UNC | SCHOOL OF GOVERNMENT

**2019 Appellate Advocacy Training**

October 30 - November 1, 2019 / Chapel Hill, NC

# ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

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# AGENDA

2019 North Carolina Appellate Advocacy Training
October 30 – November 1, 2019 / Chapel Hill, NC

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*Co-sponsored by the UNC-Chapel Hill School of Government &*
*NC Office of Indigent Defense Services*

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## Day 1: Wednesday, October 30

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|---|---|
| 8:15 to 8:45 a.m. | *Check-in* |
| 8:45 to 9:00 a.m. | **Welcome, Introductions, and Announcements**<br>*John Rubin*, Professor of Public Law and Government<br>UNC School of Government<br>*Glenn Gerding*, Appellate Defender<br>Office of the Appellate Defender |
| 9:00 to 10:00 a.m. | **PLENARY SESSION: Analyzing and Brainstorming the Facts**<br>*(work on fact problem)* (60 min)<br>*John Rubin*, Professor of Public Law and Government |
| 10:00 to 10:15 a.m. | *Break* |
| 10:15 a.m. to 12:00 p.m. | **WORKSHOPS**: **Brainstorming the Facts of Your Case**<br>*(work on own cases)* (105 min) |
| 12:00 to 1:00 p.m. | *Lunch (SOG Dining Room)** |
| 1:00 to 2:15 p.m. | **WORKSHOPS**: **Brainstorming the Facts of Your Case** *(continued)*<br>(75 min) |
| 2:20 to 2:50 p.m. | **PLENARY SESSION: Reading the Record Critically** (30 min)<br>*Glenn Gerding*, Appellate Defender |
| 2:50 to 3:05 p.m. | *Break (light snack provided)* |
| 3:05 to 4:35 p.m. | **PLENARY SESSION: Transforming Your Facts and Legal Issues into a Persuasive Story on Appeal** *(work on fact problem)* (90 min)<br>*Ira Mickenberg*, Attorney & Consultant<br>Saratoga Springs, NY |
| 4:40 to 5:10 p.m. | **WORKSHOPS**: **Developing a Persuasive Story on Appeal**<br>*(discuss homework)* (30 min) |
| 6:00 to 8:00 p.m. | Dinner at Carolina Brewery – Individual Pay |

*IDS employees may not claim reimbursement for lunch

## Day 2: Thursday, October 31

| | |
|---|---|
| 9:00 to 10:30 a.m. | **WORKSHOPS: Developing a Persuasive Story on Appeal** *(work on own cases)* (90 min) |
| 10:30 to 10:45 a.m. | *Break* |
| 10:45 a.m. to 12:00 p.m. | **WORKSHOPS: Developing a Persuasive Story on Appeal** *(continued)* (75 min) |
| 12:00 to 1:00 p.m. | *Lunch (SOG Dining Room)** |
| 1:00 to 1:45 p.m. | **PLENARY SESSION: Writing a Persuasive Brief: Statement of Facts** *(work on fact problem)* (45 min)<br>*Amanda Zimmer*, Assistant Appellate Defender<br>Office of the Appellate Defender, Durham, NC |
| 1:50 to 2:35 p.m. | **WORKSHOPS: Outlining Your Statement of Facts** *(work on own cases)* (45 min) |
| 2:35 to 2:50 p.m. | *Break (light snack provided)* |
| 2:50 to 3:50 p.m. | **WORKSHOPS: Individual Review of Outline** (60 min) |
| 3:50 to 5:05 p.m. | **WORKSHOPS: Writing a Persuasive Brief: Statement of Facts** *(participants write first several paragraphs of their statement of facts; statements saved for printing and review)* (75 min) |
| 5:05 p.m. | *Adjourn* |

*IDS employees may not claim reimbursement for lunch

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## Day 3: Friday, November 1

| | |
|---|---|
| 8:30 a.m. to 10:30 a.m. | **WORKSHOPS: Writing a Persuasive Brief: Statement of Facts** *(review and revise statement of facts)* (120 min) |
| 10:30 a.m. to 10:45 a.m. | *Break* |
| 10:45 a.m. to 11:30 a.m. | **PLENARY SESSION: Persuasive Brief Writing: Legal Argument** *(work on fact problem)* (45 min)<br>*Ira Mickenberg*, Attorney & Consultant<br>Saratoga Springs, NY |
| 11:35 p.m. to 12:20 p.m. | **WORKSHOPS: Persuasive Brief Writing: Legal Argument** *(participants write first few paragraphs of their legal argument; statements saved for printing and review)* (45 min) |
| 12:20 p.m. to 1:20 p.m. | *Lunch (SOG Dining Room)** |
| 1:20 p.m. to 2:50 p.m. | **WORKSHOPS: Persuasive Brief Writing: Legal Argument** *(review and revise legal argument)* (90 min) |
| 2:55 p.m. to 3:05 p.m. | *Closing and Adjourn* |

