

The Use of Trial Exhibits in Cases of Child Abuse

By Andrew Agatston¹

Introduction

Great novels have great first sentences. One of the greatest opening sentences in a novel was written by Colombian novelist Gabriel Garcia Marquez in *100 Years of Solitude*:

"Many years later, as he faced the firing squad, Colonel Aureliano Buendía was to remember that distant afternoon when his father took him to discover ice."

There are others: "I am an invisible man." (Ralph Ellison, *Invisible Man*), "Call me Ishmael." (Herman Melville, *Moby Dick*), or "It was a bright cold day in April, and the clocks were striking thirteen." (George Orwell, *1984*).

But I like *100 Years of Solitude*. The opening line stops me cold. It is striking. It is confusing. It speaks to fire *and* ice. Somehow it evokes simpler times in the face of imminent death.



¹ Andrew H. Agatston, Marietta, Georgia, 2022

If I want to create a trial exhibit about it, my aim is to see it vividly unfolding right in front of me. I piece together pictures (*exhibits*) to help me adequately convey it to others. At this point, the pictures are not complete, but I can play around with some to get started:

With exhibits, there will be refinement, and more refinement. I may even put one in front of a focus group if it is a key exhibit.

I suggest purchasing a stock photo subscription. For around \$100.00 per year, I can download several hundred stock images on any topic that floats into my head. I can create PowerPoints with them to practice persuasion on my own time or with other lawyers. I often do this; it is after all the practice of law. And it is easy to do. Google "greatest opening lines in a novel."² Pick one of the lines, create a story out of it in your own mind, and begin pulling stock photos together to develop your story's theme in pictures. Story board them on a white board. Move them around. Then arrange them into a PowerPoint, using *Beyond Bullet Points: Using PowerPoint to tell a persuasive story that gets results* (Cliff Atkinson, Publisher: Pearson Education, Inc., 2018) as a guide.³

Pictures, like life, are diverse. They help tell a story. They compare and contrast. They are useful metaphors. They mine memories. They persuade. They can help people reach judgments. Pictures are our exhibits and on our best day can be that great opening line of a story.

This paper is how trial lawyers can show in order to tell.

Foundation Work

Your Trial Lawyer Mindset

Mindset matters. I am a personal injury trial lawyer in the Atlanta area. I have been at the practice of law for 27 years now. I work for all types of people who come from all walks of life. They seek civil remedies in the civil justice system. Their common thread is that they have been injured through no fault of their own by other people or corporations. I want to get to know them, understand where they've been and where they were going at the time of their injuries. My job is to tell their human story.

² Reading great novels teaches us both the import and the impact of great stories. Ultimately, we want to tell the story of the case. Everyone loves a good story. Everyone learns from a good story. Becoming a master storyteller is a productive goal for a trial lawyer.

³ This book, and many others, are set forth in the "Library" section, below.

I don't know everything I need to know as a lawyer, not even close. I know I never will. That is why they call it the practice of law. But every working day my goal is to get a little bit better than the day before. I get satisfaction that I am serving people as their advocate in the American justice system. I am lucky.

What about you? Take a few minutes to write out four or five sentences to describe your own prosecutor mindset. What is it that you do? Who do you do it for? Why do you do it?

Jurors: What's in it for them? Or what are they in for? Or is this a hostage situation?⁴

We should always think about our jurors. If you're not doing something for the jury before trial, during trial, or in between breaks at trial, then you're not working. Jurors decide so they are the most important people in the courtroom.

We could spend time discussing the importance of your presentation being understandable and logical and relatable. Or we can spend time discussing how people learn and how people make decisions about core issues in our cases, like:

What happened?

What rules were violated?

Who is responsible?

Why should this matter in this community?

We can become students of the decision-making process by taking advantage of the resources right before us, like *Thinking Slow & Fast*; *Moral Tribes*; *Blink* and some of the other books in the "Library" section at the end of this paper that speaks to decision-making and persuasion.

Focus it! The value of focus group work

Although formal focus groups may not be something that prosecutor offices can afford, they can be valuable provided they can be done in a manner that protects the confidentiality of the victim. If your office cannot afford a focus group, simply bouncing concepts off of employees who are not attorneys can be helpful.

