



# A Comparative Look at the Common Law and Civil Law Legal Systems

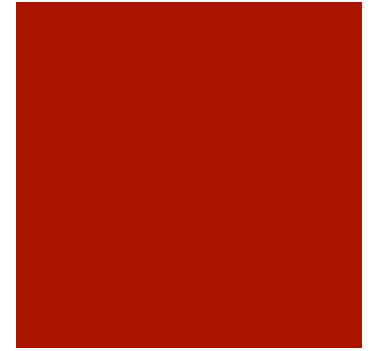
PROFESSOR DELAINE R. SWENSON

# COMMON LAW VS CIVIL LAW



- WHAT ARE THE PRIMARY DIFFERENCES BASED ON YOUR EXPERIENCE?
- ARE THEY REALLY THAT DIFFERENT? ARE THE DIFFERENCES FUNDAMENTAL OR JUST COSMETIC?
- IS ONE “BETTER” THAN THE OTHER ONE?
- IS THERE A DIFFERENCE IN THE SKILLS AND ABILITIES OF A LEGAL PROFESSIONAL SCHOOLED IN THE CIVIL LAW SYSTEM VS. ONE SCHOOLED IN THE COMMON LAW SYSTEM?

# Topics we will cover...



- The thinking and practice behind the common law approach.
- A comparison and application of the Adversarial vs. Inquisitorial Trial systems.
- Civil Law legal education vs. Common law legal education methods.
- The Role of Legal Professionals in the two systems
- The Future of both systems



# THE USE OF PRECEDENT IN THE UNITED STATES

# SOURCE OF LAW

- **Written sources are primary:**
  - **United States Constitution**
  - **50 State Constitutions**
  - **United States Code (24,757 pages)**
  - **Code of Federal Regulations**
  - **State Codes and Regulations**
  - **County Ordinances and Regulations**
  - **Municipal Ordinances and Regulations**



# SOURCE OF LAW 2

- **Precedential Decisions are used as a method of interpreting the written law and applying it to real cases. NOT as a substitution for written law.**
- **First place a lawyer goes is to the code. Understanding and application of the code to the particular facts of a case requires the use of precedent.**



# *STARE DECISIS*

- Anglo-American Doctrine – “Let the Decision Stand”.
- Judges should look to past decisions for guidance and answers questions of law consistent with precedent.
- One of the main methods of Legal Reasoning – Reasoning by Analogy.
- The body of law that is developed from court decisions in a stare decisis system is called “common law”.

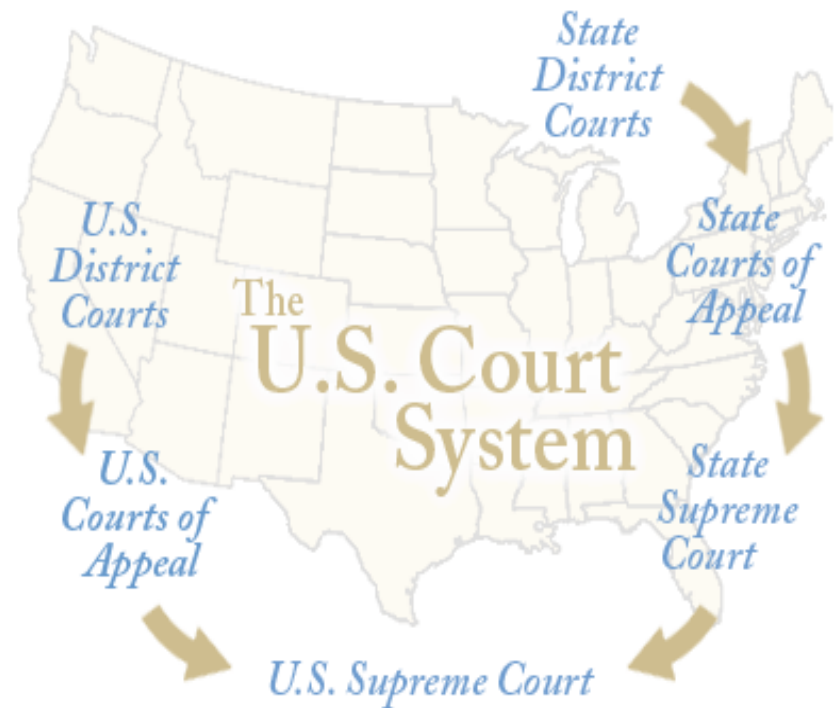


# BINDING PRECEDENT



Precedent that must be followed:

- Jurisdictional Limits
- Hierarchical Limits.
- Published Opinions
- Factual and Legal Questions Distinction



# BINDING PRECEDENT



Given a determination as to the governing jurisdiction, a court is "bound" to follow a precedent of that jurisdiction only if it is directly in point. In the strongest sense, "directly in point" means that: (1) the question resolved in the precedent case is the same as the question to be resolved in the pending case, (2) resolution of that question was necessary to the disposition of the precedent case; (3) the significant facts of the precedent case are also present in the pending case, and (4) no additional facts appear in the pending case that might be treated as significant

# USING PRECEDENT

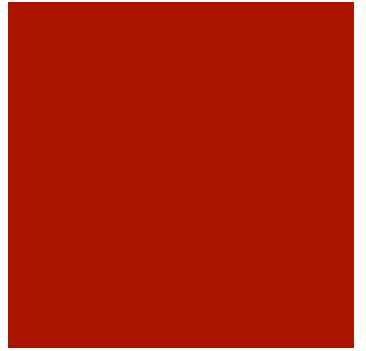
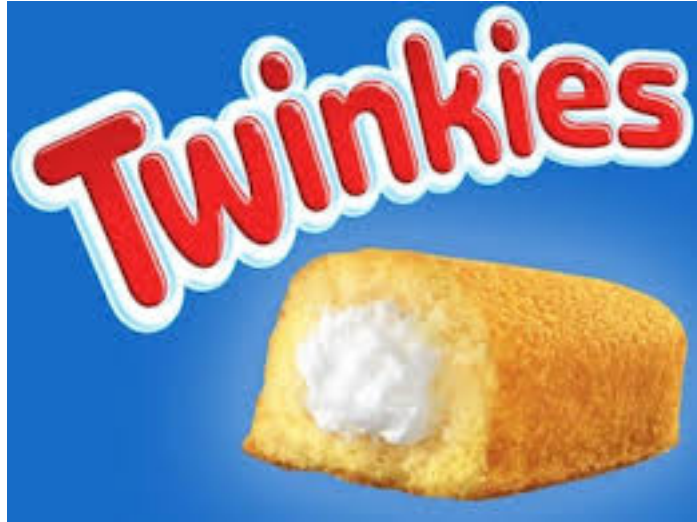


- Previous cases are either analogous to yours or distinguishable from yours.
  - Factual Analysis – Similar, Distinguishable?
  - Legal Questions Analysis: Similar, Distinguishable?
- Example: Is an aircraft a motor vehicle? Is it like a car? Or a Boat?
- SMS Messages: like mail? like e-mail? Like a phone call?

# PERSUASIVE PRECEDENT

Precedent that the court does not have to follow, but can if it is persuaded by the other court's reasoning.

