Choosing a Theme for Trial:
In a Courtroom, the Facts Don’t Speak for Themselves

by Lisa M. Marchese

“Oral delivery aims at persuasion and making the listener believe they are converted. Few persons are capable of being convinced; the majority allow themselves to be persuaded.”

— Johann Wolfgang von Goethe

I. Introduction
The next time you hear someone say, “good facts, not good lawyers, win cases” – you need to cover your ears. And remember that cool Latin phrase we all learned in Torts - “Res Ipsa Loquitur” (“the thing speaks for itself”)? It may sound cool to say when discussing a legal issue; however, when it comes to trying cases, no fact ever speaks for itself. No evidence ever speaks for itself. If facts and evidence speak at trial, it is only because we empower them to speak. We give our case a compelling voice that persuades a jury when we use themes to communicate. This article will discuss the importance, identification and effective use of themes at trial.

II. Importance of a Case Theme
Case themes aren’t just for plaintiffs’ lawyers who have the burden of proof. Successfully defending a case at trial also requires an effective theme. Here, I feel compelled to debunk the conventional wisdom that says if you don’t have a burden of proof, you don’t need a theme – you can simply rely upon the “octopus defense.” Like the octopus, you just shoot ink in the water, raise issues and hope that the picture gets sufficiently clouded so that the jury won’t be able to see anything at the end of the case. This approach is never the strategy of the skilled trial lawyer. Whether we have the burden of proof or not – we have a position. To the extent that we seek to convince a jury of our position, we need an effective theme.

The absence of a case theme allows your opponent to define the issues at trial. The party that controls the definition of the case also influences the discussion in the jury room. A story without a theme isn’t a story worth listening to. Thus, trying a case without a theme is like going to trial without a purpose.

Over the years, jury verdict research has shown time and time again that jurors deliberate in themes. They use themes to organize and characterize the evidence they receive during trial. They use themes to decide disputed facts and they use themes to reach decisions that are expressed as verdicts. To successfully try cases, therefore, we must communicate with the jury by using themes.

What are “trial themes”? Themes are the concepts and ideas which best capture the essence of your case. They are extrapolations of common life experiences that find resonance in the minds of jurors. A theme is a distinct and unifying idea. For example, “negligence” is not a theme – it is a legal theory. However, “safety first, not last” is a theme that enables you to prove your negligence case. Themes can also present a choice or a moral dilemma that compels us to take a position. The right theme motivates jurors to adopt our view of the case. For example, “David versus Goliath” can provide a powerful theme for the plaintiff who takes on a Fortune 500 company in a commercial dispute.

Labels and tag lines also provide us with powerful trial themes. We all remember the phrase “sour grapes” from Aesop’s Fables. In the context of a trial, that phrase can put a persuasive label on a party’s conduct and motivation. Similarly, phrases convey powerful themes. The movie Wall Street is a popular source for plaintiffs’ lawyers who sue corporations. As someone who spends a lot of time defending corporations at trial, I wish I had a dollar for every time I heard, “Ladies & Gentlemen, do you remember in the movie Wall Street when Gordon Gecko said, ‘every dream has its price’?” That statement, along with the imagery of the evil Mr. Gecko provides the plaintiff with some powerful ammunition. (I was really hoping Wall Street II would give us defense types some rebuttal fodder… but evidently, “greed” is still “good” in Hollywood). For the at-fault plaintiff in a negligence case who was texting his girlfriend at the time of the accident, why should Good Guy Company have to pay for someone else’s mistake? Tell this plaintiff to “look in a mirror.” Or, “it is hard sometimes to admit when we are wrong.” These are but a few of many examples of tag lines and phrases that contain persuasive trial themes.

The themes we use to try our cases are really no different from those we encounter in our everyday lives. The events that lead to lawsuits occur in the real world where people are motivated by love, hatred, greed, jealousy – all of the things that make for great movies, books and advertisements. The explosion of electronic communication has only heightened our exposure to themes as a means of messaging. Electronic media has also raised the bar for us as trial lawyers when it comes to using concise and effective themes when we tell our story to jurors. Our theme must be strong enough to carry and convey not just a message, but our message. Ultimately, it is the effective identification and use of our case theme at trial that persuades the jury to agree with us and to express that agreement in its verdict.

III. Identifying a Persuasive Theme
Hermen Melville once wrote that, “(t)o produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be that have
tried it.” Moby-Dick, Chapter 104. In the modern world of trial practice, we need mighty themes to persuade juries. How then do we identify our trial theme?

