

DEVELOPING A
THEORY OF THE
CASE

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What is a theory?

A supposition or a system of ideas intended to explain something, especially one based on general principles independent of the thing to be explained: *Darwin's theory of evolution.*

An idea used to account for a situation or justify a course of action

New Oxford American Dictionary

Electronic, ver. 2.3.0

What is a theory of the case?

“A theory of the case is a cogent statement of an advocate’s position that justifies the verdict sought.”

Larry S. Pozner and Roger J. Dodd
Cross-Examination: Science and Techniques

Music theory is not the music.

“The theory is a way to describe the music and gain an understanding of how it can be performed. It explains why some combinations of notes and chords seem to work well while others do not, and gives the music student ideas for writing new songs.”

Joseph Walsh

Theories for Direct Social Work Practice

Why does theory matter?

Ideally . . .

It is the basis for all choices and action.

It reveals the most important issues / facts.

It reveals that which is necessary and unnecessary to address and why.

Theory enables one to explain phenomena and, if necessary, decision-making processes.

Why create a theory of the case?

“Lacking a theory of the case, the phases of trial are but academic exercise of the right to trial without a unifying purpose.”

Larry S. Pozner and Roger J. Dodd
Cross-Examination: Science and Techniques

- A lawyer cannot prepare for trial efficiently or effectively without developing a theory of the case.
- A theory of the case creates a path to the lawyer’s trial goal and creates a framework for unifying favorable, unfavorable, and neutral facts into a persuasive presentation.

Why create a theory of the case?

It can inspire creativity.

It explains consonance and dissonance.

It resolves conflict.

Characteristics of a “Good Theory”

It is widely accepted . . . that a “good theory” for practice should be:

- Coherent – Internally Consistent
- Useful with the practitioner’s current clients – Client and Case Specific
- Comprehensive – Accommodates all Facts Beyond Change
- Parsimonious – Uncomplicated; Can be communicated in a sentence or phrase
- Testable, and able to withstand scrutiny – Stands up to alternative theories

Adapted from:

Joseph Walsh

Theories for Direct Social Work Practice

Consistency and Confidence Matter

A lawyer's ability to be effective is due, in part, to having confidence in whatever theory he or she uses.

Caveat In my experience, confidence alone will not produce a successful result.

Takeaway Create a good theory of the case and stick to it!

When should one develop a theory of the case?

As soon as possible!

A theory of the case can be developed before all facts are known.

The theory of the case should evoke a relatable experience.

Breach of Fiduciary Duty

Theory of the Case and Dominant Emotion

A lawyer should strive to create a dominant emotion for the theory of the case.

- A theory that is relatable can set the emotional tenor for a trial.
- Establishing the emotional tenor is important because the vast majority of decisions are based on emotion, not reason.
- **Emotion becomes fact.**

When the fact finder experiences the appropriate emotional response (e.g., betrayal, anger, unfairness) he or she is making a determination that the "fact" of the emotional aspect of the case is valid.

Thus, the client's emotional response was appropriate, and the client's conduct was appropriate.

Factual Goal vs. Trial Strategy

The theory of the case presents the factual goal.

- A theory of the case is necessary to create a strategy designed to advance the theory of the case.
- An opponent with a theory but no strategy is tactically inept, often introducing evidence that is unnecessary and obscures the theory or fails to support the theory.

Factual Goal vs. Trial Strategy

The trial strategy consists of the techniques and methods used to present, develop, and promote the theory of the case.

- The opponent without a strategy tends to attack everything without considering its salience or context, and fails to present a cohesive narrative.

A theory of the case unifies every aspect of trial preparation and trial. It is the arc of the case strategy.

It determines that which is necessary and that which may be disregarded.

Developing a Theory of the Case

Developing a theory of the case is often simple.

- I defended myself.
- He sold trust property to his friend at a discount.
- The company rushed the product to market before completing safety studies.
- I was never trained to remove the component before accessing the panel.
- He stole from Peter to pay Paul.

Developing a Theory of the Case

Over time a theory can be refined and restated.

- “When Gerald was standing in the doorway to Freda’s home, unsteady on his feet, wreaking of beer, Freda knew he had come to make good on his promise to kill her. And if she were to survive, she would have to fight for her life.”
- Kenneth, Patty’s only fiscally unsuccessful child, resented his siblings’ success and felt entitled to his mother’s wealth so he stole millions from her as her health declined.

Developing a Theory of the Case

Over time a theory can be refined and restated.

- Aaron accused Sam of burglarizing his apartment because he thought she had stolen his drugs.
- Manufacturer knew its all-terrain vehicle was prone to instability and rolling over, but thought it would be cheaper to fight lawsuits than fix its product.
- “He stole from Peter to pay Paul.”