- Often happens in cases of “first impression”.
- Applies to courts who are of “equal status”, for example – different state supreme courts.
  - Example: Battered Spouses Syndrome, The Twinkie Defense
- Also applies in the context of international sources of law.



# SUPER PRECEDENT



A political term used to describe a precedent that should not be ever overturned or one that should enjoy some special protection.

- NOT legally recognized by any court!

- Proponents of Abortion Rights have attempted to apply this to Roe v. Wade.

# OVERTURNING PRECEDENT



- Happens usually where historical, cultural or philosophical changes to society influence previous interpretations of precedent.
- Two Examples:
  - **Brown v. Board of Education (1954) versus Plessy v. Ferguson (1896).** Race Based Discrimination.
  - **Bowers v. Hardwick (1986) versus Lawrence v. Texas (2003).** Homosexual Sodomy.

# ADVANTAGES OF STARE DECISIS



- **Makes the law predictable.**
- **Stabilizes the law.**
- **Promotes the expectation that the law is just and fair.**
- **Promotes efficiency in the legal system.**
- **Controls excess by individual members of the Judiciary.**

# CRITICISM OF STARE DECISIS



- Focus on the past is not as good as focus on the present or the future.
- Courts can manipulate facts and law to match the precedent they want to match.
- System of finding and reporting precedents is time consuming and expensive. (Modern Technology is changing this.)
- Courts are too powerful.

# STARE DECISIS AND CONSTITUTIONAL LAW



- Text of US Constitution beginning point. 1787 and 27 Amendments. (Not a “modern” document)
- Court decisions interpreting the document and amendments are the body of common law that defines constitutional law in the US.
- US Supreme Court Decisions on the US Constitution are binding precedent on all US Courts.
- Supreme Court develops “tests” that it applies to determine if a constitutional right has been violated.

# MILLER OBSCENITY TEST



- What is the difference between pornography and obscenity? One is protected speech, the other is not.
- The Miller test was developed in the 1973 case *Miller v. California*. [1] It has three parts:
- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest,
- Whether the work depicts/describes, in a patently offensive way, sexual conduct,
- Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
- The work is considered obscene only if all three conditions are satisfied.

# STARE DECISIS AND TORT LAW



- One area of the law that is very much based on common law interpretation and application.
- Negligence: duty of care; breach of the duty ( reasonable person standard); causation (legal and factual); damages.
- Example: Common Law Tort: Intentional Infliction of Severe Emotional Distress.

# STARE DECISIS AND CRIMINAL LAW AND PROCEDURE



- **Substantive Crimes – historically developed as a part of the common law:**
  - **Example: Burglary.**
    - **Breaking**
    - **and entering**
    - **a dwelling house**
    - **at night**
    - **with intent to commit a crime therein**

# STARE DECISIS AND CRIMINAL LAW AND PROCEDURE



- **Substantive Crimes – modern application – crimes are codified.**
- **Certain criminal law concepts are both codified and part of the common law depending on the jurisdiction.**
  - **Example: Ambiguities in the law will be construed in the defendant's favor.**
- **Criminal Procedure (like civil procedure) now codified, but since Constitutional rights are involved, is greatly reliant on constitutional common law.**
  - **Example: Search and Seizure – reasonable expectation of privacy.**

# IMPACT OF STARE DECISIS



- **Development of Model Codes and Restatements of the Law.**
- **Analytical skills, case analysis and practical applications are emphasized in legal education and practice.**
- **Judges role is enhanced in the legal community and society at large.**
- **Legislature w/executive retains ultimate control as they can overturn precedent by changing the law.**
- **Reduced role for academics in comparison to civil law systems.**

# FUTURE OF STARE DECISIS

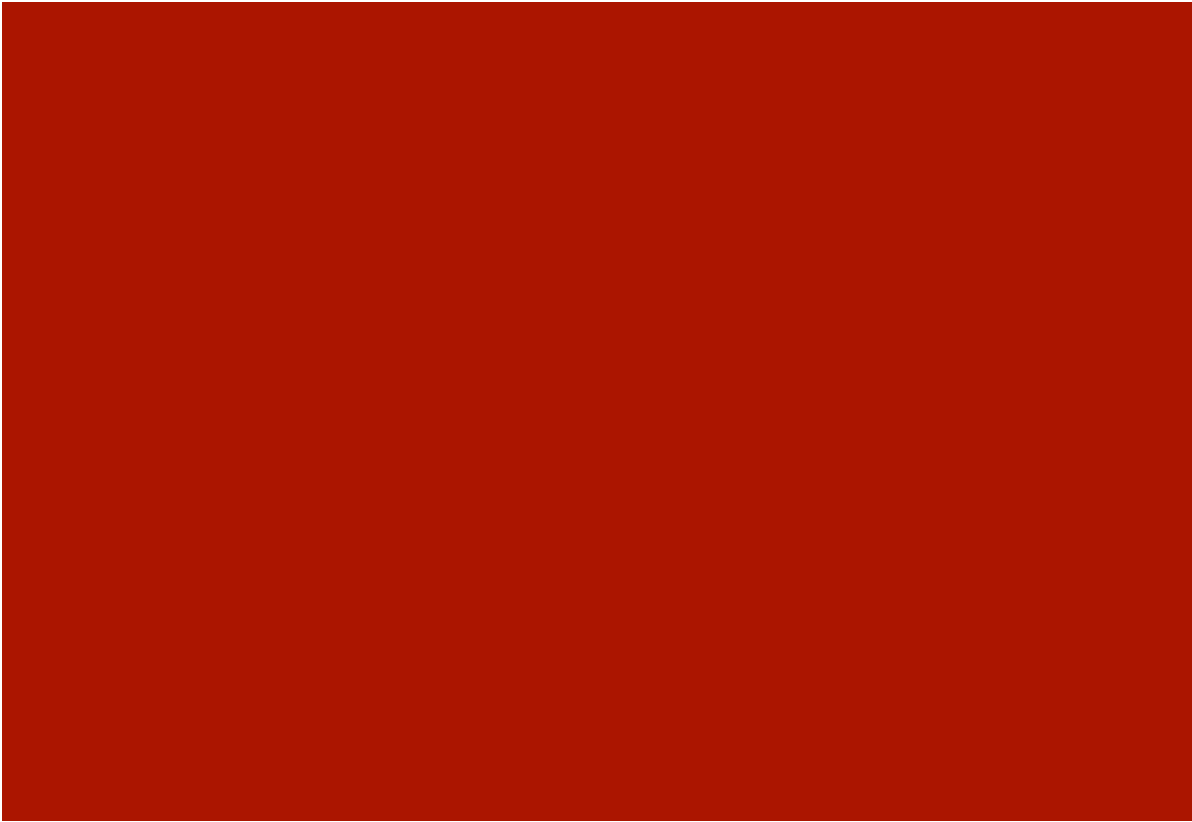


- Trend is toward codification – politicians never met a law they didn't like.
- Some areas will always be primarily defined by stare decisis. Ex: constitutional law.
- Stare Decisis is here to stay – laws will always need interpretation and application to real facts in real cases.

# Is there Precedence in Poland?

- European Court of Human Rights
- European Court of Justice
- Polish Domestic Courts





# Legal Reasoning

‘how to think like a lawyer’

# IRAC - Building Block of Legal Analysis

- Issue
- Rule
- Analysis
- Conclusion



# IRAC - ISSUE

The facts of a case suggest an Issue.

