

Theory and themes key to trying a case

By: F. Dennis Saylor IV and Daniel I. Small ○ January 21, 2016

To try a case effectively, you need to have a theory of the case, and you need to develop themes to help persuade the jury. Although they are both important, they are not the same thing, and both need to be considered carefully.

Theory of the case

It's not enough just to tell a story to the jury. The story has to mean something; it has to persuade. A trial presentation needs to be organized around a basic theory that fits the facts and (if believed) will win the case.

A theory might look like this:

"The defendant does not dispute that Mrs. Jones was attacked and robbed and that she is an innocent victim. However, he was not the one who did it. He was not there; he was at work, eight miles away, at the time of the attack. Mrs. Jones' identification of him is simply mistaken."

Among other things, this will help focus your presentation on things that matter (for example, whether the victim's vision was impaired) and help avoid wasting time on things that don't (for example, whether the victim should have taken more precautions). The facts that you develop should help prove the theory. Don't elicit facts without a clear purpose.

The word "theory" is perhaps misleading; it's not conjecture or hypothesis. It's just a shorthand way of describing what you believe (and will prove) actually happened.

A successful theory needs to be reasonable, or at least plausible. That does not necessarily mean a simple theory, or even a single one. Even a complex theory is far preferable to no theory at all. If you can't come up with a reasonable theory, maybe you need to settle the case (or plead it out) and move on.

Remember that your opponent will have his or her own theory of the case. Don't simply ignore harmful facts. Your theory needs to take those facts, and your opponent's likely theory, into account.

These principles also apply in the defense of criminal cases, and even cases in which no alternative narrative is feasible and the only goal is to establish reasonable doubt. A maxim attributed to Frederick the Great is that a man who tries to defend everything defends nothing.

Themes

A theme is a core fact, or core conclusion, that you want the jury to focus on over the course of the trial. Even a simple trial may have dozens of stray facts and arguments, and you want to make sure the jury understands and remembers your key points.

Usually a theme is grounded in the facts: "The plaintiff was not adequately trained to operate the machine."

But sometimes it is purely argumentative: "This is a case about corporate greed."

Dan Small was prosecuting a case involving a grain elevator that exploded, killing 18 people. He discovered after talking with friends and family that they did not understand a basic fact of the case: Grain dust is highly dangerous. When most people hear the word "grain," they think "bread." No one fears walking down the bread aisle at the store because the loaves might explode. Yet the reality is that grain dust in the air is five times more explosive than coal dust. That fact became one of his core themes: Grain dust is dangerously explosive.

A word of warning: Beware of taking the idea of a theme too literally or overdoing it. Bear in mind these cautions:

- Facts come first. A theme is useful if it helps to explain or interpret facts; it is not a substitute for evidence.

- Themes by their nature are simplistic. You may wind up oversimplifying, or promising too much; if you do, your credibility may be undermined when the facts don't line up quite so neatly as your theme would suggest.
- Beware the overly argumentative theme. You may think that "corporate greed" or "systematic racism" is a winning argument, but others may be put off by it. If the facts are really that powerful, they can probably speak for themselves.
- Themes can sound gimmicky. Reducing your case to a catchphrase may sound a little too slick, and more so the more often you repeat it. You're not selling a product, and you certainly don't want to sound like a salesman.

One way to conceptualize these issues is to use the "stem questions" protocol from the field of education. According to the protocol, any effective presentation must answer three basic questions: "What?" "So what?" and "Now what?"

In the trial context, the question "What?" means "What happened? What are the facts?" The question "So what?" means "Why does this matter? What difference does this make?" The question "Now what?" means "What do you want me to do about it?"

You need to supply the jurors with clear and coherent answers to those questions; don't leave it to them to puzzle it out on their own.

As you develop your themes, don't just rely on your own knowledge and instincts. Trial lawyers as a rule like to talk, but when you're preparing a case for trial, it's far more important to listen. Find opportunities to tell your story to your family, friends and co-workers, and listen carefully to what questions they ask and how they react. Then re-work it and tell it again.

Whatever your approach or style, you want to have a clear idea where you're going and communicate it clearly to the jury. Too many lawyers don't do enough to keep their points focused, simple and understandable. It's very easy to get lost in the weeds, and it requires almost constant effort to stay on point and communicate effectively.

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