THIRTY-THREE FUNDAMENTAL THINGS TO BEAR IN MIND ABOUT APPELLATE ADVOCACY IN CRIMINAL CASES[*]

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THE BIG PICTURE

1. Look for the factual or the legal story that will get your client relief.

A brief is not a law review article or a memorandum of law. You are trying to persuade the court to grant your client relief. Everyone likes stories. Tell the story of why your client should get relief. There usually is an **unstated** unifying theory in a good brief, "theory" meaning the framework for the story you are going to tell. For example:

"Jimmy, who is mentally retarded or close to it, really had no idea just how serious a crime it was opening the unlocked door and walking in the house. Jimmy certainly shouldn't be pulling a five year active sentence when the break-in happened only because Randy "Slick" Smith goaded Jimmy into it while Slick watched from across the street. Jimmy just didn't have the will to resist Slick's promise to take Jimmy to the beach if he would just look for guns in the front room and come back and tell Slick if he saw any. Slick, in spite of his record, got the sweet deal for testifying against Jimmy. Think the sweet deal might have had something to do with Slick's daddy being a big buddy of the sheriff's brother?"

There damn sure should have been a reasonable doubt that Jimmy had the intent to steal anything. Of course, the judge's refusal to submit misdemeanor breaking or entering really didn't give the jury anywhere to go with those doubts. Ain't fair."

2. Understand that your audience in the first instance is staff attorneys and clerks.

They read a lot of briefs. The clerks are generally fresh out of law school. The staff attorneys may be a little jaded, and understandably so -- a lot of briefs are not very interesting, and a lot are not written clearly. Your job is to educate clerks and staff counsel about the facts of your case and the law that applies to those facts in a way that is easily understood and interesting.

3. Judges don't like to make new law, and in most cases, the law is settled.

The challenge is demonstrating how that settled law, when applied to the facts of

[*] *Cf.* THIRTY-TWO SHORT FILMS ABOUT GLEN GOULD (Samuel Goldwyn, 1993)

your case, should get your client relief. To the extent that your client needs new law to get relief, he is less likely to get it. Your job is not to go where no one has gone before. Your job is to get your client relief.

4. <u>You are representing a person. You are not trying to advance the cause of justice or the progressive development of the law.</u> If the law becomes more rational or fair or just as a result of your efforts, that's good, but the goal is to get your client relief, not to resolve issues that you or anyone else thinks ought to be resolved in a particular way. If it is to your client's advantage to advocate for a result that screws up the law for every other client in the world, it is your duty to advocate for that result.

5. <u>Actually read the Rules of Appellate Procedure from start to finish once so you will have some idea of where to look when you have a question.</u>

<u>SPOTTING ISSUES</u>

6. <u>If something hurt the client and seems unfair, make a note of it as a potential issue, whether or not defense counsel objected.</u> There may be no issue, but don't abandon something that seems unfair without giving yourself an opportunity to later think about a theory of preservation.

7. <u>Every opinion day, scan the NCCOA and the SCONC decisions.</u> You won't have time to read each one in detail, but by scanning the criminal opinions, you will become more sensitized to various issues. However, don't make the mistake of thinking the appellate court is infallible; if a particular opinion says something that does not make sense to you or seems unfair, you might be right. Higher courts reverse lower courts every day.

8. <u>Ask colleagues what they think.</u> One of the reasons we have an appeals listserv is because it's a quick way to get feedback. You usually will want to do some basic research before you post on the appeals list. Don't do your basic research by tackling the problem in the first instance via a legal database. Try the appeals briefbank, the Public Defender Manual, Brandis and Broun, etc.

<u>FIGURING OUT WHAT THE CASE IS ABOUT</u>

9. <u>Look at every piece of paper in the trial court file.</u> Not all of the documents will be relevant, but you don't know that until you look at them. You never know the relevant connections you may make between something in an

otherwise insignificant document and an important issue in case unless you take the time to look at the document.

10. Get all the transcripts of all proceedings, no matter how inconsequential the hearing or proceeding may seem. Again, you have no idea of its consequence until you read it.

11. Remember that appellate counsel is responsible for getting extensions for the court reporter to produce the transcript.

12. 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.**

13. Take careful notes while you are reading the transcript. You will almost certainly re-read portions of the transcript when you are writing the brief, but it is inefficient and unnecessary to read the entire transcript again when you are briefing.

14. Always look at the indictment or charging document and make sure all elements of an offense are alleged.

15. 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.

16. Always compare the indictment or charging document to the jury instructions to make sure your client was convicted of the charged crime.

17. Most sentencing issues are preserved as a matter of law. Always recompute sentencing points.

BRIEFING

18. Simplicity and clarity are your greatest allies.

19. If your writing is hard to follow, and the adversary's is easy to follow, the adversary will be heard and you and your client will not be heard.

20. Creativity and power in legal writing means getting the reader's attention by speaking directly, not by rhetorical excess. Don't use adjectives and adverbs in a statement of facts unless a witness used them, and then consider using quotation marks. In fact, use adjectives and adverbs sparingly in legal argument. Dry understatement is powerful. Shrillness and exaggeration

communicate weakness. If you distort the facts or the law, staff counsel, clerks, and judges will not trust you and your client will suffer.

21. The statement of facts in your brief should read like a story (with citations to the transcript). It should not read like a summary of the testimony.

22. Personalize your client. He or she is never "the defendant" or "appellant." He is probably "Mr. Jones." If he is young, maybe "Michael." Think about how you want to refer to your client in light of your theory of the appeal.

23. Do not misstate or completely ignore the bad facts. They will not go away, and your adversary will club you with the distortion or omission.

24. Begin the argument on each issue with an introductory paragraph that summarizes the argument so the reader will know where you are going, or make that summary in the issue heading.

25. 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.

26. Lose the legalize ("It can be argued …" "It would appear that …" "Appellant submits that …"). If in your experience, a word or phrase appears only in legal writing, you should consider cutting it.

27. Do not string cite. String cites give the reader no information.

28. Edit your work. Get others to edit your work. Edit it again. And again.

29. In a reply brief, don't repeat what you said in your opening brief. It wastes the reviewing court's time and understandably pisses them off.

ORAL ARGUMENT, IF YOU GET IT (SEE RULE 30(f))

30. Practice your argument before your colleagues, your friends, or your family. Somebody who will listen and engage you critically. Listen to the feedback.

31. In oral argument, get to the point. Don't give extended an introduction explaining how wonderful it is to be there; generalized summaries of all the evidence; discussions of why you aren't arguing certain issues.

32. **Answer questions when asked.** Never, never, never say, "Your Honor, I will get to that." Answer immediately. You are not there to give a speech, but to engage the judges on their concerns. Concede, rebut, explain, but first answer the question. Evasion wastes time and emphasizes weakness. If you don't know the answer, say "Your Honor, I don't know." Don't try to generate a new legal theory on the spot or solve all the world's problems on your client's back. Speak up and use plain English; if they can't hear or understand you, you won't be heard. Be polite; if you anger judges on a personal level, you have done your client a terrible disservice.

AND FINALLY

33. **Please call the Office of the Appellate Defender when you need feedback or help.**