What are the legal problems the client wants/needs solved?

Many cases have more than one issue.

# IRAC - RULE

The Issue is covered by a Rule of law.

What legal authority applies to this case?

Remember to consider all relevant sources of law.

# IRAC - Analysis

Compare the facts to the rule to form the analysis.

How does the legal authority apply to the unique facts of your client's case?

The essence of a lawyer's job.

# IRAC - Conclusion

From the analysis you come to a Conclusion as to whether the rule applies to the facts.

What is the proper outcome for your client's case? What advice will you give your client?

Reach a conclusion based on the analysis.

Take a stand.

# State v Dressarge

- July 10 Mr. Dressarge was drinking with some friends of his to celebrate his birthday. After getting drunk, Mr. Dressarge got on his riding lawnmower and was riding it down his driveway when he was stopped by a police officer who was driving by.
- Mr. Dressarge's blood alcohol level was .19 per ml.

# State v Dressarge

- It is unlawful for anyone to operate a motor vehicle on a public roadway with a blood alcohol in excess of .08 per ml.



# State v Dressarge

- What Issues do we have in this case?
  - Is a lawn mower a motor vehicle?
  - Is a driveway a public roadway?

## Legal Authority: Motor Vehicle

- Smith Case: a motor vehicle is “any vehicle that is meant to move goods or individuals”.
- Jones case: “any vehicle that moves under its own power”

# State v Dressarge

Legal Authority: Public Roadway

- Jones Case: “any road designed for use by the public”
- Benson Case: “a road generally available to the public”

# State v Dressarge

ANALYSIS:

- IS THIS A MOTOR VEHICLE?
- IS THIS A PUBLIC ROADWAY?

CONCLUSION:

- WHAT ADVICE TO YOU GIVE TO MR. DRESSARGE?

# GERMAN LEGAL ANALYSIS METHOD

- Step 1: Analysis of the facts of a problem in order to determine and identify claim relationships between different parties;
- Step 2: Identification of a legal rule as the hypothetical basis of a specific claim;
- Step 3: Identification of the preconditions for the application of such a legal rule and examination that these preconditions have been fulfilled, that is that the claim has been established;
- Step 4: Verification that the original claim is still with the claimant;
- Step 5: Examination of the enforceability of the claim.



# A Comparative Look at the Common Law and Civil Law Legal Systems

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# TRIAL SYSTEMS

- The purpose of any system of trial is to find the truth.
- Truth in criminal cases: did the defendant commit the crime and should they be punished?
- Two trial systems have developed historically to find the truth.
- Inquisitorial System.
- Adversarial System.



# INQUISITORIAL SYSTEM



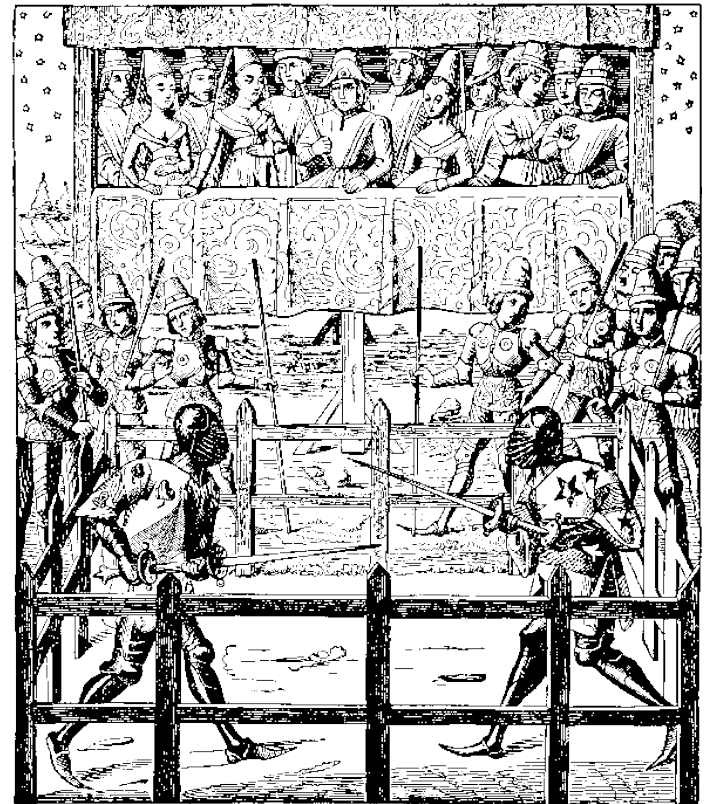
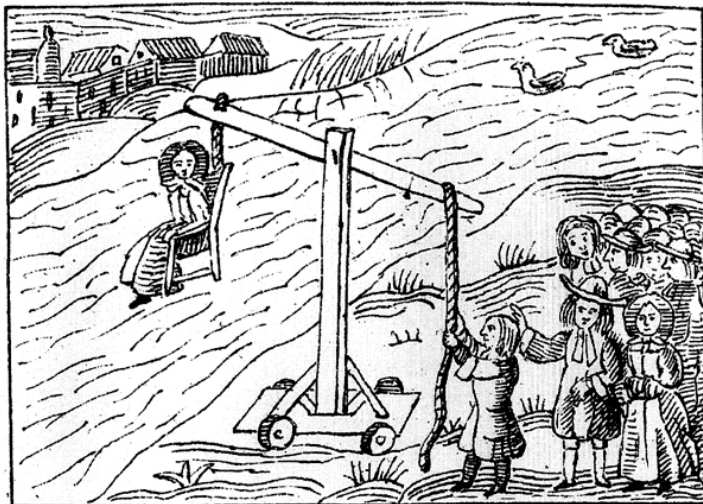
- Developed from the Inquisitions of the Christian church in a search for heresies.
- Central feature is on the Inquisitor – the questioner – who has the burden to ask the questions and develop the evidence.
- Weak role for attorneys.
- Common in civil law countries.

# ADVERSARIAL SYSTEM

- Developed under the common law (British) system.
- Certain elements found in many countries.
- Historical examples include:

Trial by Ordeal

Trial by Battle

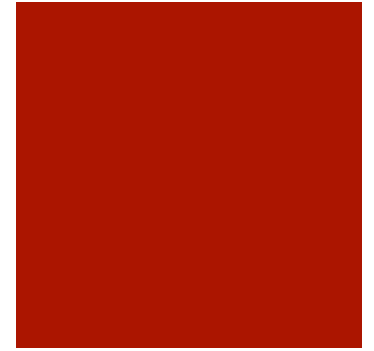


# ADVERSARIAL SYSTEM

- Like a football match. The only way to find out who is best is to play the game. Inquisitorial system – game never actually played.
- Idea: If two equal sides are each motivated to prove the truth as they see it, then this competitive process will produce the evidence necessary to find the truth.
- Places the burden on the parties to develop the evidence or risk losing.
- Presumes even teams between the two sides. Resources must also be roughly even.

