



THEORY & THEME



WHY HAVE A CASE THEORY?

- YOUR CASE THEORY CONTROLS
 - Your discovery & trial preparation
 - Jury selection
 - What's said in your opening statement
 - What is asked on direct and cross examination
 - What's said in your closing argument
 - What will be in your proposed jury charge



WHY HAVE A CASE THEORY?

- EVERYTHING YOU DO AT TRIAL
WILL BE CONTROLLED BY
YOUR CASE THEORY

WHAT IS A CASE THEORY?

- A CASE THEORY CONSISTS OF--
 - LEGAL THEORY
 - FACTUAL THEORY
 - PERSUASIVE THEORY
- EQUALS CASE THEORY

LEGAL THEORY

- THE LAW THAT ENTITLES YOU TO WIN
 - JURY INSTRUCTIONS
 - STATUTES
 - CASE LAW

FACTUAL THEORY

- WHAT HAPPENED IN THE CASE
- WAYS OF GETTING A HANDLE ON THE FACTS
 - CHRONOLOGY
 - PROOF CHART
 - FACTS NOT CONCLUSIONS
 - INFERENCES THAT CAN BE DRAWN FROM THE FACTS

FACTUAL THEORY



IF TRUE, WHAT ELSE MUST BE TRUE



HARD FACTS VERSUS SOFT FACTS



THE MOVIE SCRIPT—WHAT WOULD/SHOULD HAPPEN IN THIS SITUATION



MOTIVES—WHY DID A PERSON ACT IN THE WAY CLAIMED



COMMON SENSE—DOES THE STORY COMPORT WITH COMMON SENSE

PERSUASIVE THEORY

- WHY SHOULD YOU WIN AS A MATTER OF FAIRNESS AND JUSTICE
 - WANT TO IDENTIFY THE HERO AND VILLIAN IN THE CASE
 - SEE PERDUE EXCERPT POSTED ON WEBSITE



THE GRANDMOTHER TEST

- SUMMARIZE YOUR CASE IN ONE PARAGRAPH
 - Using simple, powerful language
 - Incorporating your best facts
 - Explicitly or implicitly refuting your worst facts
 - This is a case about....



THE GRANDMOTHER TEST

- YOUR GRANDMOTHER, AFTER HEARING THE PARAGRAPH, WILL SAY —YOU SHOULD WIN!!

TEN COMMANDMENTS OF A GOOD CASE THEORY



SHORT



SIMPLE



SATISFIES LEGAL
REQUIREMENTS



CONSISTENT WITH
FACTS



EMOTIONALLY
APPEALING— PLACES
MORAL BLAME AND
APPEALS TO COMMON
VALUES

TEN COMMANDMENTS



EXPLAIN MOTIVES



TELLS A STORY



USE IMPACT WORDS
AND PHRASES



LIMITED TO ONE
THEORY



YOU MUST BELIEVE
IT

THEME



THE ONE SENTENCE
DISTILLATION



MAKE SURE IT
CANNOT BE FLIPPED

HOW TO DO IT

- MANY METHODS.
THIS IS JUST ONE MODEL
- WILL BE DOING NEXT WEEK W/ STATE V. O'NEIL
 - – RESEARCH THE LAW (Done for us here)
- SELECT YOUR BEST

GOOD FACTS AND YOUR WORST
BAD FACTS

HOW TO DO IT

- BRAINSTORM ABOUT GOOD FACTS AND BAD FACTS
 - FACTS--NOT CONCLUSIONS
 - DON'T ARGUE AT THIS POINT—CUTS OFF CREATIVITY
- IDENTIFY OUR (ARBITRARY #) BEST & WORST FACTS
 - NOW WE CAN ARGUE ABOUT THE FACTS
 - Is it admissible
 - Is it understandable

HOW TO DO IT

- Is it believable
- Is it a hard or soft fact
- Do we need to draw any inferences
- Are the inferences reasonable
- If this fact is true what other facts must be true (are they?)
- Is it consistent with common sense
- Does it square with the motives we would expect
- Will it be countered by other evidence
- In short, why should the judge or jury believe the best facts & disbelieve the worst facts

HOW TO DO IT

- APPLY THE GRANDMOTHER
- DEVELOP A THEME—A ONE SENTENCE DISTILLATION OF YOUR CASE THEORY
 - –MAKE SURE YOUR THEME CANNOT BE FLIPPED