⁴ This latter question is taken from Sari de la Motte's book, *From Hostage to Hero: Captivate the Jury by Setting them Free* (Trial Guides, LLC, 2019). It is listed among many other books and reference materials in the "Library" section of this paper.

I have yet to be part of a focus group study where I did not learn something about my client's case that I never had thought about. It is said that the worst people to decide what matters in a case are the lawyers who are involved in it. I think there is some truth to that. Lawyers are invested for long periods of time in their cases. We can overthink. Jurors hear evidence about a case that might span five-years' time during the course of a three-day trial. This is like a college student taking a final exam of a semester-long course on the first day of class, but somehow gets an answer correct. Focus groups are the answer.

No lawyer who participates in focus groups (properly) believes the point of a focus group is to win. The point is to gather helpful information. My list (and certainly not my original thoughts; I have borrowed liberally from other better lawyers) is:

1. What do people expect as normal behavior under the circumstances involved? In a child abuse case, this can be particularly helpful in understanding potential juror biases related to a child's behavior—behavior that is often consistent with abuse but outside the expertise of many laypersons.
2. What does the group think is important in the case?
3. What does the group think is suspicious in the case? If for instance, the prosecutor views a defendant's behavior (e.g. giving expensive gifts) as suspicious but a focus group does not this likely means the prosecutor will need a witness to explain grooming behavior.
4. What does the group have questions about in the case?
5. What questions do they have for each party in the case?
6. What questions do they have for key witnesses in the case?
7. What rules would the group follow in the case? For instance, is the group willing to convict based solely on the eyewitness testimony of a child victim?
8. What does the group think are the important principles in the case?
9. What evidence in the case is the most important to the group?

You can focus key issues; key evidence; your opening statement; your voir dire; your closing argument. I have been using Zoom lately in three-hour sessions, 8 to 12 jurors, and pay them \$100 each. You can focus in large conference rooms, or in mock courtrooms if you have access to one. Have someone else focus the case for you if you are involved in it. On Zoom I observe the focus group with my camera off. Zoom records it so I can go back later and review.

Dig into focus groups. There are resources available (like *Focus Groups: Hitting the Bull's Eye* by Phillip H. Miller and Paul J. Sceptur, see "Library" below) for you to review in order to get on your way.

In the Trenches with TrialPad

The TrialPad app by [Lit Software](#) for use with an iPad has been around for years. That does not mean it is regularly used in the courtroom – but it should be! TrialPad is a breeze to use, is intuitive, and can hold your entire (very large) case in an organized fashion on your iPad.

I use an iPad Pro model, 12.9-inch 5th generation, with 1 TB of storage, way too much storage for me but I had a wild hair at the time. At present, it requires iPadOS 15 or later to run the program. I do not have cellular on my iPad, but instead wire it with accessories and connections to monitors, projectors, speakers, iPevo, or whatever I will be using to display the exhibits. When combined with [TranscriptPad](#), another app, your iPad is an amazing tool to use with the jurors and during depositions.

Please understand, it may *seem* fancy but there really is nothing Hollywood about it. You can blow up exhibits, highlight, redact, mark up, play video clips, and put exhibits side-by-side to compare. The sheer, typical *boredom* that permeates trial presentation, still in 2022, makes the presentations sizzle by comparison. Done effectively it is a professional presentation that you will value. More on TrialPad, below.

Speaking of monitors, it would do you good to invest in a 55-inch monitor to project your exhibits. What kind? Google it! Once you have one, you will be familiar with your monitor, having practiced on it and you know it will work. The only caveat is the “COVID Courtrooms,” and whether jurors are spaced out throughout the courtroom where a 55-inch monitor will not suffice. Always ask in advance how the courtroom will be set up and be sure to meet with the courtroom technology team well in advance to scout the courtroom for technology positives and negatives.