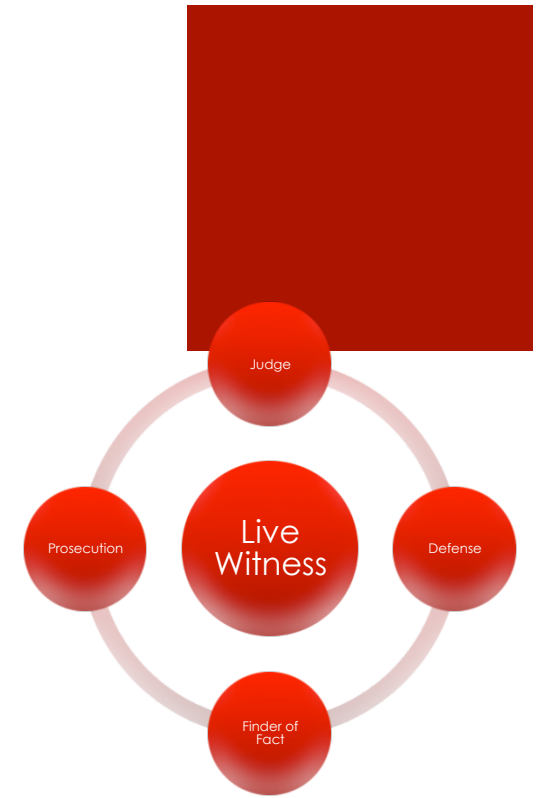


# ADVERSARIAL SYSTEM



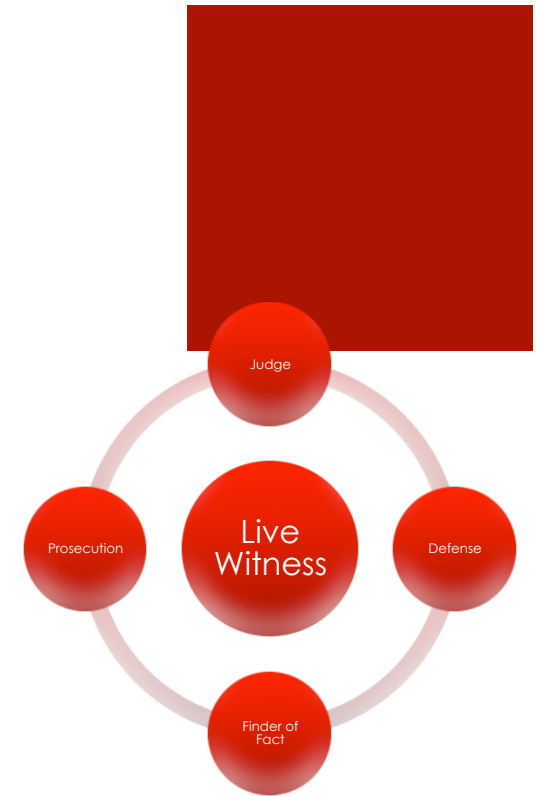
# ROLE OF THE PARTIES: PROSECUTION

- Represents the interests of the State.
- Carries the burden of proof – meaning the prosecution must provide sufficient evidence so that the accused is found guilty beyond a reasonable doubt.
- Duty to act aggressively to prove their case.
- Also carries a duty to see that Justice is done. A duty to act fair in the proceedings.



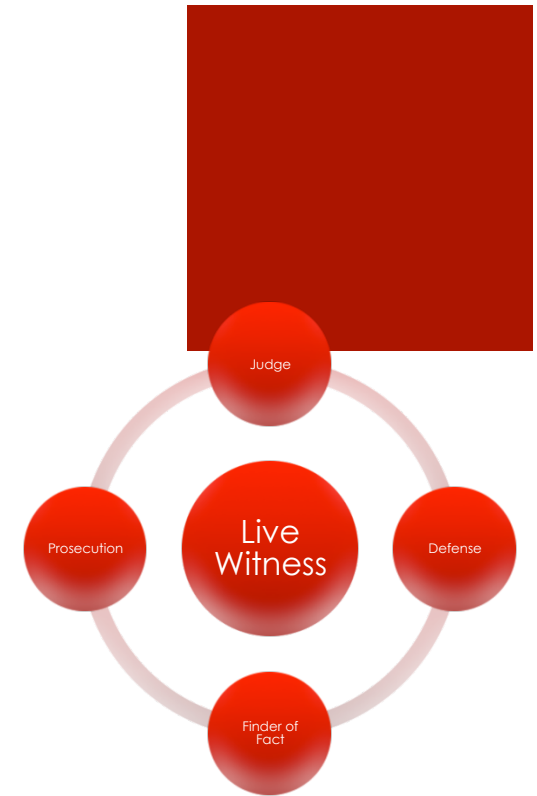
# ROLE OF THE PARTIES: DEFENSE

- Represents the interests of the Defendant (accused).
- Duty to act aggressively to protect the interests of the defendant. Makes sure the Prosecutor and Judge are doing their jobs.
- No duty to “Justice” or the “Truth”, but has ethical obligation as an officer of the court.
- No burden of proof – except in affirmative defense situations.



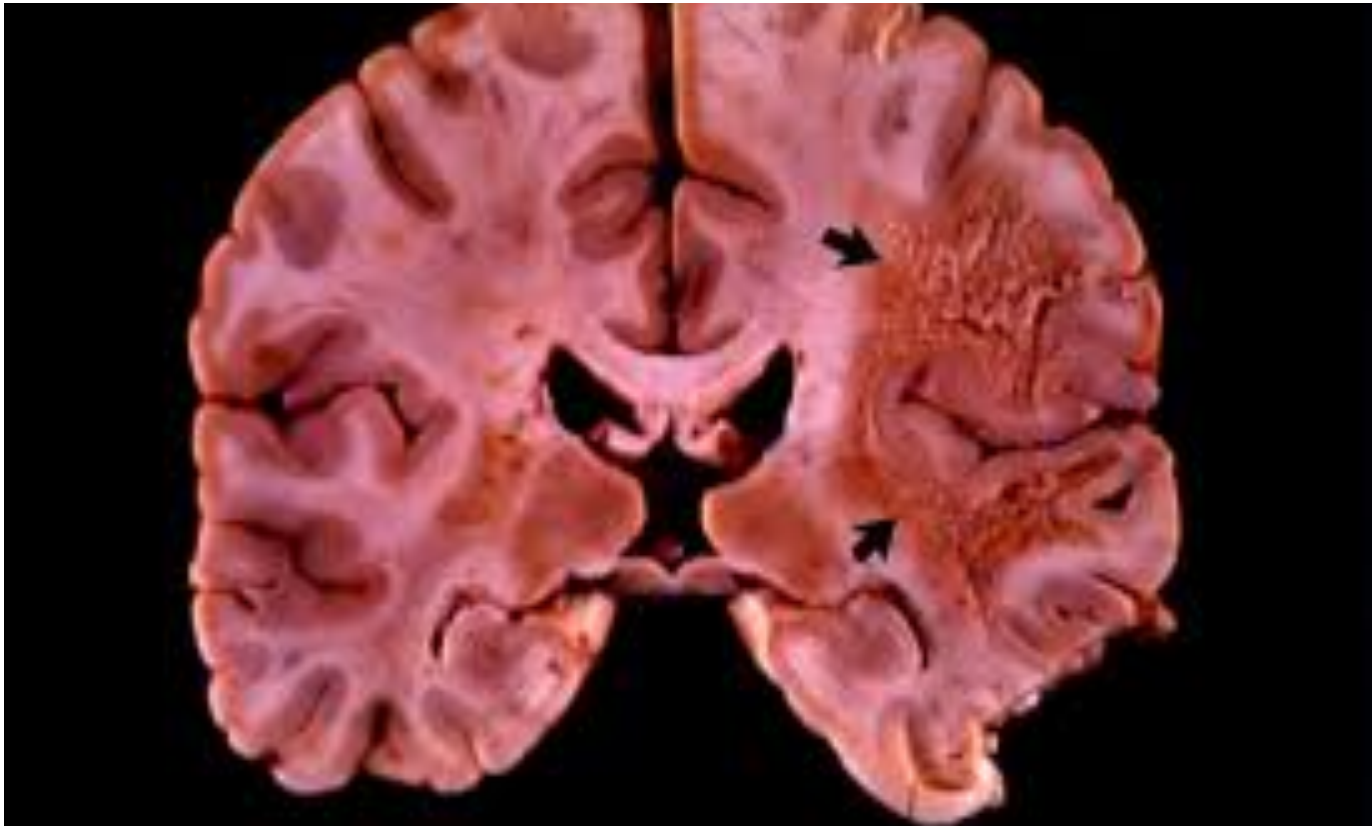
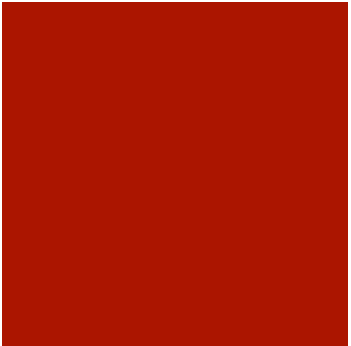
# ROLE OF THE PARTIES: THE JUDGE

