

# **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 WE 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

1. SHORT
2. SIMPLE
3. SATISFIES LEGAL REQUIREMENTS
4. CONSISTENT WITH FACTS
5. ENOTIONALLY APPEALING—  
PLACES MORAL BLAME AND  
APPEALS TO COMMON VALUES

# TEN COMMANDMENTS

6. EXPLAIN MOTIVES
7. TELLS A STORY
8. USE IMPACT WORDS AND PHRASES
9. LIMITED TO ONE THEORY
10. 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