

**BUILDING THE WINNING CRIMINAL CASE:
THE PERSUASION METHOD**

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I. WINNING CRIMINAL CASES

- A. Many more criminal cases can be won.
- B. Only a relatively small percentage of criminal cases are won.
- C. A significant number of innocent people are convicted and even sentenced to death. See B. Scheck, P. Neufeld, and J. Dwyer, *Actual Innocence*, Signet Printing (2001).
- D. That so few cases are won has a further psychological effect of causing criminal defense attorneys to be pessimistic thus affecting their ability to win.
- E. The major factor in the loss of winnable cases is the use of a method of trial lawyering resulting from the law schools that is psychologically and persuasively unsound.
- F. The good, indeed great news, is that there is a method of trial lawyering used by the great trial lawyers over the decades that wins.
- G. This paper sets forth in outline form the winning persuasion method and particularizes its application in building the winning criminal case.
- H. It is time to speak of the elephant in the parlor - the teaching and use of an outdated and wrong method of trial lawyering and the resulting injustices.
- I. It is vital to note that the wrong method is the method resulting from our legal education and is *in no way* the fault of our trial lawyers.

II. THE STANDARD LOSING METHOD

- A. The standard trial lawyering method used throughout the nation has the law (rather than persuasion psychology) as its center with emphasis on the failure of proof beyond a reasonable doubt by the prosecution.
- B. The standard method consists mainly of the following:
 - 1. Legalisms and obvious unconnected facts.

2. Going through legal rituals meeting the minimum requirements of the law rather than using maximum persuasion.
 3. Doing legal analysis for the jury, not persuasion.
 4. A defensive and negative case based on burden of production and burden of proof
 5. Weak, abstract and conclusory language rather than power language.
 6. Lack of appropriate emotion, rather than the attorney being a true believer making use of the power of ethos.
 7. Anger, tricks, and legal technicalities resorted to when the lawyer feels the weakness of the standard method.
 8. Failure to realize the power of 100% credibility.
 9. Failure to develop a case that dovetails with and appeals to the belief systems of jurors rather than that of lawyers.
 10. Thinking like a lawyer rather than thinking like the human beings we are trying to persuade.
- C. Reasonable doubt centrality is the epitome of the wrongness of the standard method for its actual message to the jury is that the defendant is guilty but should be allowed off because of the legal technicality of failure of proof. Reasonable doubt, however, is useful in a supporting role, as preventing innocent persons from being convicted.
- D. A thorough study of the cases of the great and winning trial attorneys, past and present, shows that not a single one used the standard method.
- E. The ideas and constructs of the standard method came from the law, however unpersuasive and contrary to the science of persuasive psychology.
- F. The law sets forth the law and is not meant to be a guide to jury persuasion.
- G. There is a tremendous difference in power and results between the standard method and the persuasion method next discussed.
- H. The standard method produces disastrous results

I The history associated with the standard method is enlightening and explains why this hodge-podge of ineffective and counterproductive methods developed. In 1871, Harvard Dean Christopher Columbus Langdell, initiated the "case method" which inexplicably is still the very narrow method of legal education. The case method was a compilation of appellate decisions and dealt only with law and not facts, skills, etc. Trial lawyers were knowledgeable only in law. Being untrained in trial lawyering, they looked only to legal decisions for help in what to do in trial. Not surprisingly, the standard method over time developed based on repeating legalisms no matter how unpersuasive to jurors. Because law schools teach virtually the same (case method law) as in 1871 and lawyers have yet to make persuasion psychology central, the ineffective and even counterproductive standard academic method still reigns supreme.

III. THE WINNING MINDSET

- A. The culture, too often, among criminal defense attorneys is that they are expected to lose and that nothing can be done to change this losing.
- B. The reason for our consistently losing is that we are using methods that are simply wrong and inconsistent with sound persuasive psychology.
- C. There is a way, set out in this paper, to find and build criminal cases that do consistently win.
- D. The criminal case must be approached with the mindset that criminal cases can be won and that this trial lawyer can win this particular case.
- E. The Persuasion Method, set out below, will not win every case, but will result in substantially increasing the batting average of wins.