- Must be impartial and fair to both sides.
- Keeps control of the process by making sure both sides are following the rules.
- Decides all Legal questions: What rules apply to the process and what evidence will be admitted. What law will be applied.
- Ensures basic fairness and Justice in the process.



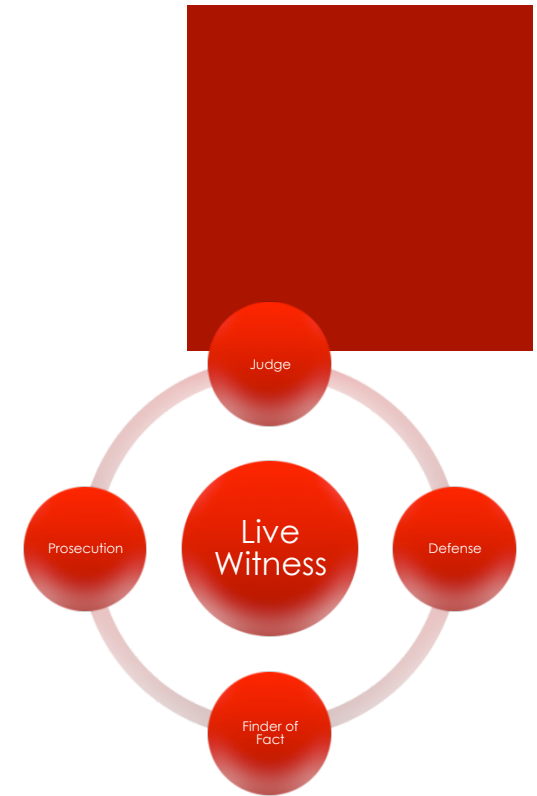






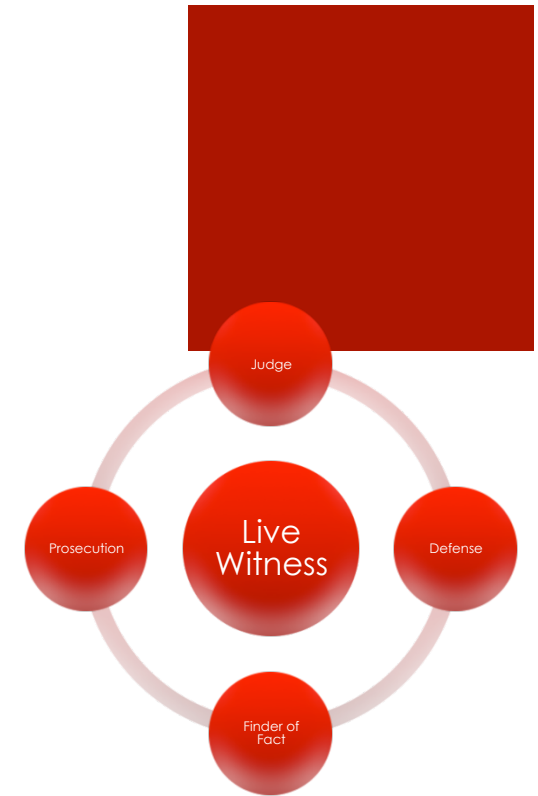
# ROLE OF THE PARTIES: THE FINDER OF FACT

- Can be Judge, Panel of Judges or Jury.
- Must be neutral and objective.
- Decides all Factual questions.
- Finds the truth by listening and then evaluating all the evidence and arguments presented by the parties.



# ROLE OF THE PARTIES: THE LIVE WITNESS

- Role of the live witness central to the Adversarial trial system.
- Finder of fact can most effectively evaluate the evidence by a face to face confrontation of that evidence.
- Should we believe this witness?: Lying? Mistaken? Hard to challenge a piece of paper.
- Constitutional requirement of confrontation. No secret witnesses.



# ADVERSARIAL OR INQUISITORIAL?



- Which system is better at arriving at the truth?
- Both have strengths and weaknesses.
- Clear International trend in favor of a more adversarial system, but both systems are adopting elements of the other.
- More fun to be a lawyer in the adversarial system, but also more work and responsibility.

# JURY TRIALS



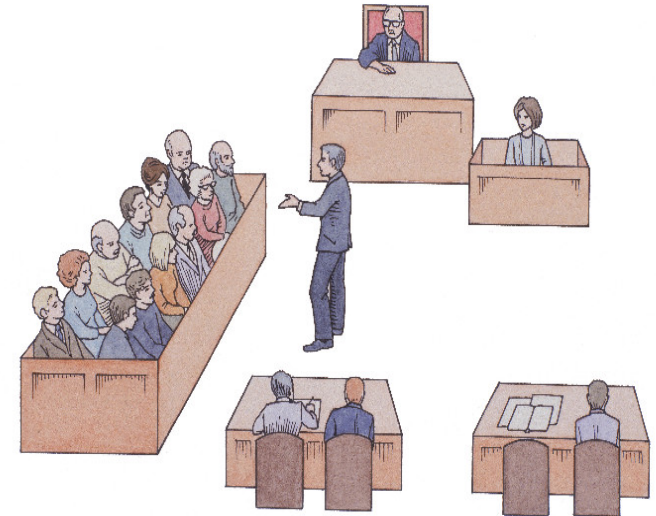
# ORDER OF A US JURY TRIAL

- Pre-Trial Motions and Hearings.
- Jury Selection
- Opening Statements
- Prosecution Case: Direct and Cross Examination of Prosecution Witnesses.
- Defense Case: Direct and Cross Examination of Defense Witnesses.
- Jury Instructions
- Closing Arguments
- Jury Deliberations and Verdict



