Developing a Theory of Defense:
Brainstorming,
Theory and Themes, and
Storytelling
WHY BRAINSTORM YOUR TRIAL CASES?

Every good trial lawyer realizes that we win cases on the facts, not on the law. Jurors are persuaded not by legal technicalities, but by a theory of defense that is rooted in the facts of the case, and by a good, factual story that convinces them that our client is not guilty.

One of the greatest obstacles to winning trials, is that we often tend to accept, or buy into the prosecution’s version of the facts. When we do this, the jury hears a story that is framed by police testimony, and ends with our client being the guilty party. To win a criminal trial, we must develop a different factual narrative from that offered by the prosecution.

Developing a different factual narrative from that of the prosecution, and devising a theory of defense based in the facts of your case are only possible if you have first explored and analyzed those facts in depth. Brainstorming is the method we suggest for developing your facts.

The basic reasons we advocate starting your trial preparation by brainstorming the case are simple:

· When we are preparing for trial, we have already become so involved in the facts, issues, and personalities of the case that it is easy to overlook ideas and facts that might help us win.

· Because we get so close to the cases we litigate, it is also almost impossible for us to find new factual perspectives and develop new ideas without help from others. Or to put it another way:

· When preparing for trial, many heads are a lot better than one.

WHAT BRAINSTORMING IS NOT

♦ Brainstorming is not a “touchy-feely,” informal get together.

♦ Brainstorming is not a theoretical or academic exercise. It is meant to generate practical ideas that will allow you to develop a persuasive theory of defense and a persuasive storyline that will ultimately convince the judge or jury to reach the conclusion you want.
Brainstorming is not the equivalent of hanging out in the office and discussing your case with a co-worker.

Brainstorming is not meant to just reinforce the ideas you have already developed about your case. To the contrary, it is meant to develop new ideas and perspectives about your case.

WHAT BRAINSTORMING IS

Brainstorming is a formal process for developing and analyzing the facts of your case, and for gaining new, creative perspectives on your case.

Brainstorming is a way to reality-check the strategies and tactics you are considering for your case, and to make an intelligent decision about what will work and what will not work.

Inclusive – At the start of your brainstorming session the goal is to get as many facts and perspectives as possible. You want quantity at this stage, not necessarily quality. As you progress with your case, you will be making decisions as to what can be used and what cannot be used. But at the brainstorming phase, all you want is to get as much on the table as possible, to give you as many options as possible when you get around to making decisions about strategy and tactics. Quantity at the start of the process helps generate quality at the end.

Non-Judgmental – Some of us have been taught that all facts can be divided into good facts, bad facts, and facts beyond change. While this formulation may be useful later on, the brainstorming phase is much too early to make these judgments. In fact, one goal of brainstorming is to be able to make an intelligent decision about what facts are really good, what facts are really bad, and what facts are really beyond change. One of the best things about the brainstorming process is that we often find that our initial judgments about these factors is incorrect. Facts we thought would be bad can be made good. Facts initially thought to be beyond change can be successfully challenged. So when brainstorming the facts of a case, do not reject any idea out of hand, and do not be too quick to shoehorn facts into pre-determined categories.

Associative – One of the best things about brainstorming is that if you are truly inclusive and non-judgmental, you will begin to start associating between ideas and facts that are being brainstormed. One person’s suggestion will give rise to a different, and possibly better formulation. Brainstorming should encourage this kind of creativity and association, which is another reason to be inclusive and non-judgmental.
HOW TO BRAINSTORM YOUR CASE

1. Find at least 3 other people to do the brainstorming.
   
   a. There should be at least three, to facilitate a real exchange of ideas and perspectives.
   b. They do not have to be lawyers. In fact, non-lawyers often provide a more realistic perspective on what jurors will and will not accept.

2. Set aside a specific time to do the brainstorming.
   
   a. It should be at least an hour or two.
   b. Give everyone sufficient time to prepare and set aside the time.

3. If there are any essential documents, such as police reports, a confession, an indictment, etc. be sure to give all of the brainstormers copies in advance.

4. Start the brainstorming session by giving everyone a 5-10 minute summary of the facts of the case. If there is a particular problem you want to address, define the problem, but do not restrict the ability of the group to redefine the problem if they want.