IV. THE PERSUASION METHOD

- A. Persuasion, in the trial context, is influencing the jury to undertake the course of action that is desired—a verdict of not guilty..
- B. Persuasion has two fundamental principles: (1) know your audience, and (2) adapt your arguments to the audience.
- C. Because the objective of every single action during the trial is persuading the jury, this method is appropriately called the Persuasion Method.
- D. The essence of persuasion is focusing on what influences the jury—it is jury-centered.

- E. The persuasion method is based on and consistent with the techniques of winning trial lawyers all through history.
- F. The persuasion method is scientifically based on such disciplines as persuasion, psychology, social psychology, interpersonal communication, linguistics, speech, drama, etc. and other soft sciences (but sciences, nevertheless backed by the experience of the great trial lawyers).
- G. The persuasion method is based on persuasion psychology.
- H. The persuasion method is narrowly founded on the idea that the object is to persuade the jury, not just to go through legal rituals.
- I. The focus in persuasion is in influencing the decision-making of the persuadees (here the jurors).
- J. A sine qua non of this method is a paradigm shift from a thinking-like-a-lawyer legal analyst to being a humanistic persuader focusing on the jurors.
- K. The persuasion method, therefore has the following constructs and features and is:
 - 1. Multidisciplinary
 - 2. Jury-centered
 - 3. Humanistic, not legalistic
 - 4. Realistic
 - 5. Is easy, natural and intuitive
 - 6. Dovetails with jurors' belief systems
- L. Central to being a persuader is being a student of jurors' belief systems. Jurors' belief systems deserve separate discussion.

V. THE JURORS' BELIEF SYSTEMS

- A. Jurors do not think like lawyers and lawyers do not think like jurors.
- B. Study of psychology, jury research and experience suggest that the following are important factors in jurors' belief systems:
 - 1. Need and desire to do the right thing - the equity theory
 - 2. Truth and justice are overriding values

3. Operate from belief systems - how the world works
4. Have attitudes, beliefs and values
5. Life experiences are important
6. They remember that which is familiar and meaningful
7. They make decisions emotionally and then rationalize
8. They remember only 10% after 72 hours
9. Have short attention spans
10. Distrust lawyers
11. Dislike "legal technicalities"
12. Want to feel good about that which they have done

- B. At least as important is that which jury research, study of psychology, experience and common sense tell us jurors do not do. They do not in deliberations conduct a legal analysis with importance to elements and burdens of proceeding and proof
- C. Our case and everything we do in trial must be with awareness of the jurors' belief systems.

VI. CREDIBILITY

- A. Studies show that the four most influential qualities are:
 1. Credibility
 2. Competence
 3. Dynamism
 4. Likeableness
- B. Credibility necessarily applies to both the advocate and the case
- C. Aristotle, three thousand years ago, said that ethos (character of the advocate) was the most powerful factor in persuasion and present-day experts agree.
- D. Unfortunately, many lawyers feel that game-playing is a part of trial lawyering. As soon as the jury sees that the lawyer is a game-player and not a truth-seeker, the lawyer's credibility is gone and a win unlikely. It is that important.

