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**BRAINSTORMING:  
DEVELOPING THE FACTS TO  
BUILD A THEORY OF DEFENSE**

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## 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 gather and investigate 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.