

DEVELOPING A TRIAL THEME

Trying a lawsuit is much more than calling witnesses, offering exhibits, and letting the facts speak for themselves. Regardless of the size of the case, every trial is a human drama that involves real people with a real story. In order to make a strong presentation, one which the jury will relate to, develop a theme throughout the trial.

A theme can be the reason the Plaintiff is in the courtroom, and why they should win. It can be the main theory of your case, or relate to a value principal that the jury will identify with. Selecting a proper theme and developing it throughout the trial is crucial to the Plaintiff overcoming the defense and prevailing.

Many people will argue that good facts win lawsuits. While there is much truth in that axiom. The proper theme enables the jury to bridge the facts which you present, to the result that you desire. The theme can explain the Plaintiff's case to the jury in a way that the jury can relate to, identify with, and use as its reason for their verdict.

THE IMPORTANCE OF THE THEME

Common experience tells us all that we have long been accustomed to seeing themes in everyday life. From deciding which fast food restaurant to eat at, which car to drive, television show to watch, or vacation spot to visit. The slogan, buzz word, or theme conveyed is what first draws our attention and then convinces us. Have you ever been convinced to see a movie based on a coming attraction, read a book based on the introduction, or bought a product based on the advertisement? If so, it is easy to see how

important themes and impressions used repeatedly can be in getting our attention and then convincing us.

A theme establishes the framework for the jury to fit the case together in a concise, easy-to-understand principal. We may work on a case for years before it gets to trial. Our knowledge of the case is overwhelming as we know the facts inside and out. As we proceed to trial, the experts, discovery, and depositions are etched in our minds. At trial, however, countless pages of depositions, research and records must be consolidated into several days of trial testimony that must be presented through witnesses. The jury will hear bits and pieces of our case in a fragmented form - a manner that is foreign to them. While we may know what the witness said and the point to be made -- does the jury? What we think is important may not be to a juror. How many times have you spoken to jurors after a case and in discussing the case with them were surprised at what they felt was important. Issues that you thought were so crucial were lost by the juror's view of the big picture. Whether it is a simple car collision or a complicated medical negligence case, we have to condense the information that we have into a theme that a jury can comprehend in a short span of time. Therefore, look at the case from the juror's standpoint and select a theme that is simple, easy to understand and relates to a principal or value the jury will identify with. Complexity breeds confusion -- simplicity is the key to understanding.

Impressions that jurors feel about the case, the witnesses, and the lawyers, may be as decisive in a trial as the facts themselves. Injecting the theme in a trial makes the facts more understandable, personalizes the case, and gives the jurors the reasoning they need to make their decision. Without a theme, a jury lacks direction much like driving to a unfamiliar place without a map.

Simple trial themes could be: An injury case which costs the Plaintiff their job -- "The theme of a broken dream". A fraud case -- "A company that cares more about a dollar than the truth". A medical negligence case -- "A question of accountability and responsibility for one's acts".

In developing a theme, don't wait until trial -- develop it early. From the moment you first meet with the client, think about why the case is important and what makes the case stand out. Talk to neighbors, friends, and colleagues. Run the case by them. See what they think the theme should be.

DEVELOP THE THEME THROUGHOUT THE TRIAL

The place to begin the development of your theme at trial is when you are first in front of the jury. Voir Dire is when you have the opportunity to speak first with jurors, a time when their attention span is at a high point. Remember that jurors have been pulled away from their jobs and their homes and asked to serve as jurors in a case. This is probably their first experience in Court, somewhat like the anxiety of the first day on a new job. The first twenty or thirty minutes of the trial is an excellent opportunity for you to put the jury at ease and personalize your client and the theme in a manner they can relate to.

As you begin your Voir Dire, do so in a way that leads right to your theme. Begin by saying "We are here today to select twelve (12) of you who will hear the case of a broken dream" . . . "We are in Court to select jurors to hear the case of a company that cared more about profit than safety." Avoid the rudimentary questions that many of us may have become accustomed to that may mean little in selecting a juror. Get across to the jury the theme of your case at this first opportunity. As you begin your questioning of the

panel, ask questions that incorporate your theme. Ask if anyone on the panel has “lost an opportunity or lost a dream?” Ask if anyone “believes that one should not be accountable or responsible for one’s act?” Or “who does not believe that companies owe consumers the truth?” Legitimate questions can incorporate the principal you are trying to promote. At the end of Voir Dire the jury should have no doubt as to why the Plaintiff is in Court.

With your theme in the juror’s mind, repeat it again in opening statement (argument). The opening statement (argument) is another opportunity for you to repeat your theme. Don’t forget the age-old rule of repetition and its importance. Avoid the normal rendition of telling the jurors what an opening statement is, that what the lawyers say is not evidence, or that the opening statement is like a road map. Tell them what the case is about. Tell them why you are here in Court. In a topic statement, state “This is a case where a company cared more about making a sale than telling the truth.” “The evidence will be that, this is a case of a young man whose dream was broken because of a drunk driver.” Let them know right up front again what your theme is and what the case is about.

As you present your witnesses and cross examine the defense, weave your theme into the questions you ask. Be subtle, but repeat the theme.

CLOSING ARGUMENT

By the time you deliver your closing argument the jury should be well aware as to what the case is all about. If you first bring up your theme in closing argument, it may be too little too late to bring the point home. While some would disagree, I tend to believe that most cases are decided well before closing arguments begin. However, a well-developed

theme, reemphasized in closing argument, may give the jury the right reasoning they need to find in favor of the Plaintiff. The closing gives you the final opportunity to tie the entire case together with your trial theme.

I'm sure we all agree that jurors want to do the right thing for the right reason. They, however, like all of us, don't like to be told what to do, so be subtle. Your theme will guide the jury, but they must believe the final decision is theirs.

A well-developed theme repeated throughout the case is much like giving the jury a map. Let them do the driving. Just be sure that your theme leads them to the right destination -- a verdict for your client.

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