FRAMING THE ISSUES

THE USE AND DEVELOPMENT OF THEMES AT TRIAL

By

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I. INTRODUCTION

It is often remarked that at heart, trial attorneys are storytellers. While that remark contains an important grain of truth, trial attorneys work under severe constraints compared to a Balzac, Shakespeare, or Dickens. Trial attorneys don't have freedom to create characters and stories from whole cloth but must work with the facts and characters given them, and the rules of evidence that allow them to be presented in a court of law. Since jurors do not evaluate facts and witnesses in a vacuum, case themes provide the context in which the evidence will be evaluated.

II. THE IMPORTANCE OF CASE THEMES IN TRIAL

Research in a variety of applied fields has demonstrated the significance of themes for organizing information and making decisions. Every experienced trial attorney understands that jurors need to be able to have some way of organizing all the information they are exposed to during a trial. To persuade a jury, an attorney needs to develop case themes that help organize the diverse case facts and convey the case theory. Case themes can provide a bridge and a way for jurors to understand what they are learning during a trial. To be persuasive, attorneys need to develop themes that influence jurors on the issues of responsibility, blame, and justice. Attorneys then need to keep these themes in mind as they work with witnesses, considering how each witness fits into the larger story the trial team wants to tell.

Case themes are particularly important in defending extra-contractual litigation. The plaintiffs' themes are usually the same—large, uncaring, rich insurance company takes premiums for years, then delays while it searches for flimsy excuse to deny claim to deserving policyholders causing them financial ruin and emotional distress. This theme is even more pronounced in catastrophic claims. Thus, defense lawyers need a better theme than--"no, we didn't."

Trials are often a battle of the themes. Cases are won by who has the best theme, the one that best appeals to the emotions and sympathies of the juror. Of course, it is not just the

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theme, but which side can best support their theme through witnesses and documents, allowing the jury to rationalize their decision.

III. THREE APPROACHES TO THEME DEVELOPMENT

While everyone knows that case themes are important, how does one develop the theme? Fortunately, there are techniques that can be used to develop case themes in insurance litigation. While these approaches may be used intuitively by attorneys, there is a research tradition that supports and explains why these approaches work.

A. Attribution Theory/Choice Theme

When a plaintiff engages in a certain behavior, one of the critical ways of looking at that behavior is whether the individual had a choice. When judgments of responsibility and blame are being made, it is important to know whether or not there was any choice involved. Did the policyholder have any choice? Did the insurance company have any choice about what happened? Attribution theory says that when a person chooses to do something, that person is then seen as responsible for the consequences of that choice. To the extent that the plaintiff or defendant is seen as having a choice in their conduct, then jurors will feel they are responsible for the consequences of that choice. Some examples of choices:

- The plaintiff chose not to return the calls from the claims adjuster.
- The policyholder chose not to disclose preexisting conditions in his/her application for insurance.
- The manufacturer made the choice not to ask for increased coverage on the contents of its warehouse.

Most attorneys use a version of the choice theme when they introduce the notion of personal responsibility. Jurors reach conclusions about personal responsibility when a decision is presented using the choice theme. In other words, if someone chooses to do something, he/she is more likely to be seen as personally responsible for what happens. The difference between presenting the theme as a choice or as personal responsibility is that with the choice theme, jurors will conclude on his or her own that the individual is responsible rather than being told that he/she is responsible by the attorney.

It has been my experience that jurors are more accepting of the choice approach rather than the personal responsibility approach, and therefore, the choice approach is more persuasive. For example, in a case involving the inability to agree on a settlement value, jurors decided the plaintiff chose to make a non-negotiable demand and chose not to engage in any discussions of the realistic value of the claim. The policyholder's choice not to negotiate resulted in a lengthy arbitration process that caused the delay in settlement. In that case, jurors felt the plaintiff was responsible for the delay because of the choices made.

B. Counterfactual Thinking

Another way of approaching theme development is to use counterfactual thinking. Counterfactual thinking occurs when a person evaluates an event by how easily it could have been undone to create a different outcome, usually a more positive outcome. The ease with which a juror can undo the negative event with a counterfactual affects the amount of blame he/she attributes to a party. In a bad faith case, the question raised is what either side could have done to prevent this problem from occurring. If it is hard for jurors to develop reasonable counterfactuals, "if only" statements, it will be harder for them to attribute responsibility, and thus blame, to the person/company. On the other hand, the more counterfactuals jurors can create to prevent the negative outcome, the stronger their opinions of blame on the party who they feel could have changed the outcome of the event.

The question answered by a counterfactual usually takes the form "if only..." or "what might have been...." An example of a counterfactual would be, "If only the agent had explained the exclusions on the policy, the insured would never have accepted the policy, and this mess could have been avoided." A counterfactual creates an alternative way of looking at a situation, an alternative reality.

