Chapter 6

Case Planning: Deciding What Things To Do To Prepare for Trial and the Order in Which To Do Them

§ 6.01 SCOPE AND PURPOSE OF THIS CHAPTER

Effective defense work requires counsel to attend to an extensive roster of tasks simultaneously during the period prior to trial. In addition to various court appearances, defense counsel must seek out and take statements from prosecution witnesses, conduct discovery and field investigation, draft and litigate motions, interview defense witnesses and prepare them to testify, engage in plea negotiations with the prosecutor, subpoena police reports and other documents, consult defense experts, and confer with the client.

This complex set of tasks is complicated further by time pressures. Counsel will often have only a short period of time between arraignment and trial in which to perform the tasks. In a case in which the respondent is not detained, counsel may have a month or a month and a half in which to prepare for trial; if the respondent is detained, the time period likely will be two to three weeks. And some of the tasks may involve long delays beyond counsel's control. For example, if counsel subpoenas reports from a police department, hospital or public agency, s/he should anticipate that the records division of that institution will be slow in responding; if counsel plans to retain an expert witness, s/he should expect that it will take some time to locate an appropriate expert and for the expert to schedule and perform the examinations or tests that counsel needs.

The only possible solution to this problem – albeit an imperfect solution – is to begin performing the tasks as soon as counsel has a skeletal understanding of the facts of the case, and thereafter to revise counsel's plans and strategies progressively as additional information becomes known. The first substantial interview of the client will tell counsel the most important foundational facts: the circumstances surrounding the offense from the client's perspective, or the client's account of his or her whereabouts and activities elsewhere if s/he denies involvement in the offense. Counsel needs to form a tentative plan of action immediately after this interview. That plan had best take the form of a provisional "theory of the case" (see § 6.02 *infra*) which will shape counsel's next moves, at least until such time as new information warrants a revision of counsel's working strategy.

This chapter is designed to assist counsel in forming a plan of action and implementing it. Every case is unique in its facts and in the series of tasks that must be performed to prepare it for trial. But some generalizations are possible regarding techniques and considerations that can usefully guide counsel's strategic planning. Section 6.02 *infra* explains the nature and functions of a defense theory in counsel's preparation for trial. Section 6.03 *infra* describes the steps that counsel should take to conduct the vital fact-gathering process and the order in which those steps should be taken. Sections 6.04 and 6.05 *infra* provide an overview of, respectively, the defense

motions that counsel should consider filing and the actions that counsel should take at this early stage of the case to begin preparing for disposition. Section 6.06 discusses ways in which counsel can use narrative thinking in case planning. Finally, § 6.07 *infra* suggests some short-cuts that public defenders with high caseloads can use to minimize the amount of time involved in performing the numerous tasks involved in case preparation.

§ 6.02 THE DEFENSE "THEORY OF THE CASE": A FLEXIBLE BLUEPRINT FOR TRIAL PREPARATION

On the basis of the first full-scale client interview (see § 5.01 *supra*) and whatever other information counsel obtains when entering a case (see §§ 3.20, 3.30), counsel should formulate a preliminary defense "theory of the case." The "theory of the case" is a detailed summary of the defense that counsel will mount at trial; it weaves together the version of the facts and an articulation of the legal rules or normative precepts on which counsel will rely to secure a favorable verdict. The theory of the case that counsel develops at this stage must be tentative and flexible enough to change as new information is gathered. Counsel does not yet have a complete picture of what the prosecution witnesses and defense witnesses will say and what pertinent scientific, tangible, or documentary evidence exists or can be produced to prove or disprove guilt. So counsel's initial theory of the case should always be considered a work-in-progress. As new facts are learned, counsel should continually update the theory of the case, interpolating the new information and reassessing previous judgments about options and alternative courses of action.

In order for the prosecution to establish guilt at trial, it will have to prove both: (i) that a crime was committed, and (ii) that the respondent was the person who committed it. A defense theory of the case will usually involve attacks upon either one or both of these two components. Counsel should be alert to the recognized, recurring causes of erroneous convictions and to the literature documenting them (*see, e.g.*, Clanitra Stewart Nejdl, & Karl Pettitt, *Wrongful Convictions and Their Causes: An Annotated Bibliography*, 37 (No. 3) NORTHERN ILL. U. L. REV. 1 (2017); Rebecca Brown & Peter Neufeld, *Chimes of Freedom Flashing: For Each Unharmful Gentle Soul Misplaced Inside a Jail*, 76 N.Y.U. ANNUAL SURVEY AMER. L. 235 (2021)) but needs to keep in mind that the range of potential prosecutorial miscues and concomitant defense theories is wide and that each individual criminal case requires a thorough-going, unique canvass of possible strategies for defeating the prosecution's case.

§ 6.02(a) Defense Theories That Refute the Prosecution's Assertion That a Crime Was Committed

There are essentially three ways of precluding the prosecution from proving that a crime was committed.

First, the defense can show that, even accepting the prosecution's basic version of events, there is insufficient proof of one or more of the legal elements of the crime charged. For example, if the crime (or the degree of crime) requires proof of a certain monetary value (such as

Grand Larceny or certain degrees of Destruction of Property), counsel can refute the existence of that particular crime either by contending that the prosecution has failed to prove the requisite value or by presenting defense evidence that the object in question was not worth as much as the prosecution asserts. Or, if the crime involves a mental element, the defense can refute it either by contending that the prosecution's evidence is not sufficient to warrant the inference that the respondent entertained the requisite *mens rea* or by presenting defense evidence (through the respondent, other defense witnesses, or both) that controverts the existence of the guilty mental state.

Second, the defense can show that, even accepting the prosecution's basic version of events, some affirmative defense renders the respondent's actions noncriminal. For example, in a murder case, the prosecution witnesses may be truthfully recounting their observations of the respondent's stabbing of the victim; but when their testimony is meticulously parsed and/or supplemented with defense evidence (consisting of testimony by the respondent, other defense witnesses, physical evidence, and so forth), the defense will ask the fact-finder to conclude that the victim provoked the attack by actions which induced the respondent to have a reasonable fear of imminent bodily harm, within the applicable doctrine of self-defense.

Third, the defense can show that the prosecution's witnesses are not telling the truth, either because they are fabricating (*i.e.,* lying or fantasizing) or because they are honestly mistaken. For an illustration of a strategy for challenging the prosecution's theory of the case as the product of honest but premature tunnel vision and confirmation bias on the part of the police, see § 31.02 *infra*. As a general matter, it is easier to prove mistake than outright fabrication because the fact-finder (judge or jury) will ordinarily be reluctant to believe that a prosecution witness is lying under oath. However, a theory of fabrication may prevail if the defense can show that the witness has a compelling motive to lie. A theory that the complaining witness is fabricating the existence of a crime can be supported with evidence that:

1. The witness has a motive to accuse the respondent falsely in order to get him or her into trouble because of past incidents that have caused the witness to be angry at or jealous of the respondent or the respondent's family or friends;

2. The witness has some other motive for fabricating a crime, such as: to collect insurance money; to cover up some other criminal behavior of the witness or the complainant; or to win a reward from law enforcement authorities for snitching (for example, dismissal of pending charges against the complainant; a financial reward; admission into a witness protection program); or

3. (In cases in which the complaining witness is a police officer) the officer fabricated the crime in order to inflate his or her arrest figures and thereby gain credit with superiors (by, for example, planting drugs on the respondent in a drug case) or in order to cover up an ill-founded arrest that would have made the officer look bad or exposed the officer to a civil suit for false arrest (and, when violence

was involved in the arrest, for assault and battery).

A theory that the complaining witness is mistaken in thinking a crime took place can be supported by showing that some innocent set of events occurred which the complainant misinterpreted as a crime. For example: the respondent merely asked the complainant for a hand-out, and the complainant thought the respondent was shaking him or her down in a robbery; the police encountered the respondent running away from the vicinity of a closed shop with a burglar alarm ringing and therefore assumed the respondent had attempted to break in, when, in fact, the alarm went off because of a short circuit and the respondent was running to find and alert the shop owner; a store security guard observed the respondent taking merchandise past a cash register and arrested the respondent for shoplifting, when the respondent was merely looking for a register that was less crowded. Of course, in addition to explaining away the complainant's testimony as a fabrication or a mistake, counsel will have to explain away the testimony of any eyewitnesses. The theory may be the same for the eyewitnesses as for the complainant, or it may be different (as, for example, when the defense asserts that the complainant is mistaken and that an eyewitness is lying in a desire to support the complainant, who is a relative or co-worker).

