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**USING THE STORY:  
THE IMPORTANCE OF DEVELOPING MEMORABLE THEMES**

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***Why Themes are Important***

In our last Insights, we discussed how the way humans think in narratives affects jurors' acceptance or rejection of a case at trial, and how to structure your case story to better comport with natural, human thinking. In this issue, we explore the importance of using themes to convey information, given the narrative nature of humans' thinking processes. How a case is framed thematically can affect the persuasiveness of its story for a jury, particularly in today's media-driven world.

We humans have limited memory capacity. For example, our ability to remember a string of numbers beyond about seven digits, even on a short-term basis, is limited (hence the seven numbers in a phone number). We also have trouble recalling information we hear only once and thus, repetition is key to our ability to understand and remember. By working through a case story, and by repeating key elements of that story regularly, we can help jurors understand and retain information we want them to recall easily throughout trial and deliberations. Those key elements of our story are called "themes."

***What Is a Theme, Generally Speaking?***

From a jury psychology perspective, themes are *intentionally oversimplified concepts that connect complex evidence with jurors' experiences, beliefs and predispositions*. These cognitive "shortcuts" become the cornerstones of the "story of the case" – i.e., an intentionally simplified narrative that enables jurors to distill mountains of complex, ambiguous evidence into a relatively simple, cognitively manageable story that: 1) aligns most closely with their emotional and cognitive predilections; and 2) leaves them feeling that, via their verdict, they have done the right thing.

For litigation themes to serve this function, they must be limited in number and scope and easily repeatable throughout argument and testimony. Although primarily proactive in purpose, good themes should also serve as safe harbors for witnesses during cross examination, offering comfortable framing for uncomfortable questions, especially questions that are highly complex. Finally, although it may seem obvious, it is important to keep in mind that good themes are not a

substitute for good evidence and effective testimony; rather, they maximize the impact of good evidence and skilled advocacy.

### ***What Is a Theme, Specifically?***

The dictionary definition of a theme is, “*A topic of discourse or discussion, often expressible as a phrase, proposition or question.*” Discussion can have themes. Music has themes. Literature has themes. Most importantly, stories have themes.

Themes are composed of a few words, a phrase—an easily remembered, easily repeatable statement that jurors can cling to as they strive to organize a mass of new, complicated information that is being thrown at them in a compressed period of time.

When we are constructing themes to simplify a case story for jurors, we can look to a number of sources:

- Story/song titles; and
- Quotes:
  - Famous quotes;
  - Quotes from witnesses; and
  - Quotes from jurors.

We can't overemphasize the value of the last source – quotes from jurors. Our objective is to appeal to and persuade jurors; doesn't it make a world of sense to use themes that are spoken by jurors? Listen to what jurors say in deliberations at a mock trial and/or especially in voir dire. When a sitting juror hears words he spoke in voir dire reiterated as a theme during trial, he will take ownership of that theme and carry it into the jury room for you.

### ***Theme or Not a Theme?***

Argument is not a theme. Evidence is not a theme. An accusation is not theme, and neither is a judgment. But these are themes:

- This Case, This Plaintiff (to combat meta-cases that so many plaintiffs' attorneys attempt to try);
- Numbers, Not Assumptions (to undo speculative damages);
- What the Defendant Did; and
- Personal Responsibility.

### ***When to Begin Introducing Themes***

A well-presented case is thematic from the moment counsel first comes in contact with jurors. That contact begins in voir dire. And while voir dire is often acknowledged as the place to begin asserting your themes, the wise attorney will do well to use voir dire as a venue in which to *test* themes. In other words, your themes may run along the lines of personal responsibility, but what if your panel tends toward the liberal and sympathetic and the majority of them show strong, anti-corporate bias? And what if there are so many of them that you can't balance the panel with peremptory strikes? People bring their own personal experiences and attitudes to the courtroom

and it won't be possible to undo a lifetime of experiences and beliefs over the course of a few days in court. So, it's time to re-tool your thematic framework to fit into the beliefs of the jurors. Instead of emphasizing the irresponsibility of the plaintiff, counsel may want to look at acknowledging that too many corporations, when faced with important safety decisions, do the wrong thing; but this company is not one of those corporations. Then the thematic emphasis shifts from Personal Responsibility to What the Defendant Did. In order for these pre-disposed jurors to find for your client, they will have to be shown (yes, they place a burden of proof upon you) that your client acted responsibly and did the right thing, and therefore is different from all those other "bad" corporations.

### ***Themes in Testimony***

Prepare your witnesses by familiarizing them with the thematic framework of the case. This can help their testimony in several ways: 1) the themes provide the "billboards," or main selling points of a witness's particular testimony; 2) understanding the case themes helps the witness understand his or her role in the overall story that is being presented at trial; and 3) the themes become a "safe harbor" for witnesses during cross-examination. They can come back to these main points when being pressed hard by opposing counsel.

### ***When Themes Are Most Needed***

Some might say that themes are most important in voir dire; others might argue that if the themes of a case are not clearly outlined in opening, the case is already lost. But the one time when themes are most vital is after you sit down for the last time – during jury deliberations.

Our research over the years has shown that closing arguments have limited utility when it comes to persuading jurors; the true persuasion comes during deliberations, from fellow jurors. Thus it is ultimately critical that the jurors who support your case also understand your themes. Then when one juror says, "They didn't warn about every possible risk," your jurors need to be able to respond, "Let's talk about 'What the Defendant Did.'" And when another juror says, "This case is just typical of what goes on in corporate America," your jurors can be prepared to respond, "We're here to talk about 'This Case, This Plaintiff.'"

Taking time to create well-developed themes that align with jurors' stories will allow you to present your case so that jurors will more effectively digest and recall those themes. In deliberations, the jurors who strongly support your case are your proxy; when they go to do battle on your behalf, those strong themes are their best ammunition.