The way to use counterfactuals to look at case themes is to consider what "if only" arguments the plaintiff and defendant could make. It is often the case that the plaintiff will have several "if only" arguments. Examples include:

- If only the insurance company had done a proper investigation….

- If only the insurance company had sent the policy in a timely manner….

The defendant insurance company, of course, can develop its own themes by employing arguments using the "if only" form. For example, "If only the policy holder had cooperated with the investigation…," or "If only the policy holder had reviewed the terms of the policy...."

One way for the defendant insurance company to defend against counterfactuals is with an "even if argument". For example, "Even if the investigation had been done differently, we would have had to wait for the results of the arson investigation…," Another example is: "Even if we had offered a settlement, the policy holder had stated that he would not accept the payment."

Counterfactuals and the choice theme are two different ways of thinking about blame and judgements of responsibility. Since they both focus on responsibility, they often deal with the same set of facts.

C. The Story Model

The story model assumes that jurors organize the evidence of a case into a coherent explanation or story. This narrative structure is then compared to the verdict categories to determine the best match. Trial attorneys have used the story model for years in crafting case presentations. The point is that jurors actively engage in creating their own story about a case and that may or may not include the attorney's version of the story. The story model, in the hands of most attorneys, is a way of presenting case themes, metaphors and analogies. This short hand version tells what happened and why it happened. Counterfactuals and arguments based on the choice theme can be integrated within the case story.

Some attorneys are gifted storytellers. Creating and fashioning a story for most of us takes time and effort. Questions to raise about the story of the case are: Does it make sense? Does it convey themes? Does it explain what happened and why? Is it compelling? Does it make sense of all the evidence and testimony, or does it leave loose ends and unanswered questions?

One of the most important elements in story structure is determining who is the villain of the story? If you do not propose the villain, then you leave it up to the jury and it could be your client. Villians do not have to be people. In catastrophic losses, the villian might be Mother Nature or government agencies.

IV. CASE THEMES AND WITNESS PREPARATION

In my experience, the most effective trial attorneys weave case theme development throughout pre-trial discovery and preparation, continually testing out themes against new facts, legal insights, and new testimony. Having strong themes won't work for you unless your evidence and witness testimony reinforces and validates the story you want the jury to hear.

In insurance cases in particular, attorneys must often work with difficult or uncooperative witnesses. The trial team must make strategic decisions about whose testimony to limit, who to put front and center, and who have to work with a trial consultant for practice and preparation. Without the guiding structure provided by case themes, attorneys don't have a solid basis on which to evaluate the possible impact of a witness's testimony and testimonial demeanor on their case.

A. Developing Themes

The three approaches described provide some focused, practical techniques for developing good themes. However, there is always also a creative aspect to case theme development. Arguments, metaphors, analogies, and imagery to use for argument can come from a variety of sources and often arrive during moments of relaxation or withdrawal from the routine of the office. Cab rides, taking a shower, and freewheeling brainstorming sessions are often the sources of the best ideas.

B. Testing Themes and How Well Your Witnesses Convey Your Themes

While developing case themes may be an intuitive and creative process, once you have solid case themes in place, you can test the effectiveness of these themes in a scientific and rigorous way. Mock trials and, in some cases, community surveys can be used to discover how jurors will respond to specific themes. When concerned about witness presentation, however, a mock trial is unquestionably the best method for testing how well a witness or a number of witnesses help persuade a jury to accept your case themes.

1. The Benefits of a Mock Trial.

The purpose of a mock trial is not to predict whether a case will be won or lost. Since there are too many variables between the mock trial and the actual trial, the result obtained during a mock trial is probably the least important benefit of such an exercise. More important is, as one of my colleagues put it, "to see what flies and what dies." Most trial lawyers understand the value of comments obtained from real jurors after the verdict. The mock trial allows the attorney to obtain some of those insights while there is still time to use them.

Some of the more common reasons to conduct a mock trial are:

- To evaluate jury reactions to case theory.
- To evaluate alternate case strategies.
- To assess the performance or credibility of key witnesses.
- To determine the type of juror who is least accepting of your Strategy.
- To determine strategies for handling damage arguments without conceding Liabilities.
- In complex cases, to determine how best to teach the jury or, as is sometimes the case, to see if they can understand the scientific evidence.

The biggest disadvantage of a mock trial is cost. Ignoring attorney time, the out-of-pocket costs of a half-day mock trial will range from $8,000 to $12,000, depending upon the number of jurors and amount of consultant time. However, this cost can be a bargain if you obtain information which results in a victory at trial.