§ 6.02(b) Defense Theories That Refute the Prosecution's Assertion That the Respondent Was the Perpetrator

The prosecutorial evidence linking the respondent to the crime will usually take the form of one or more of the following: (i) an identification of the respondent by the complainant, an eyewitness, or both; (ii) an incriminating statement by the respondent, confessing to the offense, admitting conduct or exhibiting knowledge that implicitly implicates the respondent, or reciting an alibi that the police have shown to be false; (iii) testimony or statements by a co-respondent or uncharged snitch identifying the respondent as the perpetrator; and/or (iv) scientific evidence, such as serology evidence in sex offenses, fingerprint analysis, hair analysis, fiber analysis identifying threads found at the crime scene as stemming from an article of the respondent's clothing, or a swab of the respondent's hand showing that s/he recently fired a gun.

Several of these forms of prosecutorial evidence are subject to suppression or exclusion on pretrial motions. Motions to suppress identification testimony are covered in Chapter 25, and motions to suppress confessions, admissions, and other statements are covered in Chapter 24. Motions to sever a codefendant's case from the defendant's on the ground that the co-respondent made a statement incriminating the defendant, and back-up arguments that the statement should, at the very least, be redacted to remove all references to the defendant, are described in § 18.10(a) *infra*. Challenges to the admissibility of scientific evidence are discussed in § 31.09.

Assuming that the defense does not succeed in suppressing or excluding the incriminating evidence of the respondent's identity as the perpetrator, there are several ways of refuting the evidence at trial.

Identification testimony by the complainant or an eyewitness can be challenged by

asserting that the witness, although honest, is mistaken in identifying the respondent for one or more of the following reasons:

1. The respondent bears some resemblance to the actual perpetrator and was selected because s/he was the only one among the suspects viewed (in a show-up, lineup or photo array) who fit the perpetrator's description.

2. The police caused (or helped to cause) the identification by something they said to the witness or by their employment of a suggestive identification procedure that conveyed to the witness who it was that the police wished the witness to identify.

3. Some event occurred that caused the witness to superimpose the respondent's face, which s/he saw after the offense (or, less usually, on an unrelated occasion before the offense), on top of the memory of the perpetrator's face, and the witness now honesty but mistakenly believes that respondent's face was the perp's. This theory can be used when, for example: the witness saw the respondent in police custody or at the police station and deduced that the police naturally would have caught the right person; the witness saw the respondent in the vicinity of the crime or heard the respondent saying something similar to the words spoken by the perpetrator or saw the respondent wearing clothes similar to those worn by the perpetrator; or the witness and the respondent had an encounter that suggested to the witness that the respondent was the perpetrator.

4. The witness is identifying a person of another race, and thus the identification process is subject to the weaknesses and vagaries of cross-racial identification.

Material useful in challenging the accuracy and reliability of eyewitness identification testimony will be found in §§ 25.03, 11.01(a), and 31.05 *infra* and in *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 314-45 (3d Cir. 2016) (en banc) (McKee, C.J., concurring).

Identification testimony by the complainant or an eyewitness also can be refuted by asserting that the witness is lying. To make this theory persuasive, the defense might urge, for example, that:

1. The witness bears a grudge against the respondent.

2. The witness needs to pin the crime on somebody in order to escape prosecution for his or her own complicity in it or in order to gain some benefit, such as the dismissal of pending charges against the witness or cash compensation as an informer, and the respondent happens to be an available scapegoat (because the respondent fits the description of the perpetrator or was at the scene of the crime or possesses a criminal record that would make the respondent's guilt believable).

3. Although there is no clear motive to which the defense can point, the defense does not bear the burden of proving why the eyewitness is lying but merely has to raise a reasonable doubt of his or her veracity; and the untrustworthy demeanor of the witness is sufficient to raise a reasonable doubt.

These same theories can be used to discredit a co-respondent or snitch who identifies the respondent as the perpetrator.

A confession or incriminating statement by the respondent, that the defense was unable to suppress on constitutional grounds in a pretrial hearing may nevertheless be assailable at trial under state law doctrines of involuntariness. See § 24.16 *infra.* Even when such challenges are unavailable or unlikely to prevail, counsel can argue to the fact-finder at trial that the circumstances under which the statement was made render it untrustworthy. See §§ 24.04(d), 24.22 *infra.* Typical circumstances that may persuade a judge or jury to discredit a respondent's confession in whole or in part are overbearing police interrogation; police promises of leniency if the respondent confesses; a respondent's drug or alcohol intoxication, physical injuries, depression or lack of sleep; a respondent's suggestibility (resulting from, *e.g.*, young age, mental impairment, or a desire to please the authorities) or limited competence in the language in which s/he confessed; fear of recrimination by a third party if the respondent does not take the rap; and motivation to protect a family member or loved one by taking the rap. When details in a purportedly incriminating statement make the difference between guilt and innocence, counsel can contest the prosecution's interpretation of the statement by pointing out ambiguities in the respondent's words or in the questions to which s/he was responding. Finally, the facts may support a thesis that the police fabricated the statement in an attempt to bolster their case. (Judges sitting as the fact-finder in a bench trial are often loth to conclude that police officers are lying; juries may be more receptive to claims of police perjury, particularly if jurors or their relatives or friends have had bad experiences with cops or come from communities where cops are in bad odor at the time of the trial.)

In challenging a prosecution case based on scientific evidence, counsel can employ any one or more of three approaches. (i) S/he can use a rival expert to show that this expert reached a conclusion contrary to that of the prosecution expert, and can assert that the defense expert's conclusion is the correct one, or at least that a reasonable doubt has been raised. (ii) S/he can use a defense expert, or cross-examination of the prosecution expert, to show that even if the prosecution expert's conclusions are correct, they are not very damning. For example, the impact of a scientific finding that the respondent has the same blood type as the perpetrator can be minimized by showing that one quarter of the human race shares that blood type. (iii) S/he can use a defense expert, or cross-examination of the prosecution expert, to show that there are potential inaccuracies or uncertainties in the scientific method employed (in general, or under the circumstances of this particular case) that raise legitimate doubts about the correctness of the prosecution expert's results. Most genuine experts are sufficiently cautious that they will freely admit the potential for inaccuracy that plagues many scientific tests. Material useful in challenging the accuracy and reliability of forensic-science evidence presented by the prosecution

will be found in § 31.09 *infra*.

In any case in which the prosecution is likely to use scientific evidence at trial, counsel should consider retaining a defense expert to consult with counsel about these possible approaches and to testify at trial if appropriate. When the client is indigent, counsel can request court funds to retain the expert. See § 11.03 *infra.* Often, it will be worthwhile to test the waters by talking with the prosecution's expert prior to retaining a defense expert. Many forensic experts on the police force, unlike line police officers, are willing to talk with defense attorneys. By questioning the prosecution's expert about the nature, bases, and degree of certainty of his or her conclusions, and particularly by inquiring whether there is anything unusual or difficult about the analysis of the data being interpreted in this case, counsel can make a preliminary assessment of the utility of challenging the expert testimony with a rival witness. If, for example, the prosecution's scientific evidence is based upon a simple chemical test, the test is normally highly accurate, its application in the present case was routine, and the tester seems unshakeable, it may be wise to stick to factual defenses rather than retaining a rival expert, especially if the respondent is a paying client who can ill afford the expert's fee. Additional factors to consider in assessing the likelihood of successfully challenging the prosecution's forensic-science evidence are discussed in § 31.09 *infra*.

In a case in which the prosecution seeks to identify the respondent through a chain of circumstantial evidence linking him or her to the criminal episode, defense counsel can challenge the chain as a whole – instead of, or in addition to, attacking particularly vulnerable links – on a theory that the police investigation went astray at the outset, latched onto the wrong person as a suspect, and then locked into this mistake as a result of tunnel vision. See § 31.02 *infra*; *and see Kyles v. Whitley*, 514 U.S. 419, 446 (1995); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985); *United States v. Crosby*, 75 F.3d 1343, 1347-48 (9th Cir. 1996); *Mendez v. Artuz*, 303 F3d. 411, 416 (2d Cir. 2002).

