

Getting Beyond The Catchy Phrase and Creating a Trial Theme That Truly Works

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By now, the advice to “use a trial theme” is or should be familiar to any practicing litigator. It is intuitive to discover and use a statement that unifies and embraces your view of the entire case. But crafting the right theme involves much more than thinking of a phrase that rolls off the tongue and sticks in the memory. As important as it is for a theme to do both, a theme needs to do more in order to serve the critical function of being that central representation and reference point for decision-makers.

A Quick Case Study

How a theme works depends to a large extent on the specific challenges faced by your side in litigation. Just to serve as a running example, consider a fictional employment case¹ in which a female worker, Rhonda Webb, was employed in an otherwise male-dominated manufacturing jobsite at a company, Nordick. Alleging that a co-worker, Frank Wilson, has engaged in an extreme and escalating pattern of comments and unwelcome advances, Webb files a sexual harassment and constructive discharge suit after resigning. In discovery, it becomes clear that the perpetrator considered his frequent sexual comments and occasional touching to fit within the category of “just joking around,” but it also becomes clear that the Plaintiff often willingly participated in workplace horseplay and engaged in an extramarital affair with another employee, her supervisor. It also becomes evident through discovery that many in the company—including managers and human resources personnel—knew of Rhonda Webb’s complaints about Wilson. These complaints were verbal and somewhat informal and Webb did not follow the company’s notice policies by making a detailed complaint in writing to either HR or management.

With this brief fact pattern in mind, I’d like to take a closer look at what would and wouldn’t work as a theme and why.

How Does a Theme Work?

The Plaintiff’s attorney likely remembers from trial advocacy CLE’s that she ought to have a theme to address some of these facts. At the same time, the attorney may not know the cognitive and psychological reasons that themes work. There are three ways of looking at why a theme works:

1) A Theme Works Like a *Lens*.

A theme is a way of viewing, or filtering information in a given situation. Psychologists call it a “cognitive schemata” or a mental process of bringing emphasis to some aspects and de-emphasizing others. Described as a “recipe for selecting, storing, recovering, combining, and outputting information as they transform diverse and disparate data into a cognitive scenario of ‘what is going on here,’”² jurors’ interpretative scheme is central to their ability to organize information and convert it into a verdict. Just as your reading glasses can blur distant objects while bringing closer objects into sharper focus, a good mental construct will sharpen some aspects of a situation while causing others to recede into the background. In Rhonda Webb’s case, is it a story about a mistreated employee, a story about a sexist perpetrator, or a story

about a company that failed to act on what it knew? The way the story is told determines what your decision-makers notice first and foremost.

2) A Theme Works Like an *Anchor*

Your most favorable language can also work like an anchor, or as a point that jurors start from or gravitate toward. You may be familiar with the concept of an “anchor” in the context of money damages.⁴ Stating a figure like \$20 million won’t guarantee a \$20 million result, but chances are good that once shared, this figure will serve as a starting point for adjustment. As long as the figure is not so extreme that it creates backlash, jurors who hear an anchoring figure of \$20 million will end up with higher damages than those who hear a starting figure of \$10 million. Similarly, if your theme serves as your best-view of the case, it can also serve as jurors’ starting point of view. For example, assuming that Rhonda Webb’s attorney focused the theme generally on ‘a company that failed to act on what it knew,’ then even a juror who failed to buy that theme 100% would nonetheless have a more favorable view of the Plaintiff’s case if the theme helped that juror spend more time thinking and talking about what the company could have done differently, while focusing less on what Rhonda could have done differently.

3) A Theme Works as a *Cue*

When repeated, key language can also serve to cue specific thoughts about the case. You are likely familiar with the idea of conditioning: Because Dr. Pavlov rang the bell whenever he fed the dog, the bell became associated with food and before long that hungry dog salivated based on the bell alone. Of course, jurors cannot be programmed quite as easily, but by presenting the strongest thematic language before, after, and during the strongest arguments, Rhonda Webb’s attorney can create a theme that cues jurors to recall the best case strengths. “The theme,” according to Atlanta attorney Marlo Leach, “allows the jury to listen to the evidence, while at the same time relating it back to the message that you have told them is key to the case.”⁵ In this case, the theme is the bell.

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What Makes a Theme Effective?

