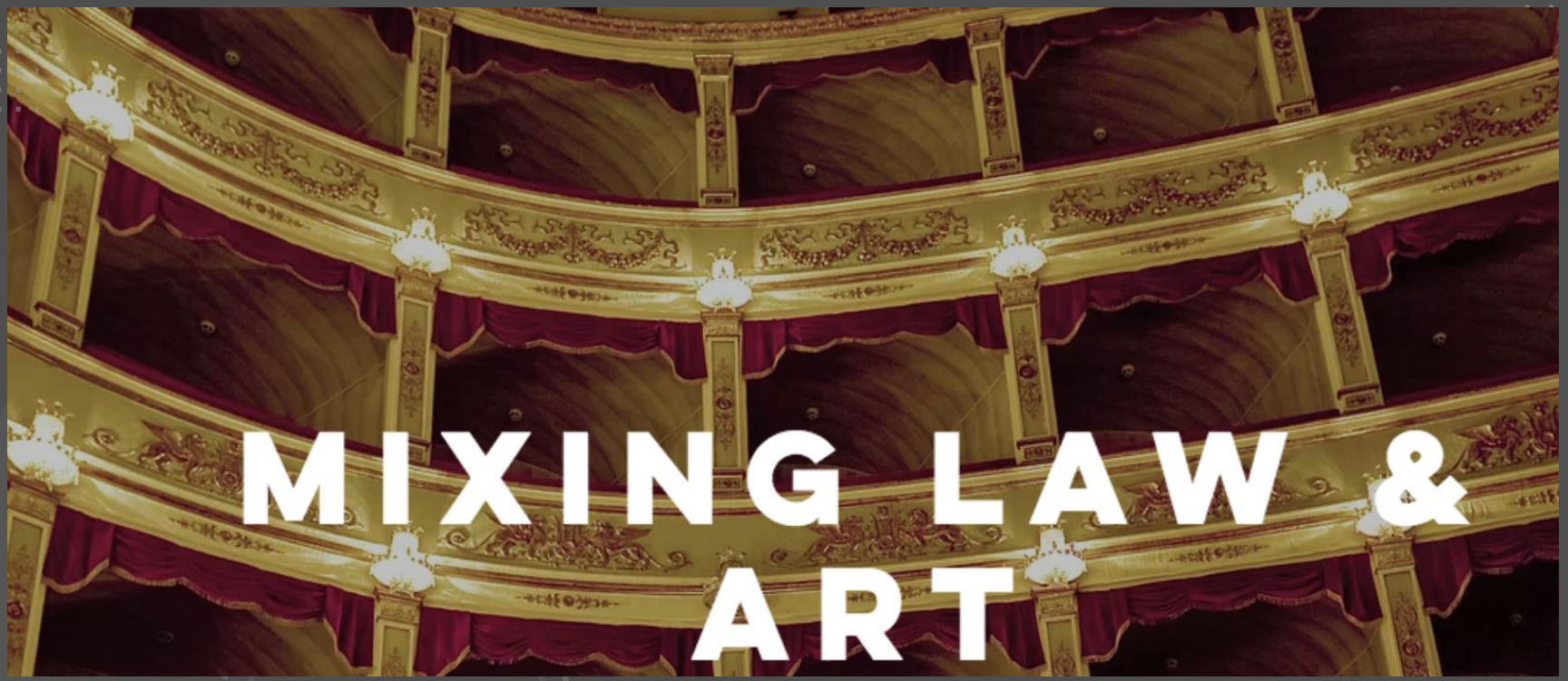
Storytelling in the Courtroom





Introduction

- I love doing this presentation because it allows me to combine two of the things that I am deeply passionate about: the law and theater.
- I am going to go deeper in this presentation and cover more ground than what is normally covered in the average storytelling for lawyers class.



Mixing Law & Art

- While I was training as an actor, I began to see the parallels between what actors do on stage with what lawyers do in a courtroom and how these tools and techniques could be applied by the lawyer in the courtroom to bring the human element to the jury.

Mixing Law & Art

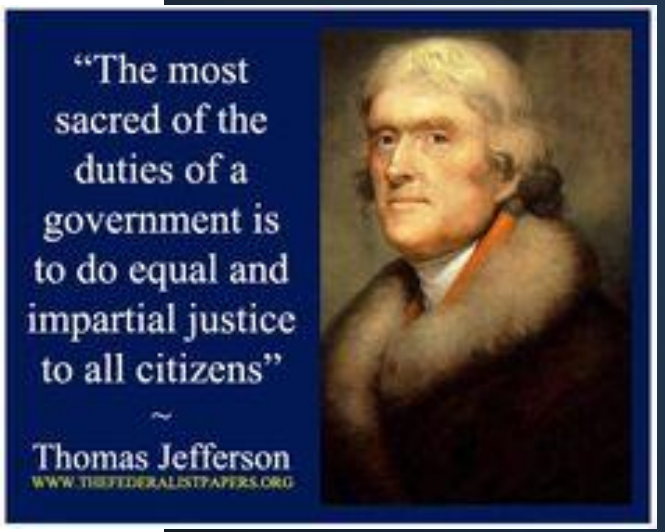
- One of the guiding principles in theater is that "art expresses human experience."
- The very essence of a trial is a *story* – the story of a human experience.
- The goal of the attorney is to draw the jury into a re-constructed reality of past events, such that they "see" what happened, even though they were not present to witness the original event.

Mixing Law & Art

- The attorney is the producer of that event as well as the writer, director, and the actor *in* that event.
- A play is also a live event with story at its core. The goal of the actor is to transform personal experience into a *universal* and *recognizable* form of expression that has the ability to *change* something in the spectator. Actors must guide the audience on a journey bringing with them their minds and hearts.

Mixing Law & Art

- Lawyers, like actors, serve something bigger than they are:



Mixing Law & Art

- This presentation reveals how the creative world of acting overlaps with the courtroom and how the connections between these two disciplines can be exploited for the good of our clients.

Topics

- My Story
- The Case for Storytelling
- Tips for Building Credibility with the Jury
- Lesson Learned from “8 Mile”
- Purpose of Opening
- Storytelling as the Device for Opening Statement

Topics

- Shifting Sands – How I view “My” Jury
- Theory
- Theme
- Organization for Opening Statement
- Cast of Characters
- Perspective

Topics

- Narrative & Scene Modes for Storytelling
- Specificity – The Secret Sauce
- Raising the Stakes
- The Tools

Topics

- The Language of Opening Statement
  - Use Standard English
  - Use Power Language
  - Give Verse a Chance — A Brief Digression
  - Vary Up Your Sentence Length
  - Use Powerful Imagery

Topics

- Emphasis and Impact Devices
- The Voice
- The Imagination
- The Breath
- Effective Voice Principles for the Courtroom

Topics

- The Sounding Body: Voice as Movement
- The Power of Silence
- We have Five Senses, Not One
- How I Brainstorm a Case

Story

- I'd like to start by telling you a story. It goes back some years to when I was a bright-eyed, bushy-tailed public defender who was determined to make a difference in the world by standing up for those who had no voice. I wanted to be like my dad, who was also a criminal defense attorney and who had a reputation as a zealous advocate for the disenfranchised.
- I was about to make my closing argument. The next decade of my client's life depended on how convincingly I could make it. The judge had called a short recess.

Story

- I was pacing up and down the hallway with a huge knot in my stomach.
- I watched the jury walk in and heard the judge utter those frightful words that still haunt me to this day: “Ladies and gentlemen. You will now hear closing arguments. Mr. DeBlis, you can begin.” The fear shot through my body like a bolt of lightening. My heart was racing and I had a lump in my throat the size of a crater.

Story

- My voice cracked before I could get out the salutation, “Ladies and gentleman”. The next thing I knew I was standing there frozen like a dear in headlights. Several seconds went by in silence. The seconds felt like minutes. All the while, I could feel my palms sweating and my hands shaking like a leaf.

Story

- The silence in the courtroom was deafening. I felt the gazes of the jury, the judge, the prosecutor and my colleagues boring right through me.

Embrace *Raw* Fear

- In that moment, I wished that the ground would have opened up and that I could have been swallowed up into a dark abyss never to be seen or heard from again. The thought of enduring yet another second of this was agonizing.

Embrace *Raw* Fear

- But the worse had yet to come. Out of the corner of my eye, I could see my client's face – and it was frozen in horror.
- As hard as it was to come to terms with my own shame, I now had a much larger problem to deal with: the feeling that I had let my client down. I tried to regain my composure, but the only sounds that I could utter were unintelligible "uum's" and "ahh's."

Embrace *Raw* Fear

- But then something strange happened. Out of nowhere, I blurted out, “I wish that I wasn’t so afraid.” This mortifies me to this day.

- The expression on the faces of the jurors was one of pure astonishment. While they could see and feel the physical manifestations of my fear, the last thing they expected me to do was to confess it. They watched. They waited.

Embrace *Raw* Fear

- I continued: “Let me tell you what my fear is. I care a lot for Johnnie. My fear is that I won’t be able to make the kind of argument that Johnnie deserves in order to convince you that he is not guilty.”
- My fear slowly began to recede and the argument took on a life of its own.

Embrace *Raw* Fear

- I no longer had to struggle in order to find the words to express the feelings that were welling up inside of me. Instead, they came gushing out of me like a spring.

Embrace *Raw* Fear

- When I finished, I sat down, utterly exhausted. Although my heart was still racing, surprisingly I was no longer in a state of panic. Don't get me wrong. The argument was far from perfect. However, it was an argument that was as real and honest as I could be in that moment.

Embrace *Raw* Fear

- The lessons I learned from this experiences were priceless. First, I learned that I had experienced the proverbial “freeze” response that often accompanies a state of panic.
- But I wanted to know why. No other author has been able to capture the rawness of what I was feeling on the inside that day than Tom Wolfe, author of the “Bonfire of the Vanities.”

Embrace *Raw* Fear

- In it, protagonist, Sherman McCoy reveals what it felt like after being arrested and forced into a perp walk in front of huge crowds who were mocking and jeering him.
- *"What I had presumed to be my private inviolate self had become a veritable amusement park to which everybody, and I mean everybody, came scampering and screaming. I could no more keep them from entering my own hide than I could keep the air out of my lungs."*

Embrace *Raw* Fear

- In a real sense, it felt as though I had stood before an audience of fourteen absolute strangers, tore open my chest, and allowed them to see my pounding heart.

Embrace *Raw* Fear

- Some might say that by confessing my fear instead of “holding my ground," I had acted cowardly. No doubt these are the same folks who equate emotional vulnerability with weakness. As for me, I saw this as an act of bravery in that I had confronted my fear head on and stared it down until it had retreated.

Embrace *Raw* Fear

- Second, it taught me the power of emotional vulnerability and how the *confession of fear* is perhaps the most exquisite expression of vulnerability.

Embrace *Raw* Fear

- Finally, it taught me about the power of storytelling in the courtroom to win over the jury.

