A " DEVIL'S ADVOCATE" APPROACH TO BRAINSTORMING AND WRITING: Unconventional Ideas That Will Help You Write a Better Brief

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Part One- Brainstorming and Strategy

1. The Law is Irrelevant

Start with the facts and work towards the law.

Read the transcript and record materials as a layperson (or client), not as a lawyer.

First identify what bothers you about the case. Brainstorm by thinking about what is wrong, not what is illegal.

> – Once you figure out what's wrong ***then*** find a reason why it is illegal.
>
> – Work from different levels of abstraction; that is, go from specific to general until you find a principle that supports your position. You can almost always find some law to support your position if you pitch it at a high enough level of abstraction, even you have to resort to "justice is good."

Treat the law as a peg on which to hang your facts. In other words, you need the law to get in the door but the facts close the sale.

Develop issues as if we lived in a just world, where the law is what it should be, not necessarily what it is.

Don't reject an issue just because there is no law or bad law. In other words, don't let bad law get in the way of a good argument (barring, of course, completely controlling precedent).

There is almost always **some** law to support your position. If your argument is convincing, you only need to give the judges a thread.

Appellate judges for the most part **make** the law. Go back to the old legal realist notion– there is no fixed, platonic ideal of what the law **is**; the law is what the judges say it is.

2. Procrastination is a Virtue

Don't be too eager to jump to the writing stage of the appeal. Its called **writing** an appeal but really the most important part is **thinking** about the appeal. The thinking stage too often gets short shrift

Thinking takes time.

Everyone's writing style is different. The usual instructions on how to write well are to write multiple drafts and to refine, hone, and polish until you get to the final result. However, there is more than one way to skin a cat. Find out what works for you.

Don't start writing too soon. It may be that your first draft is the last. It is possible to revise as you write, paragraph by paragraph.

If you are the type of person who writes early and thinks as you write, don't become invested in your work. Let it go. Allow enough time and flexibility for your ideas to change. Be ready to completely rewrite—and pillage and burn—large sections of your draft.

Take the time to step back from the record materials and your folder of research. The brief is not a list of citations. It should focus on your thinking.

The realities of your work load may get in the way. Leave as much time as possible for the appeal. Your client may be better served by an extension than a rush job.

Don't fall for an issue too early. Love, as we know, is blind. Casting your lot too soon with a particular issue may cause you to miss other, better arguments. Keep your eyes and mind open as long as possible.

If you have the nerve to wait until you really understand the argument, the writing will be easier. Wait until the ideas crystallize in your mind.

If you are having trouble writing, it is almost always because you haven't really figured out what you want to say.

Conversely, one way to figure out if an issue works is to see if it "writes." Just be sure to junk it if it doesn't.

3. You Are More Likely to Win Your Appeal in the Shower than in the Law Library

Trust yourself: you've already internalized the basics of criminal law.

At the brainstorming stage, don't be afraid to rely on what you know or half-know about the law.

Your unconscious or subconscious mind is more creative than your conscious mind.

It is very difficult to conjure up an argument by brute force.

Burying yourself in the law library (or computer) and hoping to uncover an ancient case that will win your appeal is usually not the best approach.

Feed your brain the raw material, make yourself familiar with the record and the facts and then let it percolate and sink in.

Allow room for inspiration and don't ignore that "in the shower" flash.

Its very hard to spot omissions. Don't limit yourself to the claims argued below. Letting the facts sink in and getting out of the law library may allow room for the lightbulb to include something that the government or the court should have done and didn't, in which case you may have a legal claim that the trial counsel (possibly you) missed.

Trust that the idea will come. Relax, don't panic.

Creative ideas most often pop up when we are not reaching for them. We have to remain open and receptive to them bubbling up.

Despite the dry nature of appeals and appellate courts' resistance to spin, there is still **some** room for style. You are more likely to sing in the shower than the law library.

4. Appellate Practice is a Team Sport- Build Your Network

We often think of brief writing as a solo practice. One lawyer in the library, doing research, formulating the argument and getting it down on paper.

And it certainly can be done that way– as an individual, almost monastic endeavor. But that is not necessarily the best or most efficient approach.