5. After you spend 5-10 minutes describing the facts, give the group another 10-15 minutes to ask you questions about the case.

6. When the time for questions is over, stop asking and answering questions. This will sometimes be hard to do, but if the questions go on for too long, the group may forget to do any real brainstorming, and all you wind up doing is reinforcing the original answers and perspective of whoever’s case it is.

7. Have the group brainstorm the case. This will involve analysis, free-association, and generally tossing around facts that attract your interest, and ideas about what those facts mean and how they can be used.

8. When the group starts to brainstorm, the person whose case is being brainstormed should keep quiet. The purpose of the session is not for him or her to defend his or her original ideas. It is to gain new perspectives from the others. Let everyone else talk. Listen to them.

9. Write down everything everyone says. Be as close to verbatim as possible. The purpose of this is twofold: (1) To make sure that nothing is forgotten by the end of the session; (2) To permit participants to compare and make associations between things that were said at various times in the session.
WHAT TO DO WITH THE FACTS YOU HAVE BRAINSTORMED

✓ Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a persuasive theory of defense.

✓ Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a storyline that will persuade the jury to acquit. To this end, the brainstorming should help you define the characters in the story of your case, and the role those characters will play; the setting in which your story takes place; and the sequence in which you will tell the story of your case at trial.

FOLLOWING UP – WHAT COMES NEXT

Preparing a criminal case for trial is not a linear process. As we learn more about the case, our views change. We revise our theory of defense, adjust our strategies and tactics, and go out to do more investigation. Brainstorming is an important first step in the process. After brainstorming, you may see the need to gather more facts, interview more witnesses, obtain more documents. If this is what happens after the brainstorming session, the session has been a success -- You have obtained a better idea of what needs to be done to win the trial. After brainstorming, you may feel that you are ready to develop a theory of defense that will guide future strategic and tactical decisions. If brainstorming has put you in a position to construct a theory of defense, it has also been a success.
WHAT IS A “THEORY”

A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for client’s acquittal or conviction of a lesser crime while telling the defense story of innocence, reduced culpability, or unfairness.

_Vince Aprile_

One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the case.

_Mario Conte_

That combination of facts and law which in a common sense and emotional way leads the court to conclude a fellow citizen has been wrongfully accused.

_Tony Natalie_
THEORY COMPONENTS

The three definitions by Vince, Mario and Tony share a common structure:

1. Each has a FACTUAL component (brainstorming);

2. Each has a LEGAL component (genre);

3. Each has an EMOTIONAL component (themes, descriptive words choices, etc.).
THE GENRES
THE LEGAL COMPONENT
OF THE DEFENSE THEORY

1. It never happened (mistake, setup);

2. It happened, but I didn’t do it (mistaken id, alibi, setup, etc.);

3. It happened, I did it, but it wasn’t a crime (self-defense, accident);

4. It happened, I did it, it was a crime, but it wasn’t this crime (lio);

5. It happened, I did it, it was the crime charged, but I’m not responsible (insanity);

6. It happened, I did it, it was the crime charged, I’m responsible, so what?
THEMES AND ARCHETYPES

THE EMOTIONAL COMPONENT
OF THE DEFENSE THEORY

Primary Theme

A word, phrase or simple sentence that captures the controlling or dominant emotion and/or reality of the theory of the case. The defense theme must be brief and easily remembered because it must resonant with JUDGES and/or with JURORS.

Secondary Theme

Subthemes are a word or a phrase used to describe or label an aspect of the case.

- A person or his act of omission:
  “Mr. X would have testified on Charles’ behalf, but Mr. Wilson never asked.”

- A condition:
  “Not-yet-been-to-the-law-enforcement-academy Officer Hobbs with his not-yet-been-to-the-drug-dog-academy Drug Dog Drago.”
THE EMOTIONAL COMPONENT
OF THE THEORY
II

The Emotion Comes from Two Main Sources: Archetypes and Themes

Archetypes Include:

Love
Hate
Parent/Child Relationships
Betrayal
Despair
Poverty
Hunger
Dishonesty
Being Mistaken
Being Wronged by Inaction; Misconduct

THEY ARE UNIVERSAL TRUTHS.
STORYTELLING:
PERSUADING THE COURT TO
ACCEPT YOUR THEORY OF DEFENSE
By Ira Mickenberg

What Does Telling a Story Have to Do With Our Theory of Defense?