The Case for Storytelling

- As a trial lawyer, what do you really need? What does every trial lawyer need more of in order to win their case? Attention — the jury's attention.
- I don't mean that in the narcissistic "everyone look at me" sense. When I say every trial lawyer wants more attention, what I mean is that before you can build a rapport with the jury and earn their trust, you have to fight a war — the war for the jury's attention. "Attention" and "connection" are the key elements needed to win the minds and hearts of the jury.

The Case for Storytelling

- Like it or not, we are in the midst of an attention war. We need to confront the reality that the jury's attention can no longer be taken for granted. We have to change our way of thinking to focus on gaining attention before we can leave lasting impressions.
- The jury's attention must be the currency that every trial lawyer trades in.
- We live in an age where we are bombarded with information. Walk one block in New York City and your senses will be overloaded by billboards, large neon flashing signs, and window displays that dazzle. All of this is competing for our attention at the same time.

The Case for Storytelling

- The average person has to be able to separate the wheat from the chaff in order to avoid going into information overload. This explains why attention spans are eight seconds long, one second shorter than a goldfish. A recent study found that the average person checks their smart phone up to 150 times per day.
- Even though the jury might not have their smart phones in the courtroom, they will surely substitute daydreaming or “zoning out” for looking at social media.

The Case for Storytelling

- This is where a striking comparison can be made between Shakespeare and the courtroom.
- I'm a firm believer that audiences will not listen to Shakespeare unless the actor makes them. When actors stomp around the stage shouting out lines incomprehensibly and wearing dodgy costumes, the audience cannot follow along and inevitably loses interest and becomes bored.
- In the same way, juries, despite having taken an oath and being a captive audience, may not be so apt to give lawyers their full attention unless the lawyer makes them.

The Case for Storytelling

- As shocking as this might sound, information overload is a by-product of the twenty-first century and is growing at an unprecedented rate. Therefore, it is better to accept this as mainstream and adapt to it rather than indulge ourselves in the fantasy that it is nothing more than a fad that will pass quickly.



The Case for Storytelling

- Now put yourself in the shoes of the jury. They have been herded like cattle into an unfamiliar and intimidating place called the “courtroom,” a Roman coliseum of sorts, stripped of their smart phones and any other connection to the outside world, and squeezed into a small rectangular box where they are forced to sit elbow to elbow with perfect strangers. Not such a warm and cozy feeling to say the least. Think subway car in NYC at rush hour!

The Case for Storytelling

- Before going any further, I want to clear up a misconception. One interpretation of "story" suggests something that is made up, untrue, or designed to fool those listening to it. As used here, "story" suggests oral delivery that is compelling, that holds the audience spell-bound, that will be remembered, and that will shape the jury's impression of the evidence they are about to hear.

The Case for Storytelling

- For me, the power of storytelling came when I was backpacking around Europe and the Middle East. I ended up in Marrakesh in medina, a densely packed, walled medieval city dating to the Berber Empire, with maze-like alleys where thriving souks (marketplaces) sell traditional textiles, pottery and jewelry. It has a mythological feel to it. At nighttime, it's full of snake charmers.
- As I was walking around, I saw an old man leaning on a cane with a beard telling a story. A huge crowd had formed around him. He was speaking in Arabic and although I didn't understand a word, I was completely mesmerized.

The Case for Storytelling

- Before long I said to myself, “This is what I want to do. I want to be like him. I want to tell stories because that shriveled-up old man on a cane has transformed himself into a twenty-foot beast that is holding everyone spellbound, hanging on every word he says. He is larger than life.”
- Of course, this created more questions than answers, none more apparent than, “How did he do it?” My journey into acting and storytelling, not to mention the countless cases that I have tried, have given me some profound insight into this. At the same time, I am not presumptuous enough to believe that I have mastered this craft. In fact, I feel like I have barely scratched the surface.

The Case for Storytelling

- As with anything else in life, the more you learn, the more you learn how much you don't know. I prefer to be like a sponge, absorbing everything I can.
- Jazz great Winton Marsalis said it best, "Humility engenders learning because it beats back the arrogance that puts blinders on. It leaves you open for truths to reveal themselves."

The Case for Storytelling

- Beginning in the simplest place, story is the most powerful tool of persuasion. As humans, we trust people who can tell a good story. Since the dawn of time, storytelling has been the principal means by which our ancestors have taught one another. Look no further than the story of great hunts and epoch battles told in darkness around campfires by Indian chiefs that were passed down from generation to generation and became the history of the tribe.



The Case for Storytelling

- If we examine stories from all cultures, we'll find that the most memorable ones all have one thing in common — they embody one or more of the six emotions: love, hate, joy, sadness, power, and fear. These universal truths are the very essence of what it means to be human.

The Case for Storytelling

- Storytelling contains the essential ingredients for arousing empathy. It permits the speaker to speak easily, openly, and powerfully from the heart. Social research proves that audiences are moved by a story because it touches them in those soft, unprotected places where their decisions are always made. An attorney who projects a true belief in the righteousness of the cause shows how deeply he cares about his client. And this is not lost on the jury.

The Case for Storytelling

- Recently, scientists discovered that listening to stories releases two chemicals that help control the brain's reward and pleasure centers: (1) dopamine (which aids in information processing) and (2) oxytocin (which builds trust).
- This is further proof that arts gets there before science!

The Case for Storytelling

- The other thing I want to say here might be a little controversial.
- As difficult as this might be to accept, the first impression that a jury often makes of a client charged with a criminal offense is that of a “villain.”
- Absent a story, jurors are apt to view our clients based on nothing more than the crime itself – i.e., on the “bare fact” that he has killed or raped.
- The danger that this poses is obvious. One who commits a heinous crime is hard to care about. Stated simply, it is too easy to point and to accuse and to hate on the bare facts because it relieves the jury of the responsibility of understanding.

The Case for Storytelling

- After trying some serious cases, I got to thinking a lot about this label. It impacts me not just as a criminal defense attorney, but also as an actor.
- As an actor, I've played my share of Shakespearean villains. I've always been fascinated by anti-social behavior – behavior in which people cause harm to one another, to wit what villains do. Some of the questions that arose in my exploration of villains was, "Why do we harm one another?

The Case for Storytelling

- As ashamed as I am to admit this, when I first tackled villains, I painted them with a broad stroke. By broad stroke, I mean as scheming, plotting, and conniving Machiavellian types.
- But I've learned over the years that a villain is anything but that. They are far from being one-dimensional and static. Indeed, villains are dynamic human beings with backstories just like everyone else, but their backstories are often filled with more tragedy than the average person's. It's only when we dig into these backstories that we discover the hidden story that explains why this person behaves the way they do.

The Case for Storytelling

- At their core, villains are broken. And so too are some of our clients. Just as humanizing the villain only heightens the tragedy or the drama (look no further than Joaquin Phoenix's portrayal of "Joker"), humanizing our client arouses empathy on the part of the jury.

The Case for Storytelling

- There is always another side to the state's story.
- The other side is the world we do *not* see: a world that is personal, perhaps one that is as secret as the "Forbidden Forest." The latter is the world that our clients inhabit. It is that part of the iceberg that remains hidden underneath the water, despite dwarfing the apex one hundred times over.



The Case for Storytelling

- Just as today's fan base of Marvel comics have come to expect the villain to be "complicated" and just as they have an insatiable appetite to learn more about them, so too does a jury want to learn more about our clients.
- And we should deliver by giving them a glimpse into that "other" world in which our client lives.

The Case for Storytelling

- In my opinion, storytelling in the courtroom is no longer an option for lawyers. If we don’t use it, then the jury will.

The Case for Storytelling

- Think about it. No sooner is the jury sworn in then they are bombarded by a torrent of evidence that comes in bit by bit through oral testimony and physical exhibits — often out of order — and disrupted by continuous objections, sidebars, and removal of the jury from the courtroom so that technical legal arguments can be made and ruled upon without unduly prejudicing the jury against one side or another.

The Case for Storytelling

- To make matters worse, the opposing side is advancing a completely different version of the story. The jury is left with the unenviable task of sorting through this mess and somehow making sense out of it all.
- And how do they do this while preserving their sanity? They begin to imagine a story almost immediately, interpreting facts to fit into a familiar framework. In other words, a jury instinctively begins imagining a story out of necessity. When this happens, it will be difficult for the jury to see these same facts through a competing account of what happened.

The Case for Storytelling

- As trial lawyers, we must seize upon this narrative instinct that jurors have by telling them a story from the very start. This requires us to understand the jury as human beings and not automatons.
- Let's begin with a simple truth: jurors are not blank canvasses upon which we can paint. Nor are they sticks of clay that can be molded into whatever shape we desire.

The Case for Storytelling

- Jurors arrive at the courtroom with their own experiences, “handed down frames of reference,” and biases. No matter how many times the judge instructs them to view the evidence objectively and dispassionately, jurors routinely measure the validity of what they hear against their belief systems, attitudes, life experiences, backgrounds, values, education, and training. A story is not believed unless it is complete, internally consistent, and conforms to the jurors’ notions of common sense.

The Case for Storytelling

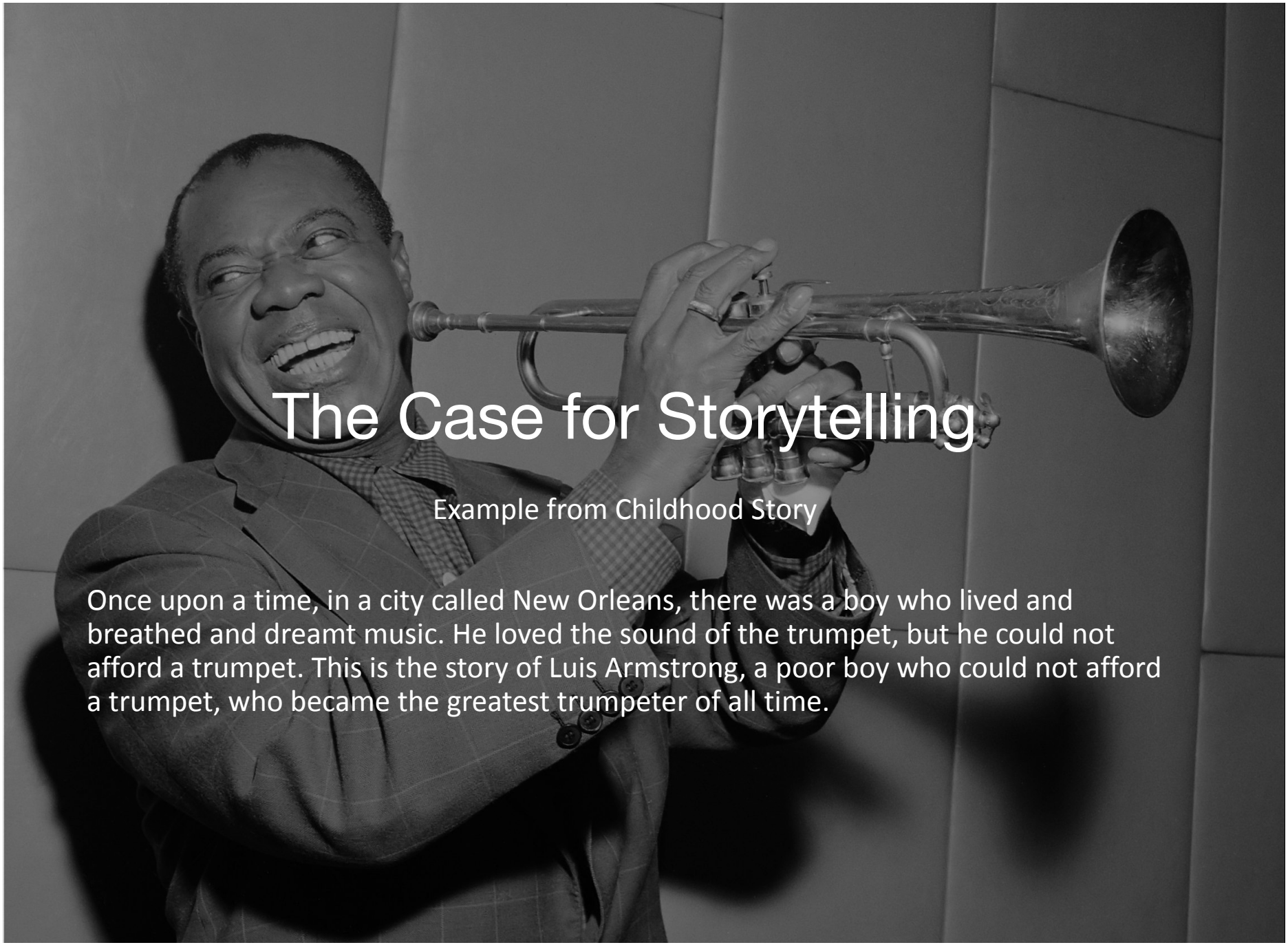
- What does this mean for the lawyer? We must be able to address disparate jurors and tell a story that will impart a *single perspective* to the entire jury, a narrative framework for them to view the evidence.