A better way is to create a network of friends, colleagues, and associates who are also engaged in appellate practice and use them as a resource, sounding-board and force-multiplier.

In your firm, on the CJA panel, and in local and national defender offices, there are talented appellate lawyers who up on the latest issues and are more than willing to share their knowledge and their time with other members of the appellate fraternity.

No matter how smart or talented an appellate lawyer you are, the collective knowledge and expertise of this group of experts is almost certainly greater.

Part of this is about not reinventing the wheel- unless your issue is truly novel, there are probably other lawyers who have researched similar issues, faced similar problems, written similar briefs. Using these materials will give you a head start and save you time and effort. There's no such thing as plagiarism when it comes to legal writing.

More than that though, a strong network will help you strength test and improve your argument, will see weaknesses you might have missed, and will provide insight and different ways of looking at the case that will make your argument stronger and deeper.

Simply put, with all the appellate big brains and resources out there, you don't have to and shouldn't go it alone.

5. No Appeal Has More Than One Winning Issue

Remember that it is very tough to win appeals. The affirmance rate is probably close to 85- 90% in most circuits.

Most appeals, at least in the eyes of the courts, have **NO** winning issues.

It is usually unrealistic to think you are going to find multiple reversible errors in your garden variety appeal.

We are usually taught to brief every non-frivolous issue on the theory that its impossible to know which issue, of the many to choose from, will move the court.

Contrary to that message, it is often possible to accurately (though not perfectly) predict when an issue, though non-frivolous, has little realistic chance of success.

While your instincts are probably right about what constitutes your most convincing argument, remember your own limits and the risks of overconfidence, as well as complacency. Although you will usually know what issue matters, it is still true that people, including judges, think differently about similar issues. When you can, hash it out with your colleagues **before** any moot, if you have one, preferably at the initial stages of deciding what issues to raise.

The advice to "brief'em all" ignores the reality of our workload and the patience of the court. The court is not going to happily wade through a seven-issue brief to pluck out the one issue it actually likes. Don't make the court work too hard.

There is big signal to noise problem in many briefs. Numerous weak issues may drag down a strong one.

You will invariably do a better job on your best issue if your time is not divided writing five other issues.

Be selective. In most single-defendant cases, it is rare for most lawyers to raise more than 2-3 issues.

6. But, You Must Often Brief Losing Issues

Notwithstanding the above, you must often raise issues that you have no hope of winning.

There are several reasons for this:

– 1. ***Issue preservation***– Even if your circuit has bad law, there may still be a hot issue that the Supreme Court will agree to take on. (Witness: *Johnson, Zedner, Crawford*, *Apprendi, Blakely, Booker, Florida v. J.L.* and *Bond*). Don't give up on *Almendarez-Torres* and *Watts*, or injustices you identified while brainstorming; if it bothers you, it may eventually bother judges or justices.

– 2. ***Cumulative effect***– There may be a number of nagging, not-quite-reversible errors at trial which viewed individually don't add up to much but, viewed as a whole, show that your client got screwed. This works best when you have one winning or almost winning issue and the other weaker issues can be used to reinforce it or at least to show lack of harmlessness or prejudice—to give it that little extra boost to push it over the finish line.

– 3. ***Tug the heartstrings***– Your best issue may be a dry legal error, a classic "technicality." You may make reversal more appealing to the court by supplementing it with non-winning issues that allow you to humanize the client or generate some sympathy. An example might include a sentencing issue that allows you to write about mitigating conduct in your client's background, but is otherwise irrelevant to the main legal issue.

7. You Can Lose Even When You Are Right

In many cases—or in many courts—being right is not enough.

Even if you have a "winning issue," the majority of cases are close enough or arguable enough that the court can find a way to reject relief if it wants to.

You have two choices: make the court **have** to rule in your favor or make it **want** to rule in your favor.

The former is often difficult. Rarely is the error so clear-cut, so undeniable, so well-preserved, so "not harmless" that a court has no other choice but to grant you relief.

But, if you do have an issue that completely boxes in the court, great. Frame the issue that way and make sure court understands that its only option is to reverse or remand.

Like alibis, however, your arguments are often not as airtight as they seem. Most times, the court will have some wiggle room. Therefore, you have to make the court **want** to go your way.

