

# **THIRTY-FOUR BRIEF POINTS ABOUT APPELLATE ADVOCACY IN CRIMINAL CASES<sup>1</sup>**

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These are my opinions on matters I believe are important to excellent representation of criminal defendants on appeal. They obviously do not constitute an exhaustive treatment of appellate advocacy, or even an exhaustive outline. They are, rather, a syllabus of some of the most important lessons I've learned from other lawyers and from my own mistakes and observations. Thanks to Gordon Widenhouse for his suggestions (see point 27 below).

## **THE BIG PICTURE**

1. **Look for the factual and the legal story to be told in each appeal.** Appellate judges are people. People like stories. Most people would rather read a story than a law review article. Your brief should be the story of what was unfair in the process that brought your client to the attention of the police and the courts, the story of what was unfair about the way the case went in court.

I am not talking about distortion, histrionics, or violation of the appellate rules. I'm not talking about being sappy.

I am talking about boiling down the facts to what's relevant to your theory of the appeal; organizing the relevant facts so the reader will want to read them and therefore will understand what happened; and explaining in plain and direct English what went wrong, supporting the explanation with legal authority. Easy to say, hard work to do.

2. **Find a theory of the appeal that will give the court a reason to want to grant relief on your legal issues.** The theory is not what you write in the brief. The theory is what you write down and keep posted next to your computer to remind you what the appeal is really about. It is the core around which the facts and legal argument are organized. Everything you write in the brief must reinforce, or at least be consistent with your theory.

Do not throw in the towel emotionally because the facts are bad. If the facts were good, your client probably would not have been convicted. Although your theory might be about innocence, it might also be about reduced culpability, or reasonable doubt and reliability, or judicial or prosecutorial misconduct that just can't be tolerated in a fair society. The theory is both how you win and why you win. Brief examples (a working statement of your theory probably would be more fact specific):

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<sup>1</sup> Cf. THIRTY TWO SHORT FILMS ABOUT GLEN GOULD (Samuel Goldwyn 1993).

“Come on, any fool can see Daisy is retarded and was just a patsy for her clearly dangerous and psychotic boyfriend. She shouldn’t have done what she did, but she was scared to death of him. She just wasn’t as culpable as he was and shouldn’t have been punished as severely, but the court rejected instructions that would have given the jury the opportunity to punish her appropriately.”

“The social workers and police investigators screwed up the initial interviews with the kids so badly that we’ll never get an accurate version of what happened. My client well may be innocent. The failure to seal the complete DSS files on each kid for appellate review was obviously legal error. The only issue is remedy.”

“If the prosecutor can’t win without this kind of completely improper personal attack on the defendant’s expert witnesses, he ought to lose his license. The experts’ opinions were the core of the defense. At the very least, the appellate court ought to rub the prosecutor’s nose in it and order a new trial.”

“The judge was a coward for failing to suppress John’s alleged statement to the police. Could the deceased’s status in the community have had anything to do with that ruling? Use of Rule 403 to exclude the best parts of the prior inconsistent statement of the purported eyewitness, who is a weasel and a skunk, was outrageous. Given that undisputed, late-discovered facts are inconsistent with the client’s statement and the weasel’s statement, could it be that the lead investigator cooked up parts of both statements in this high profile case?”

“The judge’s restrictions on the defense in jury selection, in contrast with the incredible latitude afforded the prosecutor in jury selection, guaranteed that the jury would convict regardless of what the evidence was. This ain’t how we’re supposed to do it in America.”

3. **Understand that your audience in the first instance is staff attorneys and clerks.** These folks have enormous power; they often are the lenses and filters through which the judges see the case. They read a lot of briefs. Make your case stand out by telling a good story consistent with your theory of the appeal. Don’t assume the reader knows the law. The clerks are generally fresh out of law school. They may be bright, but they often know nothing about the law governing your issues. Get their attention and then educate them about the law applicable to your facts.
4. **Most appeals are not about changing the law.** Most appeals are about applying settled law to a specific set of facts. These are comforting truths, because appellate judges don’t like to make new law. To the extent that your client needs new law to get relief, you are less likely to get it. You want your relief to be based on old, settled law. You want the result to be limited to your facts. The best issue is one that affects only your client and will never arise again. Your first duty is to your client, not to an abstract notion of progress or reform.

In short, do not seek to go where no one has gone before, unless you have no other choice.