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories, and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic or theological analysis, but through stories, parables and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all demonstrated that storytelling is one of the most fundamental traits of human beings.

Unfortunately, courts and law schools are among the few places where storytelling is rarely practiced or honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles, and talking about reasonable doubt and the elements of crimes. Prisons are filled with victims of legal analysis and reasonable doubt arguments.

For public defenders, this approach is disastrous, because it assumes that judges and jurors are persuaded by the same principles as law students. Unfortunately, this is not true. When they deal with criminal trials, lawyers spend a lot of time thinking about “reasonable doubt,” “presumption of innocence,” and “burden of proof.” While these are certainly relevant considerations in an academic sense, the verdict handed down by a jury is usually based on more down-to-earth concerns:

1. “Did he do it?”

   and

2. “Will he do it again if he gets out?”

A good story that addresses these questions will go much further towards persuading a jury than will the best-intentioned presentation about the burden of proof or presumption of innocence.

ETHICS NOTE: When we talk about storytelling, we are not talking about fiction. We
are also not talking about hiding things, omitting bad facts, or making things up. Storytelling simply means taking the facts of your case, and presenting them to the jury in the most persuasive possible way.

What Should the Story Be About?

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus.

In order to persuade the jury to accept your theory of defense, your story must focus on one or more of the following:

- Why your client is factually innocent of the charges against him.
- Your client’s lower culpability in this case.
- The injustice of the prosecution.

How to Tell a Persuasive Story

I. Be aware that you are crafting a story with every action you take.

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a jury at trial, but it is always a story. Our task is to figure out how to make the story of our client’s innocence persuasive to the jury. The best way to do this is to be aware that you are telling a story, and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the trial as if you were an author writing a book, or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story of innocence, and what roles do they play?
2. Setting the scene -- Where does the most important part of the story take place?
3. In what sequence will I tell the events of this story?
4. From whose perspective will I tell the story?
5. What scenes must I include in order to make my story persuasive?
6. What emotions do I want the jury to feel when they are hearing my story? What
character portrayals, scene settings, sequence and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to recite the events of the crime.

II. “But I Don’t Have Enough Time to Write a Novel For Every Case”

We all have caseloads that are too heavy. A short way of making sure that you tell a persuasive story to the jurors is to make sure that you focus on at least three of the above elements:

1. Characters – before every trial, ask yourself, “Who are the characters in the story I am telling to the jury, and how do I want to portray them to the jurors?”
   a. Who is the hero and who is the villain?
   b. What role does my client play?
   c. What role does the complainant/victim play?
   d. What role do the police play?

2. Setting – Where does the story take place?

3. Sequence – In what order am I going to tell the story
   a. Decide what it is most important for the jury to know
   b. Follow principals of primacy and recency:
      i. Front-load the strong stuff
      ii. Start on a high note and end on a high note

III. Once you have crafted a persuasive story, look for ways to tell it persuasively.

You will be telling your story to the jury through your witnesses, cross-examination of the State’s witnesses, demonstrative evidence, and exhibits. When you design these parts of the trial, make sure that your tactics are tailored to the needs of your story.

A. The Language You Use to Communicate Your Story is Crucial

1. Do not use pretentious “legalese,” or “social worker-talk” You don’t want to sound like a television social worker, lawyer or cop.

2. Use graphic, colorful language.

3. Make sure your witnesses use clear, easy-to-follow and lively language.
4. If your witnesses are experts, make sure they testify in language that laypeople can understand.

B. Don’t Just Tell the Jury What You Mean – Show Them

1. Don’t just state conclusions, such as “the officer was biased,” or “my client is an honest man.” Instead, show the factual jury vignettes that will make the jurors reach those conclusions on their own.

2. Use demonstrative evidence to make your point.

3. Create and use charts, pictures, photographs, maps, diagrams, and other graphic evidence to help make things understandable to the jurors.

4. Visit the crime scene and any other places crucial to your theory of defense. That way when you are describing them to the jury, you will know exactly what you are talking about.