

## **I. INTRODUCTION TO THEORY OF THE CASE/GOALS FOR TODAY**

Today we are going to talk about fact investigation and Theory of the Case.

Goals for today:

- Learn what we mean by theory of the case
- Think about the ways in which the theory informs every aspect of your work on a case
- Learn how to engage in robust fact investigation and development.
- Learn how to organize these disparate facts into a coherent story or theory
- Learn to think about it as an iterative process, constantly subject to revision as the case develops over time. The revisions, too, will inform how you gather facts, what facts you develop, and how you deal with unhelpful facts.

Usually, facts do not come to you, pre-established.

The facts that get presented to the court are the facts that you develop

You uncover facts, shape them, organize them and introduce them

If you don't develop, they won't exist.

This is THE place where good lawyering can make the most difference

- a. Shape facts/lessen impact of harmful facts;
- b. Always need good factual story.
- c. Judge or decision-maker or opposing party needs a reason to care.

## **II. What is theory of the case?**

- a. It is the logical and persuasive story of what happened that explains why your client is entitled to the relief she seeks.
- b. Primarily Factual theory, not a legal theory. But it must address the elements of your claim. It hits on the elements but it is not organized by element. Organized based on a story.

## **II. CHARACTERISTICS OF AN EFFECTIVE THEORY:**

Simple, comprehensive, believable, provable, consistent with client goals, meets the elements of your claim, rebuts opposition's likely theory, accepts facts beyond change

- i. Simple: Good theory is easily digestible- focuses on critical elements of case, not every fact. When someone asks you what your case is about, you need

to be able to explain the issue and why you win in two-three sentences. If you can't do this, it is too complicated. Judges have a very short attention span. [In court appearance, need to be able to say this quickly or you risk being cut off. Same thing in written presentations. Why your client should win not just as a legal matter but because it seems right and fair. If done very well, it tells a story that stays with your audience.

- ii. Comprehensive Takes in all the facts, even the bad ones, but still explains why your client should win as a matter of logic.
- iii. Logical and Believable, makes maximum use of undisputed facts while relying as little as possible on hotly contested facts or evidence that seems unbelievable. Appeals to common sense and instincts of target audience. Example modified from something we discussed in one of our cases last week. You've got a client who needs to prove she lived in an apartment in Harlem with her grandmother when she was a child in order to have succession rights. But her school records show that she went to elementary school way in Nassau County. Believable? What might make it believable? Special school for children with disabilities that kids from the city take buses too because of the program.
- iv. Provable: have got to be able to deliver the goods and prove what you promise. If you don't have the evidence to back up your theory need to adjust your theory.
- v. Consistent with the client's goals
- vi. Satisfies the legal elements of your claim
- vii. Rebutts the opposition's probable theory
- viii. Accepts "facts beyond change." Some things just cannot be changed.

XYZ liquor store—2 groups for liquor store- one group for prosecutor

### **III. How do you develop theory of a case?**

You have got to know your client's goals-- avoid premature diagnosis of what client needs.

And then you've got to know the elements of the claim or defense you are asserting. Then you connect the story to the disputed elements.

Start with a chart of your legal inquiry/elements: unemployment compensation

If employment terminated, not for cause.

Employee fired for being repeatedly late for work: what is a potential theory?

Employee was fired despite the fact that she had repeatedly told her employer that she would prefer not to take the promotion she was recently given. The promotion

requires her to work at a different store, located 10 miles further from her home and not accessible by public transportation. These logistical obstacles are also inconsistent with the employee's responsibilities to care for her aging mother.

Explains her inability to get to work on time, presented in most sympathetic light, and explains why she should be eligible for benefits.

- What question will court/jury be asked at the end?
  - Make a chart: of each element and the factual propositions that support it.
  - Take your elements and think of the facts that support each.
  - Client does not come to you with the facts pre-organized by element. You have to ask the questions and have the conversations that uncover those facts. Very different from rest of law school where the facts are preexisting.

What do I mean by elements?

Unlawful sale of liquor

Elements:

1. Knowing Sale
2. Liquor
3. Intoxicated

How would that change your inquiry? What additional facts would you have asked?

Helpful

Not Helpful

Develop the story

- **Chronology:** Focus on chronological relationship of facts to each other. Note if there are inconsistencies or questions remaining.
- **Weave this into a Story with a Theme:** Not just a chronology but a story that makes sense of the events
- **Story:** you're stuck with how to come up with a story. Anyone ever do student journalism? How do you write a lede?
  - Who, Who-cast of characters (need to know who the client is, what's their story)

- When-timeline
- What – plot of story
- Where – Setting
- Why – Moral of Story

- **Theme**

- How to develop a theme? Connect your story to a familiar story or sense that the decision-maker already has.
- Ways to develop a theme
  - i. Appeal to sense of justice
  - ii. What's the trouble, what should have happened but didn't, aberration
  - iii. What are your three best facts?
  - iv. Any patterns, things that recur?
  - v. Stock stories, book calls it schema. Basically from greek myths to the bible to Shakespeare to reality tv, there are about 10 standard plots.
    - what's a stock story that your hypo tenant client could use? This is a country about redemption, about second chances. Nephew is the prodigal son. We love them. Young man had gone astray, is now on the straight and narrow with support from his mother and aunt. The script writes itself.
- Ask yourself will the theme hold up throughout litigation or trial. Think about: How will your audience (judge/jury/ALJ) construct its story from the facts?
- Strategy: Formulate a number of factual propositions, each of which seems reasonable. Gather as much information as you can before you settle on one.