E. Credibility of the case is emphasized below.

VII. KNOWLEDGE OF CRIMINAL CASE SUBJECT-MATTER

- A. The prosecution's case consists of evidence such as eyewitness testimony, eyewitness identification, crime scene evidence, circumstantial evidence, other criminalistics, forensic evidence such as fingerprint identification, firearms examination, ballistics, chemistry, trace evidence, tool marks, etc., statements of the defendant, expert testimony and a myriad of other indicators of guilt.
- B. The prosecution's evidence is often junk, limited, or subject to an innocent interpretation. It can be destroyed, damaged, minimized, or even embraced as part of the defense case. This evidence is eminently attackable.
- C. Criminal defense attorneys often give too much credence to the prosecution evidence as being "airtight", "scientific", etc. It often goes unchallenged, too, because, after all, the prosecution has the burden of proof.
- D. While defense attorneys cannot be expected to be expert in all areas of subject-matter involved in criminal cases, there must be enough knowledge to know what weight to give the evidence and how to handle it in the case. It is suggested that this education be gradual as the need arises in cases but that this knowledge be recognized as important.
- E. This knowledge is often the basis of cross-examination minimizing the weight of the prosecution's evidence. Cross-examination lectures almost always deal only with the form of cross-examination. This knowledge furnishes the substance without which the form is of little value.
- F. Knowledge of criminal case subject-matter is often necessary to attack of the prosecution's case. Various attorneys and writers have developed ways to attack the prosecution's cases often faced. Examples of this literature are set out below.
- G. The National Association of Criminal Defense Lawyers (NACDL) is a tremendous source of information on the subject matter of criminal cases. In particular, NACDL's magazine THE CHAMPION is great for finding articles on criminal case subject matter and we list some valuable recent articles. The Champion of April 2005 has several articles devoted to eyewitness identification defense, which is the kind of evidence most involved in the conviction of innocent persons. The December 2007 issue of The Champion deals with the false confession issue, which results in convicting innocent people under certain circumstances.

- H. Some other valuable articles in *The Champion* are: Schwartz, *Challenging Firearms and Toolmark Identification* (October 2008); Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation*, (April and May, 2004); Thompson, *Tarnish on the 'Gold Standard: Understanding Recent Problems in Forensic DNA Testing* (February 2006); Tobin, *Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics* (July 2004); Akin, *Interpretation of Blood Spatter for Defense Attorneys* (April and May 2005).
- I. In addition to learning what others have developed in criminal case subject matter, the criminal defense attorney is encouraged to develop comprehensive defense cases. Every office of criminal defense attorneys should have files on how to attack and win criminal cases.

VIII. FINDING THE POWERFUL CRIMINAL DEFENSE CASE

- A. The tendency is to look at the discovery of the prosecution case, be impressed by it, and decide that there is no viable defense. One must become expert in approaching the case applying the principles of the art and science of critical thinking. One must believe there is a defense. If we approach a case with the attitude that this is just another case in which there is no defense then, of course, no real defense will occur to the defense attorney.
- B. The defense is highly unlikely to be set forth in the prosecution's discovery, but will be found in the mind of the defense attorney who presumes the defendant is innocent. There are defenses to eyewitness identification cases no matter how positive the witness. There are defenses to confession cases, forensic evidence cases, circumstantial evidence cases and all other cases. We must proactively look for that defense, before we decide to take the plea bargain. This is not to say we should not plea bargain; it is to say we should find the defense case. This is so particularly if the defendant is seriously claiming innocence.

IX. THE KEY: CREATING FEAR OF CONVICTING AN INNOCENT PERSON

- A. Jurors will convict if they believe the defendant is *in reality* guilty with little regard for legal standards for sufficiency of the evidence.
- B. Jurors will acquit if they believe the defendant is innocent, or if they fear they may be convicting an innocent man. You only need a case good enough to create this fear of convicting an innocent man

- C. Jurors live *in reality* and not in the lawyers' world of legalisms.
- D. The winning criminal case takes the position that the defendant is *innocent*, not centrally that there is a failure of proof
- E. The defense, to win, does not have to prove innocence but merely to create the fear of convicting an innocent man. This is true because of the power of fear and, as psychology teaches us, the power of emotion in determining verdicts.
- F. That this analysis is correct is demonstrated by experience.
 - 1. Every great trial lawyer in history tried or tries criminal cases from the standpoint of innocence, not from failure of the prosecutor to prove the case beyond a reasonable doubt.
 - 2. The experience of the author in the public defender's office is illustrative. Trying cases from innocence produced wins at least five times as often as did the failure-of-proof-beyond-a-reasonable-doubt argument of other defenders.
- G. This suggests a quick and accurate way of producing a winning criminal case. Start with the premise that Johnny Defendant is innocent. Then ask how it is that he is innocent. Then develop the 'how' of his innocence into a powerful positive case of innocence. This wins.