### **FRAMING THE ISSUES**

5. **If something hurt at trial, and doesn't seem right, figure out a way to say "Ouch,"** even if the something may not have been obviously preserved at trial for appellate review. Is the error preserved for review as a matter of law (like a judge asking an objectionable question of a witness)? Is it preserved because it violates a statutory mandate (like bringing the entire jury back into the courtroom to respond to a jury question)? If you argue plain error, you have to allege plain error in the assignment of error and explicitly argue plain error in your brief, or you may be defaulted out of plain error review.

Don't be afraid to argue plain error if what happened was unfair. It is a difficult standard to meet, but the reviewing court may grant relief if the prejudice is obvious. More often, identifying substantial unfairness in a plain error claim may improve the chances of relief on a separate, fully preserved issue.

6. **Read the Rules of Appellate Procedure.** There is no substitute for actually reading the text of the rules at least once. Read the following rules more than once: Rules 7, 9, 10, 11, 12, 13, 26, 28.
7. **Get every piece of paper in the Trial Division file. Get all the transcripts of all proceedings,** no matter how inconsequential the hearing or proceeding or document may seem. You have no idea of the consequence something may have until you actually lay eyes on it. Be on the lookout for references in the transcript or court file to proceedings or papers you have not seen or heard of. If you don't have them, get them. As a client of mine once said, "You just don't never know."
8. **Remember that appellate counsel is responsible for getting extensions for the court reporter to produce the transcript.** *See* N.C. R. App. P. 7(b)(1) [fifth paragraph].
9. **In the record, assign every potential error you see in the transcript and the court file.** Winnow issues later. Often, you only realize the full dimensions of an issue during briefing. You just don't never know.
10. **Constitutionalize every issue.** To win on appeal, the state must demonstrate that a constitutional violation is harmless beyond a reasonable doubt. This is a very high standard of review, one favorable to your client. Cite the relevant provisions of both the N.C. and the U.S. Constitutions.

11. **If something bad happened to which trial counsel did not object, allege plain error and ineffective assistance of counsel**, but don't brief IAC claims unless you are confident that you can fully develop both prongs of Strickland v. Washington, 466 U.S. 668 (1984). This is an extraordinarily complex topic. Read Janet Moore's piece on litigating ineffective assistance claims on direct appeal in this issue of TRIAL BRIEFS. Before you assign and argue IAC claims, talk the issue through with someone whose judgment you respect.
12. **Always read the jury instructions very carefully.** Do not assume that because the judge said she was going to give the pattern instruction, she did so. Do not assume that because the judge said she was going to give any particular instruction, she did so. Failure to instruct in these circumstances may be preserved for appellate review as a matter of law
13. **Make sure the indictment or other charging instrument alleges all elements of the conviction, and make sure the jury instructions conform to the elements of the offense charged in the indictment.** Variances usually warrant new trials or other relief.
14. **Always assign insufficiency of the evidence as error.** You just don't never know.
15. **Always add prior record points and look at the sentencing chart to make sure your client got a legal sentence.** You just don't never know.

### **BRIEFING**

16. **Clarity is the goal.** Simplicity is your greatest ally. If you can make complicated facts easy to follow and complex legal analysis easily understood, all consistent with a viable theory of the appeal, you have achieved eloquence.
17. **If your writing is hard to follow, and the adversary's writing is easy to follow, the adversary will be heard and you and your client will not be heard.** If writing is difficult to read, the reader will to some extent just give up. Consciously thinking of the brief as the story of what was unfair will help organize your writing and thus make the brief easier to understand.
18. **Creativity in legal writing means getting the reader's attention by adherence to a viable theory, by speaking directly and clearly, not by rhetorical excess.** Bombast it is usually a distraction. If a dramatic point is to be made, understatement and dry wit are usually the way to go.

Visual aids (charts, pictures, graphs) are underutilized in appellate advocacy. A simple diagram and summary of the steps of a complex legal analysis are gold. *See* Brief for Appellant at 27-28, *State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002).<sup>2</sup>