The Case for Storytelling

- The possibilities are endless. If your story rings true to the jurors and influences their frames of reference, they will interpret the evidence to fit your case. When this happens, it will be difficult for the jury to see these same facts through a competing account of what happened. Witnesses will be viewed in the context of how they provide validation of your story. And witnesses who contradict your story will be viewed with a healthy dose of skepticism.

The Case for Storytelling

- As trial lawyers, we must change our way of thinking by learning to accept what we once rejected and to take up what we once set aside — the human drama: how the experience was lived and felt by the people involved.
- The attorney who can leave the jury thinking, “I may not have done what Bill did, but I can understand why he did it” is a mere heartbeat away from victory.



The Case for Storytelling

Example from Childhood Story

Once upon a time, in a city called New Orleans, there was a boy who lived and breathed and dreamt music. He loved the sound of the trumpet, but he could not afford a trumpet. This is the story of Luis Armstrong, a poor boy who could not afford a trumpet, who became the greatest trumpeter of all time.

The Case for Storytelling

- For those who don't think they are good storytellers, consider this …
  - How many times when you were telling your friends the "story" of how you met your significant other did they cut you off and walk away?
  - How many times when you were reliving the events of the "big game" from the night before did your friends' heads begin bobbing and weaving and their eyes glaze over?

Tips for Building Credibility with the Jury

- Don’t be clever;
- Never lie;
- Don’t hide;
- Always be transparent

Tips for Building Credibility with the Jury

- Integrity is why many lawyers will concede at the outset whatever is true even if it is detrimental to their case
- Why? As Gerry Spence says, “A concession coming from your mouth is not nearly as damaging as an *exposure* coming from your opponent’s.”



Lesson Learned from “8 Mile”

- Papa Doc won the coin toss and allowed B-Rabbit to go first. Aware that Doc had a lot of potential material about him, B-Rabbit adopted the “stealing thunder” technique, revealing the negative facts/information about himself before it was mentioned by his opponent. While B-Rabbit embraced his own past, he outed Doc’s as well, revealing that not everything is how it seems.

Lesson Learned from “8 Mile”

- This “Stealing thunder” technique can also be applied in the courtroom. Acknowledging the weak points in your case from the very outset and dealing with them “head on” during closing argument has the effect of neutralizing them or turning them into a positive theme that provides a solid underpinning for the theory of your case. Not only will it disarm your adversary but it simultaneously forces him into a defensive position of having to rebut what might otherwise be a logical explanation.

Eye-popping Statistic

- Studies show that the verdict in a trial is the same as the tentative conclusion held at the end of opening statement 75% of the time!

Principal of Primacy

- Psychologists suggest two reasons:
  - Opening statement comes at the beginning of the case taking advantage of the psychological principal of primacy.
  - A tentative conclusion is reached by the juror after the opening statement and evidence presented afterwards is judged in light of its proving or disproving the tentative conclusion. The opening statement predisposes or taints the juror to one side or the other.

Opening Statement – Not off the “Cuff”

- Notwithstanding the sheer force of opening statements, it is the most neglected phase of the trial and often consists of legalistic phrases like “the evidence will show” followed by a fact.
- But this is precisely where the principles of storytelling must dominate.

Principles of Opening Statement

- Opening statement must set the stage for the rest of the trial and be carefully coordinated with the closing argument.

Purpose of Opening

- Twofold:
  - To “strike oil” – to hit the emotional core of your case and transform it into a powerful story that will motivate your jurors to action.

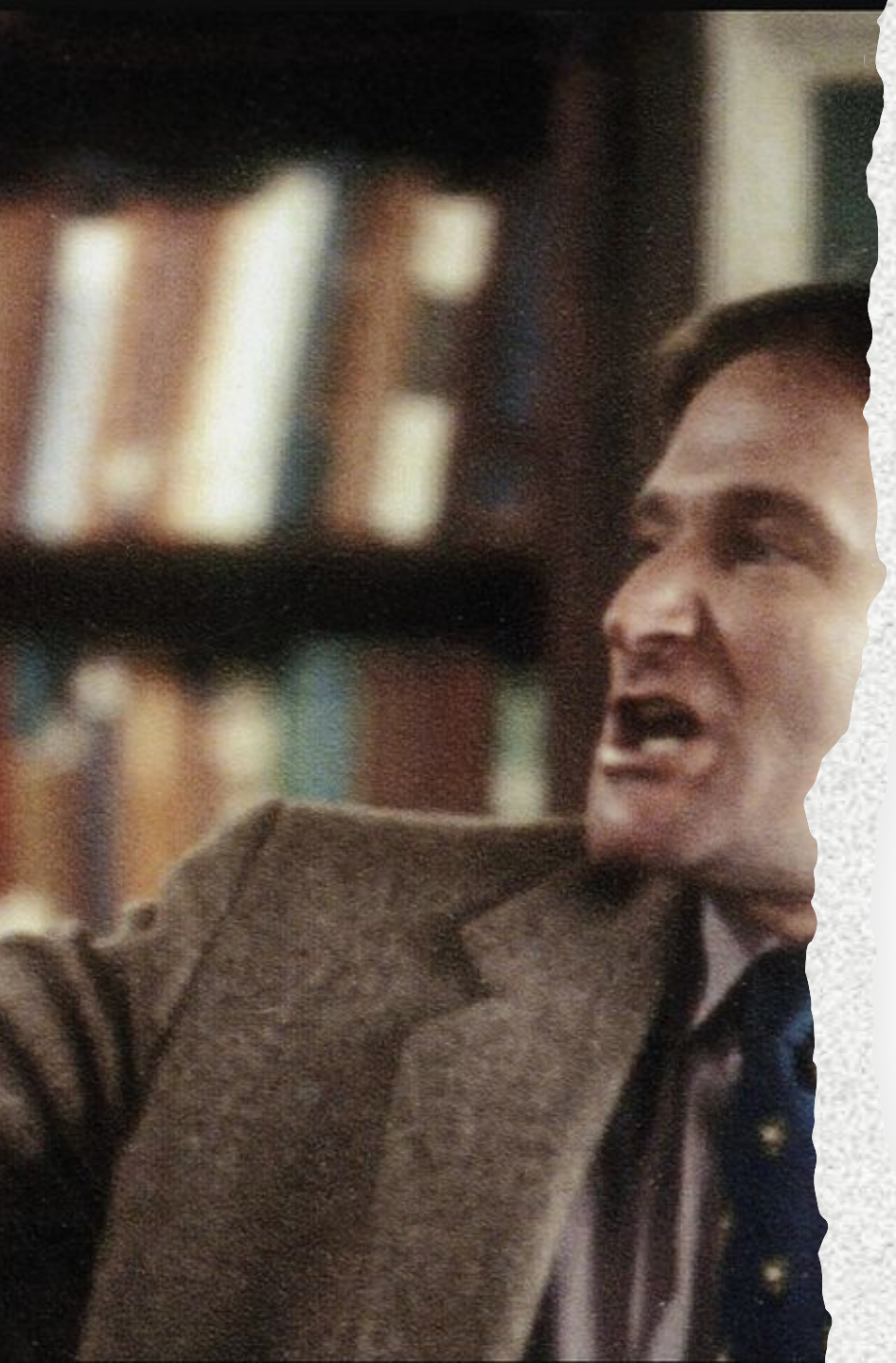


Purpose of Opening

(2) To give the jury a preview that will allow them to understand the significance of the evidence and to put it into perspective as it is admitted. The statement should be of the facts and reasonable inferences taken from the facts.

The Law of Opening

- Any evidence, the admissibility of which is questionable, should *not* be included in opening unless it has been cleared with the court prior to opening.
- Opening statement must *not* be argumentative.
- This is the most often sustained objection to opening statements.



Opening Statement – Be true to You!

- There is no right way of making an opening statement. There are as many different styles of making opening statements as there are lawyers who make them. It's about finding what workds for you.
- Duke Ellington, my favorite jazz musician, said, "It don't mean a thing if it ain't got that swing." The "swing" Duke Ellington talks about is embracing yourself and bringing all that makes you "you" to your work.

Opening Statement – Guiding Principles

- Regardless of your style, great opening statements have certain things in common.

Storytelling as the “Device” for Opening

- Story is the device for organizing, understanding, and retaining the facts and position set forth in the opening statement.
- Regardless of your style, your story must be clear, well-organized, and engage as many of the five senses as possible.
- You want the jury humming your tune from the very beginning.

Reducing Trial To Its Bare Bones

- A trial is a contest over which of two (or more) different versions of a litigated event is true.

Shifting Sands – How I View “My” Jury

- We need to change the way we think about jurors. I used to fear them and think that they were my enemy. But they really aren’t. While they might not be as kindred as a dear friend, they may still be rooting for you, often when you least expect it.
- I now view them as my friends and that allows me to notice them and make eye contact with them during the trial without being ashamed. It’s also helpful to refer to them as “my jury” instead of “the jury.” This helps to personalize it.

Opening Statement as Story

- Qualities of a great story
  - A great story has real-life problems to which the jury can relate. The jury needs to understand the "problem" from your client's perspective.
  - A great story requires a morally correct resolution. Why is it right to send Johnny home to his family? Your story needs to answer that question.

Theory & Theme

- Theory and theme are vital components of opening statement.

