly towards undisputed allegations, such reasoning makes some sense. However, today's motions for summary judgment are increasingly so voluminous that the point of them gets lost in the 101st 'undisputed material fact.' These take a tremendous amount of judicial time and can be a weapon of mass distraction for the judge to a point that any educational purpose is nullified.

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[2] Believe it or not, an informal poll of judges lists this action as in the top 5 irritating courtroom antics by attorneys.

►With every word you write, with every form of every document you generate, and with every voice mail you leave ---ask yourself first, how will this play before a jury, arbitrator, or judge? Even transactional lawyers should pay heed to this hybrid premise.

True, the transactional lawyer might never appear in court, but his words will. This is particularly important in today's e-mail, texting milieu. That rapid-fire response that permits 30 hours of work to be done in 10 without the intervening wisdom of one's secretary has its downside. In the good ole' days, the two hour gap between the dictated retort and the secretary's draft afforded a cool down period permitting calmer heads to prevail in the final wording. Now, punching the send button without a filter (sensor) is the dramatic flourish to the frustration best kept bottled. The momentary satisfaction of inflicting a prose punch that ends up attached as an exhibit to a motion or worse, as a trial exhibit, is fleeting indeed. Juries have no frame of reference for the acrimony. Judges abhor it and cry real tears for lost civility in and out of the courtroom.

►Never, ever draft a complaint, answer one, or demurrer to one without reading the jury instructions and sample verdict forms related to your proposed causes of action or defenses FIRST.[3]

Jury instructions are the last words the jury hears before deliberation. Verdict forms, especially special verdict forms, comprise the worksheet for their decision-making. Some judges when doing a court trial will use the sample verdict form to organize their own analysis of the evidence. The instructions and forms are derived from the case law. They provide the best discovery roadmap and the parameters of what is relevant to your case. Why wouldn't you want to have that perspective, guidance, and insight from the beginning?

►As early in the preparation of your case or defense or at least before the case management conference, write out or outline your opening statement and closing arguments. From that exercise, start a list of witnesses needed and exhibits required with the understanding that it is a work in progress.

►With each exhibit, note somewhere (a log, post-it note, journal, e-journal) how it is RELEVANT. (This is easy if you've read the jury instructions, know the elements, and can relate the exhibit to them.)

Next, figure out what is necessary to AUTHENTICATE it, whether it is SECONDARY EVIDENCE, and whether HEARSAY is implicated. In other words, start thinking about how you will get the exhibit admitted as early in the process as possible. This on-going process exposes holes in your discovery plan that can be plugged quickly.

►With each witness, interview them with an eye to scripting[4] their testimony.

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[3] If you want to go really crazy, read the cases cited in the Use Notes; they're pretty darn informative.
[4] Note: this not a suggestion that envisions writing any fiction; a good trial lawyer tells a story and works from carefully coordinated and truthful direct examinations.

At a minimum, you should put the necessary facts in a checklist format adjacent to the elements necessary to assert/defeat the causes of action.[5] This provides a format for any future depositions and for in-court direct/cross examination. It also can be the meat of any declarations that need to be put together for the purpose of future motions. Just like with the exhibits, separate out a witness' observations from their statements or the statements of others they report. Think out how the critical observations and statements are relevant, whether a foundation is necessary, and if hearsay, plot out the exceptions, if any, that would permit introduction/exclusion.

►Take an acting or a public speaking class or both every few years.

Even the actor lawyer needs the practice and the producer lawyer can start expanding his/her oratorical talents. With the introduction of the fast pace in which information is conveyed (e-mail, fax, I-Phones, Blackberries, etc.), there seems to be an increasing number of attorneys who speak way too fast, mumble, slur, and drop their words. If the court reporter is throwing up her hands, that is a major hint to s-l-o-w down. If the judge is advising you to speak up, SHOUT. Sadly, a not too insignificant number of jurors will advise the court that they simply didn't hear the attorneys, so, the message was lost FOREVER.

►Take a creative writing class.

This principle has a kind of dual diagnosis purpose. You probably won't write the great American novel, but you will learn how to use words that have impact, how to develop a plot and theme, and how to put together facts in an interesting, if not engrossing fashion. Think about it – what is an opening statement other than a prologue? What is a closing argument other than the cliffhanger? There's a reason that before television, people gravitated to the courts to get their reality show fix. Your writing class is also the best kind of focus group, certainly much better than the neighborhood summer barbeque.