§ 6.02(c) The Building Blocks for Constructing a Defense Theory of the Case

Ultimately, counsel's selection of a theory of the case will depend on an evaluation of the relative strengths of the prosecution's evidence and the evidence available to the defense. The respondent is often a vital source of ideas and information pointing to potential defense evidence, because s/he is positioned at the center of events from the defense perspective and can give counsel both a general framework for constructing a favorable version of what happened and specific leads to possible defense witnesses. S/he may also be able to provide some insights into provable biases of prosecution witnesses. S/he is substantially less likely, however, to be able to assist counsel in identifying other areas of weakness in the prosecution's evidence. So constructing a successful theory of the defense will usually require counsel to take the initiative in identifying, investigating, and developing exploitable flaws in the prosecution's case. And counsel will almost always have to bear primary responsibility for canvassing the full range of potential challenges to the prosecution's theory of the case, for determining whether these can be combined or are mutually incompatible (or incompatible with theories based upon potential

defense evidence) and for assessing what combination or election of defenses has the greatest likelihood of success.

In looking for potential weaknesses in the prosecution's case, counsel should obtain all pretrial statements made by each prosecution witness – whether to police or other persons – and should minutely compare the texts of what the witness said at different times. If a version of events that a witness gave soon after the crime is more favorable to the defense than the witness's present version, the defense theory of the case may be that the witness's memory has faded over time and that the witness's present inability to remember significant details casts doubt on anything s/he now says that was not in his or her original statement. Or the theory may be that the witness's self-inconsistencies demonstrate that s/he is fabricating his or her entire tale (or at least its incriminating parts) in order to procure the respondent's conviction (because that will benefit the witness in some way, or because of personal animosity arising from jealousy, anger, revenge-seeking, or other bias); the witness has never been able to tell a straight story; so none of his or her conflicting versions of the tale are worthy of belief. Inconsistencies between the statements of different prosecution witnesses can be used to support similar defense theories. When those witnesses have had opportunities to talk with one another before trial, defense counsel will often be able to demonstrate that their successive statements are increasingly compatible and to argue that this homogenization discloses the factual vacuum at the core of the prosecution's case. The homogenizing process may be demonstrable even when prosecution witnesses have interacted little during the pretrial period; it is a natural consequence of the prosecutor's rehearsing witnesses to present a unified version of what happened; and defense counsel can argue that it has critically impaired the fact-finder's ability to reach any confident, reliable conclusions about facts that the prosecution is required to prove beyond a reasonable doubt.

Another technique for pinpointing exploitable weaknesses in the prosecution's case is to consider whether there are aspects of the prosecution witnesses' conduct that fail to comport with normal human behavior. For example, if the complainant or eyewitness has known the respondent for years, it stands to reason that s/he would give the police the respondent's name as soon as s/he is interviewed by them. If s/he failed to give the respondent's name to the authorities until some time later, counsel can use this quirk to support a theory that the witness has decided to pin the crime on the respondent falsely as a result of a grudge that began after the date of the crime (or a longstanding grudge that the witness was not quick enough to act upon at the time of the police interview). In order to detect anomalies of this sort, counsel will often find it productive to trace through, from beginning to end, an imaginary "normal" scenario for a crime like the one charged. By comparing that scenario with the provable events in the respondent's own case, counsel can identify actions and statements on the part of prosecution witnesses that are out of whack with behavior that a trier of fact would expect from people in the witnesses' purported circumstances.

A similar fact-modeling process, mentally tracing step-by-step the normal sequence of police procedures in a case such as the respondent's, will enable counsel to pinpoint exploitable flaws in the police officers' versions of searches, seizures, confessions, and identification

procedures. For example, in a case in which counsel is challenging a police officer's *Terry* frisk of the respondent (see § 23.10 *infra*) and the officer claims that s/he believed the bulge in the respondent's pocket was a gun, counsel can develop the officer's failure to take the normal steps for protecting himself or herself from an armed suspect, such as radioing for backup, drawing his or her own service revolver, and immobilizing the respondent by having him or her "assume the position" with hands up against a wall or against a car, well away from coat or pants pockets.

§ 6.02(d) Implications of the Choice of Defense Theory for Trial Preparation

There are several ways in which the defense theory of the case will shape counsel's trial preparation.

First of all, the theory of the case will inform the way in which counsel assigns priorities to the tasks to be performed in the defense investigation of the case. As a practical matter, even though counsel may wish to arrange an investigative interview of every possible prosecution and defense witness, often that will not be feasible. In many jurisdictions, the prosecution is not obligated to inform the defense of the identity of all of its witnesses (see § 9.07(b) *infra*), and the investigator will have to spend considerable time searching for unknown prosecutorial witnesses. Even defense witnesses may not be easy to find, since often the client has no idea of the names or addresses of people who were standing on the street, observing the events. In an imperfect world, in which each aspect of the defense investigation consumes time and limited investigative resources, counsel will have to determine the relative importance and temporal urgency of tasks, looking first – or directing an investigator to look first – for certain witnesses, documents, and exhibits. Thus, for example, in an assault case in which the respondent's self-defense claim does not dispute the occurrence of the assault or even the manner in which the assault was committed but instead depends upon an incident earlier the same day in which the complainant threatened to kill the respondent the next time they met, counsel will assign priority to finding any witnesses to the earlier threat and witnesses who can recount a history of threats and violence by the complainant against the respondent or attest to the complainant's reputation for violence. Of course, counsel's initial assignment of priorities will have to be progressively revised in accordance with new information that is learned. For example, if the prosecution reveals in discovery that government witnesses will recount the respondent's making statements during the assault that are inconsistent with a theory of self-defense, counsel then will have to assign top priority to finding defense witnesses who describe the sound track of the assault differently.

Once counsel has identified the most important witnesses, the defense theory of the case determines what questions should be asked of those witnesses. In essence, counsel is working backwards from a goal defined by the theory of the case. Having identified what ultimate picture of events and people the defense will want to ask the fact-finder to accept at the end of the trial, counsel can specify what defensive facts need to be elicited during the trial, and thence counsel can deduce the questions that need to be asked of witnesses to learn those facts. This focusing function of the defense theory of the case also plays an important role in deciding, for example, which expert witnesses to retain and what to ask them to evaluate; what legal research has to be

conducted in preparation for drafting jury instructions or making bench arguments on the merits at trial; and what additional legal research and planning have to be undertaken in anticipation of evidentiary issues that are likely to come up at trial.

Third, the defense theory of the case will shape counsel's decisions about what motions to file. For example, if the respondent made a statement to the police telling a wholly exculpatory story of self-defense and if the defense theory at trial will mirror that statement, counsel may decide to refrain from filing a motion to suppress the statement. Or if the defense's theory at trial depends upon testimony by a co-respondent and if a severance of the co-respondent's case from the respondent's probably will have the practical result of rendering the co-respondent unavailable as a defense witness, counsel may opt in favor of abandoning a legally viable severance motion. See § 18.08 *infra.*

Fourth, the defense theory of the case will shape the way in which counsel conducts the probable-cause hearing and any suppression hearings. As explained in § 4.29 *supra* and § 22.02 *infra,* evidentiary hearings of this sort can be used for the purpose of laying a foundation for later impeachment of prosecution witnesses at trial. If, at the time of the probable-cause or suppression hearing, counsel has a vision of what the defense theory will be at trial, counsel can design his or her cross-examination at the hearing to serve this purpose most effectively, creating the best possible transcript material for use at trial even if this requires the curtailment or sacrifice of some lines of cross-examination that might have increased the defense's relatively marginal chance of winning the hearing itself. See § 22.04 *infra.*

These are only some of the most significant ways in which the defense theory of the case can shape trial preparation. It would not be an overstatement to say that the theory of the case should inform every single act of counsel's. For example, counsel's decision whether to seek a continuance or whether to assert a speedy trial demand when the prosecution seeks a continuance will depend upon the availability of defense witnesses needed to prove the defense theory of the case. Counsel's advice to the client about whether to take the witness stand at trial will depend upon the theory of the case, as well as additional considerations such as whether the judge is likely to penalize the respondent at sentencing for what the judge may view as perjurious testimony.

§ 6.03 GATHERING THE FACTS NEEDED TO SUPPORT THE DEFENSE THEORY OF THE CASE

There are four institutionally recognized methods for gathering factual information bearing on a case:

1. Client interviews (see Chapter 5).

2. Defense investigation, including interviewing potential prosecution and defense witnesses, collecting and examining police reports and other documents (whether

onsite or by subpoenaing them), and inspecting physical scenes and objects (see Chapter 8).