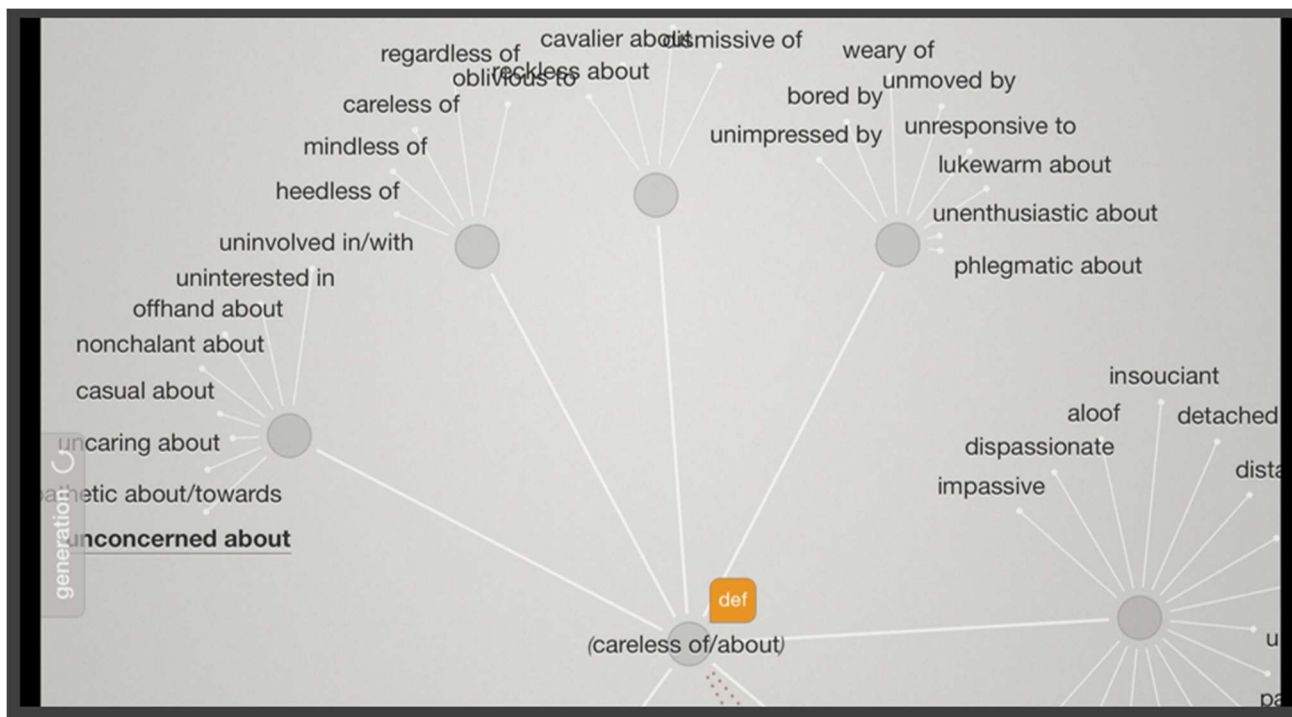
No Wi-Fi? No cry! I don't even trust the Wi-Fi in my own home, let alone a courtroom. There are lengthy HDMI and other cords that attach to your iPad that are nimble enough not to trip over and that will allow you to walk around the courtroom (with the court's permission). If you trip, who cares?!? This is live trial work. Nothing wrong with being vulnerable. Pick yourself up and keep going.

What about visuals in voir dire? Ask the court pre-trial. If you inform the court that it will streamline the process and not be argumentative, but instead will be designed to hear what the jurors think about the issues in the case, it may be allowed. You ask, “Won't I have to show opposing counsel what I will show the jurors in advance?” Yes. And so what? One of the books on the “Library” list

below is *The Fearless Cross-Examiner* by an amazing lawyer named Patrick Malone. That applies to voir dire. We have a righteous cause and we are coming to prove it.

Building Your Exhibit Toolkit: Open It Up and Look For . . .