A few ways to do this:

> – 1. ***Appeal to the court's courage and sense of justice***. Since most courts more or less despise our clients, this works best when there was truly egregious behavior by the trial court or the government or, counter-intuitively, when you are asking court to do something unpopular and can appeal to court's sense of itself as a bulwark against popular passion or defender of a bedrock principle under threat.

– 2**.** ***Minimize the impact of the ruling***. Cast the issue as small potatoes, show that no great harm will result from a favorable ruling. Narrow the issue or the class of defendants who will be affected. Show that the case is no big deal and has a limited impact. Think how you would argue the case to Sandra Day O'Connor.

– 3. ***Give court the option of throwing your client a bone***. This is easier when your client got a raw deal or is quasi-sympathetic. For example, if client got hammered at sentencing and has no great legal issues but maybe a couple of OK ones. Raise three or four guidelines issues, knowing at least three are going to lose but hoping that the court will relent on one and save your client a couple of levels. You still must have a decent issue but you may be able to frame the brief to maximize sympathy from the court, allowing it to cut the client a little break even if it is not inclined to cut her a big one.

– *4.* ***Appeal to the panel's pet issues***. Try to overcome the pro-government/anti-defendant inclination by appealing to a judge's pet legal issues or theories. Make conservative tropes your friend. If you happen to know a particular judge is a big advocate of federalism, frame your issue as governmental overreaching into matters best left to states. If the judge is big on ethics/fair dealing, frame the issue as governmental misconduct. If the judge is an originalist, frame the issue as one with a solution imbedded in text of Constitution or statute. Think about what arguments might appeal to Justices Scalia and Thomas. This is most effective with judges who are not entirely result-oriented. Often, you won't know the panel when you write the brief but you might by the time of the reply or in preparing for oral argument.

8. The Most Important Battle Is Over Where To Fight

You always want to fight the battle on ground of your choosing if possible.

The way you frame the issues is critical. Try to make the case about your strongest issues, not the government's.

For example, in a traffic stop case, you might be strong on no reasonable suspicion to stop and weak on consent. So, write your motion/brief as if the stop issue is the key issue in the case- if you win that, you win. You may not even address some other justification for the search.

If you're lucky, the govt will accept your framing of the case and focus their argument entirely on whether the stop was good.

They are then fighting on your turf.

If they raise some alternative ground to justify the search, you can always address it on reply.

This strategy is often useful where there might be an error preservation issue. Even if there is some doubt about whether the issue was preserved, write the opening brief as if it clearly was. If the government makes a waiver argument in its response, you can address it in your reply brief.

In other words, don't outline the government's argument for them in your opening brief. You must figure out which issues to pre-emptively attack and which to leave alone.

There are both legal and practical considerations:

– How likely is it that the govt will raise the issue?

– How good a response do you have?
– Do you risk credibility by not addressing?
– How comfortably does it fit within the rest of your pleading? Will it be a distraction?

Framing isn't about simply raising your strongest arguments. It's about presenting your argument in such a way that it appears to be the most important, most central issue in the case.

Put it first, put it alone, foreshadow it.

Who wins the framing battle often wins the case.

Part Two- The Hard Part: Writing

9. Writing Sucks

You've broken down the facts, analyzed the issues, done your legal research, developed your theme.

What's next? Well, unfortunately, you've got to write it.

And that is the hard part.

Analyzing the issue, thinking about it, that eureka moment when it all comes together and your figure out what the case is about and what your argument is– these are all fun.

But it is all downhill after that.

Translating your great ideas onto the page is **not** fun. In fact, it is generally frustrating, time-consuming and anti-climatic.

I'm often reminded of an old Red Smith quote– "Writing a column is easy. You just sit at a typewriter until little drops of blood appear on your forehead."

Still, until we invent a direct brain–to–brain interface, it's unavoidable; we've got to do it.

10. Focus on The Three S's

Going to break down discussion into three broad categories.

Structure- the big picture, what is the overall shape or organization of pleading.

Story- how to tell the tale

Strategy- how to present the argument in a way that maximizes your chances of winning.