3. Informal and formal procedures for discovery of materials from the prosecution (see Chapter 9).

4. Retention of expert witnesses who can perform scientific tests, such as ballistics, serology, or fingerprint examinations, that will shed light on the pertinent facts (see Chapter 11).

In addition to these methods, there are three informal means of gleaning facts: filing motions that will require the prosecutor to respond with pleadings that reveal aspects of the prosecution's case; conducting hearings, such as the probable-cause hearing and suppression hearings, in such a way as to gain disclosure of the prosecution's case at trial (see §§ 4.29, 4.32 *supra*; §§ 22.02, 22.04(b) *infra*); and informal conversations with the prosecutor about the case during plea negotiations, other meetings, or casual conversations while waiting for a court hearing to begin (see § 14.15 *infra*).

Counsel should take advantage of all of these means of obtaining factual information. Because some of them involve more lag time than others, the former procedures should be set in motion first so that they will be completed in time for trial. Generally, the following steps should be taken at the earliest practicable time, on the day of the Initial Hearing if possible:

1. Counsel should prepare subpoenas for documents. These will not take counsel long to prepare and must be prepared early because it may take a long while for the relevant agencies to comply with the subpoenas.

2. Counsel should direct an investigator to start tracking down and interviewing prosecution and defense witnesses and gathering necessary documents and exhibits. As explained in § 6.02 *supra,* counsel should use the theory of the case to assign priorities to these investigative tasks, explaining to the investigator the order in which s/he should perform the various necessary tasks. If counsel does not have an investigator and the client is indigent, counsel should promptly file a motion for court funds to retain an investigator (see §§ 8.04, 11.03 *infra*).

3. Counsel should identify and contact any expert consultants and witnesses who may be needed (see §§ 11.01, 11.02, 11.04, 12.08-12.10 *infra*), or, if counsel is representing an indigent client, file a motion for court funds to retain the experts (see § 11.03 *infra*).

4. Counsel should conduct an immediate informal discovery session with the prosecutor or, if the prosecutor is unable to meet that day, schedule an appointment as early as possible.

By taking these steps expeditiously, counsel will gather the information needed to shape further investigation of the case, the information needed to prepare suppression motions and other substantive motions (see Chapter 7), and the information needed to conduct plea negotiations effectively (see § 14.16 *infra*). The motions proceedings and plea negotiations, in turn, will provide counsel with more facts, which can be used in conducting suppression hearings and the trial.

§ 6.04 FILING MOTIONS THAT ARE CONSISTENT WITH THE THEORY OF THE CASE

The motions that counsel should ordinarily consider filing – in addition to motions for state-paid defense resources that the respondent cannot afford (see §§ 10.05, 11.03 *infra*) – are:

1. Motions for discovery (see § 9.07 *infra*);

2. Motions for protective orders to forestall potentially damaging prosecutorial activities (see §§ 7.02, 8.13, 9.07(d), 9.09(b)(6), 9.09(b)(7) *infra*);

3. Motions to suppress tangible evidence, confessions and incriminating statements, and identification testimony (see Chapters 22-25);

4. Motions for severance of counts or respondents (see Chapter 18);

5. Motions challenging the sufficiency of the Petition or the jurisdiction of the court (see Chapter 17);

6. Motions seeking a change of venue (see §§ 20.01-20.03 *infra*) or recusal of the judge (see §§ 20.04-20.07 *infra*);

7. Motions for diversion (see Chapter 19);

8. Motions to expedite or delay the pace of proceedings (see Chapter 15).

This is not, of course, an exclusive list: counsel may have to develop motions to deal with case-specific problems, such as, for example, prosecutorial interference with defense access to witnesses (see § 8.13 *infra*). Counsel should familiarize himself or herself with local rules setting deadlines for the filing of motions. In many jurisdictions the applicable statute, court rule, or local custom requires that motions be filed within a specific time (usually set at 15 or 30 days) after arraignment. See § 7.05 *infra.*

§ 6.05 SETTING IN MOTION THE PROCESS NEEDED TO PREPARE FOR DISPOSITION IN THE EVENT OF CONVICTION

As explained in Chapter 38, counsel can often prevent a sentence of incarceration in the event of conviction by presenting evidence of the respondent's potential for rehabilitation and by offering community-based (or, when necessary, residential) programs as alternatives to incarceration. An attorney who waits until the respondent has been convicted to begin preparing for disposition will discover that s/he is unable to gather the necessary background information or obtain interviews for the child at programs in the short time between trial and disposition. Accordingly, as explained in § 38.09 *infra,* counsel is well advised to begin the process of preparing for disposition as early as possible.

Counsel should obtain the child's school records in every case. In addition to playing a crucial role in counsel's preparation for disposition, the school records may reveal comprehension and reading problems that will support a motion to suppress a confession (see § 24.10(b) *infra*) or may be so favorable as to supply a basis for a motion seeking diversion (see § 19.03(b) *infra*).

If the client appears to be suffering from mental problems – either mental illness or mental retardation – counsel should arrange a mental examination by a psychiatrist or psychologist. See §§ 12.08-12.10 *infra.*

If the client's record or the nature of the current offense makes the client a likely candidate for incarceration, counsel should begin contacting appropriate community-based programs and arranging for interviews for the client. See § 38.14 *infra.* In such cases counsel also should make use of opportunities to enlist the aid of social workers in locating suitable programs and preparing a study of the child's background. See §§ 38.10, 38.14 *infra.*

§ 6.06 THE ROLE OF NARRATIVE THEORY IN CASE PLANNING[1]

§ 6.06(a) The Nature of Narrative and Its Importance in Litigation

"Narrative," as we use the term, means constructing and telling stories and includes the rhetorical creation of an imaginative world in which the story can happen – a world that gives the story its point. *See* JEROME BRUNER, ACTS OF MEANING 86 (1990); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRIT. INQUIRY 1, 13-14 (1991). There are several reasons why this narrative process is crucial in litigation.

First, narrative is "a primary and irreducible form of human comprehension" (Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in ROBERT H. CANARY & HENRY KOZICKI

[1] This section is a shortened version of the *Introduction* in Ty Alper, Anthony G. Amsterdam, Todd Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005). Elaboration of the points presented here and additional authorities can be found at pages 4-32 of that article.

(eds.), THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING 129, 132 (1978)) – humankind's basic tool for giving meaning to experience or observation – for understanding what is going on. It is the way most people make sense of the world most of the time. "[N]arrative . . . gives shape to things in the real world and often bestows on them a title to reality." JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 8 (2002). We link perceptions into happenings, happenings into events, events into stories; and our narrative expectations tell us how each story hangs together and how it will end. Jurors bring this everyday sense-making process to their work and use it to descry the "facts" from the evidence. *See, e.g.,* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY (1983); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model,* 13 CARDOZO L. REV. 519 (1991). Trial lawyers seeking to persuade jurors of a particular version of the facts need to tap into the process. *See*, *e.g.*, Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

Second, the narrative process also tells us how a story *should* end. "[N]arrative is necessarily normative" (Bruner, *Narrative Construction of Reality*, *supra* at 15), providing the interface between facts and values. "Stories fly like arrows toward their morals." WILLIAM H. GASS, TESTS OF TIME 4 (2002). They embody a society's manifest of moral imperatives. *See* BRUNER, ACTS OF MEANING, *supra* at 47. So, effective story-telling by a lawyer can help to make the lawyer's case to jurors who want to reach the *right* result.

Third (an elaboration of the preceding point), the narrative process is specialized for reconciling our expectations about the normal, proper course of life with deviations from it. "Deviance is the very condition for life to be 'narratable.'" PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE 139 (1992). The launching pad of narrative is *breach*, a violation of expectations, disequilibrium. *See* BRUNER, MAKING STORIES, *supra* at 15-20. The landing pad of narrative is *balance*, the reestablishment of equilibrium. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 45-47, 121-24 (2000). Narrative has always done for the human mind what juries are called upon to do for the body politic in every trial, and particularly in criminal trials – to deal with deviance by restoring order. Small wonder, then, if jurors resort to narrative to do much of the work.