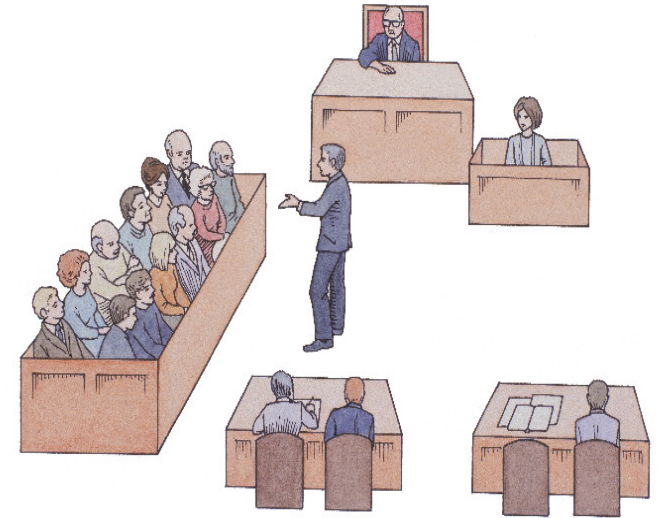
# JURY TRIALS

- Historical Basis for Juries.
- Why Juries?
- Judges are people too, and they work for the government.
- Ultimate loss of freedom requires approval of citizens in a democracy. A democratic check on Government excess – Jury Nullification.
- Jury never sees illegal evidence.
- 12 opinions on credibility have to be better than just one.
- Qualifications for serving on a jury.



# JURY TRIALS

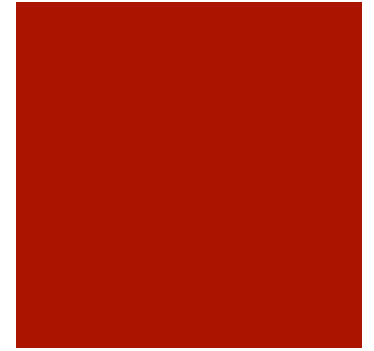
- Jury Selection:
- Motor-Voter Lists
- Summons to Jury Duty – Fill our Juror Questionnaire
- Prospective Jurors seated. Voir Dire Begins.
- Excuse for Cause; Pre-Emptory Challenges.
- Final 12 plus alternatives are jury for the case.
- Jury Selection – Art or Science?



# PROSPECTIVE JURORS

1. NUN
2. ART STUDENT
3. PHILOSOPHY PROFESSOR
4. HOUSEWIFE
5. RETIRED ARMY OFFICER
6. LAW STUDENT
7. CONSTRUCTION WORKER
8. POLISH MALE
9. UKRAINIAN TEACHER
10. LOLA





**DEVELOPING A THEORY OF THE CASE AND THE  
OPENING STATEMENT**

# THEORY OF THE CASE



- An Adversarial battle not only between two sides, but between two opposing ideas.
- Essential Elements of a Theory of the Case:
  - What Happened?
  - Why did it Happen?
- Must be opposing theories.
- A Good Theory of the Case ...
  - Should be simple and easy to understand and communicate.
  - Should be logical.
  - Should meet all legal requirements.
  - Should be consistent with real life.

# DEVELOPMENT AND ANALYSIS OF EVIDENCE



- **Goal: Present Evidence that the judge/jury finds believable. (Credible) Evidence that supports your theory of the case.**
- **Analyze all the facts of the case: Which help me? Which hurt me (help the other side)? Which are neutral?**
- **How can I turn negative evidence into positive or at least neutral?**
- **How can I turn neutral evidence into positive?**

# DEVELOPMENT AND ANALYSIS OF EVIDENCE



- How do we make evidence credible?
- Supported by other evidence.
- We believe the person who delivers the evidence.
- Evidence is consistent with the whole story.
- Evidence is consistent with common sense and normal experience and understanding.
- Lawyer believes the evidence.

# OPENING STATEMENTS



- **Purpose: To Introduce and communicate your theory of the case and to tell the story of what happened from your perspective.**
- **Remember:**
  - **Emphasis on theory of the case**
  - **Tell a story – usually in chronological order**
  - **Keep it short**
  - **Use Visual Aids and Exhibits**
  - **Do not overstate the evidence**
  - **Do not argue**

# OPENING STATEMENTS



- **Sample Outline:**
  - **Introduction: Lawyer, Client and the Case. Theory of the case and the witnesses you will call.**
  - **Set the Scene: describe the scene where the crime or the incident occurred.**
  - **State the issue that this under contention.**
  - **Tell your story of what happened.**
  - **Basis of guilt/non-guilt.**
  - **Request**

# How do we present evidence?

- Witness Testimony through the method of examination (questioning) of the parties.
- **DIRECT EXAMINATION:** Questions you ask of a witness you have called.
- **CROSS EXAMINATION:** Questions you ask of a witness for the other side.



# Direct examination purpose

- Introduce Evidence that supports your theory of the case: both disputed and undisputed.
- Make your witness believable:
  - (1) Who are they?
  - (2) Why are they here?
  - (2) Why should I believe them?
- Introduce your Exhibits – non testimony evidence.



# Direct examination techniques

- Start with Witness Introduction
- Organize Logically – Usually means chronologically
- Set the Scene – Is the location important?
- Re-create the Action through the questions. Keep the witness focused.
- Use Non-Leading Questions
- Use Exhibits and Visual Aids
- Never ask a question you don't know the answer to!!



# Cross examination purpose

- Bring out favorable evidence that supports your theory of the case.
- Attack witness or their testimony as not being important or credible – a process called impeachment.
- Favorable Evidence: Get it out first before Witness gets hostile



# Cross examination impeachment



- **Impeachment of the Witness's Testimony: Is there a reason why the substance of this testimony should not be believed?**
- **Ability to Perceive: Distance; Darkness; Glasses; Fear or Other Strong Emotion.**
- **Ability to Remember: Can witness really remember small details or are they remembering what someone has told them about the case?**