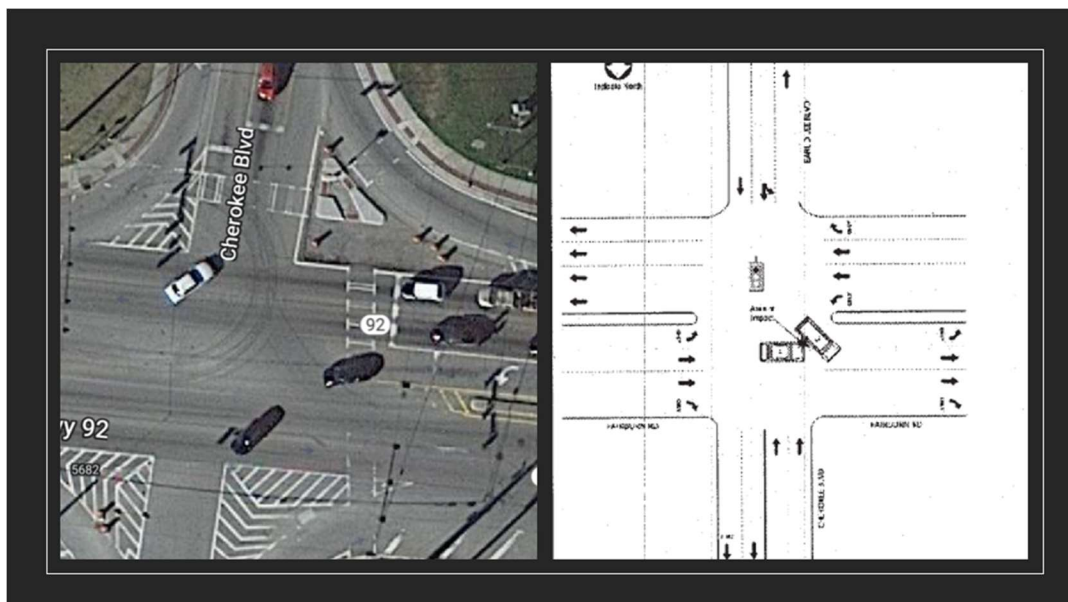
1. You. And your mouth. You are an exhibit that will be looked at more than any exhibit tendered into evidence. You *exhibit* professionalism, courtesy, competency, fairness, compassion, passion, righteousness for your cause. This is the jurors' only case they will hear. Make sure you understand that. They are not there for you. You are there for them. *Your mouth* is an exhibit. Word choice counts. It should be thoughtful and apply comfortably to what must be decided in this case. It must be practiced. This takes time, patience, and guts. In the "Library" section below, there are books such as *Predictable Irrationality*; *Pre-Suasion*; and *Made to Stick* that are super references. For you iPad users, check out the app *Wordflex* and type in a word like "careless" to find other words that may be better for your case:



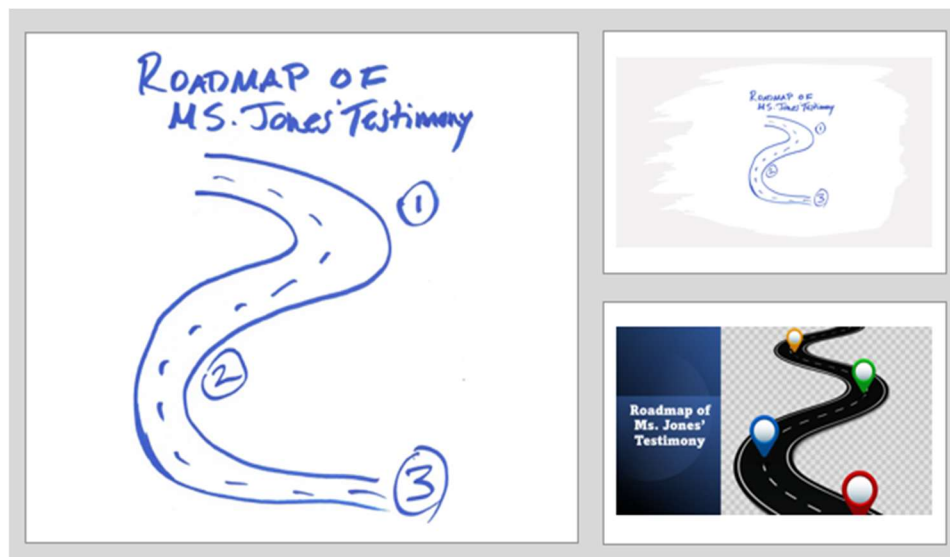
2. Your movements. I know a talented lawyer in Atlanta who, as long as I've known him, has been in a wheelchair. He is a master of movement in the courtroom. For those of us who are not in wheelchairs, we can be effective too. Body language is still language. Sari de la Matte, in her book, *From Hostage to Hero* (referenced in the "Library" section, below), has a great section on body language, and shows how your body language can be both "approachable" and "authoritative." Have another person video you on her phone while you practice your opening statement. Then watch in horror as you see your body contort into movements that you thought were not possible. *Practice* makes better (never perfect, this is law).