Fourth, jurors come to their task equipped not only with the narrative process as a mode of thought but with a store of specific narratives channeling that process. Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us – through television, movies, newspapers, books, the internet, and word of mouth from our earliest childhood (*see* BRUNER, ACTS OF MEANING, *supra* at 82-84) – provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds. When a juror perceives the familiar lineaments of one or another of these narratives emerging from the evidence, s/he "recognizes" what is afoot and s/he is cued to interpret other pieces of evidence and eventually the whole of it consistently with the familiar story line. "This means that in order to perform effectively, many lawyers, particularly litigators, may be obliged to keep abreast of (in order to tap into) the popular storytelling forms and images that people commonly carry around

in their heads." Richard Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 692 (1994).

Fifth, evidentiary trials in which facts are contested are not conducted on the premise of Kurosawa's *Rashomon* – that multiple inconsistent versions of reality are all equally true – nor do most jurors operate on this premise. The uncompromising ontological first principle of every trial is that *something real really happened out there*. Jurors are permitted to vote that they cannot tell what happened, but this verdict is conceptualized as a failure of persuasion on the part of whichever party bears the burden of proof. And every trial lawyer knows that it is very dangerous – a desperation tactic of last resort – to stake his or her case on the argument that the truth is so recondite that the opposing party has failed to meet its burden on that account alone. Even if the lawyer's aim is simply to cast enough doubt on the opponent's case to prevent the jury from agreeing that an applicable burden of proof has been met, s/he will almost always want to suggest some alternative thing or things that could plausibly have *really happened out there*, instead of the thing that the opponent needs to prove. Under these circumstances trials of "the facts" tend to turn into story-telling contests. There is a hard core of material that the contestants must incorporate and account for in their stories – for example, the jury in a homicide trial may know from seemingly incontrovertible ballistics and fingerprint evidence that at some point in time the defendant or juvenile respondent handled the gun that fired the fatal shots – and the story-teller is required to encompass these mandatory materials in his or her plot. But where they cease to "tell the whole story," the story-telling competition begins; and the story-teller whose tale best interprets the mandatory materials consistently with the audience's understanding of the human scene can hope to carry off the prize.

Sixth, story-telling offers the litigator a vital means to expand or change the audience's understanding of the human scene. And it equips the litigator to explore in his or her own head, as a necessary prelude, a range of *possibilities* for expanding or changing the audience's perception of that scene. For, in addition to its other functions, narrative serves as the mind's primary way of surveying alternative possible worlds. It is imagination's instrument for getting beyond the familiar and the obvious, for playing out never-experienced scenarios and projecting the consequences of counterintuitive conceptions. It enables us to travel paths we have not walked before and to see where they lead, to create realms of *what if* where we can experiment with new varieties of thinking and believing, of doing and being. *See* AMSTERDAM & BRUNER, MINDING THE LAW, *supra* at 235-39; JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS (1986).

So, what follows from all this? Our reason for rehearsing the functions that the narrative process serves in litigation is not to encourage litigators to make greater use of narrative. That would be as superfluous as exhorting fish to make greater use of water. Litigators are inextricably immersed in narrative; they cannot survive without it. *See* AMSTERDAM & BRUNER, MINDING THE LAW, *supra* at 110. Our aim is rather to suggest that litigators will navigate the medium more effectively to the extent that they *focus consciously* on narrative construction as an integral part of their work, *survey systematically and creatively* the range of options available to them in

constructing narratives, and make *strategic choices* among the options with an understanding of the basic elements of narrative construction and how those elements fit together.

§ 6.06(b) The Specific Uses that a Litigator Can Make of Narrative

The following inventory enumerates potential uses of narrative in jury-trial litigation. Some involve the litigator's own thinking (categories 1 and 2 immediately below). (We include in the term "litigator" all members of a litigation team.) Some have to do with gauging the thinking of other people in the litigation process (category 3). Some involve making explicit references or implicit allusions to stock scripts in communications aimed at the jury (categories 4, 5 and 6). In subpart 7, we catalog the range of techniques by which a litigator communicates to the jury; and in subpart 8, we briefly discuss the choice between explicit and implicit invocations of stock scripts.

1. *Using narrative to generate hypotheses that guide investigation and to avoid shutting down investigation by making premature judgments*. To be efficient, factual investigation must be directed by working hypotheses about what happened and why. See § 7.2.1.4 *supra*. Hypotheses fleshed out in narrative form – with a scene, characters, actions, instruments, and motives (see § 6.06(c) *infra*) – serve this function particularly well, because their projection requires the litigator to construct in his or her imagination a world containing all of the details that are necessary for the plot to unfold. These details in turn suggest others that would probably exist in conjunction with the necessary details, or that could *not* coexist with the necessary details, providing specific focuses for investigation.

Projecting alternative possible causal or explanatory stories that could fit around information already in hand enables a litigator to multiply hypotheses. And having multiple hypotheses in mind throughout a litigation can be crucial to success. Litigators tend too often to zero in on the first plausible version of events that emerges from available information, or at most the first couple of plausible scenarios. They tend to confine their investigations to attempting to confirm the most immediately obvious favorable scenario (or two) or to refute the most immediately obvious unfavorable scenario (or two). They forget that the fundamental tenet of effective investigation is: *The world is a mysterious, surprising place, where strange things happen*. Narrative provides the best safeguard against these tendencies. Narrative restores the mystery of the world. Insisting upon telling oneself alternative possible stories even after it has become "obvious" what happened is an invaluable check against premature closure.

2. *Using narrative to develop a theory of the case*. As explained in § 7.2.1 *supra*, a defense lawyer's *theory of the case* is a detailed summary of the factual propositions that counsel plans to assert as the basis for a favorable verdict or decision, with the facts organized in such a way that they invoke the application of the normative dictates (substantive rules of law; procedural rules, such as those relating to burdens of proof and presumptions; considerations of fairness, propriety, and other moral values; empathy or sympathy) that counsel will rely on. The defense theory of the case should inform every aspect of counsel's preparation and presentation.

See § 7.2 *supra*. Because of the efficacy of narrative in mediating facts and norms, the theory of the case usually takes the form of a story. When it does, counsel will often benefit from modeling it on one or more of the stock stories current in the culture, and s/he will almost always benefit by considering alternative possible versions of the story and assessing their relative believability by drawing on the culture's current register of accepted stories as examples of what is plausible and coherent, what makes a tale hang together sufficiently to be convincing.

Even when counsel's theory of the case cannot be encompassed by a single story, it is likely to depend in part upon the persuasiveness of key facts. Jurors' probable reactions to evidence of those facts can sometimes be usefully gauged by reference to the prevalence of similar factual elements in the scenes, plots, and characters of currently accepted story types. Conversely, if a theory of the case calls for discrediting the opposing party's story or components of it, popular narratives featuring an appearance/reality dichotomy – as many popular detective stories, courtroom dramas and other suspense "thrillers" do – can suggest useful litigation strategies for reducing the opponent's evidence to the status of deceiving appearances.

3. *Using narrative to fathom or affect the thinking of witnesses and other sources of information, jurors and other trial participants*. Litigators must constantly make strategic decisions on the basis of predictions about how people are thinking or how they will react to something that the lawyer does. In investigative interviewing and in interviews preparing witnesses to testify at trial, the litigator frames questions in ways that are designed both to elicit information and to shape it by structuring the framework within which the witness understands the information and its significance. Because memories are commonly stored and recounted in narrative form and the information remembered is affected by the stories the witness has in mind or can be gotten to think about as giving the information meaning (*see* BRUNER, ACTS OF MEANING, *supra* at 55-58), counsel needs to be alert to detect those stories and the possibilities for rewriting them. This is equally true in cross-examining the prosecution's witnesses. Witnesses who have had little or no prior experience with the law are frequently playing out in their heads scripts for appropriate witness responses that they have picked up from TV or the movies; this is a setting in which life tends to imitate art almost slavishly. And even witnesses who have had considerable prior experience in a witness role (such as police officers) often have organized aspects of that experience (such as cross-examination by defense lawyers) – together with the courtroom stories they have heard (*e.g.*, at the precinct station) – into scripts that can be put to good use by a cross-examiner who discerns them.

Voir dire examination of prospective jurors calls for much of the same sensitivity to narrative processes and stock scripts as witness interviewing and examination. So, often, does predicting how the prosecutor will interpret and react to what defense counsel does. And whether or not counsel makes deliberate use of narrative strategies, techniques and allusions in his or her own presentation of the case, the jurors are likely to be perceiving and interpreting the evidence they hear as the unfolding of a story that they recognize from familiar models. Counsel has to anticipate the stories jurors will see in the evidence, in order either to deconstruct them or to turn them to advantage.