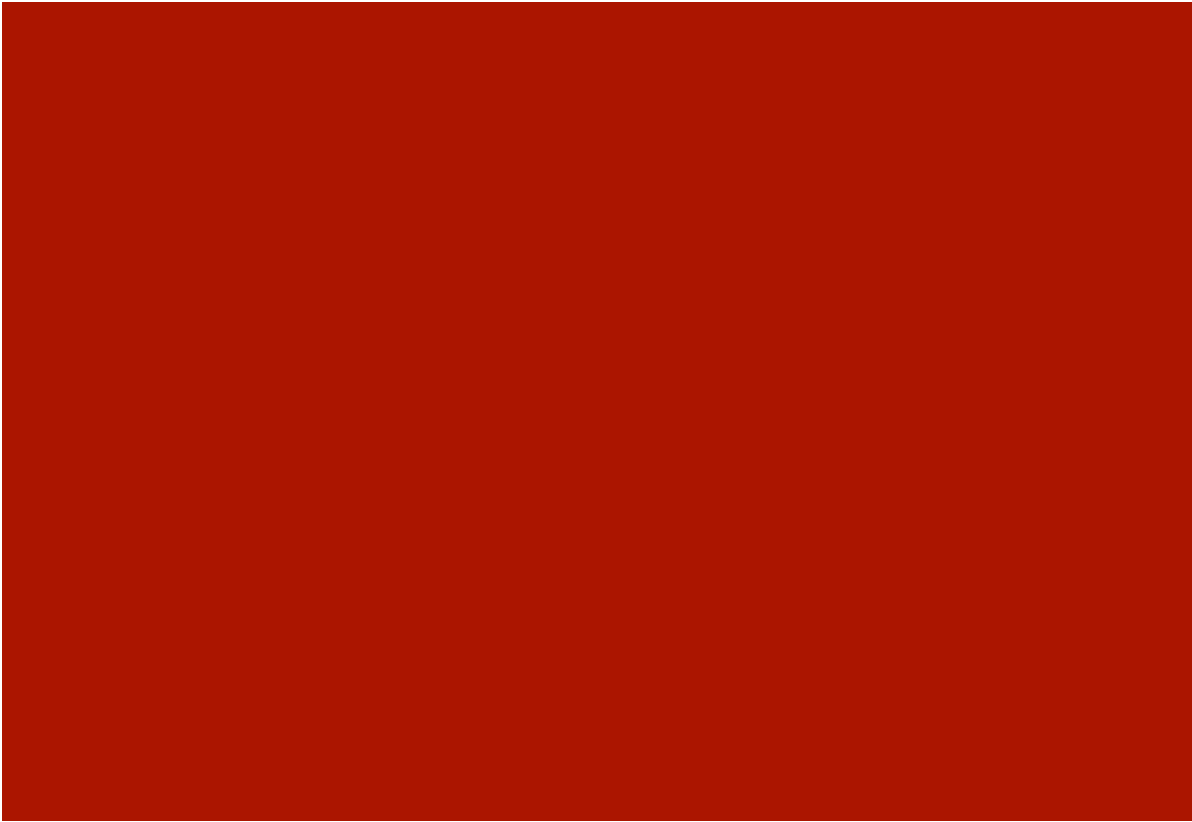
# Cross examination impeachment



- **Impeachment of the Witness Themselves: Is there a reason why this person should not be believed? Do they have a reason to lie? Have they lied in the past?**
- **Bias, Interest or Motive to Lie? Why do people lie?**
- **Prior Inconsistent Statements:**
  - Commit them to earlier statement.
  - Identify and build up earlier statement.
  - Confront with New Statement.

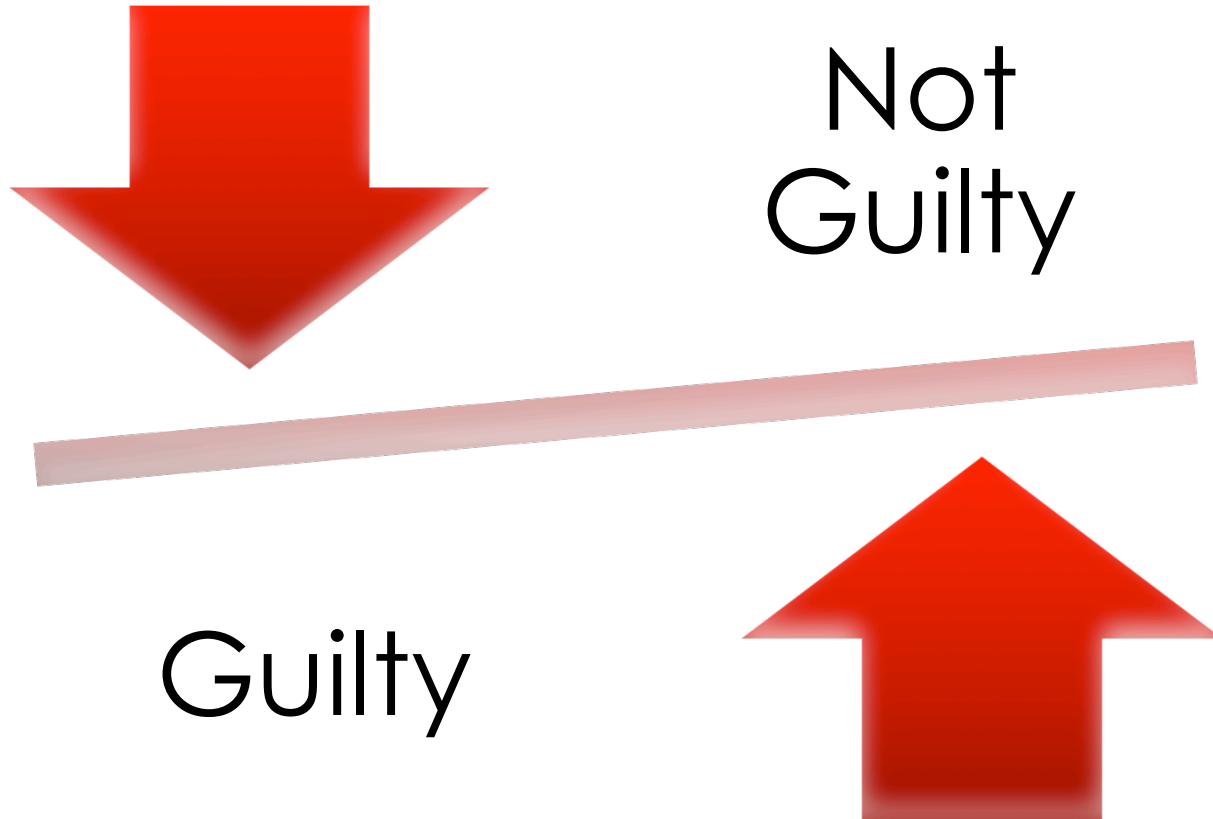
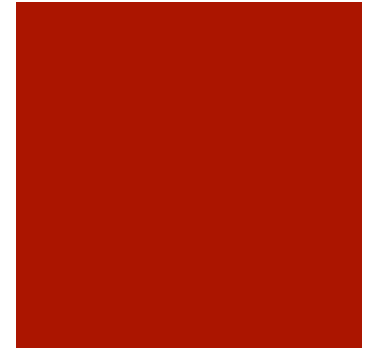
# Cross examination techniques

- **Keep Control of the Witness: (1) Short, Clear, One Answer Questions; (2) Make the Questions Leading.**
- **Do NOT repeat Direct Examination**
- **Do NOT Argue with the witness.**
- **Have a clear organizational structure with 3 or 4 major points.**
- **NEVER ask a question you don't know the answer to.**
- **Use a style that is natural to you and appropriate for the situation.**
- **Questions must advance your theory of the case. If not – shut up!**



# CLOSING ARGUMENTS

# SCALES OF JUSTICE



# CLOSING ARGUMENTS



- The highlight of the adversarial trial process.
- Not a closing STATEMENT, but a closing ARGUMENT.
- How do we argue: We interpret facts in a way that supports our theory of the case.
- Two types of evidence: Direct and Circumstantial.
- Direct Evidence: Directly proves an issue.
- Circumstantial: Can be inferred from the available evidence.