3. Paper. We are all used to paper. Documents, bills, reports. Quick and easy, but often most effective when combined with Big Boards (#6); Trial Pad (#7); or PowerPoint (#8). Paper is cumulative and Big Boards, Trial Pad and PowerPoint are laser focused. Sometimes a Big Board that summarizes all that paper can be an effective demonstrative exhibit.

4. Photos, diagrams, and videos. This includes dash cam video. Please get any dash cam video because it can be gold. This also includes security video or Nest cameras from surrounding businesses and homes. Please go knocking on doors to see if their cameras captured any of the relevant events. Photos and videos can also be combined with free online resources, such as Google Maps and Google Earth where you can zero in on a specific location to create an exhibit. An example is a side-by-side demonstrative exhibit with the police diagram (which is often incorrect) and a Google Maps view.

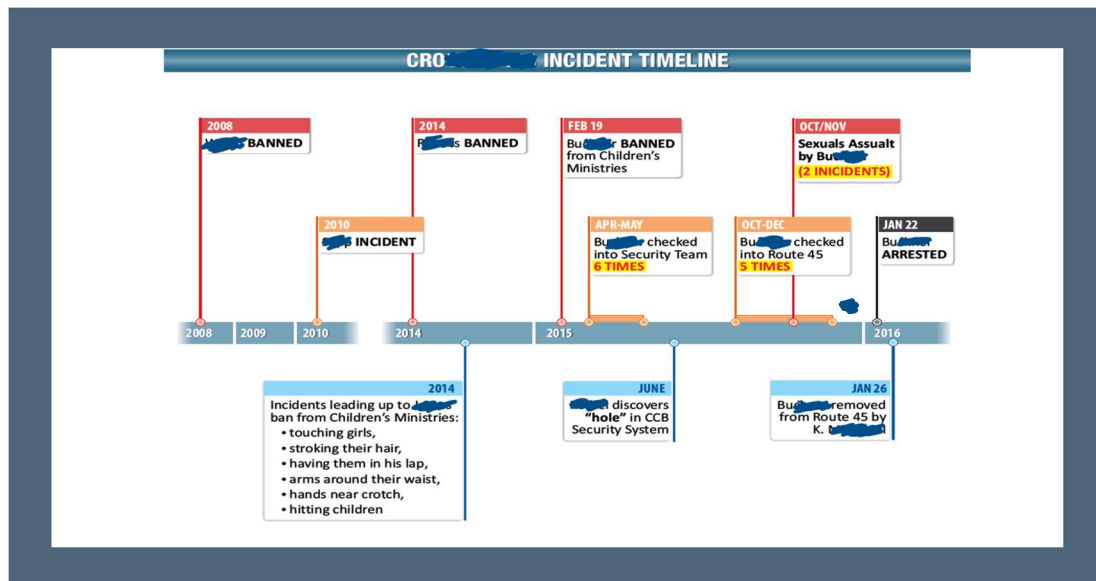


5. Flip Charts. I love flip charts. I draw poorly, and my handwriting is average on a good day. But I will draw and write on a flip chart at the drop of the hat. Better yet, have your witness write or draw on a flip chart. I know I can't draw. I will own this in front of a jury, but I will tell them I am just trying to give them information that may be useful to them. Mostly I will draw "roadmaps," an idea I learned at a conference in Texas hosted by one of the best trial lawyers in America, Mark Lanier. He can't really draw well either. He also used a block of cheese and a hay bale as demonstrative exhibits in his case against Johnson & Johnson that ended in a \$4.7 billion verdict. Below, I practice with my roadmap drawing, first on a flip chart, then transferring the flip chart drawing to a PowerPoint slide in case that might work better (probably not), and then finally by searching through my stock photos subscription for a visual that I can add to a PowerPoint slide. Next to each number, I can write in the topics of Ms. Jones's testimony in front of the jury. *Just practicing.*