But if the theme is the bell, then what is it about a particular theme that can make jurors salivate the most? It likely isn’t found in language that sounds forced or that too overtly calls attention to itself by saying in effect “... *here is the theme!*” If it sounds like a slogan or an advertising jingle then jurors’ natural skepticism toward attorneys may prevent it from truly functioning as a theme. Getting to an effective theme means getting beyond the catchy phrase, and any theme chosen should not be an impulsive ‘top of the head’ or ‘gut’ determination. Instead, your theme should be carefully vetted based on its ability to live up to five standards: A theme should be:

Targeted

Holistic

Economical

Memorable and

Easy

1) A Theme Should Be Targeted

A theme should be targeted in two ways. First, it should be targeted toward your toughest audience (the ones who will need to be persuaded). For the plaintiff, that would mean

targeting your theme toward the naturally pro-defense jurors (logical, process-driven, high personal responsibility, etc.), instead of being addressed to the naturally pro-plaintiff jurors who are likely in your corner already. Attorneys will generally need to check the natural tendency to speak to the most favorable group, and instead take aim at the toughest jurors—a few of which will almost inevitably survive voir dire. Second, the theme should be targeted toward your weaknesses. It should give jurors a way of addressing your biggest problems while still finding for you. It isn't a matter of dwelling on the negative side of your case, it is a matter of giving jurors armor against your opposition's predictable emphasis on those weaknesses.

2) A Theme Should Be Holistic

A theme should not just address one particular issue, but should instead address the case holistically, and comprehensively. A theme which is just about damages, or just about sympathy, or just about causation is not enough to give jurors a general way of viewing the case. Instead, the theme should serve as a way for jurors to put the case together and to see the story in a particular way. That doesn't mean that the theme needs to address every single issue—it never could—but it should be a way of viewing the case generally, not just a way of highlighting a favored argument, a single specific issue, or a particular piece of evidence.

3) A Theme Should Be Economical

One of the reasons a theme needs to be general, instead of addressing each issue in the case, is that it needs to be economical. A good theme practices word economy by saying the most in the fewest possible words. If you have the good fortune of having several good candidates for a theme, choose the shortest. As Leach notes, "The theme is your entire case summed up as briefly as possible."⁶

4) A Theme Should Be Memorable

Even as a theme aims for conciseness, it should include some element to make it memorable, because a theme that jurors remember and use is more likely to be effective. All of the traditional mnemonic devices (alliteration, assonance, metaphor, familiarity, unexpected turns of a phrase, etc.) may be brought to bear here, but it is still good to remember that art can be taken too far. A subtle approach is generally better, and less likely to lead jurors to feel that they are being talked down to. For example, choosing alliteration may be better than choosing a rhyming scheme.

5) A Theme Should Be Easy

Finally, a theme should be easy to use, and by that I mean that it should be effortless and natural to work into your presentation at several points. It should be easy to say and easy to repeat. Importantly, it isn't a theme if it is announced just once. It is only a theme if it is worked into several points. "For an idea to be a good theme in a trial," McElhaney writes, "it has to keep coming back throughout the case."⁷

Sample Themes

In the theme-building process, it is natural to consider several candidate themes before settling on the one that works best. For example:

Candidate Theme: *All Rhonda Webb wanted was a safe environment where she could do her job.*

This theme would have the appeal of casting Rhonda's complaints in the most reasonable light. Ultimately, however, it is probably an ineffective theme because it just appeals to

sympathy instead of appealing to defense-oriented jurors, and because it could draw attention to a potential defense theme that Rhonda Webb had a pattern of wanting more in the work environment—like relationships with co-workers.

Candidate Theme: *Nordick didn't know where to draw the line between work and play.*

Again, this theme while it may be quite true as it relates to the company, still makes it too easy to call to mind the Plaintiff's weaknesses (at-work horseplay and romance) and it invites the response, mental or actual "...and neither did Ms. Webb." The theme also risks buying into Mr. Wilson's worldview that harassment is simply "play."

Candidate Theme: *Notice means notice.*

This language, as a play on "no means no," should be familiar in a sexual harassment context, and may be effective in emphasizing the central point that, hairsplitting aside, Nordick knew of harassment issues in the workplace and should have acted on that knowledge. However, those jurors likely to buy into an absolute "no means no" mindset, and to believe that any notice counts as legal notice, are likely to already be Plaintiff-supporters anyway.

