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The Writer's Theater

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by Douglas E. Abrams *

"[E]very trial is theater and every trial lawyer is a producer of a good, bad or indifferent play," instructed former federal district judge Simon H. Rifkind, a pillar of the New York Bar for nearly half a century.[1] Judge Rifkind spoke in 1949, but many attorneys still say that experience on the stage can help teach trial lawyers how to connect with an audience.[2] The courtroom is the lawyers' theater, minus the floodlights but with an audience sitting in the jury box and on the bench.

I cannot vouch for the value of stage experience to later courtroom skills because I have been neither a thespian nor a trial lawyer. But trial lawyers are not the only members of our profession who perform on stage before a theater audience. Lawyers also appear on stage whenever we pick up a pen or turn on the computer to write something we hope other people will read, as I am doing right now. The theater is virtual because we sit in our offices, but the audience – the readers who digest our written words – remains as central to the performance as an audience that hears spoken words from the orchestra or balcony.

KNOWING THE AUDIENCE

Connecting with the theater audience begins with knowing the audience. For writers, knowing the audience means asking ourselves a threshold question before we put words on paper: "Who is likely to read this?"

The answer is usually well within the lawyer's grasp because most legal writing targets a discrete audience readily identifiable in advance. Lawyers know that briefs, motion papers and contracts, for example, target the parties and the court, but hardly anyone else. An opinion letter is usually for the client's eyes only. A judicial opinion speaks first to the parties, and then to future courts and litigants, academic researchers, and (this invites spirited debate) perhaps lay readers when the decision touches on matters of social concern.[3] A magazine article, newspaper column or other "popular piece" anticipates a wider audience, but one whose essential character the lawyer can usually foresee.

Writing's fundamentals – precision, conciseness, simplicity and clarity – remain constant regardless of the makeup of the identified audience, but style is another matter.[4] Predictions about the audience, for example, help the writer determine whether to assume a conversational or more formal tone. Predictions about the audience's likely attention span influence the document's length because, as I discussed in my Winter 2007 column on "measured brevity," readers should not finish before the writer.[5]

Identifying the audience also influences content. Suppose, for example, that a lawyer or judge wants to write about causation in tort law. A readership of judges or tort lawyers will need less background explanation than a readership of lay clients, who in turn will need less than teenage readers in a middle school civics class. Analysis that may resonate with one audience may escape

another. Readers trained in the law can also better digest terms of art undefined in the writing (such as the concept of causation itself, whose doctrinal underpinnings might be intimately familiar to tort lawyers, less familiar perhaps to lawyers specializing in some other fields, and entirely unfamiliar to middle schoolers).

Tailoring the written message's style, tone and content to help connect with the identified audience may seem like common sense, but sometimes the most obvious is also the least obvious. Even careful lawyers (and careful law professors) risk losing our readership whenever we forget that, as stage and screen actress Shirley Booth said soon after winning an Academy Award in 1952, "the audience is 50 percent of the performance."[6]

At its best, our legal writing is indeed a dialog, and not a monolog. We may understand exactly what we mean to say, but the key is whether other people will also understand because the writer on the theater stage is not a member of the audience. Once I have published a writing, I rarely re-read it afterwards unless continued close familiarity serves some greater purpose, such as preparation for a later argument or talk. With the ink dry, I simply hope I have reached the intended audience and I leave the verdict to their judgment.

THE LEGAL WRITER'S LIFETIME ON STAGE

"All the world's a stage," Shakespeare wrote in *As You Like It*.[7] All the legal world certainly is. Director-producer Viola Spolin is right that "[t]he audience is the most revered member of the theater." "They are our . . . evaluators," she said, "and the last spoke in the wheel which can then begin to roll."[8] We lawyers spend our professional lives writing on stage in virtual theaters, and knowing our audience each time will help assure that our prose continues to roll.

** Douglas E. Abrams, a law professor at the University of Missouri-Columbia, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.*

ENDNOTES

1. Debra Whitefield, Simon Rifkind Takes On the $11-Billion Case: Fighting Pennzoil's Legal Battle With Texaco May Be His Last Great Challenge, L.A. Times, July 28, 1986, pt. 4, at 1.

2. See, e.g., David Ball, Theater Tips and Strategies For Jury Trials (Nat'l Inst. For Trial Advocacy 3d ed. 2003). See also, e.g., Stephen H. Goldberg, The First Trial: Where Do I Sit? What Do I Say? In a Nutshell, ch. 1 (1982) (entitled "Trial Is Theater"); Donald B. Fiedler, Acting Effectively in Court: Using Dramatic Techniques, 25 Champion 18 (July 2001); Preview of Products and Services Displayed at the ABA Expo, 79 A.B.A.J. 65 (July 1993) (describing Advocacy and Communications Techniques (ACT) training program that uses "theater-based principles and methods" to help trial lawyers improve their court performance).

3. Compare Lee C. Bollinger, Images of a Free Press 42 (1991) (the Supreme Court "can perform a deeply educative role in society, affecting behavior far beyond the strictly legal domain"); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 58 (1948) ("The Supreme Court . . . is and must be one of our most effective teachers."); and Bernard J. Ward, The Federal Judges: Indispensable Teachers, 61 Tex. L. Rev. 43, 46 (1982) (judges are "the indispensable teachers of the American people," conducting seminars "every day from the classrooms of [their] courtrooms"), with William H. Rehnquist, Act Well Your Part: Therein All Honor Lies, 7 Pepperdine L. Rev. 227, 227-28 (1980) ("[T]he Supreme Court does not `teach' in the normal sense of that word at all. In many cases we hand down decisions which we believe are required by some Act of Congress or some provision of the Constitution for which we, as citizens, might have very little sympathy and would not choose to make a rule of law if it were left solely to us."). See generally Various Authors, Special Issue: Judicial Opinion Writing, 62 U. Chi. L. Rev. 1363-1519 (1995).

4. Henry Weihofen, Legal Writing Style 8-104 (2d ed. 1980) (discussing the four fundamentals).

5. Douglas E. Abrams, The Right to a Reader, 1 Precedent 38-39 (MoBar Winter 2007).

6. Shirley Booth, News Summaries, Dec. 13, 1954 (winner for Best Actress in *Come Back, Little Sheba*; also winner of three Tony Awards, a Golden Globe Award and two Emmy Awards).

7. William Shakespeare, As You Like It, act 2, sc. 7, l. 139-66 (1623).

8. Viola Spolin, Improvisation for the Theater, ch. 1 (1963).