A simple, commonly used statement can be perfect.

Praxis

Practice, as distinguished from theory.

The practical application of theory.

How to Begin

Determine all *facts beyond change*.

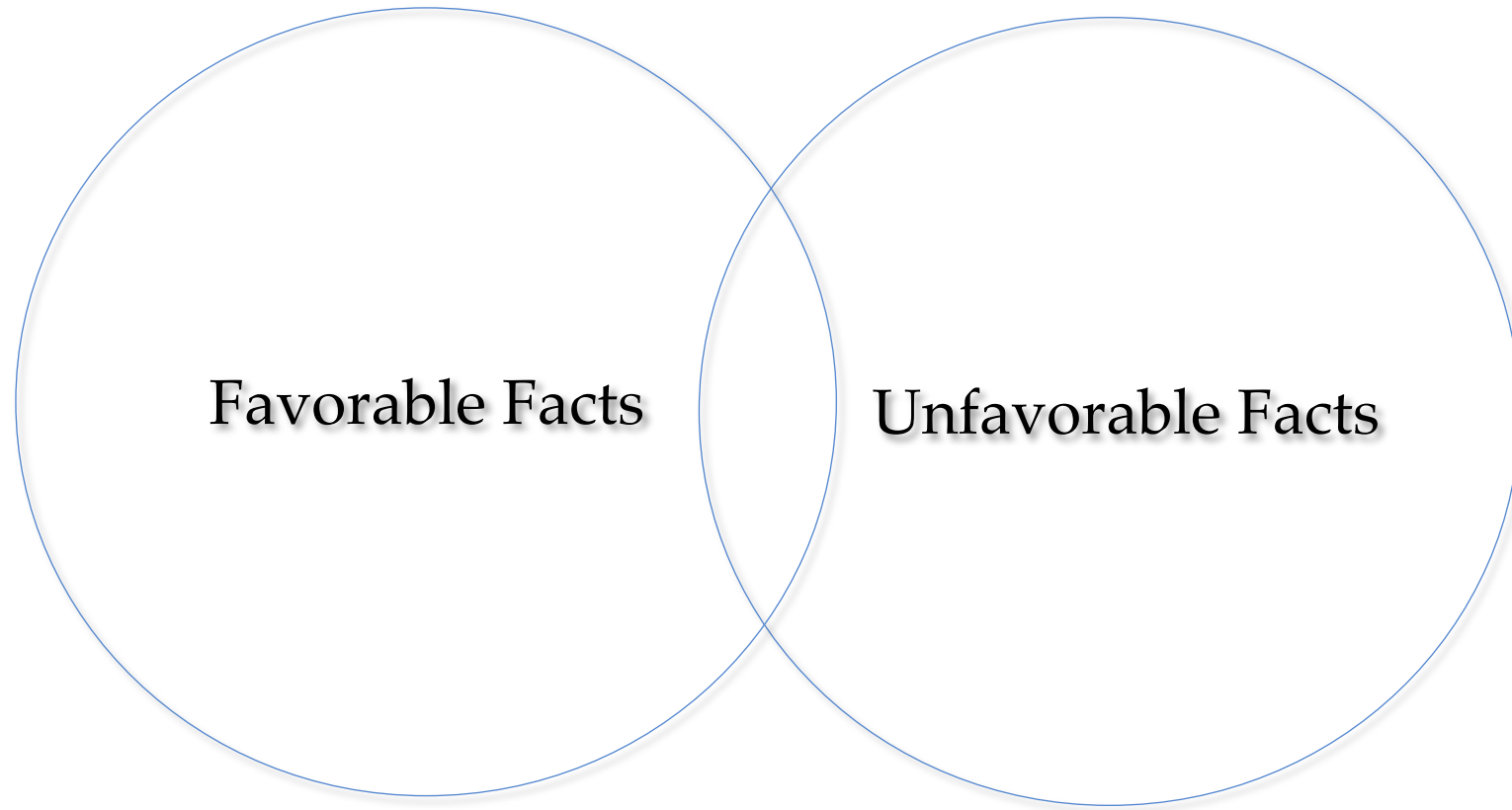
What is a fact beyond change?

A fact beyond change is a fact that will be believed to be true and relevant despite any effort to dispute it.

In other words, these are the facts about a dispute that cannot be changed.

The theory of the case must incorporate *all* facts beyond change or be neutral to them.

Facts Beyond Change



How to Begin

A successful theory of the case never contradicts a fact beyond change.

Attempting to disprove a fact beyond change is like asking someone to believe in the impossible rather than accept the known truth.

