



Trial by Design

by Cathy Kelly*

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Webster defines brainstorm as “any transitory agitation or confusion of mind.” Unfortunately, this less-than-glorious definition is probably a more accurate description of the trial lawyer’s brainstorming process than any of us would like to admit. We all brainstorm our cases. We stand around the coffee pot in the office, lift a glass together after work, collar one another in the hallways of the courthouse, and talk about our cases *ad nauseum*. Yet, more often than not, we are left on the eve of trial just as Webster predicted — agitated and confused. What’s wrong?

(Those of you who see nothing wrong with either Webster’s definition or a state of confusion and agitation on the eve of trial, do not read on, do not pass GO, just send your client directly to jail. The rest of you, read on.)

Consider this scenario:

You decide to have a house built. You meet with a contractor, show him your property and explain that you want a three-bedroom in a particular price range. Without further ado, the contractor simply climbs on his earthmoving equipment and begins digging the basement.

“Wait a minute — what about plans? Blueprints? Don’t we need to talk about the design? Materials? Options?” You ask in a panic as you watch him furiously ripping down trees and digging up your property.

“Oh, sure!” he promises, not slowing down. “Look, meet me after work down at Joe’s Bar. We’ll grab a burger and a beer, bounce some ideas around. But no time to talk now — foundation to be laid, lumber to be cut, you know how it goes.”

Point made? Builders, programmers, engineers, most every other profession, would consider it idiocy to relegate their planning and project design to spur-of-the moment encounters in the hallway or drop-by-if-you-can after hours *kibitzing*. Yet trial lawyers (who are, in theory, supposed to be a fairly bright group of people), continue to do exactly that. *It’s time to stop.*

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Brainstorming is the design phase of your trial. It deserves the same respect and attention as pre-trial court appearances, client contact, legal research, motion hearings, or any other part of your practice. *Time must be scheduled, set aside, and kept sacred simply for brainstorming!*

Brain trust: Who gets invited to the gathering?

Lawyers undergo emotional lobotomies in law school. That's why the rest of the world loves us so much. It's also why it is wise to include non-lobotomized human beings in your brainstorming sessions. Your secretary, receptionist, investigator, bartender, janitor, nonlawyer spouse — whomever you can bribe or coerce into giving you a real person's (read that "juror's") perspective — will be much more valuable to the brainstorming process than the proverbial boatload of lawyers.

That's not to say you should never include lawyers in your design sessions. Several legal perspectives combined with several human perspectives make for the most productive mix. Assuming you are fortunate enough to actually have a real defense *team* working with you, all the players should receive invitations (or summonses, if you prefer) to join the brain trust: co-counsel, investigators, law clerks, paralegals, trial consultants, hairdressers, you name it. If you are a lone wolf by choice or hardship, bribe friends and colleagues in the profession to give you a few hours of their time. Your first-born child, a bottle of Jack Daniels, even (God forbid!) a promise to help brainstorm one of their cases can all be very persuasive. Everyone has a price. Be creative. The goal is to get more than your own head into the game!

Design process

Imagine yourselves as a team of award-winning screen writers. You have been handed a run-of-the-mill crime story written by a woefully mediocre prosecutor. Your assignment, should you choose to accept it, is to turn that prosecutor's story on its head; to change that same old "lock-em-up-and-throw-away-the-key" crime show ending into another episode of "The Fugitive." You want action, emotion, and memorable characters. You want the audience cheering for your client to beat the cops, to beat the prosecutor, and to walk out of that courtroom gloriously vindicated! You want an Oscar nomination. You want to *win*.

So you have set the time aside and kept it sacred. You have gathered together the brain trust. You have posted death threats outside the door to ensure there will be no interruptions of the creative process. The empty easel pad awaits. . . .

What the hell do you do now?

Step One: Identify the facts-beyond-change

The first step of rewriting an existing story is to figure out what you can change and what you cannot. E.g., the dead body found in the trunk of your client's car is probably a Fact-Beyond-Change.

Make a master list of every Fact-Beyond-Change.

Put the list up where it can be readily viewed by everyone. As you go through the rest of the brainstorming process, you will need to build all of these Facts-Beyond-Change into your story rewrite. Since they will not be overlooked, ignored, or dismissed out of hand by the jury, your challenge is to find a way to:

a. *Turn the Fact into a Positive for you* — the fact that your client opened his trunk, with the body lying inside, after stopping to help the poor widow with the flat tire, proves he never knew that body was in his trunk and obviously had nothing to do with the murder.

b. *Neutralize the Fact* — your client’s car had been stolen the week before the woman died, so he couldn’t have had anything to do with what was in the trunk. (Also known as the “so what?” response)

Step Two: Explore all ‘the genres’

Practically every movie we see in the theater, every play, every novel, falls within a particular genre. We have action-adventure films, science fiction, horror movies, romantic comedies, historical epics, westerns, suspense thrillers, etc. The same is true for the world of criminal defense. Practically every criminal defense theory will fall within one of the following defense genres:

1. *It never happened* — [mistake, setup]
2. *It happened, but I didn’t do it* — [mistaken identification, alibi, setup, etc.]
3. *It happened, I did it, but it wasn’t a crime* [self-defense, accident, claim of right).
4. *It happened, I did it, it was a crime but it wasn’t this crime* [lesser-included offenses]
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?* [jury nullification — known in some jurisdictions as the “he needed killin’” defense]

The second step of the design process is to actively explore each possible defense genre against the framework of your Facts-Beyond-Change. Throw every category on the table and challenge the brain trust to create a story within that particular genre which includes and explains all of your Facts-Beyond-Change. Don’t worry yet about all the fine details, specific word choices, etc. (though if someone happens to throw out a great idea or turn of phrases in the discussion, by all means preserve it for posterity!) At this point in the game, you are simply looking for a few sentences with which to test your story line against your Facts-Beyond-Change. (Think of it as writing those newspaper movie summaries).

Obviously, not every category can be mutilated sufficiently to fit every set of facts or vice-versa. The task here is to begin the story under each genre and take it as far as you can before running into an unexplainable Fact-Beyond-Change brick wall.

The *challenge* is not to turn tail and run at the first sign of a brick wall. Premature evaluation is a common malady among brainstormers and it can kill the creative process almost as quickly as a prosecutor. Be constantly on guard against it! A little exploration, a little creativity, a little additional investigation can sometimes turn up a secret passageway through that brick wall that will blow an unsuspecting prosecutor out of the water. So before turning back, always make sure the brain trust has been asked — and forced to search for answers to — “*How can we get around that wall?*”

Many times, that question can’t be answered without additional investigation. In that case, the brain trust’s task becomes to outline what information they need in order to answer the question.

Once they have finished the list of investigative tasks to be completed, go ahead and move on to another genre and repeat the process. Once you’ve finished your analysis of each category as best you can without the additional information, schedule your next brain trust, review the results of the investigation, and then move on.

After every defense genre has been thoroughly and maddeningly explored, select the best one for your rewrite of the prosecutor's case. If at the end of Step Two, you have only one category able to explain or use all of your Facts-Beyond-Change, your decision is an easy one! Discard the others and move on to Step Three!

But . . .

If, at the end of Step Two, you have only two or more plausible defenses which can logically explain and use all of your Facts-Beyond-Change, you have more work to be done before you can choose between them. Do not discard. Move on to Step Three and complete it for *each* of the genres still on your table.

(Yes, it is more work. It can also be the difference between a "poor defendant goes to jail again" story and a box office hit for your client. Stop whining! You have the luxury of optional defenses and the ability to choose the more powerful of the two! Once you've flushed out a full theory of defense, complete with characters, emotions, motivations, etc., for each of your possible defenses, you will be in a position to know which makes the most powerful jury presentation. And our clients need all the power they can get in their corner when they walk into that courtroom).

Step Three: Putting the flesh on the skeleton

It's time to take that three or four sentence summary you came up with in Step Two and give it life, emotion, characters, power! There are a number of different ways to do this. I'm sharing the process I've found most helpful, but feel free to use whatever works best for you, *with one exception*:

The one unbreakable rule for this part of the design process is that *no editing, no excluding (and no sneering!) is permitted!* Again, be aware of the risks of premature evaluation. Every image, phrase, thought, or idea thrown out by any member of the brain trust should be written down, regardless of how trivial or stupid or inappropriate it may appear at first glance. The time for editing will come later. (And you will be surprised how many of those "ridiculous ideas" will wind up working quite well into your story in the end. Even those which truly are lumps of coal serve their purpose by jogging the brain trust to other ideas, images or phrases, one of which may be that diamond for which you are searching.)

Where to begin?

A. Make a list of all the characters in your story — the victim, the defendant, the witnesses, key police investigators, etc.

B. Brainstorm the relationships and possible motivations of each character: What do you know about each and how they're interconnected? What makes them tick? What are their priorities? What's going on in the rest of their lives that might impact their perspective, actions, biases in this case? Is the detective who got your client's confession up for promotion again after being passed over twice? What do you know about the history between your retarded client and his drug-dealing twin brother? Not only will this process flesh out your story line and identify areas of impeachment, it will also help you identify additional investigation you need to do in order to most effectively flesh out your characters. Keep a separate list of "What we still need to know" and add to it throughout the rest of the brainstorming.

C. Brainstorm the action through the eyes of each character: Imagine that the brain trust is (collectively) the victim, the eyewitness, the cop. Lead them through a description of all that they see, hear, smell, feel (both physically and emotionally) through the eyes of that character. Break it down into each critical point of the story:

You are the woman with the flat tire your client stopped to help.

What do you see, hear, smell, feel, think, when you first realize you are stranded without a spare? When you first see someone stopping to help? When the man who stopped is kind enough to offer his own spare? When he opens the trunk?

Do the same thing as your client. What do you first see, hear, smell, feel, think? When you see the old woman standing outside her car? When you pull over? When you open the trunk?