2. Planning the Mock Trial.

The first planning decision is the length of the mock trial. The length obviously depends upon the size and complexity of the case, as well as the amount of resources that can be committed. In most cases, a half-day mock trial is generally sufficient, with the following schedule:

Mock Trial Agenda

Introductions/Case Summary	15 minutes
Plaintiff's Presentation	35 minutes
Defense's Presentation	35 minutes
Questionnaire	15 minutes
Break	15 minutes
Witness Testimony	45 minutes
Jury Instructions	45 minutes
Consultant Debriefing of Jurors	30 minutes
TOTAL	**4 hours**

If there is a decision to be made between two alternative approaches to a case, two half-day mock trials using different juries may provide more valuable information than one fill-day session. The use of a second jury avoids unduly skewed feedback caused by a particularly aberrant or strong juror. The second jury can also be used to experiment with different techniques or different themes. Another possible strategy is to use twenty jurors and then divide them into two juries for deliberations.

Some thought should be given to the location of the mock trial. Although the mock trial can be held in a large law firm conference room or hotel conference room, such facilities are neither very realistic nor equipped for jury observation. Focus group facilities are available which have viewing rooms behind two-way mirrors.

It is a mistake to use law firm attorneys, paralegals, secretaries or friends as mock jurors. The convenience and savings do not justify the loss of objectivity. A competent trial consulting firm will be able to obtain a jury which is fairly representative of the potential jury in your Jurisdiction. They should also screen the jurors for possible conflicts and preferably exclude anyone employed in the media. In order to protect the mock trial from public disclosure, the mock jurors should sign a confidentiality agreement.

3. Presenting the Case.

A difficult decision is the designation of the attorney to represent the opposing party. It is tempting to use the lead trial attorney to represent the opposing party in order to balance the outcome, on the theory that it is easier for the more junior attorney chair to present their own position. However, since the goal of the mock trial is not to "win" or "lose", but rather to obtain feedback from the jurors, such balancing is generally unnecessary. It may be more important for the lead trial attorney to have the opportunity to articulate his or her position and see how certain themes feel before using them in front of the real jury. If there is no second chair on the case, then you will have to recruit another attorney in your office to take the opposing side.

Next, you must decide how the evidence is to be presented to the mock jury. The simplest way is to have each attorney present a combined opening statement/closing argument discussing the evidence, arguments and themes. Some lawyers try to find ways

to have some key evidence presented to the mock jury by witnesses, thus allowing the attorney to obtain the mock jury's reactions to either the testimony or the credibility of the witness.

Since it is impossible to have the opposing party present at the mock trial, it is not recommended that your own party testify live at the mock trial unless the overriding purpose of the mock trial is to give your client practice testifying before a jury and to obtain feedback from them concerning the client's appearance and credibility. A better approach is to prepare a short videotape of your client covering a few key areas of testimony which can be played during the presentation. Similarly, if the depositions of the other party or key witnesses have been videotaped, you can present short, edited vignettes of their testimony to the mock jury.

4. Use of the Mock Jury.

There should be written questionnaires on the juror's backgrounds so that you can compare their feedback with their demographics to assist you in voir dire. Written questionnaires can also be administered at different times throughout the mock trial, providing the opportunity for feedback on key issues. In this way, you can obtain the mock jury's reactions to specific arguments and witnesses, both before and after they have heard the opposing arguments.

The most exciting part of any mock trial is the opportunity to observe jury deliberations. These deliberations can be monitored by a two-way mirror (if the facility is so equipped), by a remote video camera, or simply by a microphone. If possible, these deliberations should be recorded so that they can be reviewed and studied by the trial consultants and attorneys, particularly where there is the risk that the case may be continued for many months.

These observed deliberations allow the trial attorneys to learn which issues or questions during the mock trial either worked or failed miserably. They also learn which arguments or analogies used during the mock trial either worked or failed miserably. Further, the mock jurors themselves often come up with images, metaphors and themes that can help the attorney at trial.

After the jurors have been given sufficient time to deliberate, it is helpful to debrief them. An attorney not associated with the mock trial, better yet, a consultant can sit in with the jury and ask specific questions about the case, the witnesses and the attorneys. These trial-consulting firms can assist the attorney in using the feedback from the mock jury to refine voir dire, themes and arguments.

V. USE OF THEMES AT TRIAL

Once you have selected and refined your theme, you must remember to structure your case so that everything is done in furtherance of that theme. You can't just put on the case and then hope that the theme will come out on its own or be persuasive at the time of

closing argument. Your voir dire, your opening, your choice of witnesses and exhibits, your examinations, as well as your closing, must be done with an eye toward your theme.

For example, you might decide that your best theme is that the company made an honest mistake, but not one that deserves punishment. In such case, it would not be consistent with that theme to have your witnesses deny any mistake or attack the plaintiff. With such a defense, it may be better to simply show how the mistake was made and perhaps even suggest the punishment to compensate the plaintiff. Such defense can help prevent the imposition of punitive damages.