

## Thinking Outside the Box for a Winning Case Theme

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### I. Introduction

A winning theme tells the jury what your case is about and why they should care about it. A lawyer's ability to craft a winning case theme and communicate more effectively to the jury are essential in trying a good case and, more importantly, getting a great verdict. At the end of the day, when the jurors are deliberating – hopefully some of them are fighting for your case. What's their best ammunition? The evidence... the law... ideally, yes, but arguably a great theme will be the most memorable part of your case. Your theme, or themes, should be prevalent in every aspect of your case.

### II. What Does a Winning Case Theme Look Like?

Not all themes are created equal. Sometimes a theme falls right into your lap as a result of a mistake made by opposing counsel – think: *"if the glove doesn't fit, you must acquit."* More likely though, a gift like this will not be given and you must develop your own theme long before stepping foot in the courtroom. So, how do you actually develop a theme? Don't start by boxing yourself in to just one theme. Some cases need more than one theme to effectively communicate the issues to the jury. Explore the idea that each major issue in the case deserves and requires its own theme.

Ensure that your theme connects with your jurors by creating a theme around a universal truth that every single one of your jurors can relate to. In a recent trucking case, with stipulated liability, the only issue for the jurors to decide was how much money in non-economic damages should be paid to the parents of their now deceased twenty-one-year-old child. *"No parent should have to bury their child. When that child is killed due to the negligence of another driver and/or company, they must be held accountable."* The universal truth that a parent should not have to bury their child is one that most people can relate to.

### III. How to Develop an Effective Theme

We usually don't have a hard time determining what the good facts of our case are – that part is easy. It's more important to uncover all of your bad facts. Why are you going to lose? Once you fully acknowledge all the weaknesses in your case, try to find a mini-theme that encompasses your case's weaknesses. The way you develop an effective theme is it to create a story about the scary facts. A common bad fact in car wreck cases is low property damage. The defendants have a powerful visual of a car that has hardly a dent or scratch on it, so it is imperative to have a theme to counter that. Look to undermine this theme with your other facts. Does the plaintiff have significant injuries? Explore in jury selection how someone can have significant injuries if there is no real damage to the car itself. Later, you can explain to the jury that the story behind these injuries is not told in looking at pictures of a care, but in looking at the actions of the defendant driver, for example. If all else fails, do not hide behind your bad facts. Be the first one to stand up during jury selection and say, "The plaintiff's car was not significantly damaged, who has a concern that he/she doesn't deserve to be here because of that fact alone?" If your case has unsavory facts surrounding a less-than-perfect plaintiff, own that as well and theme your case to that. For example, "The plaintiff's life has been filled with bad circumstances and the last thing he/she needed was this wreck."

Many lawyers believe that a winning theme should be crafted, perfected and *then* tested on a focus group, which is discussed below. Yes, ultimately, you will want to test your perfect theme in a focus group or mock trial, but before you get there, consider a concept-oriented focus group that is designed to help you develop your theme. A focus group is a gathering of individuals who, ideally, are not like-minded. A concept-oriented focus group is designed to strip your case down to the basic facts, with no fancy lawyering or persuasive arguments. With this method, you allow your focus group jurors to tell you what is important to them, and have them tell you what a winning theme should be instead of the other way around. If your case does not warrant a focus group with all the bells and whistles, be creative. One option to receive feedback on a broad scale is to set a Google-alert for buzz words within your case. You'll receive an email any time your buzz words appear anywhere on the internet, use these alerts to search social media and local news outlets for the comments section – you may find a theme or two floating around.

#### **IV. How Do You Know Your Theme Works?**

Once you have a winning theme, test it. Then test it again. The smaller the case, the more creative you'll need to be to test the theme appropriately. Start by simply saying it out loud. Before you use precious resources to test your theme(s) on mock jurors, tell your colleagues, family, and friends about your case. If after your brief synopsis these individuals cannot repeat back to you what your general theme is, you don't have a memorable theme. And if they don't understand it, a jury won't either. A common mistake with this method of testing your theme/case is that often times you are telling your story to like-minded individuals. The more people you can find who aren't lawyers and who don't think like you, the better.

Taking your case to trial without having done a focus group or mock trial is bordering on malpractice. Your theme(s) and ultimately your entire case should be tested in a focus group or mock trial. There is no better tool to test if your theme works than a focus group or mock trial. Is your theme simple and easy to explain? Do you hear the mock jurors discussing your theme during deliberations? The answers to both of those questions should be a resounding "yes." Arguably the most beneficial aspect of presenting your case to a mock jury is that you can present the defendant's best-case scenario as persuasively as possible. Doing so not only forces you to take a hard look at the other side in order to present it effectively, but it also allows you to learn what the mock jurors will do with the defendant's best arguments, which you can then protect against at trial.

#### **V. Implementing Your Theme**

It is imperative that you weave your theme into every aspect of the case. It starts in discovery, continues through preparation of your own witnesses, and hopefully onto a juror questionnaire. If you're waiting for *voir dire* or opening statement to introduce your theme, you've missed several key opportunities. If you are able to weave your theme in your depositions, see if you can get the defendant's witnesses to agree with your theme.

We know your goal in *voir dire* should be to undersell your case while rooting out the panel members who are not right for your case. Whatever your theme is, using the opposite premise of it during jury selection will either teach you who may be skeptical of your theme or it

will out those who downright disagree with it. After determining who doesn't agree or doesn't like the premise of your theme, develop an analogy to educate your prospective jurors. Developing an analogy for your theme is a useful tactic to use during jury selection as it may better illustrate your facts. For example, if your client has a pre-existing injury, consider analogizing that to an old woman with frail bones who has been knocked down. Should we excuse the bad actions of the defendant for knocking down an old woman just because she is more susceptible to being injured?

The effective use of a scaled question during *voir dire* is a good way to obtain feedback on certain themes quickly and from each member of the panel. However, use these scaled questions with caution as they can quickly become tedious and boring for your potential jurors. If you have an hour for jury selection, you may only need two or three well-crafted scaled questions.

## **VI. Conclusion**

Every case must have a compelling theme that will resonate with the jury. Be creative when drafting your theme and enlist the help of a small focus group to assist you with developing a theme. Once you feel comfortable with your theme, test it on your family, friends, colleagues, and a focus group of mock jurors. The theme in your case should be the memorable line that connects you and your case to the jury.