

**NATIONAL DEFENDER TRAINING PROJECT
2017 PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM**

University of Dayton School of Law, Dayton, Ohio
Friday, June 2, 2017 to Wednesday, June 7, 2017

Drafting a Theory of Defense

Ira Mickenberg, Esq.
6 Saratoga Circle
Saratoga Springs, NY 12866
(518) 583-6730
imickenberg@nycap.rr.com

Drafting a Theory of Defense

1. Decide which defense genre your case fits within.
2. Pick a method of drafting the first sentence of your theory of defense
 - a. **The Barstool Method**: If a stranger in a bar asked you “Why should you win this case,” what would the first sentence of your answer be?
NOTE: Your answer must be factual, not legal or just conclusory. It must fit the genre you chose.

GOOD EXAMPLE: “My client is not guilty because the other guy pulled a knife on him first, and my client had no choice but to shoot him in self-defense.”

BAD EXAMPLE: “My client acted in self-defense.”

VERY BAD EXAMPLE: “The elements of the crime were not met.”

INCREDIBLY BAD EXAMPLE: “There’s a reasonable doubt.”

ANOTHER GOOD EXAMPLE: “My client is not guilty of child abuse because his vindictive wife, who he was divorcing for adultery, lied in order to get custody of the kids.”

ANOTHER BAD EXAMPLE: “My client was framed.”

ANOTHER INCREDIBLY BAD EXAMPLE: “The complainant was not credible, so there was a reasonable doubt.”

-
- b. **The Headline Method**: If a tabloid newspaper was writing a headline about why you should win this case, what would it be? Again, it must be factual, not legal or just conclusory. And it must fit the genre you have chosen.

GOOD EXAMPLE: “Honest Workingman Threatened With Knife By Violent Drunk – Has No Choice But to Defend Himself.

ANOTHER GOOD EXAMPLE: “Vindictive Slut, About to Lose Divorce Action, Makes False Accusation of Abuse.”

3. Follow up with 2-4 sentences that include the most important facts that will convince the reader that your first sentence is correct.

EXAMPLE: “My client is not guilty because the other guy pulled a knife on him first, and my client had no choice but to shoot him in self-defense. After Bob got off from his shift as foreman at the plant, he stopped at the bar for a burger and a beer. Before his food was even served, he was approached by Al, who admits that he had been in the bar for five hours, and had seven boilermakers. Al blocked Bob in the booth, pulled a knife, and shouted, ‘I’m gong to kill you.’ Bob had no way of saving himself other than to pull his licensed gun and shoot Al.”

4. Make sure you address the major concerns the jurors may have in returning the verdict you want.

EXAMPLE: “My client is not guilty because the other guy pulled a knife on him first, and my client had no choice but to shoot him in self-defense. After Bob got off from his shift as foreman at the plant, he stopped at the bar for a burger and a beer. Before his food was even served, he was approached by Al, who admits that he had been in the bar for five hours, and had seven boilermakers. Al blocked Bob in the booth, pulled a knife, and shouted, ‘I’m gong to kill you.’ *Bob had no opportunity to retreat because he was trapped in the booth.* Bob had no way of saving himself other than to pull his licensed gun and shoot Al.”

5. Finish with a conclusion sentence that briefly and concisely reminds you of the essence of the defense.

EXAMPLE: “Bob is therefore not guilty because he was faced with the immediate threat of deadly force, could not retreat, and was therefore entitled to use deadly force in lawful self-defense