

North Carolina Appellate Advocacy Training
Chapel Hill, NC
Wednesday, October 17, 2007, to Friday, October 19, 2007

**FOUR STEPS TO DEVELOP A
PERSUASIVE APPELLATE THEORY OF DEFENSE**

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Step One: Decide What Was Unfair About Your Client's Conviction

Every appellate lawyer has had the experience of raising a “winning” issue, but losing the case anyway. Sometimes we lose these cases because the facts of the crime were bad, sometimes because the other evidence was overwhelming, and sometimes because the court just doesn't like to reverse convictions. But in many of these cases, the court should not get all the blame. Some of it belongs to us.

One of the most common traps appellate lawyers fall into is that they look for legalistic issues to raise, while ignoring the more fundamental question of whether the defendant's conviction was unfair. We are frustrated when we lose cases because of “bad facts,” or “harmless error,” or “bad courts,” yet aside from complaining, we often do little to persuade the court that our client's conviction was so unfair it should be reversed despite the seriousness of the crime or the weight of the evidence.

The first step towards solving this problem is to start our analysis of an appellate record not by looking for legal issues, but by asking ourselves “what was unfair about this case?” This analysis should be **FACTUAL and EMOTIONAL**, not legal. It should focus not on what legal principles were violated, but on what upsets and offends you about the factual events and processes that led to your client's conviction. These can be facts about the crime, the police investigation, the pretrial processes, the sentence, or the trial itself -- but they must be facts that cause you to believe an injustice has occurred.

Here are some suggestions for taking Step One, and deciding what was unfair about your client's conviction:

1. Read the entire record, including the trial and hearing transcripts and any motions, briefs or memoranda that were filed.
2. Speak with your client, and be sure to ask him what he felt was unfair about his case.
3. Speak with the trial defense counsel. Don't just ask her what the legal issues were. Ask questions about general fairness of the trial, the judge and anything else that happened in the lower court.

Step Two: Identify Some Legal Issues That Might Be Grounds For Reversal

This is what has traditionally been referred to as “issue spotting.” It is important to recognize, though, that the issues do not stand by themselves, but only become good candidates for reversal if we can persuade the appellate court that it is reaching a just result by accepting the issue.

Here are some areas of the record where you should be careful to examine for potential issues:

- Pre-trial motions
- Pre-trial hearings
- Possible Brady violations.
- Trial evidence
 - Prior bad acts/uncharged crimes
 - The State's expert testimony
 - Hearsay
- Prosecutor's summation
 - Invective
 - Sympathy for victim/family
 - Safe streets/community safety arguments
 - Patriotism
 - Religion
 - Distorting the burden of proof.
 - Misuse of prior bad acts -- propensity arguments.
 - Material misstatements of evidence.
- Jury Instructions
 - Defenses
 - Presumptions
 - Use of hypotheticals.
 - Unbalanced or inaccurate marshaling.
 - Any deviations from the standard charge should be examined.
- Jury Selection and Deliberation
 - Improper denials of challenges for cause.
 - Discharge of sworn juror.
 - Contact with outsiders -- sequestration problems.
 - The court's answers to jury questions.
 - Dft's presence
 - Full answers
 - Anything to do with mitigation of sentence
 - Anything to do with the use of expert witnesses

Here are some practical suggestions for identifying legal issues:

1. When you read the transcripts, keep two legal pads by your side. On one of them, take notes about the testimony and other important events during the trial and hearings. Be sure to make a note of the page numbers on which these events can be found, so you find and cite them when writing your brief. On the second pad, keep a running list of potential legal issues you have found, again noting the page numbers on which they can be located.
2. When you identify a good legal issue, make a list of the facts that support that claim.
3. When you identify a good legal issue, make a list of the reasons that the issue contributed to the unfairness of your client's trial. Don't just assume

that a legal error means that an appellate court will be convinced that the trial was unfair. It is your obligation to show that court how a reversal will be a just result.

Step Three: Draft a Theory of Defense Paragraph.

I. What is an Appellate Theory of Defense?

A short written summary of the factual, emotional, and legal reasons why the court should reverse or reduce the conviction. It tells your client's story of injustice or innocence, and it addresses and resolves any difficulties the court may have about reaching the decision you want.

Let's take a more detailed look at all the components of a theory of defense:

A. A Theory of Defense is a short written summary . . .

It is important to actually go through the exercise of writing out your theory of defense. Often we assume that we know our theory of defense, when we really have no more than a generalized idea of what it is and of how we are going to use it to solve problems on appeal. Forcing yourself to articulate the theory on paper will ensure that you know exactly what your theory is.

Also keep in mind that your theory of defense is not something you will file with the court. It is a tool you have created solely for yourself. It can be as colloquial or informal as you want. Its job is to guide you as you plan the tactics and strategy you will use on appeal.

B. A Theory of Defense is Factual

The most important thing about a theory of defense is that it is factual. Judges, like all people, are persuaded by facts -- not general principles. A good theory of defense must therefore take into account all of the facts of your case. It will help you figure out ways of highlighting the most favorable facts, and dealing with the supposedly unfavorable facts.

It is essential to realize that a theory of defense is not a collection of buzzwords or interchangeable gimmicks. It is different for every case, and is dictated by the facts of each individual case. For example, the following are **NOT** appellate theories of defense:

Self-defense
Miranda

Brady
Reasonable doubt

While each of these phrases conjures up certain images in the mind of the appellate lawyer, they have no real concrete meaning for the court because they say nothing about whether your particular client's conviction should be reversed.