This is not a magic bullet or some iron-clad dictate but a template for proceeding and some tricks to help when you get stuck or off track.

11. The Story is in the Telling

A brief that doesn't engage the reader is a brief that will lose. You must command the court's attention and interest. In a word, don't be boring. But how to do this?

The easiest and best way is to make sure your brief has a interesting, compelling structure.

It is very easy to settle into a default organization: Start with a statement of black letter law, apply the law to the facts of your case, and show how that application results in the conclusion you desire.

We've all followed this template. It's familiar, safe, and above all, easy.

But we need to resist the urge to go down that path.

We want to avoid a Berlin Wall-type of separation of law and facts. Instead, we want to achieve a blend where the law and the facts exist side–by–side, where they reinforce one another.

This might feel unnatural and awkward at first but there are a few ways to get into the rhythm.

The easiest way to begin doing this is to start the brief differently:

> 1. ***Don't start with a recitation of the law***– "In *Terry v. Ohio*, the Supreme Court held that the police must have reasonable suspicion that criminal activity is afoot before they may briefly detain an individual...blah, blah, blah"
>
> 2. ***Instead begin in medias res, throw the reader into the action***– "Joe Blow was walking out of the hospital when the two armed police officer accosted him and began peppering him with questions."
>
> 3. ***Or with an emotional hook***– "Joe Blow, who had an IQ of 70, was on his way to visit his dying mother in the hospital when he was stopped by the police that he could not proceed unless he consented to a search of his person."
>
> 4. ***Or by showing what is at stake–*** "Joe Blow was the twelfth African-American that Office Jones had stopped that day. Jones had not stopped a single white person in the last month."

A mini-summary of the argument is also a good way to get things rolling. As you weave the facts and law, a certain amount of looping and repetition is ok, even desirable.

12. Keep Your Balance

We have focused a lot on the importance of facts and story-telling and avoiding overly "legalistic" writing. This is good advice but in structuring you pleading, you need to be more nuanced.

Every argument has the right balance of facts and law and it is your job to the find it. The problem is that the balance is different in every case.

Some arguments are truly "legal" and an over-emphasis on facts might come off as a lack of confidence in the strength of your legal argument. If you want to project inescapable inevitability–100% confidence that you win on the law period–you dilute that message by spending undue time on facts that are "sympathetic" but irrelevant to your argument.

For instance, if a prior conviction no longer counts as a predicate after *Johnson*, it no longer counts regardless of how good or bad your guy is so don't spend time try to pluck heartstrings. Otherwise, the court might start wondering why you are.

On the other hand, and perhaps more commonly, some arguments are very fact-intensive. The law may be clear or undisputed and the only thing that really matters is what the court feels about your client.

A sentencing memo might be the paradigmatic example of this.

In such cases, there is no need for pages of black letter law about advisory guidelines and the legality of variances and departures that the court is already certainly familiar with.

You need to get right into it.

Many pleadings, even many briefs, have too much law. Focus your cites on the critical legal points, on the things the court doesn't know.

Above, we talked about the difference about arguments that make a court **have to** rule in your favor and those that make it **want to** rule in your favor.

Your choice of approaches will often influence the "law/fact" balance calculation. "Have to" arguments are generally tilted toward the legal side of the scale. "Want to" arguments are generally more factual.

Consider the following example: the police arrest a low-IQ suspect and ask

him to come down to the station for questioning. After several hours, without a lawyer present, the suspect confesses to the crime.

How might you structure your argument?

Law-focused approach:

Anyone who's ever watched an episode of Law and Order knows at least two things about being arrested: (1) the police must give *Miranda* warnings and (2) once a lawyer is appointed, the police can't initiate questioning of the defendant without the lawyer's knowledge. *See Massiah*. Everyone knows this, that is, except it seems for the police officers in this case who questioned Mr. Suspect before reading him his rights and without ever notifying his lawyer.

Fact-focused approach:

On July 15, 2014, John Suspect was confused. This was not surprising; he was often confused. Mr. Suspect had an IQ of 56. Growing up he was confused in school and later he was confused at work. He was confused by people. What was different about this day was that the police took advantage of Mr. Suspect's confusion, his intellectual limitations, in order to wring out a "confession" of dubious validity by isolating him from his lawyer and failing to inform him of his right to remain silent and to the assistance of counsel.

