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**BRAINSTORMING:
DEVELOPING THE FACTS TO
BUILD A THEORY OF DEFENSE**

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WHY BRAINSTORM YOUR APPELLATE CASES?

Every good appellate lawyer realizes that we win cases on the *facts*, not on the law. No matter how much judges like to think that they are emotionless legal automatons, the truth is that they are persuaded to reverse when they believe not that the law has been violated, but that the conviction has resulted in some kind of injustice. Sometimes the injustice is that an innocent person has been convicted. Sometimes the injustice has nothing to do with innocence, but is that the trial was so unfair that the defendant deserves another chance to convince a jury. In either instance, the best way of persuading an appellate court that a conviction was unfair, is with a theory of defense that is rooted in the facts of the case, and with a good, factual story that convinces them that a reversal is a just result.

One of the greatest obstacles to winning appeals, is that we often tend to accept, or buy into the prosecution's version of the facts. When we do this, the jury hears a story that is framed by police testimony, and ends with our client being the guilty party. To win a criminal appeal, we must develop a different factual narrative from that offered by the prosecution. For example, assume that your client has been convicted of stealing from the PX, and your issue on appeal is that the judge gave incorrect and prejudicial instructions to the jury. The prosecution's story will probably take place at the PX when the theft occurred, or in the barracks when the crime was being planned. If you are to have any chance of winning the appeal, your story will probably take place in the courtroom when the instructions were discussed, argued over and given. You will not ignore or omit the facts of the crime, but you will emphasize the facts that created the injustice at trial.

It is important to remember, the principle that facts must be viewed in the light most favorable to the state only applies when we are contesting the sufficiency of the evidence. When any other issue is raised, we can frame the factual story of the case in any way we see fit, as long as it is consistent with the factual evidence elicited at trial. We will never distort, conceal or mislead about unfavorable facts, but we must always choose to present, emphasize and structure those facts in a way that gives us the best chance to persuade the court to reverse.

Developing a different factual narrative from that of the prosecution, and devising a theory of defense based in the facts of your case are only possible if you have first explored and analyzed those facts in depth. Brainstorming is the method we suggest for developing your facts.

The basic reasons we advocate starting your preparation by brainstorming the case are simple:

- When we are preparing to write an appellate brief, we have already become so involved in the facts, issues, and personalities of the case that it is easy to overlook ideas and facts that might help us win.
- Because we get so close to the cases we litigate, it is also almost impossible for us to find new factual perspectives and develop new ideas without help from others. Or to put it another way:

- When preparing to choose issues and write a brief, three or four heads are a lot better than one.

WHAT BRAINSTORMING IS NOT

- ◆ Brainstorming is not a “touchy-feely,” informal get together.
- ◆ Brainstorming is not a theoretical or academic exercise. It is meant to generate practical ideas that will allow you to develop a persuasive theory of defense and a persuasive storyline that will ultimately convince the court to reach the conclusion you want.
- ◆ Brainstorming is not the equivalent of hanging out in the office and discussing your case with a co-worker.
- ◆ Brainstorming is not meant to just reinforce the ideas you have already developed about your case. It is meant to develop new ideas and perspectives about your case.

WHAT BRAINSTORMING IS

- ◆ Brainstorming is a formal process for developing and analyzing the facts of your case, and for gaining new, creative perspectives on your case.
- ◆ Brainstorming is a way to reality-check the strategies and tactics you are considering for your case, and to make an intelligent decision about what will work and what will not work.
- ◆ Brainstorming is ***Inclusive*** – At the start of your brainstorming session the goal is to get as many facts and perspectives as possible. You want quantity at this stage, not necessarily quality. As you progress with your case, you will be making decisions as to what can be used and what cannot be used. But at the brainstorming phase, all you want is to get as much on the table as possible, to give you as many options as possible when you get around to making decisions about strategy and tactics. Quantity at the start of the process helps generate quality at the end.
- ◆ Brainstorming is ***Non-Judgmental*** – Some of us have been taught that all facts can be divided into good facts, bad facts, and facts beyond change. While this formulation may be useful later on, the brainstorming phase is much too early to make these judgments. In fact, one goal of brainstorming is to be able to make an intelligent decision about what facts are really good, what facts are really bad, and what facts are really beyond change. One of the best things about the brainstorming process is that we often find that our initial judgments about these

factors is incorrect. Facts we thought would be bad can be made good. Facts initially thought to be beyond change can be successfully challenged. So when brainstorming the facts of a case, do not reject any idea out of hand, and do not be too quick to shoehorn facts into pre-determined categories.

- ◆ Brainstorming is *Associative* – One of the best things about brainstorming is that if you are truly inclusive and non-judgmental, you will begin to start associating between ideas and facts that are being brainstormed. One person's suggestion will give rise to a different, and possibly better formulation. Brainstorming should encourage this kind of creativity and association, which is another reason to be inclusive and non-judgmental.

HOW TO BRAINSTORM YOUR CASE

1. Find at least 3 other people to do the brainstorming.
 - a. There should be at least three, to facilitate a real exchange of ideas and perspectives.
 - b. They do not have to be lawyers. In fact, non-lawyers often provide a more realistic perspective on what judges will and will not accept.
2. Set aside a specific time to do the brainstorming.
 - a. It should be at least an hour.
 - b. Give everyone sufficient time to prepare and set aside the time.
3. If there are any essential documents, such as transcripts, police reports, a confession, an indictment, etc. be sure to give all of the brainstormers copies in advance.
4. Start the brainstorming session by giving a 5-10 minute summary of the facts of the case. If there is a particular problem you want to address, define the problem, but do not restrict the ability of the group to redefine the problem if they want.
5. After you spend 5-10 minutes describing the facts, give the group another 10 minutes or so to ask you questions about the case.
6. When the time for questions is over, stop asking and answering questions. This will sometimes be hard to do, but if the questions go on for too long, the group may not get around to any brainstorming, and all you wind up doing is reinforcing the original answers and perspective of whoever's case it is.
7. Have the group brainstorm the case. This will involve analysis, free-association, and generally tossing around facts that attract your interest, and ideas about what those facts mean and how they can be used.

8. When the group starts to brainstorm, the person whose case is being brainstormed should keep quiet. The purpose of the session is not for him or her to defend his or her original ideas. It is to gain new perspectives from the others. Let everyone else talk . Listen to them.

9. Write down everything everyone says. Be as close to verbatim as possible. The purpose of this is twofold: (1) To make sure that nothing is forgotten by the end of the session; (2) To permit participants to compare and make associations between things that were said at various times in the session.

WHAT TO DO WITH THE FACTS YOU HAVE BRAINSTORMED

- ✓ Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a persuasive theory of defense.
- ✓ Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a storyline that will persuade the jury to acquit. To this end, the brainstorming should help you define the characters in the story of your case, and the role those characters will play; the setting in which your story takes place; and the sequence in which you will tell the story of your case in your brief.

FOLLOWING UP – WHAT COMES NEXT

Preparing a criminal appeal is not a linear process. As we learn more about the case, our views change. We revise our theory of defense, adjust our strategies and tactics, do more research, and sometimes gather more facts. Brainstorming is an important first step in the process. After brainstorming, you may see the need to return to the library, gather more facts, obtain more documents, or speak with your client or the trial lawyer. If this is what happens after the brainstorming session, the session has been a success -- You have obtained a better idea of what needs to be done to win the case. After brainstorming, you may feel that you are ready to develop a theory of defense that will guide future strategic and tactical decisions. If brainstorming has put you in a position to construct a theory of defense, it has been a success.