X. THE POWERFUL DEFENSE CASE

- A. Credible.
- B. Unitary and internally consistent. Everything fits together.
- C. Consistent with jurors' belief systems and their ideas of how the world works.
- D. Explains and interprets the facts and connects the dots.
- E. Coherent.
- F. Integrated.
- G. Detailed.
- H. Complete. The case must be such that, if true, the defendant is innocent.
- I. The result is a powerful streamlined case furnishing a unified theory of innocence.

XI. BUILDING BLOCKS OF THE POWERFULLY PERSUASIVE CASE

- A. Legal theory: The legal theory that entitles the defense to present its case.
- B. Factual theory: Theory of how the event happened factually consistent with innocence.
- C. Basic position or theory of the case: The case for innocence stated in three or four sentences as the guide to positions throughout trial.
- D. Facts beyond change: Facts that the jury will believe no matter how capably you oppose them must be included in your theory of defense.
- E. Strategic concessions: Concessions made to define and confine the issues in the trial to winning issues and not fighting losing battles.
- F. Values and principles that support a defense verdict as being the morally right thing to do. Take the high ground.
- G. Power language instead of abstract and conclusory language.
- H. Context to make the defense plausible.
- I. Problem-solving for the jury.
- J. Simplification in the form of labels, characterizations, and summaries.
- K. Appropriate emotion and emotional themes.
- L. Story, arguments, attack, themes and other emphasis devices are dealt with below as other components of the powerful case.

XII. THE STORY OF INNOCENCE

- A. The story of innocence is an important part of the finding and building of the powerful case.
- B. The story of innocence is on the basis that the defendant is innocent, not that the prosecution has failed to prove elements beyond a reasonable doubt.
- C. The jury is interested in whether the defendant is actually guilty, so the defense attorney is on the same page with the jury when the attorney is arguing innocence rather than the legalism of reasonable doubt. Just the simple change from arguing innocence rather than reasonable doubt wins substantially more cases.

- D. The credible story is not just a statement of facts. It deals in motives, relationships, what causes what (cause and effect), etc., all fitting together so as to be within the schemas of the jurors and is a believable version of what happened consistent with innocence.
- E. The story of innocence is complete to the extent that, if true, the defendant is actually innocent. In most criminal defense stories, there is doubt, but nothing to make the defendant actually innocent.
- F. The story may be very simple and very short. It may be the story of Ms. Jones' being mistaken in her identification of the defendant as perpetrator, the police jumping to a conclusion as a result of sloppy investigation, the obtaining of a false confession, etc.
- G. Even though this paper is not about storytelling in the sense of delivery, the preparation phase should include developing visual and other sensory language.
- H. Stories are composed into focuses (detailed scenes) and transitions. Consider composing focuses (word pictures) on each of the crucial contested issues (CCIs).
- I. Above all, the story of innocence must tell the jury why Johnny is charged and in court when he is actually innocent.

XIII. THE POSITIVE CASE

- A. The positive case directly or indirectly proves the defense idea of how matters occurred consistent with innocence. It is self-defense, consent, false confession, etc.
- B. Gather all facts, inferences, and devices that proves the positive part of the case.
- C. On cross-examination, give special attention to getting favorable facts from the witnesses.
- D. The positive case can be made in story or argument form

IV. ARGUMENTS AND ARGUMENTATION

- A. Arguments and the skill of argument are, in the opinion of the author, the most powerful tools for winning criminal cases.