First, our theme must be simple and easily understood. The more complicated the case, the greater the risk that you – and your jury – will become lost in the details. Here, I am reminded of a famous Will Rogers quote, “(t)he minute you read something you can’t understand, you can be sure it was drawn up by a lawyer.” Great trial lawyers have the ability to describe any case – no matter how complex – in just a few short words. Having the ability to label your case in the minds of jurors is the mark of a successful trial lawyer. Arguably, this is the one skill that separates a litigator from a trial lawyer. Litigators see issues, trial lawyers see labels, themes and ultimately, the finish line. The litigator tries to explain the case in legal jargon. The trial lawyer, however, understands that the legal issues we think are important often are of little interest to a juror. So, to identify an effective theme you must think like your neighbor, the person in front of you in the checkout line at the grocery store or your favorite barista at Starbucks who makes your morning latte. What motivates these people? What do they care about? To answer these questions effectively, you can’t think like a lawyer.

Finding a simple case theme can appear to be a daunting task – particularly in a complex case that we have been living with for a long time. Here again, it is imperative that we shed our legalistic mindset. Thinking in legalese – something we have been trained to do since our first day in law school and something we all do instinctively as we prepare our case – is of absolutely no help in identifying a persuasive trial theme. A theme should be one that resonates with our common life experiences. It should help us embrace a position and motivate us to act. For example, when we refer to someone as “Iago” it usually isn’t a compliment. That label makes us think of a manipulative, deceitful egotist.

If we hear someone decry “a pound of flesh” we think of an onerous debt and someone’s unreasonable efforts to collect an amount well in excess of the amount actually owed. Lastly – and to balance Shakespearean comedy with tragedy – if we hear the phrase “et tu Brute?,” we think of a profound betrayal by someone we love the most. Powerful themes can evoke common imagery and beliefs in the minds of jurors.

A theme should motivate a juror to care and to act. Why is a juror going to care about this case? What is going to compel this juror to adopt our position? Does our theme enable the jury to relate to our client? In the post-Enron world, for example, many jurors view corporations with considerable contempt and distrust. This perception can be quite a challenge when it comes to representing a corporate defendant. How then do we make a jury care about the company we represent? We can waste a lot of time in a defensive posture trying to explain why we aren’t the corporate bad guys. Or, we can utilize an effective theme that enables the jury to humanize and identify with our client. After all, our corporate client is made up of people – just like jurors – who go to work every day and try to do the best job they can. Personal responsibility and accountability applies to individual plaintiffs as well as the principal managers involved who comprise the corporation. By using a theme to humanize our client, we enable the jury to identify with them. A jury that identifies with our client will care about our client. Most important, a jury that cares is a jury that will be energized to take action that, ultimately, is expressed in a favorable verdict.

There are many ways to identify an effective case theme. When I prepare for trial, I use an exercise with my trial team colleagues to zero in on our theme. I ask each team member to prepare a focused description of our case that can be no longer than 30 seconds. When everyone is ready, we sit down and go around the table and listen to each person’s “elevator speech.” Given the short time allotted, themes necessarily must be used to convey the message of our case. This deliberative process often yields different perspectives of what is and is not important in a case. It always surprises me how many different – but symmetrical labels, tag lines and metaphors a group like this can come up with. We have all lived with the case for a long time and we are all on the same page with how the case must be defended. Yet when it comes to choosing the right words to recreate the picture we all see in the mind of another – a juror – it is a different proposition entirely. Does that theme really convey our message? Is our case really captured by this analogy or that metaphor? The ensuing discussion and collaboration results in a concise theme that conveys a simple and integrated message. This exercise allows us to draw upon a diverse range of life experiences and attitudes that are essential to trial theme development.

IV. Effective Use of Themes at Trial

Ideally, we have identified our basic themes at the outset of the case and we have used discovery to refine them. We have now honed in on our case theme and we are ready to begin trial. From the moment we walk into the courtroom until the last words of our closing argument – our case theme must be our priority. Our actions, our advocacy and our choice of words all must be driven by our case theme.

As a young trial lawyer, I remember a mentor telling me that your closing argument begins when the jury panel walks into the courtroom. This valuable advice applies to trial theme development – which also begins with jury selection. Some of the best attention we ever get from jurors is during jury selection. This is our first opportunity to speak to jurors and it is their first opportunity to learn about the case. A skillful introduction of our case theme in jury selection, therefore, is imperative.

The “Donahue” or “struck method” is now the most common practice of jury

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dire, I firmly believe the best attention we get from a jury is during the first 30 seconds of our opening statement. Our most important dialogue with jurors, therefore, must occur in that first 30 seconds, for that is our best opportunity to label our case and motivate jurors to agree with us. That critical dialogue is effective only if we impart upon the jury our case theme.

Many lawyers make the mistake of developing a great theme for opening and closing, only to completely neglect that theme in the direct and cross examination of witnesses during trial. Our theme cannot sit on the sidelines. Our theme is our MVP. It doesn’t come out of the lineup after opening. It stays on the field with us throughout trial.

