

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

**STORYTELLING:  
PERSUADING THE COURT TO  
ACCEPT YOUR THEORY OF DEFENSE**

Ira Mickenberg, Esq.  
6 Saratoga Circle  
Saratoga Springs, NY 12866  
(518) 583-6730  
FAX: (518) 583-6731  
[imickenberg@nycap.rr.com](mailto:imickenberg@nycap.rr.com)

## **Persuading the Court to Agree With Your Theory of Defense**

Probably the most important thing we do to prepare for an appeal is develop a theory of defense. A theory of defense is usually defined as:

*A paragraph of four or five sentences that summarizes the factual, emotional, and legal reasons why the court should reverse or reduce your client's conviction. It tells your client's story of injustice, innocence or reduced culpability, and it resolves any problems or questions the court may have about reaching the result you want.*

The theory of defense paragraph is a guide that will help you resolve every tactical and strategic issue that comes up during the appeal. It will help you figure out what issues to raise, and how to write convincingly about those issues. If we can persuade the court to believe our theory, they will vote to reverse. If we cannot persuade them to accept the theory of defense, they will affirm.

But to convince a court that it should believe our theory, we need more than just good legal issues – we need a persuasive storyline.

### **I. What Does Telling a Story Have to Do With Our Theory of Defense?**

Stories and storytelling are among the most common and popular features of all cultures. Humans have an innate ability to tell stories, and an innate desire to be told stories. For thousands of years, religions have attracted adherents and passed down principles not by academic analysis, but through stories, parables and tales. The fables of Aesop, the epics of Homer, and the plays of Shakespeare have survived for centuries and become part of popular culture because they tell extraordinarily good stories. The modern disciplines of anthropology, sociology, and Jungian psychology have all revealed that storytelling and the love of stories are among the most fundamental traits of human beings.

Unfortunately, law school is one of the few places where storytelling is neither practiced nor honored. For three (often excruciating) years, fledgling lawyers are trained to believe that legal analysis is the only key to becoming a good attorney. Upon graduation, law students often continue to believe that they can win cases simply by citing the appropriate legal principles.

For appellate public defenders, this approach is disastrous, because it assumes that judges are unbiased, and are persuaded by the same academic principles as law students. Unfortunately, this is not true. Lawyers and law students spend a lot of time thinking about “reasonable doubt,” “burden of proof,” “elements of crimes,” and “presumption of innocence,” but appellate judges tend to view these principles as legal technicalities that get in the way of the real issues. And for the appellate court, the real issues are:

1. Did he do it?
2. Was the trial basically fair?

A good story that addresses these questions will go much further towards persuading a court than will the best-intentioned treatise about a legal issue.

## **II. What Should the Story Be About?**

A big mistake that many defenders make is to assume that the story of their case must be the story of the crime. While the events of the crime must be a part of your story, they do not have to be the main focus. **Remember: You don't have to tell the story in the same way the police told it in their reports or the prosecutor told it at trial.**

In order to persuade the court to accept your theory of defense, your story must focus on one or more of the following:

The injustice of the trial, focusing on:

The unfair rulings of the trial judge

The improper, unfair conduct of the prosecutor

Anything else that happened that made the trial or conviction unfair

Your client's innocence or reduced culpability

## **III. A Guide For Telling Your Story of Injustice at Trial**

Most stories of reversible error at trial fall into one of eight categories. These categories are:

1. The judge made a bad ruling and I was prejudiced
2. The prosecutor did something bad, the judge did not/could not stop him, and I was prejudiced
3. The prosecutor did something bad, the judge helped him, and I was prejudiced
4. The police or some other witness did something improper, and I was prejudiced
5. A juror or jurors did something improper, and I was prejudiced
6. Some external event prejudiced the trial

7. The defense lawyer at trial did something improper, and I was prejudiced.  
(But remember: IAC should almost always be raised in post-conviction, not on direct appeal)
8. The evidence was insufficient to support the verdict

Please keep in mind that these categories are not meant to be a substitute for in-depth legal research or for articulate and persuasive writing about the facts and law. They are merely a guide to help appellate lawyers decide what kind of a story they must tell to convince a court that there was reversible error at trial.

It should also be mentioned that the eight categories are arranged in order of descending frequency and effectiveness. The final two categories – IAC and insufficiency are rarely successful and therefore rarely raised.

#### **IV. A Word About Innocence**

Unless you are raising a claim that the conviction was based on insufficient evidence, or was against the weight of the evidence, you cannot explicitly say on appeal that your client was innocent. It is important, though, to write about the facts in such a way as to emphasize the weaknesses in the State's case, and to imply that had the trial been fairer, the jury might well have acquitted. This will not only help persuade the court that the conviction was not fundamentally fair, but will also help you overcome the inevitable issue of harmless error.

#### **V. How to Tell a Persuasive Story**

##### **A. Be aware that you are crafting a story with every action you take.**

Any time you speak to someone about your case, you are telling a story. You may be telling it to your family at the kitchen table, to a friend at a party, or to a judge in court, but it is always a story. Our task is to figure out how to make persuasive the story of the trial's unfairness. The best way to do this is to be aware that you are telling a story, and make a conscious effort to make each element of your story as persuasive as possible. This requires you to approach the brief as if you were an author writing a book, or a screenwriter creating a movie script. You should therefore begin to prepare your story by asking the following questions:

1. Who are the characters in this story, and what roles do they play?
2. Setting the scene -- Where does the most important part of the story take place?

3. What scenes must be included in the brief, in order to make the overall story persuasive?
4. In what sequence will I tell the events of this story?
5. From whose perspective will I tell the story?
6. What emotions do I want the judges to feel when they are hearing my story? What character portrayals, scene settings, sequence and perspective will help the jurors feel that emotion?

If you go through the exercise of answering all of these questions, your story will automatically become far more persuasive than if you just began to tell the events of the crime.

Finally, it is important to remember that you do not have to tell the same story as the police or the prosecutor told at trial. That is the story that got our client convicted in the first place. It is therefore essential that you tell a different story – a story of the injustice at trial that requires reversal.

## **B. Once you have crafted a persuasive story, look for ways to tell it persuasively.**

You will be telling your story to the court through your point headings, introduction, statement of facts, and legal argument. When you design these parts of the brief make sure that your tactics are tailored to the needs of your story.

1. The language you use to communicate your story is crucial to convincing the court to accept the theory of defense.
  - a. Do not use pretentious “legalese.” You don’t want to sound like a television lawyer or cop.
  - b. Use graphic, colorful language.
  - c. In general, shorter is better – short words, short sentences, short paragraphs.
2. Use charts, pictures, maps, and other graphic evidence to help make things understandable.
3. Practice, Practice, Practice –

When you review your brief, honestly appraise whether it tells your story in a persuasive manner. Have someone, preferably a non-lawyer read it. Pay attention to his or her feedback, and adjust your presentation until your story is communicated effectively.