13. Read the New Yorker, Not Harvard Law Review.

Enough about structure. Let's talk a little about story.

Everyone, including judges, loves stories, craves narrative. So give the people what they want. Tell them a story.

Especially in district court, where factual findings have not yet been made, want narrative flow. If you tell a coherent, logical story with your set of facts, court is more likely to accept your view of them.

This is super important because as discussed above you really want to win the framing battle.

In telling the story, it is tempting to fall back on straight chronology, and that is sometimes the way to go if events are confusing or sprawling.

But, if you notice, almost no literary or journalistic non-fiction uses this structure. Instead, it often it starts with pivotal event and moves backwards and forwards from it. Why? It creates interest and tension. You want the court to keep turning the page.

There are many alternatives to chronological narrative.

– Character-based

– Event-based

– Thematic

Shorter is always better.

Don't over explain, trust your reader.

14. Your Freak Flag Can Only Fly So High

The danger with novel narrative structures is, of course, confusion.

Clarity must always be the paramount goal. If the choice is between clarity and novelty, you must always choose clarity.

But you can have both.

So how to maintain clarity within a non-chronological structure:

–Put a summary near the beginning

– Clear road-mapping through headers

– Include copious cites to the record.

– Use consistent terminology and frequent reorientation.

– Be highly specific

There is a “push-pull”, “yin-yang” dynamic between structure and language. The more daring your structure, the more straightforward your language should be. Conversely, ornate, high-flow rhetoric should be paired with a clear and simple structure.

15. Write Like a Human Being, Not a Lawyer

Transparent clarity is your aim. However, transparent does not mean boring.

Repetitive, monotone, "just the facts" writing is not the goal. You do not want your brief to sound like it was written by a robot. Your writing must sound human.

You are striving for flow, for narrative momentum. How do you achieve this?

– Strong, varied sentences which are direct and not mealy-mouthed.

– Avoidance of cliche and tired constructions.

– Verbs give life. Adjectives and adverbs destroy life.

Do not use intensifiers. They are not persuasive and betray weakness. They are lame stand-ins for an actual argument.

“The government's argument is absolutely frivolous.” What does the intensifier add to this sentence? Has any judge anywhere been pushed from uncertainty into agreement with your argument by the addition of “absolutely?” No.

16. Good Writing Wins- It's Science!

Check out this article:

Campbell, John E., *Writing that Wins: An Empirical Study of Appellate Briefs*, The Colorado Lawyer, Vol. 46, No. 3, March 2017; U Denver Legal Studies Research Paper. Available at SSRN: https://ssrn.com/abstract=3011605

Campbell conducted an empirical stylistic analysis of appellate briefs at the Supreme Court and appellate level.

He found that a writing style marked by brevity, simplicity, and active voice was more likely to win than voiceless, passive, complex writing.

He concluded: "Given that energetic, simple writing rules in the Supreme Court and even correlates with winning in the busy Ninth Circuit, we'd all do well to set aside some time to make our briefs read more like a Grisham novel and less like a statute."

17. Beauty is Not Skin Deep.

So you've got a great idea, great issue, that you've written up with clarity and power.

It really won't matter if pleading looks like crap. How your brief looks is not an afterthought. A clean, good-looking is pleading is not a luxury, it is an essential.

You **must** think about typography, layout, format, consistency. Here are a few specific tips:

– Use a good font- Century, Palatino, **not** Courier or Times

– Read the 7th Cir. Typography Guide- http://www.ca7.uscourts.gov/rules/type.pdf

– One space between sentences, **NOT TWO**.

– Widow/orphan protection.

– No page breaks between header and body

– In proportional type, use bold or italic, **not underline**, especially for case names.

– Don't worry about bluebook, pick a style and **BE CONSISTENT**.

If want to do a deep dive into fonts and typography, read *Typography for Lawyers* by Matthew Butterick available at https://typographyforlawyers.com/. Super interesting.

Solicitor General briefs are a model. They always look great. Just do what they do.

A super clean, professional brief will buy the trust and attention of the court and will ensure your argument is shown in the best possible light.