**CLE HOURS**
**General Hours: 18.00**

*IDS employees may not claim reimbursement for lunch

# North Carolina Appellate Advocacy Training

October 30–November 1, 2019
UNC-Chapel Hill School of Government

## Instructions to Participants

### How to Prepare for this Training

There are five things that you need to do to prepare for the training:

1. Be prepared to discuss and work on one of your own appellate cases. At the beginning of the program, each participant will be expected to present his or her case in the small group workshop. Accordingly, you must be familiar with the facts of your case. **Please read the transcript and other parts of the record closely and take detailed notes.** It doesn't matter whether the case is a felony or misdemeanor, or one in which you represent a parent in an abuse, neglect, and dependency matter, as long as it meets the following criteria:

a. **It must be at the direct appeal stage.**
b. **It must be a case in which you haven't written a brief yet.**
c. **It must be a case in which you have read the transcript and are familiar with the facts of the case.**
d. **It should be a case on appeal from a verdict rendered after a trial or evidentiary hearing in a 7B case.**
e. **You need not have done any legal research on the case yet. However, you must know the facts.**

It is very important that the case you select meets these criteria because you will be spending most of the program working on your case in small group workshops. These workshops are aimed at teaching techniques that focus on direct appeals, not post-conviction or trial level cases. Also, the case should be one in which you have not yet written the brief. This is because the workshops will focus on the process appellate lawyers must go through to analyze a case and develop an appellate theory of defense **before** the writing begins. We then do writing exercises based on what we have learned from that process. So please bring a case that meets the above guidelines.

2. Please **fill out** the attached **Case Description Form** (criminal or 7B depending on the type of case you're bringing) and bring **8 copies** of it with you to the program. We will distribute the form to the other participants and the trainers in your workshop group so everyone can start with some information about the cases they will be discussing. **On the case description form, please include sufficient facts to enable others in the group to understand your case.**

3. If you have served a proposed record on appeal or if you have filed the settled record on appeal, **please bring** the proposed or settled record to the training. If you have not filed a PROA or a settled record, please bring the trial court file with you to the training. Also, **please bring** the transcript with you.

4. **Bring your laptop or other device you use for writing (quill and ink discouraged).** You will be writing portions of your brief during part of the program, which you will provide to the trainers and other participants to review. **If you do not have a laptop and need to be provided a desktop computer on which to work,** please advise the program manager, Michael Spinosi, spinosi@sog.unc.edu.

5. **Read the Plenary Session Fact Problem** (which we will email to you after you register) and be prepared to discuss it at the plenary sessions of the program. **You do not need to do any research on the plenary problem; just be familiar with the facts.** We will begin discussing the Plenary Session Fact Problem at the first session on Wednesday morning.

**Friendly warning:** This program may be unlike any other skills program or CLE course you have attended in the past. All of the sessions are interactive and **require** your attendance and participation. This is not the type of program where participants can attend some sessions and skip others. In the plenary sessions, we will be working together on the plenary fact problem, with the aim of teaching skills that you will be able to apply to your own cases in the small group workshops. The plenary sessions will involve your participation and will include demonstrations by faculty members. In the small group workshops, you will be working on your own case, practicing the skills taught in the plenaries, and assisting the other members of your group to develop their cases. (Please note that if you are a private attorney, IDS does not consider the time spent at this program to be billable time.)

# CASE DESCRIPTION FORM:
# Criminal Appellate Attorneys

**PLEASE BRING 8 COPIES OF THIS FORM TO THE TRAINING**

Case Name: _____

When the trial began, your client was charged with:

Your client was convicted of:

Your client was sentenced to:

On a separate sheet (up to one page for each question), please give a brief summary of the following. You may include any information that is in the record or reasonably inferable from the record, whether the information was brought out at trial, a pretrial hearing, a charge conference, or other proceeding in the case. You also may include any significant fact that, although not part of the record, is not subject to dispute and could reasonably be made part of a motion for appropriate relief on appeal.

