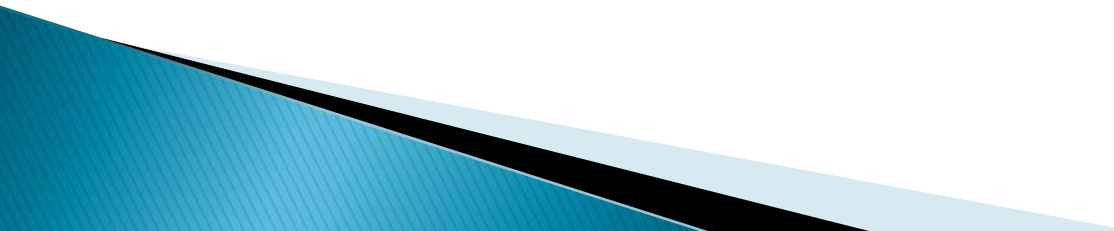


# THEORY & THEME

# WHY HAVE A CASE THEORY?

## ▶ YOUR CASE THEORY CONTROLS

- Your discovery & trial preparation
  - Jury selection
  - What is said in your opening statement
  - What is asked on direct and cross examination
  - What is 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

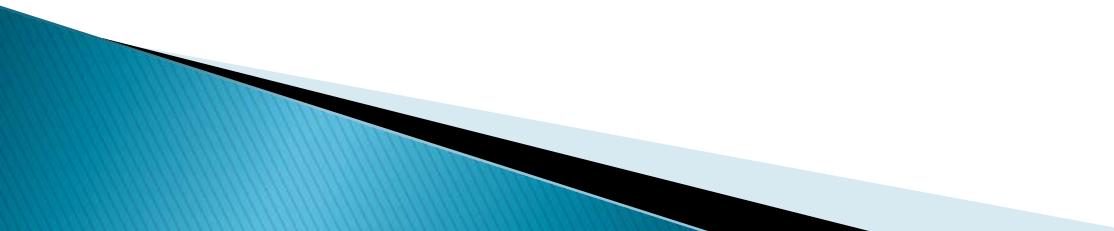
# WHAT IS A CASE THEORY?

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

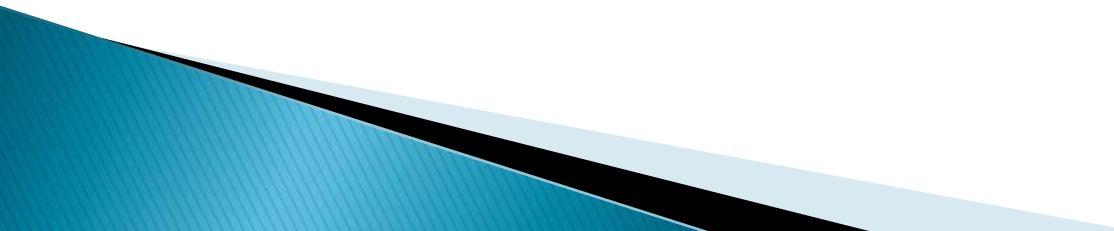
# LEGAL THEORY

- ▶ 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 VILLAIN IN THE CASE



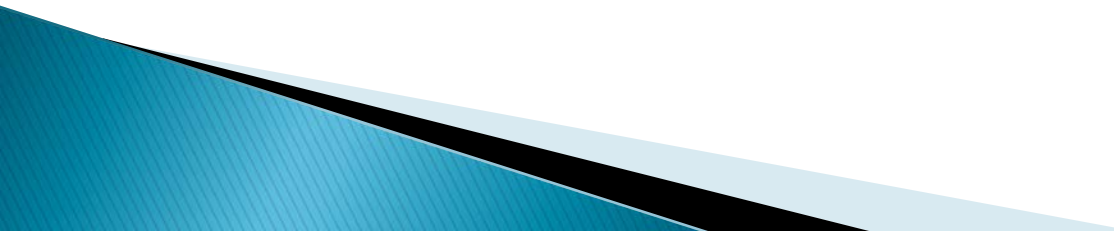
# THE GRANDMOTHER TEST

- ▶ **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 . . . .”

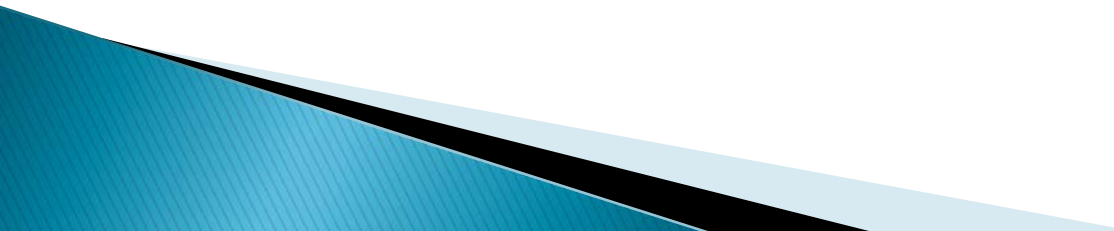
# THE GRANDMOTHER TEST

- ▶ YOUR GRANDMOTHER, AFTER HEARING THE PARAGRAPH, WILL SAY “YOU SHOULD WIN”

# TEN COMMANDMENTS OF A GOOD CASE THEORY

1. SHORT
  2. SIMPLE
  3. SATISFY LEGAL REQUIREMENTS
  4. CONSISTENT WITH FACTS
  5. EMOTIONALLY APPEALING—PLACE MORAL  
BLAME AND APPEAL TO COMMON VALUES
- 

# TEN COMMANDMENTS

6. EXPLAIN MOTIVES
  7. TELL 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

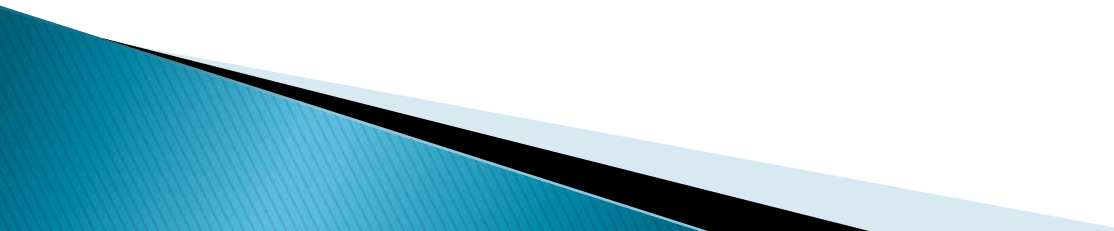
# HOW TO DO IT

- ▶ MANY METHODS. THIS IS JUST ONE MODEL
  - ▶ 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 of creativity
- Identify our (pick a number) 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 Test
- ▶ Develop a theme – a one sentence distillation of your case theory
  - Make sure your theme cannot be flipped