Theory

I. Theory
   - Your theory of the case is your version of what happened and why you should win.
   - It must be logical, fit the legal requirements of the claims or defenses, but not be expressed in legalese. Remember: “Ease the legalese!”
   - When your client is hit from behind in a bar fight and ends up stabbing a person, self-defense is the legal defense. The theory must express the dilemma from your client’s perspective and in language that is both rich and compelling.

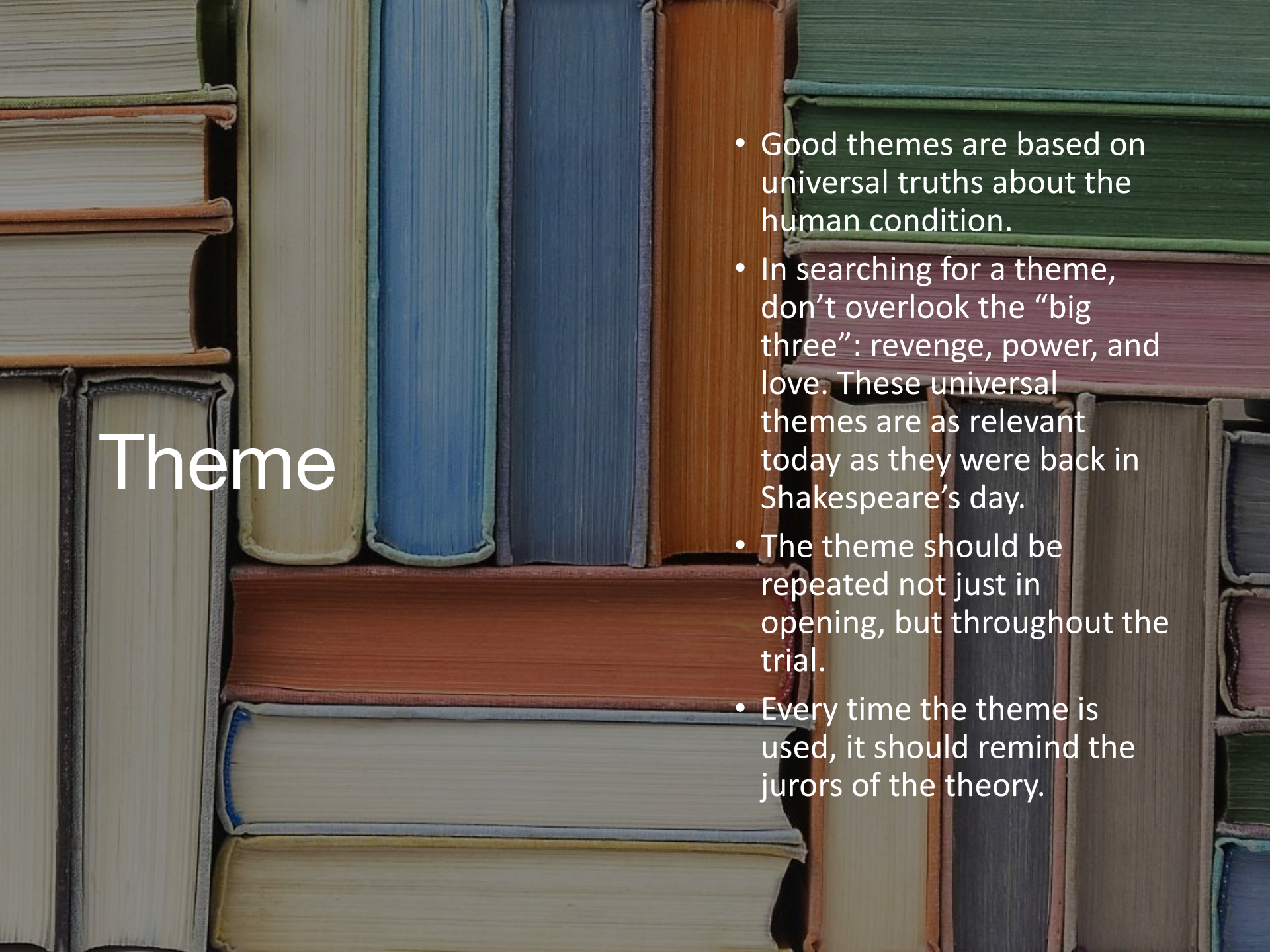
Theory

- Example: After John was hit from behind, thrown to the floor, and lying in a pool of blood, the kicks from the five guys that he did not know seemed like they would never end. Gasping for air and with blood oozing out of his nose, John remembered that he still had the pocket knife that he used at work lying in his pocket. This was his only hope.

Theory

- This is a real life problem to which the jury can relate. They'll be asking themselves, "What else could John do but defend himself?"
- This theory explains the critical element to your case – why John was afraid, and why a knife in his pocket does not make him a criminal.





Theme

- Good themes are based on universal truths about the human condition.
- In searching for a theme, don't overlook the "big three": revenge, power, and love. These universal themes are as relevant today as they were back in Shakespeare's day.
- The theme should be repeated not just in opening, but throughout the trial.
- Every time the theme is used, it should remind the jurors of the theory.

Theme

- Adapting this for the courtroom, I find it helpful to begin my opening statement with a strong theme statement. A strong opening line grabs the jury's attention, stimulates their imagination, and draws them to the edge of their seats craving to hear more.

Theme

- An opening line can plunge the jury into dramatic action (“He flung open the door and she ran.”) or an impressive statement they’ll want you to elaborate on or a mysterious statement that will make them curious as to why you’ve come to this conclusion or a striking introduction to a key player in the plot and their “deal.”

Theme

- I like to begin with, “This is a case about …” and add a short description of the overall theme.
- An example of a theme statement in a breach of contract case might be, “This is a case about a broken promise and all the trouble that breaking that promise caused.”

Theme

- How do you find the theme?
  - Good sources of themes are the great works of literature, songs, folklore, and popular sayings.
  - Here's a story within a story that serves as inspiration for finding the theme.

Theme



- Let me take you back to 1997, the year that Dustin Hoffman won the “Lifetime Achievement Award” at the Golden Globes Award Ceremony.
- After thanking everyone who helped him during his career, he told a story that has a great deal of relevance to this topic.

Theme

- The story went something like this:
  - “When I was doing a promotional tour for ‘The Graduate,’ I found myself flipping the dials in my hotel room one night. I came upon an interview of the great Russian-American composer, Igor Stravinsky. It caught my eye and after listening to it for a few minutes, I became spell-bounded. The interviewer asked Stravinsky:
  - ‘Sir, what is the best moment for you as a composer? Is it when you have finished a newly completed work?
  - Stravinsky pondered the question and answered: “ No-no-no, it’s not then.”
  - ‘Then, is it when your agent informs you that the piece will be performed at one of the concert halls of the world?’
  - ‘No, no, no it is not then either.’

Theme

- ‘Then is it on opening night at Carnegie Hall or The Kennedy Center, when the last note has been played and the audience erupts into a standing ovation, is that the best moment?’
- ‘No-no-no. Not then either.’
- ‘Well, sir,’ the interviewer asked: ‘What IS the greatest moment for you?’
- ‘Vell, I vill tell you. Ven I’m working on my piano in a composition, looking for the melodic phrase that vill carry the movement forward. I vill be sitting at the piano, going: bee-bum; bee-bum; bee-bum.’
- ‘This goes on for hours, days, sometimes even veeks: bee-bum; bee-bum; bee-bum. Then miraculously, it happens: I find the note! That, for me is the moment.’

Theme

- Hoffman: “My fellow actors, for me ‘the moment’ is not when I get cast in a major role in a blockbuster movie. The moment is not when I stand before you accepting a lifetime achievement award or even an Oscar. But when I am doing my ‘bee-bums’ to find the inner sole of the person I am portraying. Whether it be Benjamin in ‘The Graduate’ or Ratzo Rizzo in ‘Midnight Cowboy’ or ‘Papillion’, when I come upon the ‘Bee-Bum’ that makes that character work, that for me, ‘is the moment.’”

Theme

- The “Bee-Bums” in our profession are found when we discover the theme of our case.

Theme

- Once identifying the theme, how do we frame it?
  - Try to come up with a newspaper headline in ten words or less.
  - I like to use trilogies. Example from a battered woman's case: "Battered, beaten, and abused."
  - Studies show that people remember things best in threes.

Organization for Opening

- Great opening stories are well organized.
- This is not as easy as it sounds.
- We know our cases inside and out. And therein lies the problem. We sometimes deliver an opening as if the jurors have the same amount of information.
- They don’t!

Organization for Opening

Good organization involves dividing the opening into chapters, like a book.



Organization for Opening

- But be careful …
  - Avoid witness-based chapters, which describe what a witness will say.
    - Example: “Mr. Smith will testify that the light was green.”
    - This is the least effective way of telling a story.
    - Event-based chapters are better because they describe an event that is critical to the case.
    - During event-based chapters, you can introduce characters critical to the case and describe their role.



Organization for Opening

- You are not restricted to telling the story in chronological order
  - Instead, you might want to begin your story at a pivotal moment.
  - Identify the strongest fact of your case and start the story in a place that highlights that fact.