**IV. Theory of the case must be evolving.**

- a. Like a scientific hypothesis: it is based on an initial set of factual assumptions, then tests it against new data to assess its validity and revise it if necessary. Unlike a hypothesis, you are not neutral in testing whether the data support it. You are an advocate trying to persuade the decision-maker that your theory makes sense and should win. Continuing legal research in light of continuing factual development. Select the theory of your case from among several possibilities, develops it based on preliminary facts, routinely revisits it to assess how well it fits the facts and law as they are evolving. It is revised as needed.

**VI. WHAT DO YOU DO WITH THE THEORY ONCE YOU HAVE IT?**

Guides everything.

We are going to test this all out by doing an exercise based on the facts you reviewed for the exercise you did for today.

**Mr. Alvarez's case.**

Your client, Mr. Alvarez, seeks unemployment insurance. He is a 55-year-old Salvadoran immigrant who worked for a janitorial service and was fired for missing work for a week without permission. His employer attempted to reach him by phone daily during his absence and never received a return phone call. When he appeared for work the following week, he was fired. Mr. Alvarez had worked for the company for seven years, has no history of absenteeism or any other problems, and explains that he had to be away to attend his father's funeral in El Salvador. The claims examiner has found that the absence constitutes misconduct and the client has appealed. The client says he had permission to leave, though his English is difficult to understand.

Brainstorm together:

What possible theories do these facts suggest?

What are the facts beyond change?

What are the bad facts or inconsistencies?

What are the client's goals?

What does the law require you to prove or defend against? What does the law require your opponent to prove or defend against? Anyone know? (*In order to obtain ui, cannot be fired for cause. Cause includes violating established policy of the employer.*)

Who is the decision-maker that will be our target audience?

What facts are likely to appeal or not appeal to them?

What aspects of the facts might appeal to unstated bias on the part of the decision-maker or anyone else involved?

What is the opposition's likely theory of the case?

What interests are motivating the opposition?

With all that in mind, break up into 4 groups. Take 10 minutes to come up with a theory of the case, taking into account the characteristics of a good theory that we talked about. At the end, one of you is going to be a reporter and write your theory out

**Now let's look at these theories. For each:**

Does this theory appeal to the emotions of the target audience? How does it do so?

Does this theory appeal to the common and probably life experience of the target audience?  
How does it do so or not?

Does it connect with the law so that, if accepted, your client gets his benefits?

Is the theory consistent with the “facts beyond change.”

Does the theory explain factual inconsistencies or gaps?

Is the theory sufficiently responsive to the probably theory of the opposing side?

What additional facts might you seek out about Mr. Alvarez’s larger life context to make sure this theory will be effective?

One possible theory- A conscientious employee with limited language skills reasonably believed that he had permission to be absent from work for one week to attend his father’s funeral. He therefore did not intentionally violate the employer’s rules and is entitled to unemployment benefits.

**PICK ONE THEORY. IF THIS IS OUR THEORY, WHAT OTHER FACTS ARE WE GOING TO GATHER?**

- limited English
- communicates only in Spanish in other spheres of his life
- not required to use English on the job
- he told employer he had to go to the funeral, thought that was enough
- Did not understand formal leave request was required under employer’s rules
- Sole contact info that the employer had was Mr. Alvarez’s cellphone.
- Did not have cellphone access while in El Salvador
- Has never gotten along well with supervisor

**REVISING THE THEORY.**

We’ve picked this theory and discover new fact (one that is generally favorable but inconsistent)

Discover that Mr. Alvarez’s father died a year before he took time off from work and that he actually went to El Salvador to close out his father’s estate. Since his father’s death, he has asked for permission to leave on several occasions but his supervisor said no. Fellow employee told him he could leave under the Family and Medical Leave Act.

How would you modify your case theory based on this new information? Can it be revised to accommodate this fact? Or do you need a wholly new theory now? What happens if you don't modify the theory? How might the ALJ respond? (*simple question: when did your father die?*)

How might context influence outcome? Are there ways in which the ALJ might give undue weight to certain facts due to a lack of understanding or unconscious bias? If so, does case theory explain the context and provide a counterweight to the potential bias?