*A.* *What were the "crime" or "event" facts?* (that is, the facts relating to the offense)

*B.* *What were the significant "trial" or "procedural" facts?* (that is, describe anything interesting or problematic that occurred during the investigation, pretrial proceedings, motions hearings, trial, or other proceedings against your client that led to a conviction)

*C.* *What significant facts are in the record about your client?* (that is, employment, schooling, family ties, mental health issues, prior criminal justice involvement, or other matters)

*D.* *What potential legal issues are there?*

# CASE DESCRIPTION FORM:
# 7B Appellate Attorneys

**PLEASE BRING 8 COPIES OF THIS FORM TO THE TRAINING**

Case Name: _____

Appeal from: _____ (adjudication of abuse, neglect or dependency, other)

When was the petition alleging abuse, neglect, or dependency filed (underlying petition)?

What did the underlying petition allege (abuse, neglect, or dependency)?

At the adjudication on the underlying petition, the juvenile was adjudicated:

Was the adjudication the result of a negotiated consent or of a contested hearing?

If the juvenile was adjudicated neglected or abused, was your client found to be the offending party? If not, who was?

What did the case plan require your client to do?

*(Case Description Form: 7B Appellate Attorneys – Cont'd)*

Please give a brief summary of the facts of your case on a separate sheet (up to one page for each question).

*A. What were the event facts that led to the adjudication of the juvenile or the termination of your client's parental rights?* (that is, the facts relating to what your client did or failed to do)

*B. What were the significant procedural facts?* (that is, describe anything interesting or problematic that happened in the investigation, hearings, or other proceedings that led to an adverse judgment)

*C. What significant facts are in the record about your client?* (that is, employment, schooling, family ties, mental health issues, criminal justice involvement, or other matters)

*D. What potential legal issues are there?*

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# PLENARY SESSION
# FACT PROBLEM

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Your client, Robert Callison, has been charged with four counts of first-degree sexual offense (for two oral sex acts and two acts of digital penetration), felony breaking and entering, and felony assault inflicting serious bodily injury.

Mr. Callison is a 35 year old black man who lives in Raleigh. He was born in rural Alabama and moved to Raleigh with his parents when he was 8 years old. He is a high school graduate who works full time as an auto mechanic at an Exxon/Mobil station. He has three prior convictions: Two misdemeanor convictions for marijuana possession when he was 18 and 19 years old, and one felony conviction for possession of crack when he was 28 years old. He successfully completed a drug treatment program and a term of probation for the felony charge.

All of the other participants in the case are white. They all live in the same low-income neighborhood of Raleigh. About 50% of the people in the neighborhood are black. The remainder are white and recent Mexican immigrants.

<u>The Testimony of the Complainant, Angie Hobbs</u>

The complainant, Angie Hobbs, said that at about 3:00 a.m. on August 29, 2018, she was awakened by a knocking on the door of her small, one story, four room house, that she had only moved into three weeks earlier.

She went to the door and saw a man wearing shorts and a blue tank top shirt. According to Ms. Hobbs, it was not unusual for strangers to stop by at her house at odd hours of the night. She had never seen the man before. She did not open the door, but spoke to the man through a window. They talked for about five minutes, and Ms. Hobbs told him that the person he was looking for no longer lived there. The man asked if he could use her phone, but she refused. The man left.

Sometime between 6:30 and 7:00 a.m. of the same morning, Ms. Hobbs again heard a knock on her door. She thought it was her boyfriend, who often came by in the morning to bring her breakfast. She therefore did not ask or look to see who was at the door but simply opened it. The same man who had stopped by at 3:00 a.m. was there again. According to Ms. Hobbs, the man's shirt was pulled up over his face, and he pushed his way into the apartment.

The shirt was made of fairly thick, blue cloth, and could not be seen through. According to Ms. Hobbs, her assailant had the shirt covering his face for the entire time he was in the house so that she never saw his face and was unable to make an in-court identification. She was, however, sure that it was the same man who had come by earlier that morning.

Ms. Hobbs said that the man pushed his way into the apartment and dragged her into the bedroom. She testified that he pushed her onto the bed, sat down next to her, took out some marijuana and a pipe, and began to smoke. After he finished smoking, he walked over to the bedroom window, shut it, and returned to the bed. He then began to fondle her and demanded sex. He took her hand, unzipped his fly, and asked her to touch his penis.

Ms. Hobbs contends that at this point, she grabbed a hammer that she kept under her pillow and hit the intruder in the head. He collapsed and "fell over." Ms. Hobbs then dropped the hammer and ran for the door. A crime scene photograph taken by the police shows the hammer on the television stand, alongside several nails.