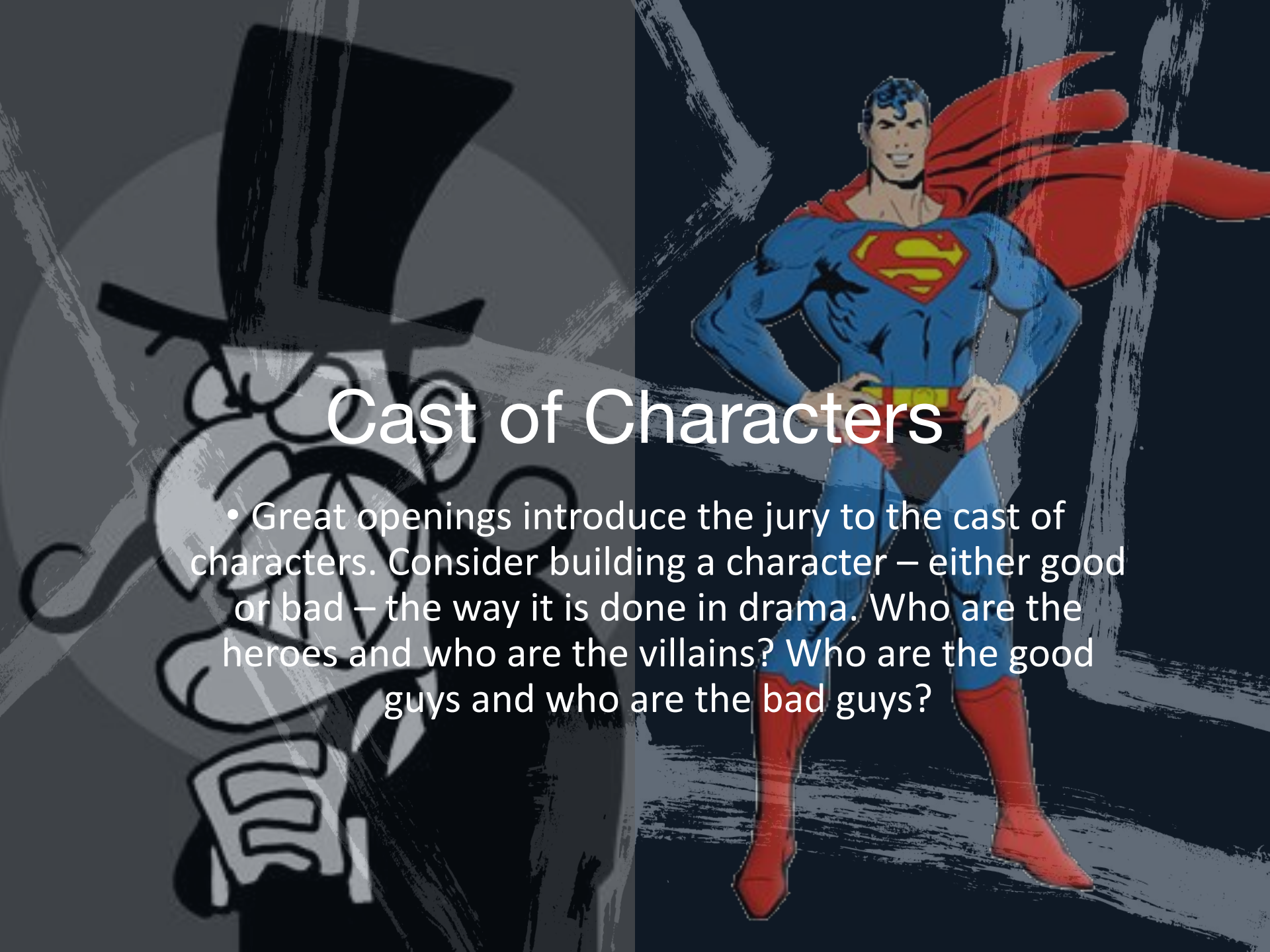


Organization for Opening

- Why is this a good practice?
- There is a concept in storytelling called “primacy and recency.”
- Primacy: The first item in a list is initially distinguished from previous activities as important and may be transferred to long-term memory by the time of recall.
- Recency: Items at the end of the list are still in short-term memory at the time of recall.
- Takeaway: The first and last parts of a presentation are most memorable and is what sticks with the

Organization for Opening

- Example: If your client made a spontaneous statement of innocence that is genuine (and not self-serving), your story might begin at the time of his arrest.
- Example: If your client's fingerprints were no where to be found on the gun, your story might begin in the crime lab.



Cast of Characters

- Great openings introduce the jury to the cast of characters. Consider building a character – either good or bad – the way it is done in drama. Who are the heroes and who are the villains? Who are the good guys and who are the bad guys?

Cast of Characters

- You might describe an entire event and the actions of a person during that event in exquisite detail without so much as uttering their name.
- Example: “And who was the agent that ran the investigation we just spoke of – the agent who never bothered to look at the records and simply relied on a disgruntled employee instead. That was Agent Jones – you’ll meet him during this trial.”

Cast of Characters

- Essentially, you're bestowing a label on a person according to what role they played and what their motivations were: "the detective who took no fingerprints," "the eyewitness who only saw the attacker from behind," or "the detective who takes no responsibility."
- This will help you identify the good guys and the bad guys.

Perspective

- One of the wonderful things about telling a story is that it can be told from any one of a number of perspectives or points of view. For our purposes, we want to tell it from the most *advantageous* perspective.
- For each chapter or event, determine whose perspective is most consistent with your defense.
- Is it your client's? The victim? The witness? The detective?

Perspective

- If your client has an alibi, the perspective of your client at the time of the crime may be compelling. In that case, you might describe the topics covered on the evening news while John was at home in his living room reclining on his easy chair and watching television at the time of the crime.

Perspective

- Example: At 10 PM on Thursday night, Robert was in his apartment. He had just turned on the 10:00 news. He learned that there was another delay in starting construction on the casino, that the interest rate had gone up, and that New Orleans had more people below the poverty line. While Robert was eating Doritos and watching the news, a thug robbed Janet across town. He came up from behind her as she was walking to a bus stop. He put a gun to the back of her head. He demanded her purse. And he ran. Janet turned and caught a glimpse of the robber as he ran away. A few days later, she would mistakenly pick Robert as the robber, and she will repeat that mistake in court today.

Perspective

- The perspective of the victim who understandably could make a mistake – but who would not want the jury to convict an innocent man just because she thought she was right – is equally availing.

Perspective

- Example, except it is now told through the point of view of the victim: Janet is an honorable person. She would not intentionally pick out an innocent man and accuse him of being the assailant. But like most of us, she is not incapable of making a mistake. And five days after she was robbed at gunpoint, she mistakenly picked out a photograph of Robert as the robber.

Two Basic Modes

- Once you decide whose perspective to tell the story from, how is that perspective best portrayed?
- Should you use the third person narrator or the first person participant to tell the story?
- Here it is important to understand the textual modes in which a story is composed. This will help you craft vivid, emotional and cinematic scenes into your opening.

Two Basic Modes

- Stories are told in *two* basic modes: (1) narrative summary and (2) scenes. Narrative summary is an overview. It's an expository way of moving the audience along in the story. It's very much "telling." Most Nineteenth Century novels begin with narrative summary. For example, "It was the best of times, it was the worst of times." It's more conceptual than cinematic.

Narrative Summary

- In narrative summary, the audience doesn't feel like they're firmly rooted in one setting. They don't see and hear specific actions and utterances unfolding in real time. Instead, they're being asked to consider life in a more general way from a distance.

Narrative Summary

- For example, “I’ve always been a runner. I saw myself as being a runner even before I knew what it meant.” This is a summary statement. Compare it to this: “I’m running as fast as I can. It’s so foggy out, I can’t see my fists pumping in front of me. But I keep saying to myself out loud, ‘It’s okay Bill. You’re a runner. You always have been.’”

Scene Mode

- That second statement is told in scene mode, *not* summary. When narration goes into scene mode, sights, sounds, smells, tastes, textures, spoken utterances, physical action, physical sensations within the body, thoughts running through the head, and other details are unfolding step-by-step, in real time. It's more visceral.

Two Basic Modes

- Both scene and summary are necessary. There are stretches of a story where important things happened, but they're not so important that they need to be shown in exquisite detail, so a broad overview of these events can be covered in summary.

Two Basic Modes

- But the major, essential events in a story always provoke more interest and sound far more interesting when the storyteller delves into meticulous, moment-by-moment detail because it allows the audience to hear actual dialogue spoken or see complete actions taken or hear whole thoughts running through the person's mind.

Two Basic Modes

- It is possible to tell an entire story in scene mode or an entire story in summary mode. But most stories we love have a mix that adds up to a little more scene than summary.

Specificity – The Secret Sauce

- There is a difference between specific details and specific details that *matter*. “The bright pink tulip in the window” is an elegant piece of set-dressing to bring the visual of the room to life, but if it has been established in the beginning of the story that, “the more stressed mom would get, the more likely she was to put colorful flowers around the house,” then “the bright pink tulip in the window” has an extra layer of meaning. It’s a sign that mom is stressed. It shows emotion.

Specificity – The Secret Sauce

- So when you're adding detail to a story, ask if it's significant.

Raising the Stakes

- The single most common problem with stories that bomb are *low* stakes. The storyteller fails to show the audience how deeply they cared about what was going on and why they cared so much. When you find yourself going “Whoa…!” during a story, or when you find yourself leaning forward in your seat anxious to hear what happens next, or when you feel tears streaming down your cheek from something that’s happened in a story, it is most likely because there were *high stakes*.

Raising the Stakes

- Raising the stakes means making what is to be gained or lost an even bigger deal.
- Jurors sense high stakes when the attorney is deeply and emotionally invested in what is unfolding. We must show the jury that emotional investment as frequent and often as possible.

Raising the Stakes

- You can show how much emotional investment you have in a story by describing what was running through your client's mind.
- You can also show emotional investment in physical reactions. "His fists clenched. Her eyes narrowed. Her throat swelled up. Her palms were sweating."

Raising the Stakes

- Emotional investment can also be shown in the *small* choices you make. For example,
- “That morning, John poured a cup of coffee… then threw it down the drain. He didn’t want anything making him even the slightest bit shaky before meeting with Detective Smith. As he drove out of his driveway, John made a point of *checking the time* on the dashboard. Just in case if Detective Smith tried anything shady, he’d be able to say *where he was* and *when*.”

The Tools

- Our tools for becoming better storytellers:
  - The voice
  - The body
- We must explore, develop, and utilize their potential to the fullest.



The Language of Opening Statement

"A picture is worth a thousand words."

The Language of Opening Statement

(1) Use Standard English
(2) Use Powerful Imagery
(3) Stick with the action – avoid abstractions
(4) Emphasis and Impact Devices
(5) The Power of Silence
(6) We have five senses, not one

The Language of Opening Statement

- The language used in opening statement is different from the abstract and general language used in everyday life.

The Language of Opening Statement

(1) Use standard English: vivid, plain, simple language. Ease the legalese.

- Use concrete, not abstract language.
- Use specific, not general language.

The Language of Opening Statement

(2) Use power language.

- We want our words to sound like we're telling the jury a story.
- Remove qualifiers like "I think," "I believe," and "I will attempt to show …"
- Use the active voice.
- Use language that has appropriate emotional content and appeal.

The Language of Opening Statement

- Rely on nouns and verbs. Nouns are nothing more than words used to identify a class of people, places, or things.
- What's ironic about nouns and verbs is that these are also the "operative words" in Shakespeare's plays.
- Operative words are the essential words in a thought, without which the thought would not make sense. They are a single word that contains within it an idea, an action, or a significant thing

Power Language

- In order of importance, first is action verbs, second is significant nouns, and third is **colorful** adjectives.
- Action verbs receive the most stress, nouns a little less stress, and colorful adjectives a little less stress than nouns.



it comes to verbs, stick to action verbs and

Power Language

- I highlight the words that fit into each category with a different color specific to that category.
- Here is how this might look in practice: "**Deny** ~~thy~~ father." "**Doubtful** ~~it~~ **stood**." This practice is helpful because it restricts actors from emphasizing every single word as many new to Shakespeare have a habit of doing. If every word is emphasized, then nothing will be emphasized and the entire meaning will be lost on the audience or jury.

Words Not to Stress

- Don't stress pronouns. They'll point the jury in the wrong direction for meaning unless you're comparing two or more ideas.
- Don’t stress prepositions unless they are part of a two-word verb like, “sit down.”
- Don't stress the word, “not.” Other negations not to stress are, “did not, could not, and would not.” We hear negation so easily that these words have evolved into, “didn’t, couldn't, and wouldn’t.”

Words Not to Stress

- Be picky when choosing which adjectives to stress. Otherwise, you'll be so descriptive and flowery that people will miss the point. I lean into colorful adjectives only. A famous French author by the name of Gustave Flaubert spent over six pages describing a living room in “Madame Bovary” much to the chagrin of his readers. We hear descriptions so easily that they don't have to be stressed.

Disclaimer

- Of course, there are always exceptions and these are rules to be broken.

The Language of Opening Statement

(3) Vary up the length of your sentences, but tend strongly towards s*hort* sentences. Written sentences are normally longer, clunky, and more complex than sentences delivered orally.



