DEVELOPING AN APPELLATE THEORY OF DEFENSE

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Step One: Decide What Was Unfair About Your Client’s Conviction

Every appellate lawyer has had the experience of raising a “winning” issue, but losing the case anyway. Sometimes we lose these cases because the facts of the crime were bad, sometimes because the other evidence was overwhelming, and sometimes because the court just doesn’t like to reverse convictions. But in many of these cases, the court should not get all the blame. Some of it belongs to us.

One of the most common traps appellate lawyers fall into is that they look for legalistic issues to raise, while ignoring the more fundamental question of whether the defendant’s conviction was unfair. We are frustrated when we lose cases because of “bad facts,” or “harmless error,” or “bad courts,” yet aside from complaining, we often do little to persuade the court that our client’s conviction was so unfair it should be reversed despite the seriousness of the crime or the weight of the evidence.

The first step towards solving this problem is to start our analysis of an appellate record not by looking for legal issues, but by asking ourselves “what was unfair about this case?” This analysis should be FACTUAL and EMOTIONAL, not legal. It should focus not on what legal principles were violated, but on what upsets and offends you about the factual events and processes that led to you client’s conviction. These can be facts about the crime, the police investigation, the pretrial processes, the death sentence, or the trial itself—but they must be facts that cause you to believe an injustice has occurred.

Here are some suggestions for taking Step One, and deciding what was unfair about your client’s conviction:

1. Read the entire record, including the trial and hearing transcripts and any motions, briefs or memoranda that were filed.
2. Speak with your client, and be sure to ask him what he felt was unfair about his case.
3. Speak with the trial lawyer. Don’t just ask him or her what the legal issues were. Ask questions about general fairness of the trial, the judge and anything else that happened in the lower court.

4. Write out a short paragraph, explaining for yourself what was unfair about the facts of your client’s conviction. It is important to actually write this out, don’t just decide it in your mind and leave it at that. The exercise of transferring your thoughts to paper will help you develop an articulate way of persuading others that the conviction was unfair.

Step Two: Identify Some Legal Issues That Might Be Grounds For Reversal

This is what has traditionally been referred to as “issue spotting.” It is important to recognize, though, that the issues do not stand by themselves, but only become good candidates for reversal if we can persuade the appellate court that it is reaching a just result by accepting the issue.

Here are some areas of the record where you should be careful to examine for potential issues:

- Pre-trial motions
- Pre-trial hearings
- Possible Brady violations.
- Trial evidence
  - Prior bad acts/uncharged crimes
  - The State’s expert testimony
  - Hearsay
- Prosecutor's summation
  - Invective
  - Sympathy for victim/family
  - Safe streets/community safety arguments
  - Patriotism
  - Religion
  - Distorting the burden of proof.
  - Misuse of prior bad acts—propensity arguments.
  - Material misstatements of evidence.
- Jury Instructions
  - Defenses
  - Presumptions
  - Use of hypotheticals.
  - Unbalanced or inaccurate marshaling.
  - Any deviations from the standard charge should be examined.
- Jury Selection and Deliberation
  - Batson problems.
  - Improper denials of challenges for cause.
Discharge of sworn juror.
Contact with outsiders—sequestration problems.
The court’s answers to jury questions.
    Dft's presence
    Full answers
Anything to do with mitigation
Anything to do with the use of expert witnesses

Here are some practical suggestions for Identifying Some Legal Issues:

1. When you read the transcripts, keep two legal pads by your side. On one of them, take notes about the testimony and other important events during the trial and hearings. Be sure to make a note of the page numbers on which these events can be found, so you find and cite them when writing your brief. On the second pad, keep a running list of potential legal issues you have found, again noting the page numbers on which they can be located.
2. When you identify a good legal issue, make a list of the facts that support that claim.
3. When you identify a good legal issue, make a list of the reasons that the issue contributed to the unfairness of your client’s trial. Don’t just assume that a legal error means that an appellate court will be convinced that the trial was unfair. It is your obligation to show that court how a reversal will be a just result.