According to Ms. Hobbs, she did not make it out of the house. The intruder chased her to the door and, still wearing the blue shirt over his head, beat her severely on her head and back. She was punched and kicked many times and was bleeding profusely from the nose and mouth. The intruder then dragged her back to the bedroom and forced her to perform oral sex on him. He then performed oral sex on her. She was forced to do these things with him several times, "back and forth." The intruder also penetrated her with his fingers, vaginally and anally.

The assault lasted about an hour. The intruder then smoked a cigarette and fell asleep. Ms. Hobbs finally managed to escape, fled to a neighbor's house, and called the police.

Throughout the entire case, Ms. Hobbs refused to tell police or anyone else the identity of her boyfriend, saying only, "He has nothing to do with this case."

Testimony of the Police Officers

At about 8:30 in the morning, the police responded to the 911 call and interviewed Angie Hobbs at her neighbor's house. The officers then went to Ms. Hobbs' house and found Robert Callison, sleeping on the bed. The police had great trouble waking up Mr. Callison, whom they described as either "unconscious or in a very deep sleep." When he finally awoke and saw the officers, the first thing Mr. Callison said was, "Why are you making all this trouble over a little crack?"

While some police officers were arresting Mr. Callison, others took Ms. Hobbs to the hospital. A medical examination revealed that she had a fractured vertebrae, a broken nose, and many bruises and scratches on her head and face. Pictures taken by the police at the neighbor's house showed Ms. Hobbs had drying blood all over her body, mostly they believed from her broken nose.

Police Sergeant Harry Wilson, of the Crime Scene Squad, found blood all over the house including the walls, floors, and carpet. Although tests identified bloodstains belonging to Angie Hobbs, and some bloodstains from an unidentified person, none of Robert Callison's blood was found in the house.

Mr. Callison was examined by a doctor at the police station about an hour after his arrest. The examination showed no bruises, scratches, or cuts anywhere on Mr. Callison's body. There was also no blood on his body or clothing. Testing also revealed that Mr. Callison had a large quantity of cocaine in his system, but no marijuana.

The Defendant's Testimony

Mr. Callison took the stand and testified that he knew Ms. Hobbs because she was a dancer at a strip club he frequented. He also said that Ms. Hobbs knew him, because he was the only black man who went to that club, and she was one of the few white dancers who would speak with him. Mr. Callison contends that at about 1:00 a.m. on August 29, he met Ms. Hobbs on the street, and they decided to go to her house to smoke crack. After they smoked, Mr. Callison fell asleep. He says that there was never any sexual contact.

Mr. Callison does not know what else happened because he was in a deep sleep and does not remember anything until the police woke him up. He vehemently denied attacking Ms. Hobbs or having any kind of sex with her.

Ralph Dean's Testimony

Ralph Dean testified for the defense. He is the owner of the Rusty Wheel, a "gentlemen's club" in Raleigh. He testified that Angie Hobbs is an "exotic dancer" who has worked at his club for three years. He also testified that he knows Robert Callison is a regular customer of the club. Dean acknowledged that "pretty much all" of his customers are white. He said that Callison has been a good customer and has never caused any trouble.

The Court's Pretrial Evidentiary Rulings

Sergeant Wilson reported that when he examined the crime scene, he cut out and seized a semen-stained section of Ms. Hobbs' mattress. The mattress appeared to be brand new, and the stain appeared to be fresh. DNA analysis revealed that the semen did not come from Robert Callison. Ms. Hobbs has refused to identify her boyfriend, so no tests have been done to see if his DNA matched those stains.

The State made a pretrial motion to preclude the defense from introducing the DNA test results and any other evidence of the semen stain. The State contended that the Rape Shield Law barred use of the semen stain and the DNA results because they indicated that the alleged victim had engaged in sex with persons other than the defendant. Over objection, the court granted the motion.

The prosecutor also moved to preclude the defense from arguing in either opening or closing that Ms. Hobbs' boyfriend was the real attacker. Again over objection, the court granted the motion, stating that there was no evidence from which a reasonable juror could infer that the boyfriend was involved.

The defendant was convicted on all counts and was sentenced to consecutive terms of imprisonment for two counts of first-degree sexual offense, with the terms of imprisonment for the other offenses run concurrently.

Applicable Statutes

North Carolina's Rape Shield Law is contained in Evidence Rule 412, which states in pertinent part:

**Rule 412. Rape or sex offense cases; relevance of victim's past behavior.**
(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape;

(2) A charge of a sex offense or a lesser included offense of a sex offense; or

(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

. . . . . .