Selected Theme: *Nordick knew, but Nordick said "no big deal," and that left Rhonda Webb with no real choice.*

This theme contrasts the Defendant's knowledge with the complacency in its informal responses to the situation in a simple, subtly alliterative phrase that is conversational enough to be repeated at several points in the case narrative. If ultimately chosen, it does the best job so far of meeting the five criteria:

1) **It is Targeted.** The phrase "Nordick knew" is an important way of bridging over the question of a formal report to focus on the relevant purpose of any report, and to emphasize that in one form or another, Nordick had that notice. In addition, the emphasis on "Nordick" rather than any particular decision-maker is a way of emphasizing that at all levels, Nordick knew that *at least* there were reasons for further investigation into Wilson's conduct. It addresses two main weaknesses: One, whether Webb did enough to give notice (that doesn't matter, because Nordick knew); and two, the fact that Webb resigned (only because she had no real choice).

It also targets the Plaintiff's harder-to-persuade jurors, because defense-oriented jurors are less likely to be swayed by sympathy or appeals to fairness and responsibility. These jurors are instead motivated by procedure: Did the company follow the right steps? That line of thinking calls attention to the most glaring of the company's weaknesses: The emphasis on the complacency of the company's response (*No big deal*), contrasts with process-oriented pro-defense jurors' expectation that in this day and age, there is a procedure to follow when there is *any* knowledge of a possible sexual harassment situation. Even if jurors also fault Ms. Webb for her conduct or for failing to make a clearer record, they can still conclude that the company erred grievously by relying on informal responses and then assuming, but not verifying, that any problem had been resolved.

2) **It is Holistic.** Instead of singling out a specific issue, this theme presents a combined message on harassment, the company's knowledge, the company's trivialization and lack of response, and finally Rhonda Webb's necessity to leave that leads to her constructive discharge claim.

3) **It is Economical.** While it is not the shortest of the candidates, the selected theme still boils down to a short sentence. In addition, an even shorter version (*“Nordick knew”*) could be used at several points in the case presentation.

4) **It is Memorable.** It is mnemonic because it is short, uses some subtle alliteration (Nordick Knew... No big deal), and parallel phrasing (... *No big deal... No real choice...*). At the same time, it avoids the perception of ‘artfulness’ that might lead jurors to see it as over the top or manipulative.

5) **It is Easy.** As illustrated in the next section, the theme lends itself to repeated application, either in whole or in part.

Using the Theme Throughout the Case

1) Using the Theme in Opening Statement

The first few minutes of a good opening statement are referred to as the “Silver Bullet” designed to tell the initial story of the case and help set jurors’ impressions while introducing the theme. The following is one example of a Silver Bullet incorporating the above theme.

You will hear that the situation Rhonda Webb faced in Nordick’s workplace went far beyond casual joking. From her supervisor, Frank Wilson, she faced constant sexual comments, continued and unwanted touching of her body, and was held, kissed, and groped: a situation that screams of sexual harassment. Yet the worst part of this situation is not just what Frank Wilson did in the workplace, it is what Nordick knew, and what Nordick considered to be ‘no big deal.’ When Rhonda Webb reported this situation to her supervisor, then to his supervisor, then to the human resources Manager, and then finally to the assistant to the plant manager—Nordick knew. The Nordick plant manager will tell you that he knew about the situation with Rhonda Webb, but he will also tell you he considered it no big deal—he just had a little talk with the shift supervisor, who then had a little talk with the abuser himself... and that’s it. Problem solved. Mission accomplished. No questions, no investigation, no interview, no report, no plan, no verification that the problem had been resolved. Nordick knew, and said ‘no big deal.’ And when that is the only option Nordick pursued, Rhonda Webb had no option but to resign and to remove herself from a situation that screamed of harassment.

But that isn’t the way it is supposed to happen. When Nordick knows, Nordick has no legal option but to follow a process that resolves the problem. Because they didn’t, Rhonda Webb now has no option but to be here today, and to ask you for justice.

2) Using the Theme in Witness Examination

The thematic goal in cross examination will be to have the witness confirm various elements of the theme. In Frank Wilson’s case, we know that he will not confirm the harassment, or necessarily the fact of Nordick’s knowledge, but he is ideally situated to confirm and embody Nordick’s ‘no big deal’ attitude toward harassment.