4. *Using narrative to attune the jury to lines of thinking that advance the litigator's case or set back the opposing party's case.* Narrative involves a special way of thinking, of processing information, of proceeding from premises to conclusions. If a litigator can get jurors into a narrative mindset early in a trial – by, for example, stressing in *voir dire* interchanges with prospective jurors, in an opening statement, and/or in the way s/he talks about the trial process when making and arguing objections in the hearing of the jury – that the jury's job is to [reconstruct the story] [figure out the real story] [get to the bottom of the story] of what happened, s/he can tap into this mode of thinking and use it to shape the jurors' understanding of the case.

One important characteristic of narrative thinking, for example, is that it is inescapably hermeneutic. In a story, the meaning of the whole is derived from the parts at the same time that the meaning of the parts is derived from the whole. *See* Bruner, *Narrative Construction of Reality*, *supra* at 7-11. In a deductive evidence-marshaling jury argument, this process can be derided as "circular" or as "bootstrapping," but a litigator can make it acceptable, even necessary, to a jury despite this derision if s/he can persuade the jurors that the process is the best way to see how the story hangs together.

Another important characteristic of narrative thinking is that it generates expectations through a presumption of relevancy. This is why a reader knows that if s/he is told in Chapter One there is a gun hanging on the wall, s/he can expect a gunshot and a dead body or at least a near miss by the end of Chapter Three. *See* ANTON TCHEKHOV, LITERARY AND THEATRICAL REMINISCENCES 23 (Samuel S. Koteliansky trans. 1927). A related structural feature of stories is that they translate Time into a sequence of events that must be "of relatively equal importance (or value), and . . . of approximately similar 'kinds.'" GASS, *supra* at 11. These aspects of narrative thinking can be used to imbue small items or events with large significance. And narrative thinking not only intensifies people's ordinary tendency to regard the actions of other people as a product of will – indeed, of character – rather than of external circumstances. It also gives this tendency the twist of focusing attention on "'reasons' for things happening, rather than strictly [on] . . . their 'causes.'" Bruner, *Narrative Construction of Reality*, *supra* at 7. By working with these and other distinctive qualities of narrative thinking, a litigator can cue the jurors to process what they see and hear at trial in ways that bolster his or her case, undermine the opposition's, or both.

5. *Using particular narratives to accredit, discredit, configure or code pieces of evidence or information*. A jury is likely to find evidence persuasive to the extent that the "facts" it portrays conform to the jurors' understanding of The Way the World Works. Jurors enter a trial with strong views, based on personal experience and on the second-hand information prevalent in their cultural milieu, about The Way the World Works. But these views are neither monolithic nor immutable. We all carry around in our heads an inharmonious assortment of notions, sometimes even flatly inconsistent notions, about what is usual, plausible, probable, possible, right, in human affairs. These notions usually take story form. *See* AMSTERDAM & BRUNER, MINDING THE LAW, *supra* at 39-47. Depending on which stories are salient when we are trying to

make sense of things, we can come to different conclusions about what happened and why. By reminding the jury of apt stories to be thinking about as it receives and evaluates the evidence at a trial, a litigator can prompt the jurors to be more trusting or more skeptical regarding particular kinds of evidence or the facts the evidence is offered to prove.

The stories can be drawn from "news" or fiction. For example, when objecting in open court to the admission of crime-lab evidence on grounds of unreliability (see § 33.11 *infra*), counsel might refer to media exposés of ineptitude at forensic laboratories (see § 31.09 *infra*). Additionally or alternatively, counsel could make disparaging comparisons between the crime-scene investigators in the present case and those in well-known TV entertainment series like *CSI*, where the forensic science techniques are invariably sophisticated and flawless.

Stories are also useful in coding items of evidence or other pieces of a case. Coding is the process by which words, images, objects, and ideas become associatively linked with others, so that the former bring the latter to mind. *See* AMSTERDAM & BRUNER, MINDING THE LAW, *supra,* at 187-92. Narrative construction involves considerable coding, which contributes heavily to the verisimilitude of good stories. And the conceptual, emotional, even sensory "baggage" packed into an item by narrative coding travels with the item beyond the story where the packing was done.

6. *Using particular narratives to cue the jury's interpretation of the case as a whole or to free the jury from sets that dispose it to fit the case into a harmful mold.* The ultimate task of the jurors in any jury trial is not only to decide what happened in terms of physical bodies moving in space and time, or even bodies moved by minds possessing specified mental states. It is also to *interpret and categorize the actions and mental states as understandable human behavior* susceptible to legal and moral judgment."Placing things, events, and people in these categories is very much a matter of *what stock script one recognizes* as being in play or *what story one chooses to tell*." *Id*. at 47. A litigator who taps into stock narratives familiar to jurors – either the conventional story lines of prevalent news and entertainment *genres* or specific books, films, or TV shows that are recognizable by name, by leading characters, or by other signature features – can put those narratives to work as a cognitive framework for the jury's interpretation of the evidence that will shape an understanding of "what really happened" and what it means.

7. *Techniques for communicating narratives to the jury.* One virtue of grounding a litigator's case in stock stories is that s/he can begin to evoke the scripts and trappings of the story during pretrial proceedings or at the very outset of the trial. This makes it possible to use the *voir dire* examination of prospective jurors to sound out the jury's likely reactions to a story before the litigator commits to it by presenting evidence or even taking an overt position regarding the facts of the case in opening argument.

If story-based images have attached to a case in pretrial publicity, that makes it easier for the litigator to advert to them in connection with *voir dire* examination of prospective jurors. But if they have not, it may still be possible to use language evocative of stock narratives in talking

with the jurors on *voir dire* or in framing written *voir dire* questions in courts where the judge conducts the oral questioning. These evocations have the dual purpose of priming the jury early to think in terms of the narratives that a litigator expects to tap into later and of giving the litigator an opportunity to observe any reactions of prospective jurors to the narrative. Their reactions may suggest that s/he will be wise to play it down – or, conversely, to play it up – or to strike particular jurors.

Means for suggesting narratives to the jury at later points in the trial abound. During opening and closing argument, counsel may or may not be permitted to make explicit references to stories current in public discourse, but s/he will usually be able to trigger recognition of widespread and recurrent stock narratives – and even of the better-known books or films or TV series that exemplify them – by implicit allusions. She can usually find occasions for similar allusions in questioning witnesses and in making and arguing objections. Witnesses can be prepared to testify in ways that make the narratives come to mind. The litigator's style of witness examination and even his or her physical activity in the courtroom can be designed to summon up the narratives s/he wants the jurors to recognize in the evidence. For example, it is advisable for counsel to consult the client extensively at the defense table in cases where the prosecution is seeking to depict the client as impulsive and lacking in self-control but not in cases where the prosecution's theory is that the defendant or juvenile respondent was a criminal mastermind.

8. *Choosing between explicit and implicit invocation of stock stories*. When a litigator has the option of making more or less explicit references to the stock stories that s/he wants jurors to have in mind, s/he needs to balance the values of clarity and dramatic emphasis against their risks. One risk is related to the risk of premature commitment. The more unequivocally a litigator has announced his or her reliance on a particular narrative, the more difficult it will be to back off it if subsequent developments weaken that theory of the case or reveal a better one. Overt or overly clear identification of a particular stock story as the theme of a litigator's case invites opposing counsel to argue that the case is built around a fable or that the facts don't fit the fable. More oblique reference to the stock story would confront opposing counsel with a hard choice between ignoring it or reinforcing it by recognizing it and undertaking to refute it. And if a refutation seemed sufficiently persuasive, the litigator could always reply, "That isn't what I meant at all." Similarly, the clarity of a reference increases the extent to which it offers traction for resistance. A juror may be roused to quarrel with the story who would not have reacted to a more ambiguous reference that was nonetheless sufficient to engage the imaginations of jurors more in tune with the tale.

§ 6.06(c) The Basic Structure and Process of Narrative

Journalists learn and teach that the recipe for making stories is the Five W's: *Where? Who? What? When? Why?* There is a conspicuous resemblance between this formula and literary theorist Kenneth Burke's Pentad or "Five Key Terms of Dramatism":

1. Scene: the situation, the setting, the where and when;

2. Agent: the actors, the cast of characters;
3. Act: the action, the plot;
4. Agency: the means, the instruments of action;
5. Purpose: the motivations, goals, aims of the characters.