# CLOSING ARGUMENTS



- **Keep it Simple and Short – Remember Attention Spans.**
- **Use Visual Aids and Exhibits!**
- **Argue your Theory of the Case.**
- **Argue your Strengths.**
- **Deal with your Weaknesses. Explain them or make them less important.**
- **Use Analogies and Stories that relate to real life.**

# CLOSING ARGUMENTS



- **Develop a style that is appropriate to you and to the case.**
- **Use all your best effective communication skills to develop that relationship with your audience.**
- **Relate like a real person. Someone to be trusted, believed and who makes sense.**



# A Comparative Look at the Common Law and Civil Law Legal Systems

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# BECOMING A LAWYER



## UNITED STATES:

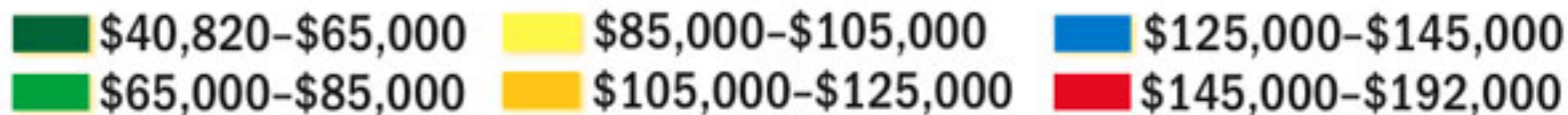
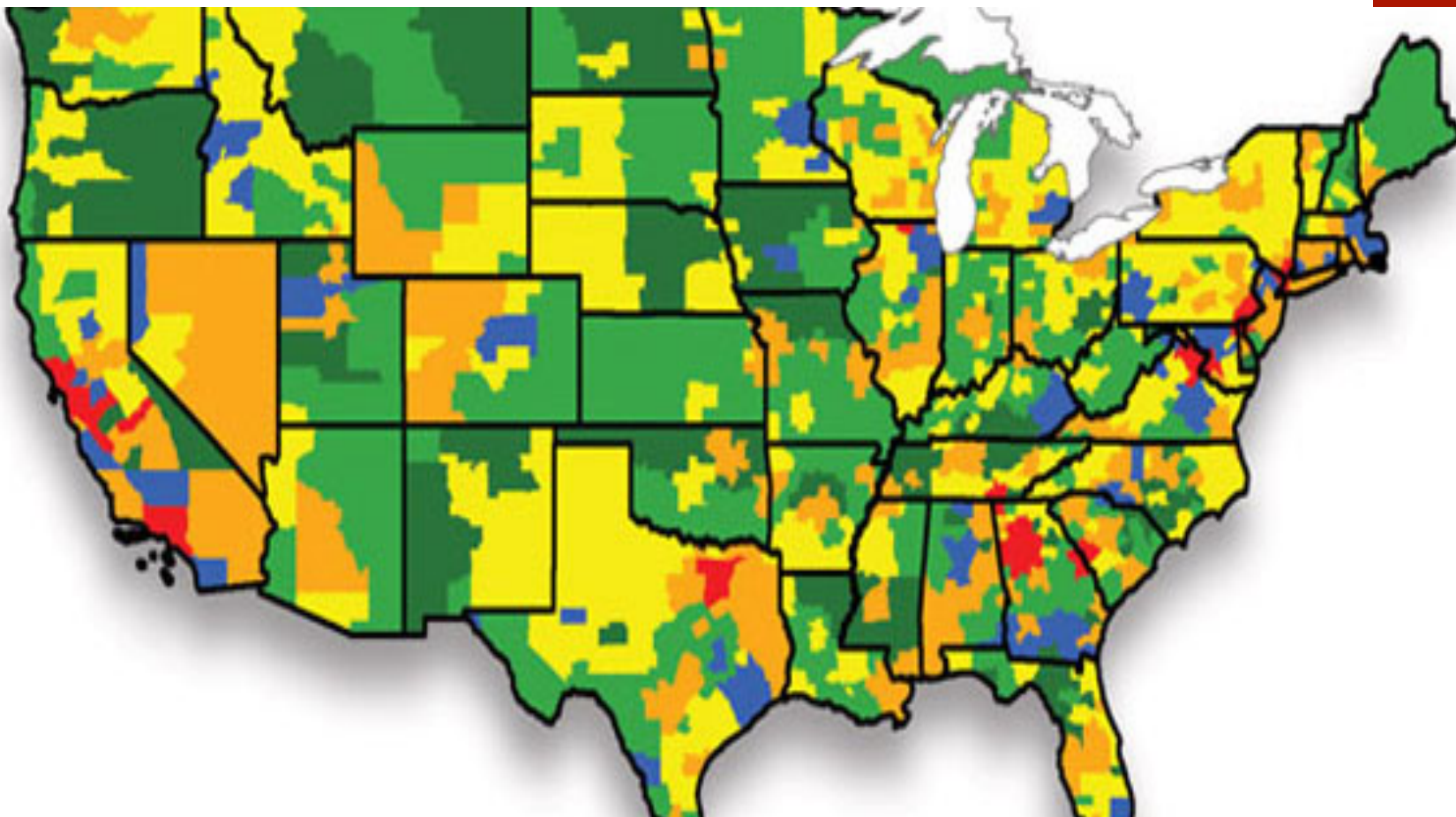
- HIGH SCHOOL GRADUATION
- UNIVERSITY UNDERGRADUATE DEGREE: BACHELOR DEGREE
- LAW SCHOOL ADMISSIONS TEST (LSAT)
- THREE YEAR FULL TIME LAW DEGREE (JURIST DOCTORATE)
- BAR EXAMINATION
- MEMBER OF THE STATE BAR – ATTORNEY, LAWYER, PROSECUTOR AND JUDGES.

# EDUCATION OF LAWYERS



- GRADUATION FROM HIGH SCHOOL
- ADMISSION TO UNDERGRADUATE PROGRAM AT A UNIVERSITY
  - BACHELOR DEGREE IN ANY SUBJECT – NOT LAW
- LSAT – LAW SCHOOL ADMISSION TEST – APPLICATION PROCESS
- LAW SCHOOL – THREE YEARS FULL TIME
  - MIXTURE OF SUBSTANTIVE AND LEGAL SKILLS CLASSES AND EXPERIENTIAL EDUCATION SUCH AS CLINICS
  - JURIS DOCTORATE (JD) DEGREE
- BAR EXAMINATION IN EACH STATE
- LAW PROFESSORS – TERMINAL DEGREE IS JURIS DOCTORATE, THERE IS NO PHD IN LAW IN THE US.

# WHAT ARE US LAWYERS PAID?



# BECOMING A JUDGE



- EXPERIENCED LAWYERS BECOME JUDGES
  
- STATE COURTS:
  - ELECTION
  - GOVERNOR'S APPOINTMENT
  - APPOINTING COMMISSION
  - RETENTION ELECTIONS
  - FIXED TERMS
  
- FEDERAL COURTS:
  - PRESIDENTIAL APPOINTMENT WITH ADVICE AND CONSENT BY THE SENATE.
  - LIFETIME APPOINTMENT – IMPEACHMENT

# FUTURE OF CIVIL AND COMMON LAW LEGAL SYSTEMS:



- A CONVERGENCE OF PRACTICE IN THE TWO SYSTEMS?
  - ADVERSARIAL VS. INQUISITORIAL
  - JUDICIAL PRECEDENCE
  - SKILLS AS AN ESSENTIAL ELEMENT OF LEGAL EDUCATION