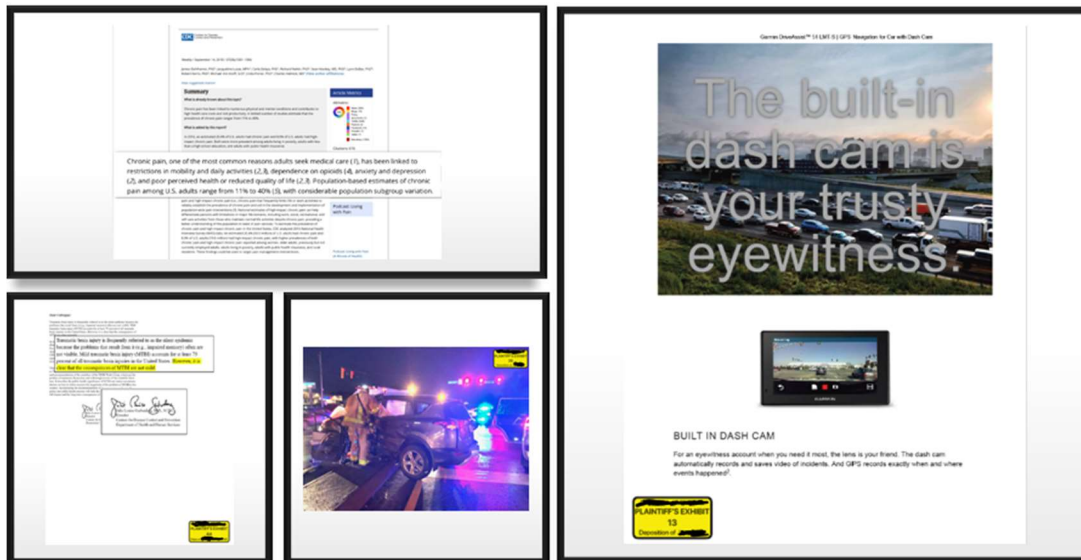


6. Big Boards. It can be a good idea to use the bigger foam boards for key demonstratives. This includes the golden nugget known as the *Timeline* demonstrative. We often think chronologically. A timeline can concisely cover multiple years with one power-packed exhibit. The below exhibit is from a recent case involving my young client who was molested at a church by a volunteer. During discovery, thousands of documents were obtained, covering more than 10 years of activities. Within those pages was information that established the church's notice and knowledge of prior problems with volunteers who were known to be grooming and potentially abusing children at the church, well before the banned volunteer abused my young client. While the case settled, it was planned to be a five-day trial. That is really only 3 ½ "evidence days" for the jury to digest 10 years-worth of

information. The Big Board distilled those years down to one visual that could be referred to at trial repeatedly. "Red flags" was going to be a theme at trial, and indeed many of the church's own witnesses adopted our questioning that included the words "red flags." (See *"word choice counts,"* above at page 5). So, we made sure that the exhibit contained some red flags.



7. Trial Pad. I have fun with TrialPad. It is so easy, crisp and clean, and the creative options are numerous. It makes you look like you are prepared and invested in the case because you are. Once you are invested in TrialPad, you will *want* to get better at it. The below images are from TrialPad in a case involving a collision recorded on the at-fault driver's dash cam. He was having trouble at deposition remembering certain important facts, so I pulled the manufacturer's advertising of his own dash cam, which couldn't have had a better motto for my client's case: **"The built-in dash cam is your trusty eyewitness."** The photographs can be projected in court or on Zoom. My client suffered a mild traumatic brain injury, and the former director of the CDC had an important quote that I could "call out" very easily with TrialPad's "callout" while I questioned my client's treating neurologist and asked him whether he agreed with the former CDC director that "it is clear that the consequences of mild traumatic brain injury are not mild." The same "call out" strategy is used in a CDC article about chronic pain. The exhibit stickers are created by you on TrialPad, and automatically keep the exhibit numbering in order.



There are so many other features in this app, and its creator, Lit Software, has dozens of tutorials on YouTube. You will find that when you take sufficient time to plan and prepare your examinations with TrialPad – and diligent planning and preparing is the key – the witnesses can't run away, don't argue, don't filibuster, but are just focused on the relevant facts and issues in the case that are unfolding in front of them on TrialPad.

