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. EMOTIONALLY 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