Use Powerful Imagery

- The setting: We may have to take the jury to the streets of an inner city such as Newark or Camden without ever leaving the courtroom in order to draw them into the re-constructed reality of a new and unfamiliar world.

Use Powerful Imagery

- The words we use can help the jury picture the streets of Newark.
- Action verbs paint vivid pictures in our minds and avoid dull and empty abstractions.
- Paint vivid word pictures by visualizing the scene in your mind and then describe it in exquisite detail so that the jury can see it in theirs.

Use Powerful Imagery

- There is great power that comes from being able to see an event in detail
- The famous author Ray Bradbury recommends reading poetry, essays, novels, and comic books. Anything that will touch us viscerally. The more you read, the more you can draw from.
- Use of word pictures must be learned. Lawyers intuitively speak in abstract and general terms.

Use Powerful Imagery

- This was not lost on Aristotle, who said: “When a speaker describes an event so vividly, in such detail, that it seems as though the event is happening right in front of them.”

Stick with the action – avoid abstractions!

- Active or passive words tell very different stories.
- “John fired the gun” tells a radically different story than “the gun went off in John’s hands.”
- Decide which story you want to tell, and then use the appropriate active or passive tense.

Stick with the action – avoid abstractions !

Abstraction: My client suffered a broken leg.



Stick with the action – avoid abstractions!

- Criticism: This tells us nothing. Tell them what it felt like to have a broken leg with the bone sticking through the flesh. Tell them how excruciating the pain was. How John could not make it through the night without being heavily sedated. How he clenched his teeth so much that he grinded two teeth down down to the gums. Tell them how John was confined to a bed for two weeks with a solid cast extending up from his ankle to his genitals. How he couldn't walk for two weeks and how he had to use a bed pan to urinate and to defecate. Make the jury see it. Make the jury feel it. Make them understand. Make them care!

Emphasis & Impact Devices

- There must be emphasis to the extent that your points will dominate the conversation during deliberations.
- Cases are lost because the jury does *not* know how important something is and does not remember the point.

Emphasis & Impact Devices

- As lawyers, we are very good at emphasizing the written word in our briefs through a variety of literary and stylistic devices such as *italics*, **bold-faced font**, and <u>underlining</u>.

Emphasis & Impact Devices

- However, we sometimes struggle to do with the spoken word what we do with the written word.
- We must emphasize important points orally in the same way that we emphasize written words.
- The challenge is, “How do we do orally what we do with the stroke of the pen (or keyboard)?”

Emphasis & Impact Devices

- From day one of my acting training, I learned that an actor is like a composer: that what you read in the script is only the *merest indication* of what you have to do when you really act the part. After all, anybody can *read* lines.

Emphasis & Impact Devices

- Emphasis may be gained in a number of ways from outright telling the jury how important something is to harnessing the power of our voice. After all, you are your voice. And your voice is you.
- Here, tone, voice inflection, pace, and silence are our tools. We'll discuss these in more detail.

Emphasis & Impact Devices

- The starting point is to have a strong point of view, but that is only the tip of the iceberg.

Emphasis & Impact Devices

- For example, “What do you love? What do you hate?” These things engender strong feelings.
- “I loved Lord of the Rings! I could watch it six more times.”
- “Ben and Jerry’s ‘Heath Bar Crunch’ is my favorite ice cream.”
- “I hate when my dog starts barking in the middle of the night.”

The Voice

- Now, if you're anything like me, your voice might need some work. One thing that I've learned over the years about my voice is that I tend to be slow and sustained, taking my time to emphasize certain words and to be precise, methodical, and accurate. I reason and I use logic.
- This translated into a voice that was monotone and devoid of emotion. I was told that I could wring meaning out of words easier than poets could infuse feeling into theirs.

The Voice

- This evolved as a result of my need to be clear and precise when explaining things to my clients. Clarity of thought was critical.
- However, this was a “turn off” to the jury. And the last thing I wanted was to put my jury to sleep, especially when there are important things that I want them to hear.
- It also prevented me from playing some of the characters that I’ve always dreamed of playing from the world of Shakespeare.

The Voice

- I shook things up so that I would not be boxed in to one way of speaking and expressing myself.
- In drama school, we receive tons of training. There are some principles that I am going to introduce you to that will help you to expand your vocal range.
- The more expansive your vocal pallet, the more interesting and persuasive you will be.

The Voice

- Step one in the process is to have a self-awareness of what your habitual patterns and natural tendencies are. Before you can effectuate change, you need to know what you're already doing well. Only then will you know what needs work. Of course, what comes easy to you should remain untouched. Instead, focus on those areas that are underdeveloped and that need practice.

The Voice

- For example, I learned that quickening the tempo of my speech resulted in more urgency in my delivery. And that urgency instantly raised the stakes and infused my arguments with more passion, which had always been there but had never been expressed in that way.

The Imagination

- Step two is reigniting your imagination. I cannot emphasize enough the power of the imagination. It is limitless. No matter what occupation you're in, from advertising to practicing law, your imagination is your strongest ally. It is our birthright as human beings. As Emily Dickinson once said, "I dwell in possibility." What a beautiful way to capture the essence of imagination!

The Imagination

- How do we develop our imaginations? You can do this though daydreaming, reading a good book, a poem, or meditating. I love daydreaming. It allows me to tap into sub-conscious images and bring them up into consciousness just as if I had awoken from a dream that was still fresh in my mind. This allows you to tap into that wealth of the mind without walls, without boundaries, to fertilize your creative work.

The Imagination

- I always go with the first image that pops into my head. That catapults my imagination into far deeper and richer places than if I were to try and control the direction of it. The idea is to let images flood into your mind without censoring anything, like a trailer to a “James Bond" film. For me, when I’m in this state, images of my childhood begin to emerge.

The Imagination

- If you would prefer to read a book or a poem, take a few lines and read them out loud. What thoughts and images come into your mind? Let the words come out however they want to. Surprise yourself. Were there specific images that stirred something up inside you?

The Imagination

- One thing that I've become acutely aware of is that if I am stressed out or carrying a lot of tension in my body, my imagination will be blocked. So taking a few deep breaths before you get started in order to ground yourself is a good practice.

The Breath

- I think it is helpful to focus on your breath. When we come into this world, the first thing we do is breath, so it should come as no surprise that the breath is a vital component of our speaking voice.

Kristin Linklater

- Kristin Linklater, one of the great voice instructors, puts it like this:

"There's a desire to speak—an impulse. It runs down the spinal column and through the central nervous system galvanizing simultaneously the breathing mechanism and the laryngeal mechanism into an activity that creates a vibration which is immediately amplified by surrounding resonating surfaces into voice. At the same time the impulse activates movements of lips and tongue that deliver words."

Kristin Linklater

“Let go of the result. Commit yourself to the feeling of what you want to say. Feed in the desire to communicate that feeling. Release the desire into your breath and the vibration of your voice. See what happens.’ This is a commitment to causal thought. Voice and speech are the result of that causal impulse. Communication is a by-product of desire and freedom.”

Kristin Linklater

- There is a beautiful exercise that we do in acting to demonstrate the connection between the desire to speak and the delivery of words.
- We are told to close our eyes. When a bell rings, we open them. A physical object or a picture is displayed. It might be a fruit, like an orange or a pineapple, or a picture like the sun setting over the beach, a tiger in the wilderness, or a wolf howling at the moon.

Kristin Linklater

- Upon opening our eyes, we are told to take in that image, let it feed in an impulse to speak, and then to name the image by infusing your voice with any of the subconscious images that it triggered in your mind – without censoring a thing. For example, with the image of the wolf, one might say, “Lone wolf.”
- We then close our eyes again and wait until prompted to reopen them again for the next object or image.

Effective Voice Principles for the Courtroom

- Imagine how dull life would be if we all sounded the same. Voices are dramatically different from one another.
- Our voices are extraordinary. They have the capability to speak in so many different ways. To be loud or quiet. To be harsh or gentle. To be warm or cool. To be demanding or compliant. To be comforting or vengeful.

Effective Voice Principles for the Courtroom

- Sadly, few of us use our voices to its full potential.
- By practicing and creating more vocal variety, you'll become more vibrant and exciting.
- Some of the best practice I've had in this area has reading bedtime stories to my two-year old nephew.

Effective Voice Principles for the Courtroom

- What are the vocal tools at your disposal?
- First is pitch. Pitch is an integral part of every human voice. It's the depth or height of a voice and it ranges from base to soprano. What designates the natural pitch of your voice is the rate at which your vocal folds vibrate. The higher the number of vibrations per second, the higher the pitch of the voice. Conversely, as the vibration rate slows, then the voice becomes deeper.

Effective Voice Principles for the Courtroom

- By working on and with your voice, by stretching your voice, by careful vocal exercises, you can develop a greater vocal range and extend the pitch that you're comfortable working with.
- There are three pitches: High, middle, and low.
- Every voice has its own pitch, which is governed by the length and thickness of your individual vocal folds.

Effective Voice Principles for the Courtroom

- Changing pitch while keeping within your voice's natural range creates mood, ambiance, drama, and emotion.
- There are four main reasons to change pitch. First, changes of emotion. Second, for characterization. Third, for a change of subject matter or a change in time or space. For example, when moving to a new day or into a different geographical space. Fourth, when quoting another person in the story, such as a witness.

Effective Voice Principles for the Courtroom

- Next is pace. What exactly does that mean? It's obviously about how quickly you speak. But is pace the same thing as rate? There is a subtle difference. Pace is a combination of technical vocal devices and vocal tricks that a storyteller uses to keep the audience on the edge of their seats. This is accomplished by giving the jury a series of subtle mental nudges without them ever realizing that this is being done to them.

Effective Voice Principles for the Courtroom

- Changes of pace and the use of pause are just two of these vocal tricks that help the listener to follow the story and to know what's most important.

Effective Voice Principles for the Courtroom

- Combining pace and pause gives the listener a clue to what words and phrases are the most significant. By subtle use of stress, inflection, or pause, the goal is to make this significant word or phrase stand out slightly so that almost, subliminally it sticks within the consciousness of the jury. Subtlety is the key.

Effective Voice Principles for the Courtroom

- You want the connection to be made in the listener's subconscious mind. You're not trying to make it so obvious that it hits them over the head so that they feel they're being patronized. You must leave something to their imagination. What you're doing with your voice is pointing them in the right direction like a lighthouse bringing a ship safely back to harbor. If you get the emphasis wrong, you can lead the listener down the primrose path and even give away more than you intended.



Effective Voice Principles for the Courtroom

- Next is pause. There are many different types of pauses. A stressed pause is a technique where the last word just before a tiny pause is ever so slightly stressed. So you dwell gently on the syllable or even on a single letter before giving the tiniest of pauses before significant words so as to highlight it as it were. The pause is always your friend. Never be afraid to pause as long as it is meaningful.

Effective Voice Principles for the Courtroom

- A grammatical pause is used to make sense of a phrase. Where you put the pauses can totally change the meaning of a sentence. "A panda eats shoots and leaves." Put the pause in the wrong place and this becomes, "A panda eats, shoots, and leaves."
- Or my favorite, "What's that in the road, a head?" or "What's that in the road ahead?"