The pertinent statutes on sexual offense are as follows:

**14-27.20. Definitions.**

As used in this Article, unless the context requires otherwise:
. . . . . .
(4) “Sexual act” means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

**14-27.26. First-degree forcible sexual offense.**

(a) A person is guilty of a first degree forcible sexual offense if the person engages in a sexual act with another person by force and against the will of the other person, and does any of the following:

(1) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon. or

(2) Inflicts serious personal injury upon the victim or another person; or

(3) The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

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# BRAINSTORMING: DEVELOPING THE FACTS TO SUPPORT YOUR APPELLATE STORY

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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 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 an appellate storyline 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 difficult 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 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 appellate storyline.

- ✓ 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 storyline, 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 an appellate storyline that will guide your strategic and tactical decisions. If brainstorming has put you in that position, it has been a success.

# REVIEWING THE RECORD AND ISSUE SPOTTING IN CRIMINAL APPEALS

Glenn Gerding, Appellate Defender

1. **Do preliminary research on the elements of the offense.** NC CRIMES, published by the UNC School of Government, is a good tool – see the SOG website for ordering info.

2. **Get every piece of paper in the Trial Division file for ALL file numbers. 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 look at 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.

3. **Look at every piece of paper in the trial court file.** BOLO for references to things that should be in the file but are not. We rely on the clerk to send the entire file. Repeat, BOLO.

4. **Read the transcript carefully and take notes.** You should read between 30-60 pages an hour, taking notes and maintaining concentration. You will not be paid to review the transcript twice. Take notes in Word so that you can access your files from any device and so you can search your notes.

5. **Get/Read/look at the exhibits, including audio, video, software presentations, etc.** Take detailed notes of your review of the audio and video files, including the time stamp on the video (if any) and the time stamp on your media player, if different. Compare the audio with any written transcript that was prepared, especially if the transcript was admitted as an exhibit and published to the jury. Take note of things you see in the video that might not have been obvious from testimony, ie. blue lights flashing in the background, lots of noise from passing traffic, rain falling, etc.

6. **Use a spreadsheet or chart to keep things organized**. Testimony, exhibits, probation revocation documents, etc.

7. **Issue spotting is the top of the funnel.** Err to the side of inclusion. Winnow later. Keep a separate Word document in which you list possible issues. Add record and transcript cites after the issue to remind yourself where the issue infects the trial. Cut and paste quotes from cases along with the case

8. **It obviously is helpful for trial counsel to have objected or otherwise preserved an issue, but if something hurt at trial, and seems unfair or just wrong, take note even if there is no objection.** You may develop a theory of preservation that does not depend on an objection.

9. **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.

10. **Make sure the indictment or other charging instrument alleges all elements of the offense of 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.

11. **Always keep insufficiency and variance in the back of your mind.** If you get to the end of the transcript and think, "they never showed the value of the items stolen," you have an issue. If you get to the end of the transcript and think "how did the jury convict on that evidence?" you have an issue.

12. **Always add prior record points and look at the sentencing chart to make sure your client got a legal sentence.** You just never know, and most sentencing claims are preserved as a matter of law.

13. **Scan reported decisions via the web on NCCOA and NCSC decision days.** Do not assume that the case was correctly decided just because the decision is the law. www.nccourts.org

14. **Read annotations to the statutes.** Even if you don't find any issues by looking through the annotations, you'll learn something for the next case you have involving that crime.

15. **Think and research outside the box**. Pull up the briefs and records in other cases to find nuances that will distinguish your case from an unfavorable opinion.

16. **Connect the dots at trial to establish prejudice.** Voir dire, openings, testimony across witnesses, exhibits, closing arguments, jury instructions (or lack of instructions), jury questions during deliberations, and events that occur in or out of court can all be tied together to show prejudice.

17. **Communicate with trial counsel and your client.** You might learn about things that didn't get in the record.

# Reviewing the Record Critically – Taking Notes

**Assistant Appellate Defender Emily Davis**

Efficiently taking detailed and useful transcript notes is an essential part of appellate representation. If you take detailed notes while carefully reviewing the transcript, ***good things will follow:*** (i) you will gain a better understanding of the evidence, the State's theory, and whether the two fit together logically; (ii) brief drafting will be easier and faster; and (iii) the brief will be more accurate, well-supported by record citations, and as a result, more persuasive.

**Here are some ideas on how to take useful transcript notes.**

**1.** Combine your transcript PDF volumes into a single, searchable PDF. You will be able to search the entire transcript rather than having to go volume by volume.

**2.** Type transcript notes in a searchable Word document. Being able to use the Find setting will save time when searching for particular testimony, objections, instructions, requests, jury out, jury in, defendant's presence, etc.