KENNETH BURKE, A GRAMMAR OF MOTIVES xv (1945). Either roster will serve as a handy checklist of the elements that need attention in constructing stories for the uses identified in the preceding subsection. "Elements" as in *elemental*. For each element represents a whole dimension in which choices are possible and arrays of variables should be canvassed before making the final choices.

The five dimensions are, of course, interconnected. They need to be in tune. *See id*. at 3. Choices made in one dimension affect each of the others. (For example, adding characters to a story may require an expansion of the scene to encompass a longer period of time or a wider stage. It may also, by increasing the complexity of the interpersonal dynamics, change the motivations of the characters previously onstage.) Intensifying the focus upon one dimension may diminish the significance of another. *See id*. at 17. And transmutations from one dimension to another can be accomplished by the narrative alchemy that Kenneth Burke describes as re-forging distinctions in the "great central moltenness" where all of the dimensions have a common ground. *See id*. at xix. (Capital defense attorneys, for example, transmute Scene into Agent when they construct mitigation stories in which the defendant's or juvenile respondent's childhood environment becomes the Villain of the plot.)

The interdependence and partial interchangeability of Scene, Agent, Act, Agency, and Purpose make narrative a highly variable and flexible medium. Still, there is a certain constancy in the way in which agents act to pursue their purposes within the temporal framework of the scene. This constancy resides in what is usually called "plot" – the "principle of interconnectedness and intention [necessary] . . . in moving through the discrete elements – incidents, episodes, actions – of a narrative." BROOKS, *supra* at 5. It reflects "a 'mental model' whose defining property is its unique pattern of events over time." Bruner, *Narrative Construction of Reality*, *supra* at 6. Most stories have a common plot structure. The unfolding of the plot requires (implicitly or explicitly):

(1) an initial *steady state* grounded in the legitimate ordinariness of things

(2) that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,

(3) in turn evoking *efforts* at *redress* or *transformation*, which lead to a *struggle*, in which the efforts succeed or fail,

(4) so that the old steady state is *restored* or a new (*transformed*) steady state is created,

[(5) and the story often concludes with some *point* or *coda* – say, for example, Aesop's characteristic *moral of the story*: "Bird of a feather flock together," or "One lie will lead to another and ultimately seal one's doom" – a/k/a "*This is the Way the World Works*."]

See AMSTERDAM & BRUNER, MINDING THE LAW, *supra* at 113-14. For illustrations of the structure in appellate opinions, see *id*. at 77-99, 143-64.

§ 6.06(d) The Special Features of Narrative in a Jury-Trial Setting

Although stories have a core of common elements and a common basic structure, they differ widely depending upon the purposes for which they are told, the setting in which they are told, and the conventions and constraints of that setting. Fictional stories told for didactic purposes (in the tradition of Aesop's Fables) have different conventions and constraints than do cautionary tales, or novels and dramas aimed at exploring the human condition, or novels and movies and TV shows aimed at entertainment. Purportedly nonfiction stories told by historians have different conventions and constraints than those told by ethnographers and anthropologists or by propagandists. The following conventions and constraints bind the stories that litigators can tell in jury trials:

First, *the stories that litigators ask the jury to believe as constituting "the facts" of the case* (although not necessarily the stories to which they refer for analogies or illustrations) *must appear to be true*. Jurors view their job as getting at the truth of what happened. A litigator's version of events must appear to be true not only from the standpoint of verisimilitude (lifelikeness) but from the standpoint of external referentiality (conformity to any information that jurors will take to be objective "fact"). And a trial litigator's resources for creating facts are limited. S/he cannot, like a novelist or playwright, conjure physical props out of thin air or put into the mouths of witnesses any words that s/he cannot convince them to utter under oath. If admissible evidence of fact *X* just isn't out there (or if bad luck or a client's inability to pay for thoroughgoing investigation prevents the litigator from obtaining evidence of fact *X*), then the litigator's story at trial has either got to jibe with the nonexistence of fact *X* or contain a sub-story that explains why fact *X* is unprovable though true.

Further, some jurors have an unshakeable belief that truth is a matter of objective fact to be discerned exclusively by logical deduction from physical evidence and the accurate testimony of reliable witnesses. These jurors will resent and resist any suggestion by a trial attorney that the jury needs to *interpret* the evidence. They will be positively outraged at the idea that *stories* have anything to do with truth-finding. Such jurors are not immune to the influence of narrative. Indeed, their denial of the need for interpretation in fact-finding may make them peculiarly prone to reach uncritical conclusions on the basis of stories that they do not realize they have in their heads – like the very story that the only way to get at truth is Sherlock Holmes'. But a litigator facing jurors of this sort needs to tell his or her stories in the manner advised by the classic rhetors, using art to conceal his or her art.

Second, a litigator's story to a jury usually needs to accommodate the opposition's story (because it needs to trump it) *and always needs to be made as immune as possible against challenge*. Trial stories are stories told in contemplation of contest. Except on the rare occasions when a story can be unveiled for the first time in rebuttal closing argument, the opposition will get a chance to refute it or coopt it. This means that, to the extent possible, stories should be built in such a way that an assault on any piece will not bring down the whole; vulnerable pieces should be eliminated; loose ends are usually better left hanging than tucked in, if the opposition is likely to pull them out again. And, the litigator always needs to consider whether something s/he is thinking of putting into his or her story can be spun by the opposition to support a competing story.

Third, a litigator's story to a jury will invariably be an incomplete story, a story without a last chapter. It has to point to a concluding chapter that the jury's verdict will write. It has to have a role for jury to play, and that role has to be made an attractive one – sleuth, quester-after-Truth, avenger, righter-of-otherwise-irremediable-wrongs.

And, fourth, of course, *the last chapter that the jury is called upon to write must be a verdict in favor of the litigator's client*. Q.E.D.

§ 6.07 METHODS OF MAXIMIZING THE TIME AVAILABLE FOR, AND THE EFFECTIVENESS OF, CASE PREPARATION IN PUBLIC DEFENDER OFFICES IN WHICH CASELOADS ARE PROHIBITIVELY HIGH

Probably the most difficult aspect of being a public defender is coping with the high caseload that assistant public defenders normally carry. In some jurisdictions staff attorneys in a public defender's office have active caseloads of more than a hundred cases pending trial at any one time. When a new staff attorney begins work, s/he is often thrown into a courtroom and assigned to handle the heavy caseload left behind by his or her predecessor, with little or no training. Attorneys thrown into such a position may feel that manuals such as this one are simply irrelevant to their practice because the high caseload, constant court appearances, and perennial deadlines preclude the type of individual attention to cases and careful preparation that this MANUAL contemplates. If the attorney succumbs to this bleak view and sacrifices case preparation in some or all of his or her cases, s/he will not only deprive the clients of their Sixth Amendment right to effective assistance of counsel, but s/he will also violate the canons of ethics requiring thorough and competent preparation. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (2023); AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1980); American Bar Association, Formal Op. 06-441 (May 13, 2006) ("Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation"); Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); *In re Edward S.*, 173 Cal. App. 4th 387, 412-15, 92 Cal. Rptr. 3d 725, 745-48 (2009); *Public Defender, Eleventh Judicial Circuit of Florida v.*