Effective Voice Principles for the Courtroom

- Pause is also used for dramatic or emotional affect. When a pause is for that purpose, it's used to make a word stand out, to build up to a climax. Or to highlight the strangeness of an event.
- If you play with pauses and add pace to certain sections, it brings a dynamic energy and a kind of range to your presentation that makes it powerful.

The Sounding Body: Voice as Movement

- Another way of expanding your vocal pallet is through movement. Everything in life is movement. This is not just a slogan for somatic practices. Even something as small as the flutter of an eye or an incoming breath involves movement.

The Sounding Body: Voice as Movement

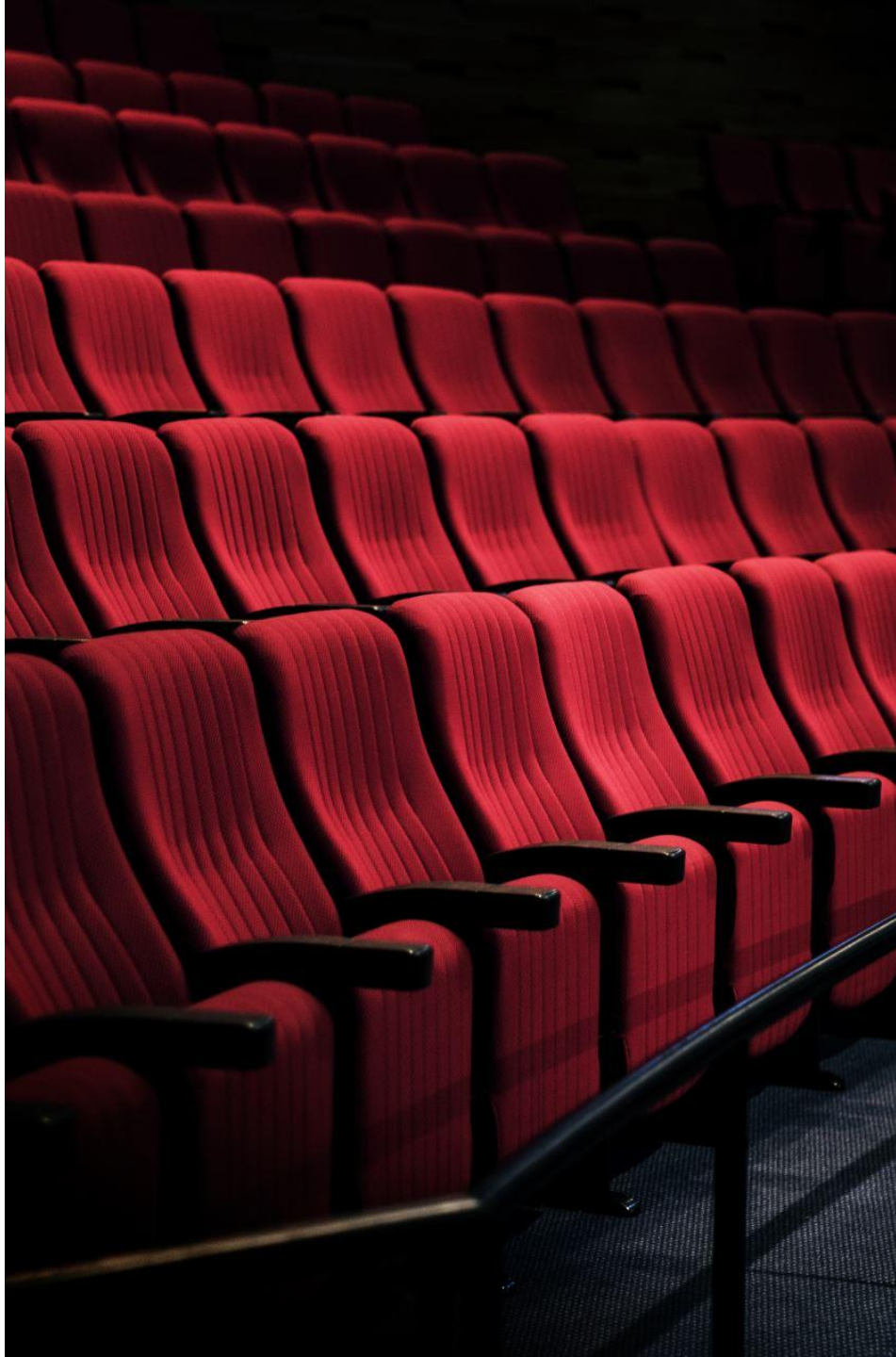
- This could not be any more true than in theater or film. When someone acts in theater or film, because it's a visual medium, they are being seen and heard by an audience. As such, their physicality reveals so much, especially when they are in extreme states.
- But even when someone is still, that stillness communicates something to an audience. In fact, stillness might even communicate something more significant than a large physical gesture

The Power of Silence



The Power of Silence

- Why silence?
  - There is no such thing as nothing – there is always *something, even if it's as subtle as the sound of breath going in and out.*
  - Silence has a myriad of meanings. In theater, silence is an absence of words, but never an absence of meaning.



The Power of Silence

- A word can be emphasized and a thought underlined by silence.
- Silence has a certain energy to it like no other energy source. It has the power to get people to think and to act. It can help slow the mind down.
- There is also a certain intimacy that surrounds silence. Indeed, it's the type of intimacy that is shared between two people who have a very deep and meaningful relationship. That might explain why no words need to be said.

Meisner on Silence

- “Silence has a myriad of meanings. In the theater silence is an absence of words, but never an absence of meaning.”
- Meisner: “A moment of silence is something, too. Let me prove it to you. Ask me whether I think you have talent.”
- Student: “Mr. Meisner, do you think I have talent?”
- Meisner’s head cocks away from the student and he maintains complete silence. The class begins to laugh.
- Meisner: “That was silent, wasn’t it? My silence was very expressive.”

The Power of Silence

- The trouble with silence is that it can make people feel uncomfortable and alone, that’s why the world is filled with TV’s that have been left on when nobody is watching, for background noise.

The Power of Silence

- Because of how uncomfortable silence can be, many people feel the need to fill the void of silence with needless chatter.
- The rapid, close, unbroken delivery of words cause ideas to become blurred and to recede into common noise.

Tips: Emphasis & Impact Devices

TIPS

Tips: Emphasis & Impact Devices

- # 1: There is music in speech. By adjusting the pitch and vocal inflection of certain syllables in important words, shortening your sentences, slowing down the pace, pausing to allow for important points to “sink in,” you will draw the listener in.

Tips: Emphasis & Impact Devices

- # 2: Don't overlook the mannerisms and phrases that you use to convince people in everyday life. These will bring you closer to the goal of being real and natural in front of the jury.
- "To become more successful, you do not have to change who you are – you have to become *more* of who you are." Sally Hogshead

Tips: Emphasis & Impact Devices

- Here's a short story from my personal life to underscore this. I was asked to give a cold read and the script contained the line, "Oh, I forgot." I gave a straightforward but uninteresting reading of these words.

Tips: Emphasis & Impact Devices

- But when I thought about it, I realized that that was not how I would personally react to forgetting something, especially if it was important. I then put my trust in my body since it never lies. Instantly my fists went to my temples in a moment of painful recollection.
- A long *pause* followed during which I realized that it was too late now and that I must make the best of it.

Tips: Emphasis & Impact Devices

- Finally, almost with a shrug of my shoulders, I casually said, “I forgot.”

Tips: Emphasis & Impact Devices

- # 3: Voice work is an often overlooked but invaluable tool for the trial lawyer. Simply put, it will help you free your breath, develop resonance, loosen jaw and tongue tensions and wake up your full vocal range. When this happens, your voice will drop into your body. Tip: Relaxation and release is essential to opening, freeing, and ultimately strengthening your voice.

We Have Five Senses, Not One

Don’t forget to actively engage the five senses!

We Have Five Senses, Not One

- The easiest way to get vivid, cinematic, and sensual details into your story is to think in terms of the five senses:
- If your story can enter the listener through the senses, the listener can experience the story in real time and as if it were happening to *them*.

We Have Five Senses, Not One

Sound

Smell

Touch

Taste

Sight

Sound

- Remembering *sounds* can help to access the emotions they trigger inside you.
  - Does the ringing of a classroom bell bring back feelings of being out of place and alienated, as you felt in middle school?
  - Does the sound of an ambulance siren scare you, causing you to remember the day that your grandmother died?
  - Does the sound of a brook running make you feel peaceful?
  - Example: “He heard a loud ‘pop’ like a muffler backfiring and took cover on the ground. In John’s neighborhood, you could never be sure. More often than not, a loud pop meant that someone was firing shots. ”

Smell

- A smell can help open up the personal emotions you need to feel.
  - The stench of garbage might make you feel nauseous.
  - The fragrance of lilacs or roses could make you feel the first stirrings of romance.

Touch

- Does sand trickling through your fingers transport you to a beach?
- Does the touch of fur make you feel romantic?
- Does a cool breeze blowing through your hair remind you of the day when your husband proposed to you?

Touch

- The five senses are one big super-sense: touch. We've already covered physical touch. But how is touch triggered in the context of the other four senses?

Touch

- When we *taste* something, it touches our taste buds.
- When we *smell* something, the molecules penetrate our nose.
- When we *look* at something, the color or the light touches the back of our cornea and that's how we see it.

Touch

- In what might be surprising and even a little bit creepy, *sound* waves are touching us all the time. Even now, as I speak to you, I'm touching you with the sound of my voice.
- I send out sound waves (physical, tangible things) that travel through my mic, into the computer, out of your speakers and hit your ear drums causing inner vibrations. The vibrations that I'm sending here are literally touching you there.

Touch

- I’m fascinated with this idea of how our words and sounds are always touching people. Indeed, the sounds of people’s voices by themselves trigger certain sensations inside us. Look no further than some of your favorite narrators on Audible. Recognizing the sheer power of our voice, we should exploit it for the good of our clients when we’re speaking to the jury.

Touch

- I’m also fascinated with the power of touch through sight when we’re speaking to the jury.
- I can think of times in my life when another person “shot daggers” at me from across the room. It felt as if they had touched me when they looked at me. Indeed, it felt as if the person had “stripped me naked with their eyes.”
- Example: “The officer’s grip on John’s arm was so tights that the imprint it left was still there more than two hours later.”

Taste

- Does the taste of a bitter pill, rancid milk, or liver make you want to throw up?
- Perhaps the taste of vanilla icing makes you feel loved and special, as you did when your mother would make a birthday cake just for you, with her special vanilla icing.
- Or, maybe the sensation of a dark piece of chocolate melting in your mouth creates primal, sensual feelings.

Taste

- Example: “As he lay on the ground, he could *taste* the blood that was dripping out of his nose and onto his lips.”

Sight

- A Hawaiian sunset, an abandoned house, a dead carcass on the highway, an intimate candlelit room or a flag-draped coffin.
- What visuals create a response in you?
- Explore different images to see which ones move you. Chances are they will move the jury too!