- B. Arguments go to, focus on, and win the central issues of the case.
- C. Arguments are not just statements of position or storytelling; they are arguments, a very different animal.
- D. Argument is a hard-hitting statement of the argument-point, followed by the marshaling of evidence and reasoning that supports that point.
- E. Preparation of arguments before trial is necessary to framing the issues and maximizing the gathering of evidence supporting the arguments during the trial, especially in cross-examination.
- F. To find what arguments to make, one must list the crucial contested issues (CCIs). The concept of CCIs is vital to trial lawyering. Arguments are prepared on the lawyer's side of each crucial contested issue.
- G. Much of preparation is tightening so as to concentrate firepower and emphasis. The concept of CCIs makes possible a focus and concentration (concentrated fire) on a very few issues with power and at the same time avoids that which is extraneous to the determinative issues.
- H. Each argument is a separate unit and not contaminated by other arguments or the extraneous.
- I. The standard organization for an argument is: (1) statement of the point, (2) support making the point, and (3) closing the point.
- J. Juxtaposing supporting evidence increases power of the point several times over, making them power points.
- K. Prepare the arguments with power language during preparation. Do not leave power language to be left to "just happen" during trial.

XV. ATTACK

- A. Attack is a powerful weapon in winning the criminal case.
- B. Storytelling is not attack and attack is not storytelling. The storytelling method leaves the prosecution largely undamaged and the result is like two ships passing in the night.

- C. Attack is understanding the prosecution case and destroying, damaging or at least minimizing that prosecution case.
- D. Knowledge of criminal case subject matter (described above) is essential in formulating the attack on points in the prosecution case or the prosecution case as a whole.
- E. Examples abound of the attacks necessary in criminal cases. In case a prosecution witness' testimony, if true, convicts the defendant, the witness and/or the witness' testimony must be attacked. If the prosecution's case based on eyewitness identification, eyewitness identification evidence and/or the witness must be attacked

XVI. DEVELOPING POWERFUL THEMES

- A. Themes are ideas that are repeated during the trial and often are the most powerful part of the case.
- B. After the story of innocence is developed, themes will derive from that story of innocence.
- C. The central overriding theme is that the defendant is innocent.
- D. Making the failure of the prosecution to prove each and every element beyond a reasonable doubt the central theme results in few acquittals for scientific and pragmatic reasons.
- E. The central theme of innocence (and all other themes) needs careful attention to come up with a precise powerful wording fitting that particular case as to how the defendant is innocent.
- F. Supporting themes must be developed to back the central theme.
- G. The power of themes, because of repetition, comes from the fact that ideas expressed just once are not likely to be remembered in the jury deliberation room. Expressing an idea only once is like hitting a nail only once. It must be hit several times to drive the nail and the idea home.
- H. Themes serve several purposes in creating the powerful case:
 1. The case organized around themes is coherent, consistent, and integrated. Most criminal cases have only ad hoc points and arguments.
 2. Themes simplify a case.

3. Cases with themes are easily remembered by the jurors.
4. Themes are a great rhetorical device furnishing power to the case.
5. Variations of themes (never inconsistent) give even more power.

I. Examples of themes in criminal cases:

1. They have the wrong man.
2. They jumped to a conclusion.
3. There was a rush to judgment.
4. The police did not do their job
5. Things not done.
6. He had no choice.
7. He is _____, but he is not a murderer.

J. Emotional themes are at least as important.

1. Fear
2. Fear of convicting an innocent man.
3. Sadness
4. Remorse
5. Any other emotion.

K. The following sections contain suggestions for fully developing themes and the other ideas which powerfully win cases.

XVII. DEVICES FOR EMPHASIS

A. The central points must stand out and be remembered by the jurors. The way to accomplish this is with emphasis, which must become an important part of the trial lawyer's repertoire. Various devices and techniques are available.

- B. The point is the unit of discourse in every part of the trial. At every moment the lawyer must be aware of the current point. This greatly helps eliminate that which is not making the point.
- C. Points must be streamlined so that the point is hard-hitting and understood as a point by the jury. That which supports a point must be juxtaposed succinctly into a bullet point. Most points are more like pillows than bullets.
- D. Power language and rhetorical devices furnish many emphatic devices. These are set out more fully and specifically in the closing argument outline, but need to be part of the preparation phase in building the powerful case.

