

North Carolina Appellate Advocacy Training
Co-Sponsored by the UNC School of Government and
North Carolina Office of Indigent Defense Services
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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.

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**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.