8. PowerPoint. We all know PowerPoint (which can be run through TrialPad, too). That doesn't mean we are all good at it. An excellent resource for PowerPoint users is *Beyond Bullet Points: Using PowerPoint to tell a persuasive story that gets results* by Cliff Atkinson (Pearson Education, Inc., 2018), which is referenced in the "Library" section, below. Pictures can tell the story. Pictures aid visual learners, who are the majority of our jurors. Pictures can be accompanied by words, but strive for just a few words at most on a slide. Let the picture carry the exhibit. And please . . .

PowerPoint Presentation

- Please
- Don't ever make
- A PowerPoint slide
- Like this one
- Ever again

9. *Skeleton Person*

Another great idea I got at Mark Lanier's conference was his use of "Skeleton Person." For medical injuries suffered by a client or a crime victim, you bring a life-sized skeleton to court. As the doctor testifies about the injuries, you place red tissue paper in the areas of the skeleton depicting where the victim was injured.

Q: Is this the area of the injury, doctor?

A: Maybe a little lower?

Q: How about here?

A: Yes, that's right.



10. Animations. I have yet to use an animation at trial. But I know of lawyers who use them with great effect when recreating events, such as trucking collisions, and surgical procedures. It is mission critical that they are accurate and are in compliance with your state's or federal court's rules of evidence.

There are so many more exhibit ideas. For example, there is a law firm in California, Athea Trial Lawyers, that not only has some of the best trial lawyers in the nation, but has a component of its practice called "Slide Girl" that will create trial visuals for lawyers. For examples, see

www.athealaw.com/for-attorneys/slidegirl-co/. If creativity has no limits, then exhibits don't either.

Good luck!

What's In Your Legal Library?

My father just passed away at age 99. He was a lifetime learner, and up until the last two years of his life, he continued his personal scholarship. He was curious about life, what is known, and what is unknown. It seems to me that this is a good recipe for a prosecutor, even those of you who are on the "tail end" of your careers. Most certainly for younger prosecutors, who I envy because they have so much more time to make a difference in people's lives and in the justice system.

I have 6, maybe 7 more years in the *practice* of law. I have so much more to learn. I am grateful for the authors of the books in my personal legal library that I have developed over the years. For what it is worth, I offer you some of the titles in my library, in no particular order, that have helped me in my journey of lifetime learning and the *practice* of law.

1. *No Visible Bruises: What We Don't Know About Domestic Violence Can Kill Us*, by Rachel Louis Snyder (Bloomsbury Publishing, 2019)
2. *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*, by Bessel Van Der Kolk, M.D. (Penguin Books, 2014)
3. *The Book of Virtues: A Treasury of Great Moral Stories*, edited with commentary by William J. Bennett (Simon & Schuster, 1993)
4. *Trial By Human*, by Nicholas Rowley & Steven Halteman (Trial Guides LLC, 2013)
5. *Polarizing the Case: Exposing and Defeating the Malingering Myth*, by Rick Friedman (Trial Guides, LLC, 2007)
6. *Advanced Case Framing*, by Mark Mandell (AAJ Press, 2019)
7. *From Hostage to Hero: Captivate the Jury by Setting them Free*, by Sari de la Motte (Trial Guides, LLC, 2019)
8. *Advanced Depositions: Strategy & Practice*, Phillip H. Miller and Paul J. Sceptur (Trial Guides, LLC, 2013)
9. *Forensic Epidemiology: Principles and Practice*, Edited by Michael D. Freeman and Maurice P. Zeegers (Elsevier, Inc., 2016)
10. *Made to Stick: Why some ideas take hold and others come unstuck*, by Chip Heath and Dan Heath (Arrow Books, 2008)
11. *The Culture Code: An Ingenious Way to Understand Why People Around the World Live and Buy as They Do*, by Clotaire Rapaille (Crown Publishing Company, 2006)