State, 115 So.3d 261, 270, 274, 279, 282 (Fla. 2013); *State ex rel. Missouri Public Defender v. Waters*, 370 S.W.3d 592, 597, 605-08, 612 (Mo. 2012); *State v. A.N.J.*, 168 Wash. 2d 91, 112, 225 P.3d 956, 966-67 (2010); *Carrasquillo v. Hampden County District Courts*, 484 Mass. 367, 142 N.E.3d 28 (2020) ("The government of the Commonwealth . . . has a constitutional obligation to ensure that there is an adequate supply of publicly funded defense attorneys available to represent eligible indigent criminal defendants." *Id*. at 368, 142 N.E.3d at 34: "Ordering assignment of additional cases to public defenders who are already carrying maximum caseloads risks making them ineffective, by hindering them from, among other responsibilities, giving adequate attention to contesting pretrial detention if necessary, investigating their cases, making strategic decisions, filing pretrial motions, and preparing for trial, thereby defeating the very purpose of the right to counsel." *Id*. at 388-89, 142 N.E.3d at 49.); *Tucker v. State*, 162 Idaho 11, 19-20, 394 P.3d 54, 62-63 (2017) ("Appellants alleged systemic, statewide deficiencies plaguing Idaho's public defense system. Appellants seek to vindicate their fundamental right to constitutionally adequate public defense at the State's expense, as required under the Sixth Amendment to the U.S. Constitution, and Article I, Section 13 of the Idaho Constitution. They have not asked for any relief in their individual criminal cases. Rather, they seek to effect systemic reform. Their allegations find support in both *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963), and *State v. Montroy*, 37 Idaho 684, 690, 217 P. 611, 614 (1923), which make clear that it is the State's obligation to provide constitutionally adequate public defense at critical stages of the prosecution. Alleging systemic inadequacies in a public defense system results in actual or constructive denials of counsel at critical stages of the prosecution suffices to show an injury in fact to establish standing in a suit for deprivation of constitutional rights."); *Kuren v. Luzerne County*, 637 Pa. 33, 79-80, 146 A.3d 715, 743 (2016), and cases cited (holding that "there is a cognizable cause of action whereby a class of indigent defendants may seek relief for a widespread, systematic and constructive denial of counsel when alleged deficiencies in funding and resources provided by the county deny indigent defendants their constitutional right to counsel. The consequences of holding otherwise would be untenable, and would be fundamentally irreconcilable with the United States Supreme Court's pronouncements on the role of the right to counsel in our system of justice."); *State v. Peart*, 621 So.2d 780, 789, 791 (La. 1993) ("We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients. ¶ . . . [T]he Louisiana indigent defender system . . . has resulted in wide variations in levels of funding, both between different . . . [Indigent Defender Boards] and within the same IDB over time. The general pattern has been one of chronic underfunding of indigent defense programs in most areas of the state. . . . ¶ [H]aving found that evidence in the record before us shows that the provision of indigent defense services in Section E of Orleans Criminal District Court is in many respects so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel the constitution guarantees, we find that a rebuttable presumption arises that indigents in Section E are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards. . . . This presumption . . . is to apply prospectively only; . . . it will be applicable to all indigent defendants in Section E who have . . . [Orleans Indigent Defender Program] attorneys appointed to represent them hereafter, so long as there are no

changes in the workload and other conditions under which OIDP assigned defense counsel provide legal services in Section E."); Jay C. Hauser, Note, *Funding the Unfunded Non-Mandate: An Equal Justice Case for Adequate Funding of Public Defense*, 25 U. PA. J. L. & SOC. CHANGE 287 (2022). As the ABA Standards for Criminal Justice explain:

> "Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel's workload is approaching or exceeds professionally appropriate levels."

AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DEFENSE FUNCTION (4th ed. 2017), Standard 4-1.8(a), *Appropriate Workload*.

The high caseload of a public defender undoubtedly does make the job of defending each individual client more difficult. However, there are countervailing virtues in an institutional defender's office that offer the possibility of maximizing efficiency in case preparation.

The first of these is the fact that the attorney's practice is highly specialized. Because all or most of the cases handled by the attorney will be delinquency cases, the attorney will need to take the same actions and can use the same pleadings and forms again and again. For example, counsel will need to subpoena police reports and the school records of the respondent in every single case. This ministerial task, which tends to be very time-consuming, needs be done personally only once at the start of the attorney's career. Once the attorney has developed a format for these subpoenas, s/he can leave it to a law clerk, investigator, or administrative assistant to do the routine and mechanical job of copying the language devised by the attorney onto a subpoena bearing each new case's name and docket number. Similarly, certain routine motions, such as motions for discovery, can be duplicated with relatively little adaptation in each case.

A second type of routinization of counsel's practice takes advantage of the recurrence of fact patterns in delinquency cases. For example, counsel will probably handle several drug possession cases involving the so-called "dropsie" fact pattern (see § 23.13 *infra*) and will be able to use virtually the same motion to suppress tangible evidence and virtually identical questions for cross-examining the police officer and the prosecution chemist in every such case. This type of replication of fact patterns also can be found in, for example, cases in which the prosecution's proof turns upon a show-up identification (see § 25.03(a) *infra*), and counsel can consistently litigate an identification suppression motion and thereafter stress at trial the factors that precluded the witness from getting a good look at the perpetrator and the suggestiveness of the show-up procedure. Obviously, there is no need to reinvent the wheel in case after case. Since

either the attorney himself or herself or some other attorney in the office is likely to have handled a particular fact pattern before, counsel can resort to that prior case file to obtain forms for writing the necessary motions, drafting direct and cross-examination questions, and preparing the *prima facie* motion and closing argument.

Another, and perhaps the most important, virtue of an institutional defender's office is a factor that has already been implicit in this discussion: the existence of a number of colleagues with whom to share information and resources. Other trial attorneys in the office are likely to have motions, names of expert witnesses, cross-examination techniques, and even artful phrases for closing arguments, that counsel can use in his or her own practice. In addition, the appellate attorneys on the staff will have briefs containing caselaw needed to litigate in new cases the various issues raised on earlier appeals. The key to making use of these large resources is establishing an office-wide "motions bank" (a central file containing copies of all substantive motions filed by the trial attorneys), a "brief bank" of appellate briefs, and a central file listing the cases (with the attorneys' names) that present issues likely to recur (such as the previously mentioned identification and drug issues and, for example, issues relating to serology, ballistics, alibi, character evidence, and self-defense).

Of course, a staff attorney in a public defender's office cannot do an adequate job unless the office provides him or her with sufficient resources. The most important of these is investigative assistance. Unfortunately, many public defender offices depend upon a small band of professional investigators to handle all of the investigative work for the office. Because the caseload carried by the office is far too heavy to be served by a handful of investigators (especially in view of the large number of witnesses to be interviewed and other investigative tasks to be done in each case), the investigative division soon degenerates into doing nothing more than serving subpoenas. A very effective solution to this problem was developed by the Public Defender Service for the District of Columbia and thereafter duplicated in public defender offices in Minneapolis and Seattle. These offices make use of law students and college students from local schools who spend a semester or a year working on a volunteer basis as investigative interns. The interns are recruited and trained by a staff investigator who also supervises the investigations performed by the interns. The interns are assigned to individual attorneys, and they meet with their attorneys to discuss the witnesses that should be interviewed, the statements that should be taken, and the exhibits that should be gathered in each case. The offices that have created a system of this sort have discovered that it produces benefits for all involved: the attorneys obtain a corps of dedicated and enthusiastic workers who, albeit inexperienced, quickly learn the ropes and devote the time and energy necessary to perform first-rate investigation; the students, in turn, obtain credit from their schools for the work and can obtain a valuable credential on their résumés as well as letters of recommendation from the attorneys for whom they worked.

Another essential resource for public defender offices that handle delinquency cases is a division of social workers. As explained in §§ 38.10, 38.14 *infra,* much of the dispositional work in a delinquency case is the social work involved in finding an appropriate community-based

program to propose to the judge at disposition. Social workers have the expertise and the knowledge of community resources necessary to effectively perform the tasks of diagnosing the child's or parent's needs and finding a program to suit those needs. A prototype of this sort of social work complement exists at the New York City Legal Aid Society's Juvenile Rights Division, which has a large corps of social workers assisting the attorneys on delinquency cases.

Assuming that the office maintains adequate investigative and social work divisions and assuming that the office possesses motions banks, brief banks, and other central information systems, a staff attorney can start most of the work needed to prepare a case for trial on the day of the Initial Hearing. Immediately after completing the hearing and conducting a full-scale interview of the client, the attorney would develop a defense theory of the case (see § 6.02 *supra*); meet with an investigator, relate the theory of the case, and inform the investigator which witnesses need to be located and interviewed and which documents and other exhibits need to be gathered; give the case name and number to an administrative assistant and instruct him or her to fill out subpoenas for police reports and for the child's school records, which can be served by the investigator; locate motions and other materials from prior cases with similar fact patterns, adapt them to the unique facts of the new case, and give the adapted versions of the motions to the administrative assistant to type; telephone and retain expert witnesses who will be needed for trial or disposition; and, if the child appears to have psychological or emotional problems or special needs, meet with an office social worker, brief him or her on the case, and request that s/he meet with the client and investigate programs suitable to the child's needs. Once freed of all of the mechanical and nonlegal aspects of case preparation, the attorney will be able to devote time (in this as well as other pending cases) to the functions that only an attorney can perform – working with witnesses and drafting examination questions and legal arguments.