**3.** If you read the transcript on your computer screen, use a split screen with the transcript on one side and your Word document for note-taking on the other side.

**4.** Put the transcript page number to the left so that you can easily find it. Indicate a new page number before taking notes on the next page.

**5.** Use abbreviations: W = witness; Off = Officer; SO = sheriff's office; OBJ; SUS; OVR; DEN. Use initials for repeated names or places: Jesus Martinez = Mart; 16 Lazy Lane = 16 LL or 16 house.

**6.** Use summary descriptions for lengthy discussions on mundane topics when appropriate: *[W qualification]*; *[expert qualification]*; *[schedule discussion]*; *[description how gun works]*. If you later determine a topic is important, it is easy to locate the relevant portion of transcript from your notes. ***Warning:*** Only use summary descriptions for these types of pedestrian topics. For everything else, take detailed notes on the facts. Take detailed notes even if you think you already know what the appellate issues will be.

**7.** If jury selection was recorded, take very brief notes showing peremptories, challenges for cause, and Batson issues. Failure to exhaust peremptories waives many jury selection issues. If you have peremptories, challenges for cause, and Batson in your transcript notes, and later determine an issue is briefable, it is easy to locate and review the relevant portions of transcript.

**8.** Use different fonts for different things that happen at trial: *italics* for voir dire, pretrial hearings; **Emphasized Titles** for each witness; **emphasized notation** for charge conference, closing arguments, instructions, exhibit admission, jury question, additional instructions, etc. Using **different fonts** will enable you to glance at your transcript notes and quickly determine where you need to be looking.

**9.** Highlight all rulings made against your client. Notes could look like this:

> 557 AJ told me --
> **OBJ - OVR**
> AJ said D's sister was standing there

**10.** Emphasize potential plain error or questionable stuff. Notes could look like this:

> 103 who did SM say he saw shoot V? D
> ***Is this ok??***
> ***NO OBJ***
> ***SM testified he saw D shoot V (Tp. 130)***

**11.** Start a list of proposed issues for the record on appeal.

**12.** Make a timeline. Timelines are an effective way to organize the State's non-chronological presentation of evidence. If the State's story is hard to understand, there may be problems with the State's version of events. Your timeline will provide an objective view of the evidence. An objective view of the evidence will help you identify and tell a persuasive and accurate story.

**13.** Make charts, lists, and tables. Each is an effective way to organize voluminous or confusing information.

**14.** Use Google maps while reading testimony about a location. Visualizing the scene or how one location relates to another location is usually difficult when the only source of information is witness testimony or State-chosen photos/diagrams. Use maps and street view to get a better idea of what happened and whether the State's version made sense.

**15.** Use diagrams and photographs. Diagram and photo exhibits also help with visualization. Make extra copies of diagrams and mark them up as you read the transcript.

**Reviewing the Record Critically -- Be Efficient**
**Assistant Appellate Defender Emily Davis**

**1. Take detailed and useful transcript notes:** Review the transcript carefully and take detailed notes. Highlight rulings made against your client. Emphasize potential plain error or questionable stuff. Make lists, charts, and timelines to organize information.

**2. Write a brainstorming memo:** This step forces you to streamline and organize large amounts of information. Include procedural and crime facts, potential issues, preservation facts and problems, and prejudice. Use procedural and crime facts to write statements of the case and facts in the brief. Use potential issues to determine what arguments to brief.

**3. Make an outline:** After determining what issues to brief, make an outline. My outline is a short bulleted list of preservation facts, facts relevant to the legal error, the legal error, and prejudice. Each section is supported by record and transcript citations and legal authority. I use the outline to write the brief.

**4. Efficiently research an unfamiliar issue:** For an unfamiliar issue, do these steps in this order: (i) look at annotated statutes and NC Crimes book, (ii) ask another attorney and email the listserv, (iii) check briefbank and SOG publications online, and (iv) if you still know nothing about the issue, limit full throttle research to 30 minutes per issue.

**5. Get a draft of the brief started AS SOON AS POSSIBLE:** Do it. Use your brainstorming memo and organization of trial tribunal from the proposed record to knock out statements of the case and facts. Use your outline to knock out standards of review. When you return to the brief later, brief writing will go faster and feel much less cumbersome.

**6. Copy and paste from other briefs *when reasonable*:** Do not forget to run spelling and grammar checks. Do not forget to tailor details.

7. **Do not waste time citing tons of cases when 1 suffices:** No one is impressed by long string citations. One and done. Move on.