By contrast, the following is an example of a good theory of defense paragraph for a homicide case, where the defendant was charged with beating his wife to death while they were vacationing in a state park, and the issue on appeal is the admissibility of the medical examiner's expert testimony:

Mr. F called the police to report that an intruder had broken into his cabin and knocked him unconscious. When he came to, his wife was lying on the floor, beaten to death. None of the physical evidence in the cabin contradicts Mr. F's statement. The police, however, did a slipshod investigation, and made no effort to search for any intruder. The state's entire case rests on the "junk science" testimony of a supposed medical expert, who eighty four hours after the attack, looked at Mr. F's head with his naked eye, and then claimed that he was certain Mr. F had not been unconscious more than three days earlier. This so-called expert had no training in neurology or head trauma. He admitted that he did not take a medical history, did no tests, used no instruments, and did not take an x-ray or CAT scan. Real experts, specialists in neurology and neuropsychology, testified for the defense that the evidence of the State's witness is phony "junk science." The State's so-called expert testimony is medically and scientifically impossible.

Note that this paragraph is almost purely factual, and provides excellent guidance about how defense counsel will have to write the brief:

(1) the facts that it will be important for the defense to emphasize (the conclusions of the "real" experts, the superficial nature of the Government's medical exam, the shoddiness of the police investigation); and

(2) the facts that the defense must be prepared to neutralize (the Government expert's opinion, any physical evidence at the cabin).

C. A Theory of Defense is emotional . . .

Every theory of defense must be driven by emotional themes. By emotional themes, we mean fact-based reasons that will make the court *feel* that it is doing the right thing by granting relief. The emphasis here is on *feeling*. In most instances, an emotional theme is something that makes the court aware of an injustice that is being done to the defendant, or of unfairness in the way the case was investigated or prosecuted. In the OJ Simpson case, for example, a major emotional theme was that the defendant was being framed by a racist police officer. Some of the

emotional themes worked into the Mr. F theory are:

(1) The police did a slipshod investigation, frustrating the efforts of an innocent man who tried to tell them what happened.

(2) Because they have no real evidence, the prosecution is relying on junk science that distorts the truth.

D. A Theory of Defense is legal . . .

Every theory of defense must articulate a claim that is cognizable in law. This is easy if your theory involves a claim that your client was not the one who committed the crime. If, however, your theory involves self-defense, for example, you must be sure that the factual assertions you make in your brief require the legal conclusion that your client acted in self-defense.

E. A Theory of Defense tells a story . . .

The best way of persuading people is with a compelling, factual story. A good theory of defense tells a moving story that explains how and why your client is not guilty. By doing so, it also guides you to the facts and evidence that you need to gather to tell that story on appeal, and to persuade the court to accept your story.

When designing your theory of defense, it is very helpful to explicitly think in terms of telling a story. Ask yourself questions such as:

1. What genre of appellate defense story am I asserting?
2. Who are the characters in this story, and what roles do they play?
3. Where does the most important part of the story for advancing my theory of defense take place?
4. In what sequence will I tell the events of this story?
5. From whose perspective will I tell the story?

Bear in mind that the language you use for your story is crucial to developing a theory of defense that the court will accept. Do not use pretentious “legalese.” Use short sentences. Use graphic, colorful language. For example, in the Mr. F theory of defense, the phrases “junk science,” and “phony,” are graphic ways of communicating the core of your defense, and are much more persuasive than talking about “unreliable testimony,” “issues of credibility,” “inadequately qualified experts,” or “failure to satisfy the legal standard for admissibility.”

F. A Theory of Defense resolves any difficulties the court may have . . .

The theory of defense addresses all of the facts of your case. It does not ignore the other side's case, or pretend that the court will ignore it. It does not ignore, omit or conceal "bad" facts. The process of drafting a theory of defense requires you to figure out a way to deal with the prosecution's case, and to explain the so-called "negative" facts in a way that makes them fit within your theory, or even support your theory.

G. A Theory of Defense is Dynamic

1. Your theory of defense will change as you investigate, and learn more about the facts of your case. This is OK. You should adapt your theory as you become more knowledgeable about the case. Remember, a theory of defense is not a goal in itself -- it is a means of achieving your ultimate goal of reversal.

2. Don't try to develop your theory of defense by yourself. Brainstorm the facts of your case with others. Discuss the theory of defense with others. Show it to other people, particularly non-lawyers, and ask them if it is believable. Ask them what parts of your theory they have difficulty accepting. Listen to the opinions of others, and enlist their help in developing and improving your theory of defense.

II. How to Draft a Theory of Defense

A. Brainstorm the facts of your case

B. Decide which defense genre fits your case.

C. Write the first sentence of your theory of defense using either the Barstool Method or the Tabloid Method:

1. **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.”

2. **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.”

REMINDER: The theory of defense is not something you are going to be filing in court, or showing to the judge. It is simply a tool for yourself. It’s OK to be as colloquial as you want. The key is to write something that helps you develop a winning theory.

D. 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.”

E. Make sure you address any major concerns the court may have in returning the result you want.

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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 going 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."

F. 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

III. How to Use Your Theory of Defense

The theory of defense should be used to guide every aspect of your appeal. Use it to decide:

1. What do you need to investigate further?
2. What motions do you need to make?
3. What issues should you raise?
4. How should you structure the facts and arguments in my brief?
5. What should you say in your oral argument? In what sequence should you say it?