Have someone write down all that your brain trust throws out. You will draw from this process some incredibly powerful images: The acrid smell of burnt rubber as the old woman climbed out of her car. The heat pounding down on her shawl as she stood stranded on the highway, the relief and nervousness in her stomach when a car finally pulled to help, the sick terror that engulfed your client when he opened the trunk and saw a body. Images ~~you will never think of if you evaluate the case from a third party, past tense perspective.~~ **Try it!** *It works.*

Step Four: Cutting Floor

You have completed the entire process described above and you are now ready to begin the editing process. Now is your chance to evaluate, denigrate, annihilate and belittle — in short, you get to be a lawyer again! Your goal here is to select the most powerful images, the most believable motivations, the most logical progression of action.

A. Throw out anything that is not consistent with human experience, that stretches believability, isn't a logical sequence of events, or that runs contrary to the dominant emotions in the case. With a few miraculous exceptions, most jurors do not care what the law says, they decide cases based upon their gut reactions to the stories told them by each side. Your story has to be consistent with what they're feeling in their gut or you don't win.

B. Outline the action of your story. (This will become your opening statement.) Who did what to whom and why? Make sure every Fact-Beyond-Change is accounted for. Make sure every action, every motivation is believable and logical.

- *Choose through whose eyes you want to tell your story in opening statement — e.g. old woman along the highway or your client?*

- *Identify your most powerful points. You'll want to position them either first or last in your witness examinations. e.g., do you want your opening scene to be your client's brother giving him back the car? Or would it be more powerful to start with your client finding the body in the trunk, then flashing back to his brother giving him that car just 30 minutes before?*

- *Choose the word pictures you want to paint, what senses, descriptions, images, you want to evoke. Identify the places and the characters through which you want to weave those pictures.*

Step Five: Theme Song

Every Oscar winning film has a memorable theme song, as does every winning case theory. The theme song is what you want playing over and over in the back of the jurors' minds when they walk into that jury room to deliberate. It must be short, catchy, and powerful. It must instantly evoke for the jury that entire case theory you just spent all Step Four developing.

Those who have studied the art of communication tell us that trilogies are particularly effective in planting themselves into human memory. (Just consider, “red, white and blue”, “blood, sweat, and tears”, “sex, drugs, and rock and roll”!) The same is true for alliterative phrases — several words that start with the same sound. (e.g., “drug dealer dealing in death and deceit.”) That’s not to say your theme has to use a trilogy or alliteration to be effective. It obviously does not. But it does have to be memorable — and if those things help make it more memorable, use them where you can!

Have your brain trust throw out as many catch phrases as they can. Again, you are back into the Non-Editing mode here! Everything goes up on the list, no matter how idiotic or embarrassing!

Brainstorming is a living, creative process, good stuff may happen as a result. Beat this horse until it is deadlier than dead. You need as many options as you can possibly come up with in order to find that perfect one.

In this process, you will also run across some great turns of phrases, descriptive labels, etc. that you will want to incorporate into your trial design. They may not be all-encompassing enough to qualify as your theme song, but they may fit very nicely somewhere in your soundtrack! Be on the alert for those and don’t immediately pitch your list after settling on the overall theme. Scour it for “secondary themes” that you can build into a particular witness examination or use during opening or close as a short hand reference to a particular event or witness.

Step Six: Write the script & choose your props

You have the genre — (your legal defense). You have the story outlined — (your theory of defense). You have your characters fleshed out into real people, along with their motivations, their emotions, their connections, and their individual perspectives on the case. You have your theme song and your secondary themes. Now it is time to put it into print. Write it out, witness by witness. What word pictures are you going to paint with each one? How are you going to phrase your questions to evoke just the image you want? What type of physical or demonstrative evidence are you going to use? Place your most powerful points at the beginning and the end of each new trial segment. Weave your theme throughout each segment, looking for ways to play it once again for the jury before they go back to deliberate. Build in your secondary themes, so that by the time the jury hears them from you again in closing, they nod along with you — like an old family story, the entirety of which can be evoked by a single word or a phrase.

There are some gifted folks who can complete this part of the design phrase in tandem with the brain trust. If you and your colleagues fit that category, by all means do it! Others of us may need to withdraw from the brain trust and do a rough draft of this part of the design phrase on our own first. If you’re working with co-counsel, you may want to split up the assignment. At any rate, be sure to bring your draft back to the brain trust for review, comments, critiques, and editing. You may need to do several more rewrites until it is in final form, but in the end — you have designed an Academy Award winning trial for your client. And it really wasn’t even all *that* painful.

A final thought

Let me leave you with a rewrite of Webster’s definition of brainstorm. It is based on the definitions for the root words brain and storm, and — I believe — much more accurately describes the brainstorming we, as criminal defense lawyers, do:

Brainstorm : 1. (n) A violent disturbance of the prosecutorial atmosphere, created by defense lawyers participating in a shower or furious flight of ideas and understanding; characterized by passion,

excitement, and occasional outbursts, which, when done correctly, results in the clearing of confusion and prosecutorial influences from jurors' minds.

2. (v) *To dash out the brains of the prosecutor.* ■