



**A “Devil’s Advocate”  
Approach to Brainstorming:  
Seven Unconventional Ideas  
that will Help You Write a  
Better Brief on Appeal**

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2d Series

# A “DEVIL’S ADVOCATE” APPROACH TO BRAINSTORMING: Seven Unconventional Ideas That Will Help You Write a Better Brief on Appeal

## 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. (I.e., follow the “Candide” theory of appellate practice).

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. Even concurring judges may not join in all of the dicta of an opinion. 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 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 nerves to wait until you really understand the argument, the writing will be easy. 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. 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 whether an issue, while non-frivolous, has a 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.

Big signal to noise problem.

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.

## **5. 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: *Zedner*, *Crawford*, *Apprendi*, *Blakely*, *Booker*, *Florida v. J.L.* and *Bond*). Don't give up on *Almendarez-Torres* and *Watts*, or injustices you identified in heresy #1; 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.

## 6. You Can Lose Even When You Are Right

In many cases—or 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.

## **7. *Anders* Is Not a Dirty Word**

Some lawyers take it as a point of pride that they would never file an *Anders* brief, implying that only a bad lawyer would.

While you should avoid filing an *Anders* when you have issues, there are some situations where it actually serves the client's interest if you do.

One reason *not* to file an *Anders*: to preserve your "credibility" with the court.

Most circuit judges understand the tensions faced by appellate lawyers and don't begrudge a lawyer's good faith attempt to make a silk purse out of what is obviously a sow's ear. They know we face cases with losing issues or no issues and that we sometimes have to file a "no-hoper." Typically, they don't hold it against us.

An *Anders* brief is appropriate when the client and lawyer disagree about the relative merit of various issues in the appeal. If there are issues that the client feels strongly about but the lawyer can't find a factual or legal basis for, or can't raise in good faith, the best outcome may be an *Anders* brief.

If the lawyer finds other non-frivolous issues to be raised, the most appropriate course of action is to file the brief and raise the issues the lawyer believes gives the client the best chance to win, and omitting some of the client's pet issues. A client can always move to file a pro se, supplementary brief raising those issues.

In filing an *Anders* brief, the lawyer can identify the issues the client wants to raise to the court and then the client has an opportunity to file a pro se brief, raising any issues, no matter how outlandish, inappropriate or reliant on extra-record material.

Sometimes, in these circumstances, a client will get more satisfaction from *Anders* than from a regular brief raising a marginal issue they don't care about, and will almost certainly lose.

In addition, you can inform the client that the court itself is required by *Anders* to conduct an independent review of the entire record to discover any issues you, as his lawyer, may have overlooked.

The client will, of course, not win. But, having had an opportunity to air pet claims and having been granted the extra assurance that the court has reviewed the entire record, many clients derive greater satisfaction from the appellate process than those defendants whose lawyers filed regular briefs that were *Anders* in everything but name and who, therefore, did not get a chance to raise the arguments they felt most strongly about.

As long as there are no real issues in the case and the pros and cons of the *Anders* procedure are clearly explained, *Anders*, for some clients, can provide a greater sense of agency and control than a regular brief.