XVIII. THE SYSTEM FOR PRODUCING POWERFUL IDEAS

- A. The trial lawyer must have a system of tools for producing the powerfully persuasive and therefore winning criminal case.
- B. The yellow pad method of preparation cannot produce the strongest case.
- C. Creative thinking in producing case-winning ideas is vital.
- D. The IdeaBook is the systematic method of writing and organizing those ideas as they occur.
- E. The computer can be used to produce and record the ideas. What is important is having a system.
- F. A possible system of building tools is outlined below in more detail.

XIX. TOOLS FOR BUILDING THE POWERFUL CASE

- A. The first tool is creative thinking or brainstorming.
 - 1. The emphasis on legal analysis often prevents creative thinking.
 - 2. Brainstorming is a form of creative thinking with two very significant requirements.
 - a. The goal of creative thinking is to develop as many hypotheses, theories, interpretations, inferences, explanations, and other ideas as to how the litigated event occurred, as possible - the maximum number of ideas.

- b. Evaluation of ideas must be done but postponed, or such evaluation will hinder the free thinking necessary for maximizing the number of ideas.
 - 3. Creative thinking or brainstorming must be approached with determination to find every useful idea, and an optimism and belief that the process will indeed produce useful ideas. Let the imagination run wild in producing ideas that may win the case.
 - 4. The depth produced by creative thinking will more likely result in truth by unearthing many ideas which are at first not apparent.
- B. The *IdeaBook* is the second important tool and is the place where ideas produced by the creative thinking or brainstorming process are immediately recorded.
 - 1. The *IdeaBook* is loose-leaf with size suitable to the lawyer (9 1/2" x 6" is suggested) and organized by dividers reflecting subject matter and phases of trial. Suggested divider titles follow
 - a. To Do - Planning
 - b. Law and Legal Theories
 - c. Facts - Fact Issues
 - d. Ideas
 - e. Discovery Planning
 - f. Opposing case
 - g. Strategy
 - h. Jurors Perspective
 - i. Analysis - Decision Making
 - j. TOC, Detailed Development
 - k-o Case-Specific Dividers
 - p. Story
 - q. Arguments
 - r. Feeling, Emotion, Equity
 - s. Rhetoric - Language Devices
 - t. Finishing Touches
 - u. Voir Dire - Jury Selection
 - v. Opening Statement
 - w. Prosecution Witnesses
 - x. Defendant's Witnesses
 - y. Closing Argument
 - 2. As one brainstorms the case or otherwise generates ideas, the ideas (themes, stories, inferences, power language, etc.) are immediately briefly written in the appropriate division of the *IdeaBook*.

3. As new ideas occur, these new ideas generate still more new ideas and the thinking gets deeper and closer to the truth.
 4. The important idea here is to creatively and actively think about the case and to have a system for immediately recording the ideas.
- C. Another useful tool is the *Workbook* in which various tasks, such as doing chronologies, extracting nuggets from materials, analyzing for impeachment, etc., can be carried out.
1. The *workbook* is loose-leaf and serves to keep all work on a subject together. Dividers are titled to suit the lawyer's purpose.
 2. Important also is a method of organizing materials so that they may be found immediately during trial. Organize by purpose of the materials in trial.
 3. The important idea is to have a system and organization. Consideration should be given to using the computer in organizing the case. The lawyer should be constantly alert to creative ideas for organizing the case.

XX . PUTTING THE POWERFUL CASE TOGETHER INTO FINAL FORM

- A. With all the listed materials and ideas gathered, it is now time to put the case together in final form.
- B. Many attorneys have a formula for putting together a case. They do the case close to the same every time. Instead, the structure should be tailored to the individual case. One case may have a strong component of storytelling. Another case may depend more on argument. Attack can even be the almost total way of trying the case. The lawyer's judgment, using the Persuasion Method , determines what is most powerful.

CONCLUSION

It is the purpose of this paper to suggest the importance of systematically building the case with story, powerful themes, and argument with persuasion as the guiding star. It is when the possible methods suggested here are used that the case is powerfully persuasive and wins.