However . . . excluding evidence

Facts beyond change create limitations, so make certain that it is *impossible* to persuade a fact finder that the fact does not exist.

Example

Diagnosis of dementia in 2007

But diagnosis of cognitive impairment in 2010

Examples of Facts Beyond Change (Depending on the Circumstances)

- In contract litigation, the contract at issue
- A paper trail demonstrating the transfer of funds from the decedent's account to the client's account
- Blood analysis indicating that the decedent was not receiving her medications
- Bedsores – Elder Abuse

Incorporating Facts Beyond Change Into a Theory of the Case

Example: Homicide Case

- Coroner's report concludes there are six bullet wounds to the deceased
- All bullet wounds are contact or close contact (stippling)
- Defendant's statement to police is that the deceased attacked him, knocked him down, and was on top of him when defendant fired upward at the deceased
- Facts beyond change are consistent with a self-defense theory of the case

Remember Trayvon Martin and George Zimmerman?

Transforming Theory Into Theme

Definition of “Theme”

A theme is an idea that recurs in or pervades a narrative or work of art.

Why use a theme or several themes?

A theme can simplify the theory of the case.

Converting the theory of the case into one or more themes can refine the theory by extracting its essence and expressing it in a word or brief refrain that expresses the essential information of the theory.

Marijuana Cultivation, Transportation, and Distribution – “I don’t know.”

Transforming Theory Into Theme

Examples

- Jessica lied about Jason hitting her because she felt angry and betrayed. She found out that Jason came back from duty in Afghanistan three days earlier than he said. Instead of coming home, he spent three nights with Jessica's best friend, Marlene.

This theory of the case becomes . . .

“A woman scorned” . . . With different facts – “The jealous husband”

- Socio-cultural processes of the United States curtail liberty and justice for non-whites and create and perpetuate disregard for the value of their lives while simultaneously elevating the value of white lives.

The statement, “Black lives matter” expresses a history of systemic disparate treatment, recognizes the intrinsic value of non-whites, and demands equal treatment.

Use Every Phase of Litigation and Trial to Advance the Theory of the Case

Complaint/Petition and Answer/Response

Pre-trial Motions

- Discovery motions
- Exclude evidence; express the theory to the judge

Opening Statement and Closing Argument

- Often a theory of the case can be adapted for use as an opening line
- Use thematic phrases consistent with the theory of the case

Direct and Cross-Examination

- Every question should further the theory of the case

Present the Theory of the Case Methodically and in Easily Digestible Portions

Example: Cross-Examination

Cross-Examination Is a Critical Opportunity to Advance a Theory of the Case

The lawyer does not cross-examine because he or she has the right to do so, but because it is necessary.

The lawyer cross-examines to advance his or her theory of the case.

Cross-examination is an excellent opportunity to establish facts that assist in supporting the theory of the case.

Deciding to Cross-Examine

Can the lawyer ask the witness any question that furthers the lawyer's theory of the case?

If "yes," cross-examine the witness.

If "no," do not cross-examine the witness.

Three Rules of Cross-Examination

1. Leading Questions Only
2. Ask one new fact per question
3. Questions must follow logical progression to each specific goal

Leading Questions Only

Leading = Answer

Answer = Fact

Example – Breaking Down the Issue

How do you feel about drinking alcohol?

Do you like to drink alcohol?

You like to drink alcohol?

You drink alcohol?

You like it?

Always break down the issue to its simplest statements.

Enemy Words

Explain, Who, What, When, Where, Why, How

One New Fact Per Question

Benefits

- Easily digested and understood
- Control
- Prevent objection
- Create certainty
- Easier impeachment

Example

You threw a ball?

The ball was red?

You threw a red ball to Sue?

Time = Importance

The measure of importance is time.

The importance of a fact and the time spent questioning about a fact must be proportional.

Do not waste time establishing an unimportant fact.

Green Light, Red Light Exercise

Use time to indicate to the fact finder the importance of the fact.

Framework for Analyzing Evidentiary Issues

Determine whether you want the evidence admitted.

When analyzing evidence, ask yourself these questions:

1. Is the evidence relevant?
2. Does due process require admitting or excluding the evidence?
3. Is there a foundation for the evidence?
4. Does the Hearsay Rule apply?
5. Does the Confrontation Clause apply?
6. Is the evidence subject to a privilege or limitation?
7. Does Evidence Code section 352 apply?

Remember: There are *multiple types of evidence* (e.g., direct, circumstantial, physical, demonstrative, testimonial, jury views, opinions, writings, recordings).

Theory of the Case

Invest as much time as necessary developing a sound theory of the case because it will be the foundation and framework upon which your advocacy is constructed.