Sight

- Examples:
- “His palms were shaking and soaked in sweat.”
- “The room looked like it hadn’t been cleaned in months.”
- “He could tell that she was holding back tears.”

How I Brainstorm a Case

- I brainstorm my cases using the steps below. This is merely one way of brainstorming a case. There are many different ways to brainstorm a case as there are lawyers who try them.
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How I Brainstorm a Case

- This blueprint should be viewed through the lens of a criminal defense attorney. I always start backwards by asking myself the question, “What facts must I establish during the course of the trial in order to make the kinds of arguments that I need to make at closing to support my client’s innocence?” Or, more specifically, “What facts do I need to establish during the course of the trial in order to advance my defense and get an acquittal?”

How I Brainstorm a Case

- Brainstorming requires a lot of “free association,” which can be torturous for those who are perfectionists and prefer structure. It’s like being afraid of heights but finding the courage to bungie jump off of the steepest cliff. In other words, you have to “let go” and give yourself permission to think outside of the box. There is no such thing as a “bad idea.”

How I Brainstorm a Case

- Of course, that does not mean that every thought that comes out of the deepest recesses of your mind is going to be brilliant, much less that it will be a “keeper.” Like minnows swimming upstream, only a few ideas will actually survive. But the only way to realize these ideas is by allowing your imagination to run wild and not to self-edit or censor yourself.

How I Brainstorm a Case

- **I. Step 1**: List the date and time of the incident.
- **II. Step 2**: Make a list of witnesses — distinguishing whether they are States' witness or defense witnesses. Further break them down according to whether they are lay witnesses are members of law enforcement.
- **III. Step 3**: Make a list of the names of any witness or victim who gave a statement. Indicate how the statement was made, when it was made, and how long it lasted.

How I Brainstorm a Case

- a. Was the statement made to a police officer at the scene? If so, does it appear as a summary in the narrative of the officer's report?
- b. Was the statement made to a detective at the police station?
- c. If the suspect was the one being questioned, was he read his Miranda warnings before being questioned at the scene or at the police station?
- d. If taken at the police station, was the statement video recorded or was it transcribed by a stenographer?

How I Brainstorm a Case

- e. On what date and at what time was the statement made? How much time elapsed between the incident and the taking of the statement?
- f. How long did the questioning last? If it was typed up by a stenographer in real time at the police station, how long did it last? Twenty minutes? One hour? What was the start time? What was the end time? How many pages does the transcript consist of?
- g. Was an interpreter needed? If so, was one obtained?

How I Brainstorm a Case

- **IV. Step 4**: Create a three-column chart called “Bad facts.” Label the far left column, “Bad facts.” In that column, list all of the bad facts, no matter how obvious they might be. Do not worry about what is admissible and what is not admissible when making the chart. Just try to list everything you can think of. Label the middle column, “Source of bad fact.” Cite the source for each bad fact. For example, if it was a police officer’s report, write the name of the police officer and the page on which it can be found. If it was testimony given at a grand jury hearing, reference “GJ Transcript” and the page on which it can be found.

How I Brainstorm a Case

- The “Bad facts” can be a work in progress through the case. Sample “Bad facts” include: (1) Defendant has criminal record; (2) Defendant fled the scene; (3) Defendant admitted crime to witness; (4) Defendant assaulted victim in the past; (5) Defendant was arrested in clothing that matches the description provided by an eye witness; (6) No coercion on behalf of police during defendant’s interrogation.

How I Brainstorm a Case

- **V. Step 5**: Create a three-column chart called "Good facts." Label the far left column, "Good facts." In that column, list all of the good facts. If few exist, don't be afraid to reach. For example, "John did not make an incriminating statement." Name the middle column, "Source of good fact." Cite the source for each good fact. Do not worry about what is admissible and what is not admissible when making the chart. Just try to list everything you can think of.

How I Brainstorm a Case

- The “Good facts” can be a work in progress throughout the case. Sample “Good facts” include: (1) No fingerprints on gun; (2) Defendant consented to a DNA test; (3) No DNA found; (4) Law enforcement did not record the defendant’s statement; (5) Defendant had no motive; (6) It was dark out.

How I Brainstorm a Case

- **VI. Step 6**: State your defense, as shallow as it might be. For example, “Mistaken identification.”

How I Brainstorm a Case

- **VII. Step 7**: Return to your “Bad facts” chart. Label the far right column, “Neutralizing bad facts.” For each bad fact, present the State’s argument — i.e., how you expect the prosecutor to use that damaging fact in closing argument to “smoke” your client (i.e., in support of guilt). Directly underneath it, provide a rebuttal. Are there any pre-trial motions you should file? Is there any supplemental voir dire you would like to submit to the court? Your goal is that by the time you do your summation, you either have a good explanation for every bad fact or you have suppressed it or kept it out of evidence.

How I Brainstorm a Case

- **VIII. Step 8**: Return to your "Good facts" chart. Label the far right column, "Defense's argument." For each good fact, write out your argument — i.e., how that fact supports a vital point that you want to make during your closing argument in support of John's innocence. Are there any pre-trial motions you should file? Is there any supplemental voir dire you would like to submit to the court? Your goal is to ensure that every good fact has been presented during the course of trial so that you have a legal basis for making the kind of arguments that are consistent with innocence at closing.

How I Brainstorm a Case

- **IX. Step 9**: Look at the good facts and bad facts and determine if there are any pre-trial motions you should file. List of potential pre-trial motions:

How I Brainstorm a Case

- Dismiss the indictment or dismiss counts of the indictment;
- Suppress physical evidence;
- Suppress statements;
- Suppress identification;
- Prevent the State from introducing 404(b) evidence;
- *Sands*/*Brunson* hearing
- Prevent irrelevant or unduly prejudicial evidence (*N.J.R.E.* 403)
- Admissibility of expert testimony or scientific evidence;
- Prevent hearsay;
- Admissibility of evidence of third party guilt;
- Identity of confidential informant;

How I Brainstorm a Case

- Disclosure of police surveillance post;
- Admissibility of victim's prior sexual conduct (Rape Shield Exception);
- A *Driver* hearing (admissibility of tape recordings);
- Prevent Fresh Complaint Evidence;
- Prevent Tender Years Hearsay Evidence (*N.J.R.E.* 803(c)(27));
- Prevent "excited utterance";
- A *Michaels* hearing (coaching child sexual abuse witnesses);
- Severance of co-defendants (*Bruton*);
- Severance of counts of the indictment;
- Prevent the State from relying on lab reports;
- Redact inadmissible portions of a tape recording of the defendant's statement.

How I Brainstorm a Case

- **X. Step 10**: Examine the good facts and the bad facts and determine if there is any supplemental voir dire that you would like to submit to the court. If so, submit supplemental voir dire questions regarding these areas in a supplemental voir dire brief. Also, for voir dire, I recommend constructing a chart with the seating positions of each of the jurors. The court will usually provide one. Write the juror's name and the information about that juror inside the rectangle that corresponds to that juror on the chart.

How I Brainstorm a Case

- Insert a “mark” for how you feel about that juror. For example, you might draw an upward arrow for jurors you like, a downward arrow for jurors you don’t like, and a straight line or no mark at all for jurors you feel neutral about. Have a small pad of sticky paper available so you can create a clean space in your chart over any jurors that were struck. An alternative is to write all of the information on a pad but that can get confusing. Be sure to keep track of how many peremptory challenges you have used and how many the prosecutor has used.

How I Brainstorm a Case

- **XI. Step 11**: What are the underlying dominant emotions that you expect the jury to feel after hearing the prosecutor's opening statement? For example, sympathy for the victim. Disgust for your client.

How I Brainstorm a Case

- **XII. Step 12**: What are some things that law enforcement should have done but didn't? Did they neglect to take fingerprints? Did they fail to take a statement from a key witness? Did they forget to cordon off the crime scene with yellow tape to protect it from contamination and to prevent nosy people from traipsing through?

How I Brainstorm a Case

- **XIII. Step 13**: What questions is the jury likely to ask after hearing the State's case? For example, "If Bill is truly innocent, why would he have confessed to a crime that he didn't commit?" This question will need to be answered directly during closing argument.

How I Brainstorm a Case

- **XIV. Step 14**: Write out the theory of your defense in a short sentence or two. Example when the pivotal question is, “Why would an innocent man confess to committing a crime that he didn’t do?” “John took responsibility for a bank robbery that he didn’t commit in order to protect the love of his life from going to prison. If he is guilty of anything, he is guilty of loving Vanessa too much and of using poor judgment.”

How I Brainstorm a Case

- **XV. Step 15**: Come up with some themes: For a false confession case, “He was as desperate as a bear who chewed off his paw after getting caught in a hunter’s trap.” Trilogies are great. For a battered women’s case: “Battered, beaten, and abused.”

How I Brainstorm a Case

- **XVI. Step 16**: Tie it together and start writing out your closing argument.
- a. Why would an innocent man admit to committing a crime that he didn't do?
- i. Why would a bear chew off his paw when he is in a helpless situation?
- 1. Papa bear and his cub were out foraging for berries. Papa bear's paw becomes ensnared in a hunter's trap
- 2. The cub doesn't realize that his father is in trouble and full of curiosity, drifts away from his father
- 3. A hungry lion, perched on the top of a cliff, sees the wondering cub

How I Brainstorm a Case

- 4. Seizing the opportunity to catch the cub off guard and in a vulnerable state, the lion takes off like the speed of light from his perch
- 5. The papa bear sees the lion out of the corner of his eye racing towards his cub
- 6. He knew all too well what was going to happen. And he knew what he had to do. With no time to spare, the father bear chewed off his trapped paw

How I Brainstorm a Case

- 7. Limping, the bear rushed to his cub as fast as he could. And it wasn't a minute too soon. The lion had already closed in and was eying his prey. Summoning up all of the strength that he had, the father bear stood between his cub and the lion, stood up on his hind legs and raised his paws up in the air, showing his menacing claws.
- 8. The lion stopped dead in his tracks, turned around, and retreated like a hyena with its tail between its legs back into the forest.

How I Brainstorm a Case

- ii. Just like the father bear sacrificed his paw to save his cub from the lion, John sacrificed his liberty to protect the love of his life from going to prison.
- iii. As John testified, the detectives told him that Jessica had been arrested and charged with being in possession of heroin.
- iv. On the way to the police station, when John was alone in the car with Detective Jacobs, Detective Jacobs made John a promise. If John confessed to robbing the bank, then Detective Jacobs would talk to the prosecutor and see to it that Jessica did not go to jail.

How I Brainstorm a Case

- v. Detective Jacobs exploited a vulnerability of John — his unconditional love for Jessica. He knew that John was in a relationship with Jessica. And he dangled Jennifer's fate in front of him like a hunter dangling a piece of raw meet in front of a lion.

How I Brainstorm a Case

- vi. Why did John admit to committing a crime that he didn't do? To protect the love of his life from going to jail. He couldn't bear the thought of seeing someone as naïve and innocent as her rotting away in a cold, dank jail cell where her safety would be at risk every day. You may not have believed what John believed or done what he did. But it doesn't make him a criminal for exercising poor judgment. It only makes him a criminal if he violates the law.