19. **The statement of facts in your brief should not read like a chronological summary of the testimony.** Tell the story, don't just present a digest of the transcript (but cite to transcript pages per N.C. R. App. P. 28(b)(5)).
20. **Personalize your client.** He or she is probably not "the defendant" or "appellant." He may be "Mr. Jones." If he is young, maybe "Mike." Think about how you want to refer to your client in light of your theory of the appeal. Conversely, if the snitch's street name is "Slick," he is not "Mr. Smith" or "John," he is "Slick."
21. **Do not misstate or completely ignore the bad facts.** Doing so is unethical and stupid. The bad facts will not go away, and your adversary will club you with the distortion or omission. The clerks and judges will hold it against you and your client.
22. **Argue your best issue first in the brief.** If you have a great issue about the prosecutor's closing argument, a promising evidentiary issue, and a less-promising jury selection issue, don't place them in chronological order, argue the best first. Although all the arguments should buttress the overall theory of the appeal, putting your best stuff first creates momentum for relief.
23. **Begin each issue with an introductory paragraph which summarizes the argument so the reader will know where you are going.** If the reader gets an encapsulation of the argument up front, what comes after it is much easier to follow.
24. **Do not write long sentences or long paragraphs.** Both exhaust the reader. If a paragraph is over a half page, it is probably too long.
25. **Lose the legalize** ("It can be argued ..." "It would appear that ..." "Appellant submits that ..."). No one is impressed with stilted language. Stilted language is weak language and makes writing harder to follow. Further, if a non-technical usage appears only in legal writing, you should consider cutting it. Sometimes you have to say "collateral estoppel." You never have to say "eleemosynary."
26. **Do not string cite.** String cites give the reader no information. If the point is that courts have stuck with the same holding a long time, say that and cite the oldest and newest cases, or find a case that collects the cases and cite it with a "collecting cases" parenthetical. Use the facts of the cases you cite as well as the legal principles they articulate.

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<sup>2</sup> The *Millsaps* brief, written by Anne Gomez of the Office of the Appellate Defender, and most other records and briefs filed in the North Carolina Court of Appeals and the Supreme Court of North Carolina can be accessed via the search engine on the Courts' electronic filing site, [http://www.ncappellatecourts.org/nc\\_main\\_1.nsf](http://www.ncappellatecourts.org/nc_main_1.nsf).

27. **Edit your work. Get others to edit your work. Edit it again. And again.** Nobody does the best job on a first draft. I have made my worst errors of form and substance as an appellate lawyer by not getting review from colleagues before filing.

Typographical errors and obviously deficient citation form are distractions that communicate to the clerk or judge that you are sloppy and probably stupid, and that what you write is not to be trusted.

28. **Don't rehash your initial brief in a reply brief.** Clerks and judges have a lot of reading to do and don't want to waste time with repetition. Go straight for the throat in the reply brief by tersely correcting factual errors, identifying miscited authority, and exposing illogical argument. Shorter is always better. If there is no reason to file a reply brief, don't file one.
29. **Don't file Anders briefs.** Anders briefs make for lazy appellate lawyers and angry clients. It is easy to stop thinking creatively about the case at the point where you realize there are no properly preserved or clearly winning issues. Any appellate lawyer worth a damn who has been at it a while can tell you of instances where he or she realized the true worth of an issue only after torturing it a while.

### ORAL ARGUMENT

30. **Practice or discuss your argument with colleagues or some other informed audience.** If you can convince your significant other, you're probably in good shape. Even grizzled old vets benefit significantly from meeting with colleagues to discuss which issues to argue and how to argue them.
31. **Speak up and use plain English.** If the court can't hear or understand you, you and your client won't be heard. Stilted language sounds even more stupid than it looks.
32. **Get to the point.** Begin with necessary factual or legal groundwork, but don't give extended introductions, generalized summaries of the evidence, or discussions of why you aren't arguing certain issues. You are not there to give a speech, but to engage the judges on their concerns. Remember your theory – it is what the appeal is really about. Everything you say in oral argument should be consistent with the theory and should advance it.
33. **Know the record.** The ability to respond with accurate factual information about the case emphasizes your competence and reliability. It strengthens your client's position.
34. **Answer the court's questions.** Questions mean the court is interested. Even hostile questions are an opportunity to present your view of the case. Great oral advocates concede, rebut, explain, but respond directly to the question while staying with their theory of the case. Anything akin to evasion emphasizes weakness and wastes

precious time. You should be able to respond to most questions if you know your case. If something comes out of left field and you don't know the answer, some version of, "Your Honor, I don't know," is a perfectly acceptable response. Don't try to generate a new legal theory on the spot or solve all the world's problems on your client's back.

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Every criminal defense lawyer's first duty is to advocate for the client (who is probably in very bad trouble) on the unique facts of the client's case within the bounds of applicable legal and ethical constraints. Appellate defense lawyers, however, necessarily are privileged to regularly remind courts of their duties to maintain the rule of law and to exercise fundamental fairness. Appellate advocates in criminal cases thus are significant players in the effort to guard fundamental rights. And they get to develop monster keyboard skills.