I. What is an Appellate Theory of Defense?

A paragraph of about one to four sentences which summarizes the facts, emotions and legal reasons that make it a just result for your client’s conviction to be reversed or reduced. The paragraph should tell a story of injustice, innocence or reduced culpability. It should answer any questions and doubts the court may have about why the conviction should be reversed.

II. What Must Be Included in a Theory of Defense?

1. FACTS
2. EMOTIONS
3. LAW

III. What is Not a Theory of Defense?

Shorthand buzzwords, like “Miranda,” “sufficiency of the evidence,” and “Brady” are not
theories of defense. These buzzwords have three fatal defects when we substitute them for a real theory of defense:

1. They do not persuade anyone of anything.
2. They are not at all specific to the facts of your case.
3. They often mean something different (and less favorable) to judges than they mean to us.

IV. An Example of a Theory of Defense

Assume the following facts:

Your client is charged with beating his wife to death when they were vacationing in a cabin in an isolated state park. In the early hours of the morning, he ran out of the cabin in a driving rain storm, called the police and reported that an intruder had entered the cabin and knocked him out. When he came to, his wife was lying on the floor, seriously injured. The police arrived, found that the wife was dead, and took your client to the hospital, believing him to be a victim. Their investigation showed no physical signs of an intruder or a break-in. Four days after the crime, a state medical examiner, who had no training in neurology, did a three minute visual examination of the defendant. At trial, the medical examiner testified as an expert witness that based upon his examination, he has concluded to a medical certainty that the defendant could not have been knocked unconscious during the crime. You wish to appeal on the grounds that (1) this testimony was without foundation; (2) the expert was unqualified to give this opinion; and (3) the testimony was unreliable, false junk science that falls below the standards for admissibility of expert testimony.

A possible theory of defense on this case could be:

The only witness produced by the State who contradicted Mr. Somers’ defense was Medical Examiner John Mallon. Mallon admitted that he had no training in neurology. He did not see Mr. Somers until four days after the incident, performed no medical tests of any kind, and merely looked at the bruises on Mr. Somers’ head for about three minutes with his naked eye. Nonetheless, he swore that Mr. Somers could not have been unconscious four days earlier. Independent medical experts and neurologists agree that it is scientifically impossible for anyone to make this conclusion. They also agree that Mallon’s techniques are far below any acceptable scientific standard. Mr. Somers conviction must be reversed because the jury was irreparably tainted by Mallon’s false, medically unqualified and factually impossible “expert” testimony.
Step Four: Develop Emotional Themes That Support Your Theory of Defense

An emotional theme is a fact based, emotional reason that will make the appellate court feel that it is doing the right thing by ruling in your favor. It is usually aimed at convincing the appellate court that there was something unfair about the defendant’s conviction or sentence. NOTE: When we refer to fairness in this context, we are speaking about it in human, not legalistic, terms.

This step requires you to take the conclusions you reached in step one and apply them to the theory of defense you designed in step three. Now that you have a theory of defense and a good idea of why you client’s conviction was unfair, you must come up with emotional themes that will persuade the court that a reversal is the only thing that will restore justice to the case.

In the hypothetical example above, some possible emotional themes could be:

- Junk science has once again tainted the judicial system.
- A fraudulent expert tricked a jury of lay people.
- A jury of lay people naturally trusted and deferred to a supposed expert who misled them.
- The State has relied on phony evidence that has been rejected by every reputable expert in the field.

The language you use to develop these emotional theme will be very important. Words and phrases should be selected to have the maximum effect in convincing the reader that the conviction was unfair. For example, key words and phrases to use in designing emotional themes for the above example are:

- Junk science
- Tainted
- Fraudulent
- Phony evidence
- Tricked, misled
- Jury of lay people
- Naturally trusted
- Supposed expert/reputable expert

As with steps one through three, it is important to actually write out the emotional themes and important language you will be using to support your theory of defense.