►Take a class in the visual arts.

Today's juries and judges are video generations deep. While some do remember life without a TV remote, those persons are retiring at a rapid rate. Today's jurors only remember color TV and now have Blu-Ray to boot. A trial without visuals is, to us, a corporations lecture in law school without the benefit of Socratic questioning as a much needed interruption to dozing off. Did you know that there's a theory in home decorating that if you have a piece of furniture or art that doesn't quite fit into your desired color scheme or genre but the client wants it included that the best remedy is to make that misfit the focal point of the room? It works. In trial work, it's the same. Take the weaknesses of your case, parade/spin them as strengths and/or non-issues, and then move on. (Hmm, who knew that home decorating tips equate to superior trial strategies?!)

►Before you file any pleading, read it out loud to anyone who'll listen or even to just yourself. This is a superior device for detecting typographical errors, run-on sentences, split infinitives and arguments that are pretty lame when given audio status.

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[5] Remember, if you've read the jury instructions, you know the elements and defenses.

This technique also highlights timing. Consider this: if it took you hours to read the pleading out loud, think about judicial time reading it must take for decision-making purposes. Most judges average three to four motions a day. If an average of one to two hours is spent per motion, that's a full day, BUT, the judge is usually in trial, preparing for a trial, or working on matters under submission. You figure out the math on the kind of attention that a rambling, unorganized, sneaked-in-font-size-10 motion will get. This technique highlights the need for pithy (intense but brief and meaningful) pleadings.

►AFTER taking your client and any critical witnesses on a 'field trip' to a courtroom in session, videotape your client and put them through the most brutal cross-examination you anticipate your opponent will muster. As discovery commences, review the videotape, readjusting any spins as required by the discovery obtained.

►Develop relationships with people who HAVE NOTHING TO DO WITH THE LAW.

Lawyers and judges exist in both an isolated and insular environment. How many times have you wondered about how 'people' could vote a certain way? Why do some TV shows that seem to have little or no socially redeeming value remain on air year after year? Well, it's because segments of societies view the world differently from those of us in the justice system. Why should this concern us? Well, for one, they are jurors. For two, they are clients. For three, they are friends of jurors and clients. A doctor that hangs out only with other medical professionals, reads obsessively all medical journals she can find, and can't wait to get her hands inside of a surgical patient is brilliant and intense. An attorney who lives only to read advance sheets, draft the award-winning demurrer, and rack up billable hours as the barometer of success, is simply clueless. Join a bowling league that caters to computer companies or volunteer at senior citizen homes. It can be fun and it is always rewarding.

►Engage in Judicial Intelligence.

Did you know that 80% of judges are introverted, realistic, practical, prefer logical thinking and objectivity, and desire control with an ordered life?[6] Introverted judges love quiet and hate interruptions. They prefer written over oral communications. They need to reflect before taking an action that they want and need to be logical. Most judges are firm, tough-minded, uncomfortable around emotional situations, can hurt other people's feelings without realizing it, and hate surprises. They like an established way of doing things and are not often inspired, so they distrust inspiration when they are. This should come as no surprise to trial lawyers who find themselves butting heads with their trial judge. Actor lawyers aspire to out-of-the-box thinking, to evoking emotions, and to creating drama. This is antithetical to the average judge's modus operandi. So, when the producer lawyer tells the actor lawyer that they have a 'great' judge, the disconnect is palatable, because the same judge that presided over the law and motion calendar with preciseness and order may well have difficulty with the flamboyant trial attorney.

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[6] California Center for Judicial Education and Research offers courses on personalities and ask judicial officers to take the Myers Briggs Personality Inventory test. (MBTI) With over 2500 judges tested nationwide, these are the predominant (%) personality traits.

So, database searches about a judge are critical. It's also critical to watch the judge and figure out to what degree they fall within the 80% personality profile. Adjustments either way are required for effective advocacy.

FINAL THOUGHTS

Whether you fit into the actor/producer role as an attorney, you are always a part of the larger picture: the justice system. It is important for our society to have its champions (lawyers) place a priority on honing their craft to effectively advocate for a client's respective rights.