In the deposition of the perpetrator, Frank Wilson, he describes the talk that Rhonda’s supervisor had with him, presumably after he had been asked by the plant manager to deal with the situation: “Other than Ned telling me to leave her alone, no one said anything to me. And the only reason Ned said to leave her alone was because Rhonda was his girl.” So, to Mr. Wilson, the company’s response is just a case of boyfriend defending girlfriend, no big deal. The opportunity in cross is to demonstrate how Nordick’s response echoed Frank Wilson’s own casual attitude toward the harassment.

Using this as a jumping off point for cross, one way to cross on this theme might be as follows:

A: *Do you recall the shift supervisor asking you to leave Rhonda alone?*

W: *Yes.*

A: *You believed he was asking just because Rhonda was his girl, right?*

W: *Right.*

A: *So you didn't consider this any formal message from management, did you?*

W: *No I didn't.*

A: *... just a comment from a boyfriend?*

W: *Right.*

A: *No big deal?*

W: *No big deal.*

A: *And you never heard from the Nordick human resources manager that you should stop harassing Rhonda Webb?*

W: *No.*

A: *And you never heard from the Nordick plant manager that you should stop harassing Rhonda Webb?*

W: *No.*

A: *So, it seemed to you like it was no big deal to them either?*

W: *It wasn't.*

3) Using the Theme in Closing Argument

The closing argument should return to the theme in a more pointed and argumentative fashion. Here is one possibility:

You have now had the chance to hear from both Rhonda Webb and Frank Wilson, and they couldn't have described a situation that was more different... or more similar. Different because what Rhonda Webb saw as daily intolerable harassment, Frank Wilson saw as no big deal. But similar because, apart from the way they saw it, they both describe and confirm the same basic facts: constant sexual comments, continued touching of her body, and unwanted holding, kissing, and groping.

I guess it is not surprising that Rhonda Webb and Frank Wilson would see these same facts in two different ways. But what is more surprising is that Nordick chose Frank Wilson's view: No big deal. When Rhonda Webb told her supervisor, then his supervisor, then the HR manager, and then finally the plant manager's assistant—Nordick knew. But when Nordick time after time chose no response or the ineffectual response of a little chat, Nordick said 'no big deal.'

Nordick is forgetting that in today's workplace, any suggestion of harassment, indication, or possibility of harassment has to be considered a big deal. You all know that from your own work experience and the law, what you will hear just confirms that. When a company knows, as Nordick knew, it can't say 'no big deal.'

But Nordick is here today, and in effect Nordick is still saying ‘no big deal.’ In blaming Rhonda Webb herself for participating in a romantic relationship that Nordick allowed; In saying ‘we needed to hear about the harassment a few more times,’ or ‘we needed to see it in writing,’ or ‘the plant manager needed to be told by Rhonda herself and not by his own assistant,’ Nordick is still finding lots of ways to say ‘no big deal.’

Your verdict today is a chance to finally set the record straight. To say, ‘Nordick, you knew, and it is a big deal.’

Ultimately, the best theme flows naturally into your own patterns of argument and advocacy, and fits naturally with the facts of your case. Think of the musical meaning of a theme—not the “theme song” but the theme itself, and there is a definite parallel. The theme from Star Wars can be conveyed in only five notes—a sequence that is so familiar it may be creeping into your head right now. That theme is not just relegated to one song or one point in the movie score, it reappears throughout the movies in many different scenes and moods. As a result, it unites and sets a tone. Your best trial theme should do the same thing.

Notes

- [1] This fact pattern, *Webb v. Nordick*, is owned by the Foundation of the American Board of Trial Advocates and is used here with permission.
- [2] Schutz, A. (1970). *On Phenomenology and Social Relations*. Chicago: University of Chicago Press.
- [3] Holstein, J. A. (1985). Jurors’ Interpretations and Juror Decision-making. *Law and Human Behavior*, 9:1, pp. 83-100. p. 85.
- [4] Hinsz, V., & Indahl, K. (1995). Assimilation to anchors for damage awards in a mock civil trial. *Journal of Applied Social Psychology*, 25, 991-1026.
- [5] Leach, M. O. (2005). Common Themes for a Successful Trial. Tort Trial Insurance Committee News. p. 1.
- [6] Leach, op cit.
- [7] McElhaney, J.W. (May, 2007). Themes That Strike a Chord. ABA Journal.

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