

Creating a Persuasive Theory of the Case

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What is a theory of the case?

A short articulation in **story form** of why the jury should do what you tell them to do that is consistent with the **facts**, your **legal defense**, and the dominant **emotion** of your case.

What is a theory of the case? Part One

The facts

- Brainstorming after discovery and investigation. List whole universe of facts. Storyboarding, timelines can be helpful.
- Non-judgmental recitation of the facts is the key.
- Must identify facts beyond change and address them in your theory.

What is a theory of the case? Part One

The facts

- Must identify **facts beyond change** and address them in your theory.
- Definition: A fact that the jury will believe to be true no matter what we (us, the state, the judge) do or say.

What is a theory of the case? Part One

The facts

- Must identify **facts beyond change** and address them in your theory.
- The theory must accommodate these facts.
- These facts can create, limit, and/or extinguish a potential theory of the case

What is a theory of the case?

Part One: The facts

Who is the witness?



"WE COULDN'T SAVE HIM, BUT WE FOUND
OUT WHAT MADE HIM TICK."

What is a theory of the case? Part one:

The facts

Judgmental facts

- Stephanie was a battered woman.

Non-judgmental facts

- Pictures taken after her arrest showed 47 separate bruises and lacerations.
- She was tied up for three hours.
- 66 pictures show the marks boyfriend left on her.
- That night he kept saying tonight was the end.

What is a theory of the case? Part one:

The facts

Judgmental facts

- Stephanie failed to leave battering boyfriend at any time during their ten year relationship.

Non-judgmental facts

- Stephanie moved out once but boyfriend found her at a shelter, convinced her to return, and put a GPS tracker on her car so he knew where she was.
- He said he would take the baby if she left him.
- He told her there would be consequences if she left again.

What is a theory of the case? Part one:

The facts

Judgmental facts

- Stephanie did not immediately report shooting to police or anyone.

Non-judgmental facts

- Stephanie was shocked and could not believe what she did.
- Stephanie wanted to make sure her baby was safe before she called the police since she expected to be arrested.
- Stephanie did not tell Tony's family because she did not believe what had happened.
- Stephanie tried to clean the mess but it was futile.

What is a theory of the case? Part Two

**The legal defense
There are only six.**

What is a theory of the case? Part Two

The legal defense

There are only six.

1. It did not happen or It was not a homicide.

(suicide, natural causes)

What is a theory of the case? Part Two

The legal defense

There are only six.

- 2. It happened, but I didn't do it.
(alibi, mistaken ID, set up)**

What is a theory of the case? Part Two

The legal defense

There are only six.

**3. It happened, I did it, but it
wasn't a crime.**

(self-defense, accident)

What is a theory of the case? Part Two

The legal defense

There are only six.

- 4. It happened, I did it, it was a crime, but it wasn't this crime.
(lesser included offenses)**

What is a theory of the case? Part Two

The legal defense

There are only six.

5. It happened, I did it, it was the crime charged, but I'm not responsible.

(not guilty by reason of mental disease/defect/insanity)

What is a theory of the case? Part Two

The legal defense

There are only six.

**6. It happened, I did it, it was
the crime charged, I am
responsible, so what?**

(Jury nullification)

What is a theory of the case? Part Two

The legal defense

- 1. Did not happen/not a crime (suicide/natural causes);**
- 2. It happened but I didn't do it (mistaken ID, alibi, set up);**
- 3. It happened, I did it, but it wasn't a crime (self-defense, accident);**
- 4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);**
- 5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity);**
- 6. It happened, I did it, it was the crime charged, I am responsible, so what? (nullification).**

After facts + legal theory

Write headlines about your case.

Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected.

After facts + legal theory

Write headlines about your case.

- Woman who survived years of violence ends life of abuser after she was tied up for hours and suffered 47 bruises and whip marks.
- Woman tried to leave, but he found her, became more controlling, and things got worse.

What is a theory of the case? Part Three

Emotional component

- The facts and legal defense alone rarely persuade juror to side with defense.
- It is the emotional component of the theory that brings life, viability and believability to the facts and the law.
- Generated from two sources: archetypes and themes.

What is a theory of the case? Part Three

Emotional component

- Archetypes: basic, fundamental corollaries of life which transcend age, ethnicity, gender and sex.
- In battered woman case, woman as avenger/vigilante. She finally rises up and wins!

What is a theory of the case? Part Three

Emotional component

Themes are a word, phrase or simple sentence that captures the controlling or **dominant emotion** of the theory of defense.

What is a theory of the case? Part Three

Emotional component

Themes = word, phrase or simple sentence capturing **dominant emotion** of the theory of defense.

(OJ: If it does not fit, you must...)

What is a theory of the case? Part Three

Emotional component

Themes can be found in music lyrics, quotations.

“If you tell the truth, you don’t have to remember anything.”

“Hell hath no fury like....”

In the self-defense, battered woman’s case, “It was either him or her.” “Necessary, no other choice.” “Lost my best friend.”

Creating the theory of defense paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the theory of defense paragraph.

Creating the theory of defense paragraph

Theory of Defense Paragraph Template

1. Open with a theme;
2. Introduce protagonist/antagonist;
3. Introduce antagonist/protagonist;
4. Describe conflict/address bad facts;
5. Set forth desired resolution;
6. End with theme.

Creating the theory of defense paragraph

Another way to write theory of defense
paragraph:

- Identify the best and worst fact(s) in your case
- Start with a headline – it can help you begin
- Draft a few short persuasive sentences in story form
- Don't forget the emotion
- Deploy your vocabulary (or use a thesaurus)

Creating the theory of defense paragraph

Theory of Defense Paragraph Template

1. That night it was either his life or hers.
2. The last hours Tony Turner was alive he punched, choked, whipped, tied up, and threatened to kill Stephanie Johnson. 66 photos of her bruised body document the marks of his fury.
3. Ms. Johnson is accused of causing his death without an excuse. Immediately after she shot him she could not believe what she did but knew she had to make sure her baby was safe.
4. But she had every right to protect herself and her child from certain death.
5. She loved him, he was her best friend. But she is safe now. And she is sad about that.

Why is theory of defense important?

- The theory of the defense is your “rudder” that will guide each decision during trial.
- The theory will make trial preparation much easier.
- The essence of the theory will be delivered through each witness.

Why is theory of defense important?

- The theory will dictate everything.
- Whether to object,
- How to select the jury,
- what to include in the opening,
- how to handle each witness on cross,
- what witnesses are necessary to call in the defense case, and
- how to deliver the closing argument.