When we examine witnesses, we must reinforce our theme. There are many different ways to do this. One effective technique is “anchoring.” Stated simply, an anchor is a word or phrase that conveys a unified idea (e.g., a theme or sub-theme) that is repeated throughout trial. We can weave anchors into our questions of witnesses. And, witnesses can use anchors when testifying (e.g., “All I know is...”). Effective anchors reinforce certain evidence in the minds of jurors. Ultimately, they are important tools that enable the trial lawyer to control the definition of the case in the minds of jurors.

Having the knowledge to make and meet proper trial objections is a challenge in and of itself. However, developing the skill and instinct to know when objections should be made is essential to case theme development during trial. Over the years, I have had the opportunity to talk to many jurors post-verdict. One issue that comes up with frequency are questions from jurors about objections. What was the evidence that was excluded? Why did you object to those questions? My one important take-away is that jurors really don’t care much for objections. They don’t like it when evidence is excluded. When a line of questioning is objected to and sustained, jurors may speculate that the anticipated answers would have been harmful to our case.

This does not mean that objections should never be made during trial. There are plenty of important reasons to make objections. However, tactical considerations should also play a part in our decisions to make objections. If the testimony at issue is not hurting us – but is otherwise objectionable (e.g., hearsay, etc.) – why do we care? Do we object just because we can and run the risk that the jury mistakenly will suspect we are afraid of something that would weaken our case? The point here is to think both legally and strategically about making trial objections. Let your case theme be your guide.

“Recency” refers to the principle that what people hear last – they retain in their memory. Unlike “primacy” – which entails the formulation and adoption of a belief system, recency relates to the jury’s ability to recall the key details and most important facts of our case. Whether direct or cross – we always strive to end an examination on a high note during trial. This is the principle of recency at work. We end with our strong points so that we can put an exclamation mark on those compelling points we want the jury to remember.

Closing argument presents our final opportunity to reinforce our case theme. The techniques of recency are critical to this objective. For example, the introduction and conclusion are the most important parts of our closing. This is because we must start and end with our most powerful and persuasive points. We start with our most powerful points to draw our jurors back in to our case theme. We end with our strongest points because we want jurors to take these points into deliberations.

Recency is a technique that can be carried out in many ways. Here, the use of repetition is most effective. For example, Dr. Martin Luther King’s “I Have a Dream” speech provides a wonderful illustration of the potency of
repetition as a rhetorical device. In that great speech, Dr. King used two different forms of repetition. First, he used “anaphora,” a technique where the speaker repeats a word or phrase at the beginning of a group of neighboring paragraphs. In that speech, the phrase “I have a dream” was repeated in 8 successive opening sentences. However, Dr. King also used 7 other key phrases in this way during the speech (e.g., “One hundred years later,” “Now is the time,” “We can never be satisfied”). These phrases were used so effectively that even without the remainder of the text, we would have the essence of Dr. King’s message by his persuasive use of anaphora.

Dr. King used another form of repetition in this famous speech. Here, he repeated key words and phrases that conveyed his theme throughout the speech. For example, the word “freedom” was used 20 times. “Dream” was used 11 times and “we” was used 30 times. By repeating key theme words throughout his speech, Dr. King imparted an inspiring and unforgettable message. As this memorable historical example illustrates, repetition is an important rhetorical device that we can use to further the principles of recency in closing.

Closing argument is our best opportunity to impart our ‘anti’ themes to the jury. There is no better anti-theme than thematic reversal. Here, we strive to use our opponents’ themes against them. If we have scored points on a disputed issue during trial, if we have uncovered evidence to suggest that a party has lied on a material point, we need to hammer this home in closing. For example, if we have a photograph showing a plaintiff who isn’t all that injured or an email in which a defendant made damning admissions – we need to highlight these points in closing through thematic reversal. (“Does this photograph really show a permanently disabled man?” or “The defendant says he didn’t know! He sure knew a whole lot when he wrote this email after the incident!”) Thematic reversal, when used strategically and effectively, furthers the objectives of recency as a persuasive rhetorical device.

In sum, as we prepare our closing argument, we should strive to accomplish the objectives of recency. We should consider techniques such as repetition and thematic reversal to highlight our strongest arguments both at the beginning and end of our closing. If done effectively, our last and strongest points will be the ones jurors take with them into deliberations and remember the longest. If we have done our job, the jury will express the strong points we have made in a favorable verdict.

V. Conclusion

Attempting to try a case without a theme is like going into battle without any weapons. It is a losing proposition. By identifying and using an effective case theme at every phase of trial, we arm ourselves for success. When it comes to jury trials, the facts won’t speak for themselves. We give our case a persuasive voice when we use a unifying concept or idea – one that jurors can relate to, one that motivates them to act and leads them to our conclusion. If we have accomplished all of that, we know we have put a good case theme to its proper use.

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