

Representation in Mediation

Day 2

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CHARACTERISTICS OF AN EFFECTIVE THEORY/

Why your client should win as a matter of logic & law

- Simple: Tells a simple story that is easy to understand; Focuses on critical elements of case, not every fact.
- Comprehensive: Takes in all the facts, even the bad ones you cannot change., but still explains.
- Logical and Believable: Appeals to common sense and instincts of target audience , makes maximum use of undisputed facts little on contested or facts that seem unbelievable.
- 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.
- Consistent with the client's goals
- Satisfies the legal elements of your claim
- Rebuts the opposition's probable theory
- Accepts "facts beyond change." Some things just cannot be changed.

Theory of the Case/Telling a Story

- Law is made up of stories that are constructed by lawyers, clients, and decision makers...by viewing the law through a narrative lens, we discover not only “how law is found, but how it is made.”

- Carolyn Grose, *Storytelling Across the Curriculum* (2010)

Start with a chart of your legal inquiry/elements:

- Example: unemployment compensation
- Eligible for compensation if employment terminated, not for good cause.
- Employee fired for being repeatedly late for work: what is a potential theory?

Potential Theory

- Employee was fired even though 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.

Representing XYZ Liquor Store- Understanding and Developing the Facts

- Prosecution for “the knowing sale of liquor to an intoxicated person.”
- Allegation: Last week, late in the evening near closing time, Billy, the employee on duty, sold a bottle of liquor to John who was visibly intoxicated at the time. The police report states that the police officers were stationed outside the store and saw John stumbling as he walked into the store. They reported that when they saw him come out of the store he was carrying a bag with a bottle of rum inside.

Legal Theory

- “the **knowing sale** of liquor to an intoxicated person.”
- “the knowing sale of **liquor** to an intoxicated person.”
- “the **knowing sale** of liquor to **an intoxicated person.**”

Elements of a Story

- Setting
- Characters
- Motive/purpose of characters
- Acts: What happened? What did characters do or refrain from doing?
- Agency: Who or what makes things happen in a story?
- Themes
- Storyteller: Can sometimes become a character in a story?

Client Scenario

- 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 (so ineligible for unemployment insurance) and the client has appealed. The client says he had permission to leave, though his English is difficult to understand.

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.

Learn new information

- You 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. A fellow employee told him he could leave under the Family and Medical Leave Act.