

Handout 7

Developing a Theory of the Case

Directions: A theory of a case is a clear outline of what a party hopes to prove in court, complete with the themes around which the case will revolve, the facts that will make up their argument, the evidence to support the facts, and the strategy that will lead others to the conclusion they want. The theory of the case is an argument about rhetoric, not the law; if you are going to persuade a decision maker you need to create a story and the theory is the overarching theme that makes your case more persuasive.

In developing the theory of a case, it is important to thoroughly understand the facts of the case and the underlying law before choosing a particular strategy. As Michael Tigar, a famous trial attorney, notes, "Advocacy skills are indispensable to success, but are worthless without thorough and thoughtful preparation of facts and law." When lawyers develop their understanding of the facts, they cannot merely rely on their clients' statements; instead, they must also do independent research to get a full picture of the facts presented. At the same time, the client's emotions and interests are key. Why does he/she feel that he/she was wronged? The human side of the case is essential in telling a winning story.

Because the vast majority of cases settle before trial, the bulk of a lawyer's work occurs in this preparation stage. Armed with a full understanding of the facts and the law, the next step is to brainstorm strategies, including the strategies and narratives your opponent will likely use (in order to develop counter narratives), and to select the best among them. Throughout the development of this strategy, keep in mind that the point of litigation is to tell a coherent narrative about justice. Every stage of the trial must be organized around the central theme of the case, and calculated to convince the decisionmaker that your client's version of the facts is more plausible than the opponent's version.

In developing your narrative, it is also important to remember that losing the judge or jury's trust can have disastrous results. Going into litigation, you should always know your case's strengths and emphasize them. But to deny your case's weaknesses (for example, by arguing that your client was not at a certain location at a certain time when there is clear video evidence to the contrary) will likely lead the decisionmaker, whether that's the judge or the jury, to distrust you and be skeptical about the remainder of the arguments presented.

In addition to knowing all the facts pertaining to a case, a theory of a case includes the following elements. Keep in mind that this is not necessarily the order in which you'll present your case, just the parts you should include.

Note that in this case, the trial will be about the plaintiffs' requested declaration that the County's policy is unconstitutional, and request for a court-ordered change to the policy, rather than about damages. For that reason, the decisionmaker is a judge, not a jury.

Theory of the Case Worksheet Responses

A. Key Facts. *What facts do you want to emphasize in making your argument? What facts are beyond dispute?*

B. Evidence. *What are the key pieces of evidence you will use? What part of your argument will the evidence support? How will you use this evidence to convince the judge that your client's version of the facts is the more plausible version?*

C. Motive. *Why did the plaintiff/defendant act in the way they did? What explains their actions?*

D. Law. *What laws are at issue? What do you think should be the proper legal outcome of the case?*

E. Emotions. *To what kinds of emotions can your case appeal? Has an injustice been committed? Has the plaintiff/defendant been mistreated? What kind of fear, sadness, or anger is this case likely to rouse?*

F. Weaknesses. *What are the weaknesses in your case? Where will you have the most trouble convincing the judge/jury that your interpretation of the facts is correct? How, if at all, do you plan to address these weaknesses? In certain circumstances, it may undermine your case to not admit the weaknesses to the judge or jury.*

G. Opponent's Case. *What is your opponent going to argue? What key facts will their argument hinge upon and how will they use the evidence? How will you counter their argument?*

H. Short Summary. *Who did what to whom and why did they do it? What was the result? What are the legal and moral reasons this requires a verdict in your favor? What is your single most important item of evidence, and your best response to the other side's case?*