8. **Do not waste time searching for a case directly on point:** If you cannot find it easily, it does not exist. Make your argument. Cite relevant authority. Compare or distinguish. Move on.

9. **Do not waste time trying to reinvent the wheel:** You will not succeed. And no one can afford your unsuccessful attempts to reinvent.

10. **If you start feeling bogged down or sluggish, talk it out!** Talking it out definitely clears the cobwebs. It helps you streamline and refocus.

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Chapel Hill, NC

# THE GENRES OF APPELLATE STORIES:

# ISSUE STORIES, CRIME STORIES

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# Genres of Crime Stories

1. It didn't happen.
2. It happened, but I didn't do it.
3. It happened, I did it, but it wasn't a crime.
4. It happened, I did it, it was a crime, but it wasn't the crime charged.
5. It happened, I did it, it was the crime charged, but I'm not responsible.
6. It happened, I did it, it was the crime charged, I'm responsible, but there is an overwhelming reason to reverse my conviction anyway.

# Genres of A/N/D Stories

1. It never happened (mistake, false report)
2. It happened, but I didn't do it (accidental injury, perpetrator not a caretaker, non-offending parent)
3. It happened, I did it, but it wasn't abuse, neglect, or dependency ( isolated incident, DSS overreaching)
4. It happened, I did it, it was abuse, neglect, or dependency, I'm responsible, but DSS is overreacting (inappropriate discipline, out of control teenager)
5. It happened, I did it, I'm responsible, please help me (front-loading disposition)

# Genres of Appellate Issue Stories

1. The court made a bad ruling, and I was prejudiced

2. The prosecutor (or DSS or GAL attorney) did something bad, the judge did not/could not stop him or helped him, and I was prejudiced

3. The police (or DSS) or some other witness did something improper, and I was prejudiced

4. A juror or jurors did something improper, and I was prejudiced

5. Some external event prejudiced the trial

6. The defense lawyer at trial did something improper, and I was prejudiced

7. The evidence was insufficient to support the verdict (or court's determination)

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# STORYTELLING: PERSUADING THE COURT TO REVERSE A CONVICTION

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## Persuading the Court to Accept Your Legal Issue

Every appellate defense lawyer has had the experience of finding a solid, winning legal issue, writing a brief that explains that issue, and then losing the case anyway. Sometimes the court affirms by repeating the phrase "harmless error." Sometimes the court doesn't even mention our legal issue, but pretends that the case is about a weaker, secondary issue. Sometimes the court just focuses on the facts of the crime and hardly addresses any legal issue.

The way to convince a court that a legal issue is worth reversing on requires that we have more than a legal basis to appeal – it requires us to put the legal issue in the context of a persuasive storyline. Sometimes the storyline will be about the legal issue. Sometimes it will be about other facts in the case. But it will always be the thing that persuades the court that reversing is the right thing to do.

## I. What Does Telling A Story Have To Do With Winning An Appeal?

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. The unfairness of the trial, or of some pre- or post-trial hearings or events, is often far more significant on appeal than the facts of the crime. **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. The police and prosecutor always focus on the facts of the crime because that is their strongest, most emotional point. Our job is to tell a story that refocuses the court on the unfairness of the trial level legal process.**

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 seven categories. These are:

1. The judge made a bad ruling and I was prejudiced

2. The prosecutor (or DSS or GAL attorney) did something bad, the judge did not/could not stop him or helped him, and I was prejudiced

3. The police (or DSS) or some other witness did something improper, and I was prejudiced

4. A juror or jurors did something improper, and I was prejudiced

5. Some external event prejudiced the trial

6. 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)

7. The evidence was insufficient to support the verdict (or court's determination)

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 seven 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 crime facts in a way that emphasizes 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 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, never forget 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.

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# PERSUASIVE LEGAL WRITING

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# LAW AS LITERATURE:
# SOME SUGGESTIONS FOR EFFECTIVE APPELLATE WRITING

I. Remember that good legal writing has two goals:

A. Persuasion
B. Clarity

II. Persuasive Writing

A: Know what your theory of defense is for the appeal. Having an appellate theory of defense will allow you to consciously decide what is important to your case. This is crucial to writing your brief, because you can choose your words intelligently only if you know what you are trying to accomplish with them. For example:

1. What facts are you trying to emphasize?
2. What facts are you trying to downplay?
3. What emotions are you trying to elicit in the reader?
    a. Disbelief.
    b. Frustration over an injustice.
    c. Anger.
    d. Sympathy.