12. *Predictable Irrationality: The Hidden Forces That Shape Our Decisions*, by Dan Ariely (Harper Collins Publishers, 2008)
13. *Metaphors We Live By*, by George Lakoff and Mark Johnson (The University of Chicago Press, 1980)
14. *Metaphoria: What Deep Metaphors Reveal About the Minds of Consumers*, by Gerald Zaltman and Lindsay Zaltman (Harvard Business Press, 2008)
15. *Pre-Suasion: A Revolutionary Way to Influence and Persuade*, by Robert Cialdini (Simon & Schuster Paperbacks, 2016)
16. *Black Box Thinking: Marginal Gains and the Secrets of High Performance*, by Matthew Syed (John Murray Publishers, 2015)
17. *How to Win Friends and Influence People: The Only Book You Need to Lead You to Success*, by Dale Carnegie (Simon & Schuster, Inc., 1936)
18. *Winning at Cross-Examination: A Modern Approach for Depositions and Trials*, by Shane Read (Westway Publishing, 2020)
19. Any good High School Dictionary
20. *Thinking Slow & Fast*, by Daniel Kahneman (Farrar, Straus and Giroux, 2011)
21. *The Fearless Cross-Examiner: Win the Witness, Win the Case*, by Patrick Malone (Trial Guides, LLC, 2016)
22. *Exposing Deceptive Defense Doctors, Volumes 1 & 2, Revision 6*, by Dorothy Clay Sims (James Publishing, Inc., 2018)
23. *Luvera on Advocacy*, by Paul Luvera and Lita Barnett Luvera (Trial Guides LLC, 2020)
24. *The Tipping Point*, by Malcolm Gladwell (Little, Brown and Company, 2000)
25. *Blink: The Power of Thinking Without Thinking*, by Malcolm Gladwell (Little, Brown and Company, 2005)
26. *Cross Examination Science and Techniques, 3rd edition*, by Larry Pozner and Roger Dodd (LexisNexis, 2018)
27. *The Way of the Trial Lawyer: Beyond Technique*, by Rick Friedman (Trial Guides, LLC, 2020)
28. *Becoming A Trial Lawyer: A Guide for the Lifelong Advocate*, by Rick Friedman (Trial Guides, LLC, 2008)
29. *Focus Groups: Hitting the Bull's-Eye*, by Phillip H. Miller and Paul J. Sceptur (AAJ Press, 2019)
30. *AMA Guide to the Evaluation of Permanent Impairment, 5th edition*, Linda Cocchiarella and Gunnar B.J. Anderson (American Medical Association, 2017, 9th Printing)

31. *Diagnostic and Statistical Manual of Mental Disorders, 5th edition (DSM-5)* (American Psychiatric Association, 2013)
32. *The Merck Manual, 20th Edition*
33. *Textbook of Traumatic Brain Injury, 3rd edition*, edited by Jonathan M. Silver, M.D., Thomas W. McAllister, M.D. and David B. Arciniegas, M.D. (American Psychiatric Association Publishing, 2019)
34. *Brain Injury Medicine: Principles and Practice*, by Nathan D. Zasler and many others (Springer Publishing Company, LLC, 2022)
35. *Turning Points at Trial: Great Lawyers Share Secrets, Strategies and Skills*, by Shane Read (Westway Publishing, 2017)
36. *Anatomy of a Personal Injury Lawsuit, 4th edition, Volumes 1 & 2*, edited by John F. Romano, multiple authors (Trial Guides, LLC, 2015)
37. *Beyond Bullet Points: Using PowerPoint to tell a persuasive story that gets results, , 4th Edition*, by Cliff Atkinson (Pearson Education, Inc., 2018)
38. *Who Will Speak for the Victim: A Practical Treatise on Plaintiff's Jury Arguments*, by Jim M. Perdue (the State Bar of Texas, 1989)
39. *Recovering for Psychological Injuries, 3rd Edition*, by William A. Barton (Trial Guides, LLC, 2010)
40. *Voir Dire and Opening Statement*, by Nicholas Rowley, Courtney Rowley and Wendy Saxon (Trial Guides, LLC, 2020)
41. *The Zen Lawyer: Winning With Mindfulness*, by Michael Leizerman with Jay Rinsen Weik (Trial Guides, LLC, 2018)
42. *Moral Tribes: Emotion, Reason, and the Gap Between Us and Them*, by Joshua Greene (Penguin Group, 2013)