B: **Write about facts**. In most cases, there is little debate over the law. The real issue is whether the facts of your case fit within the relevant legal boundaries.

1. The statement of facts should be used to persuade, not just provide background information. Emphasize those facts that advance your argument.

2. Use facts to create the mood in which your brief will be read.

a. If you want the reader to feel sympathy for your client, select facts and use language that will make him or her appear sympathetic.

b. If you want the reader to be outraged over the unfairness of the trial judge, lead off with a factual description of the worst things the judge did.

3. When you discuss legal principles, be sure that you quickly follow up by explaining what about the facts of your case makes those principles relevant.

4. Do not just cite case law for general legal principles. Find, cite, and discuss precedents that are factually analogous to your case.

C: Use active, not passive language.

Ex. Active: She went to the office at 9:00 A.M.
Passive: She had gone to the office at 9:00 A.M.

Active: He took the money from the drawer.
Passive: He had taken the money from the drawer.

D: Use graphic language to support your case.

Ex. Dull: The officers forcibly entered the room.
Graphic: The police smashed through the door.

Dull: She threatened appellant with a gun.
Graphic: She held a gun to appellant's head.
or: She stuck a gun in appellant's face.

BUT: Be sure that you only use graphic language where it will help you. Don't use it to enhance the prosecution's case.

E: Use dull, conclusory language when describing facts you want to minimize.

Ex. Dull (but good): Appellant held a gun.
Graphic: Appellant brandished a 9mm automatic.

Dull (but good): Appellant was found with the complainant's personal property.
Graphic: Appellant was grasping the victim's wedding ring and life savings.

F: Avoid cop-talk.

1. Using institutional police language legitimizes the behavior of the police.

2. Using institutional police language suggests that everything that happened in your case was normal and routine.

3. Remember that institutional police language is designed to give the impression that your client is guilty.

Ex. Cop-talk: They apprehended an alleged perpetrator.
Normal speech: They arrested somebody.

Cop-talk: They proceeded to the vehicle.
Normal speech: They went to the car.

G: Use language that humanizes your client.

1. Refer to your client by his or her name.
2. Don't always refer to your client as "appellant" or "defendant."
3. Try to include factual details which make your client seem to be a decent person.

Ex: Instead of: Ms. Smith was on her way to work.
Humanize: Ms. Smith was walking to her job at Ace Motors, where she had been a salesperson for three years.

Instead of: Mr. Jones went home.
Humanize: Mr. Jones went to his apartment on Laurel Road, where he lived with his wife and three children.

H. Don't obviously sugar-coat things.

1. If your theory of defense allows you to admit that the crime occurred, you don't have to minimize the seriousness of the crime.

2. Avoid unrealistic and unbelievable claims that your client is a wonderful person.

3. Avoid assertions that are so trivial that the court will automatically dismiss them.

III. Clear Writing

A. In general, shorter is better.

1. Short sentences enable you to communicate in a way that is easier for most people to understand.

2. If a sentence is too convoluted or difficult to understand, try to divide it into two or three separate sentences.

B: Decide how you are going to organize your story. **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.**

1. Every story can be told in various sequences and perspectives. For example:

    a. Chronologically, according to the events of the incident.

    b. Chronologically, according to the events of the trial.

    c. From the perspective of individual characters.

2. Select an organizational form that best compliments your argument on appeal.

3. Once you have chosen a perspective from which to tell your story, try not to flip back and forth between other organizational forms.

C. Avoid meaningless language. Many words have specific meanings, but are instinctively used by lawyers as filler, when they have nothing of substance to say. Some of these words are:

a. Clearly
b. Merely
c. Obviously
d. Generally
e. Certainly

D: "Would a non-lawyer understand this?"

1. Whenever possible, have a non-lawyer read your brief. Ask him or her questions about the clarity and organization of your facts and arguments -- then listen to the answers and make changes accordingly.

2. This is an excellent test for deciding whether your writing is clear enough.

3. This test also forces you to make your argument sufficiently factual.

Developing a Persuasive Story on Appeal
Appellate Advocacy Training
HOMEWORK!

1. Identify the injustice in your case.

2. What is the story that shows the reader the injustice.

    a. Who are the three main characters?

    b. Where and when does the story start?

    c. What are the first three scenes in the story of injustice?

3. Identify the legal issues in your case and, if more than one, prioritize them in light of your story of injustice.

4. What is the story of the principal legal issue?

   a. Who are the three main characters?

   b. Where and when does the story start?

   c. What are the first three scenes in the story of the legal issue?

5. What emotions do you want the judges to feel when they read your story?