

Great Themes and How to Craft Them

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Themes are the stuff of fluff, right? After all, how important can one sentence be amidst the millions of words spoken at trial? Our mock trial research and that of others begs to differ. The best theme won't save a losing case, but it may well win one that's sitting on the jury's fence. The formula for a persuasive case theme in civil litigation always integrates the following critical common denominator concepts.

Aim your theme toward the toughest audience on the jury. We have tested this approach over and over again and it matters. With rare exception, at least two audiences exist in every civil jury: pro-plaintiff jurors and pro-defense jurors (with self-proclaimed undecided jurors typically having at least a slight leaning). Good trial attorneys often make the classic error of designing a theme around the way they see their own case rather than around the manner in which the more skeptical audience on the jury might see it. If you are plaintiff's counsel, you may wonder, why not arm your fan base of the more sympathetic pro-plaintiff jurors with a theme aimed toward them?

The answer is that pro-plaintiff jurors are far less likely to need a "killer theme" to reinforce how they already feel about the plaintiff and the evidence. Rather, you need to reach pro-defense jurors and you need to do it early, especially in jurisdictions where the jury is required to reach a unanimous decision.

In breach of contract cases, for example, pro-defense jurors tend to rely heavily on written language and industry standards. They tend to scrutinize the plaintiff's actions through a very high standard of care. Their primary filter is one of high personal responsibility. As a result, the plaintiff's theme should level the playing field by focusing on law, power, and personal responsibility. However, many plaintiff's attorneys make the mistake of relying on themes that speak to their fan base of pro-plaintiff jurors, such as emotion and damage. Defense counsel often errs in the opposite direction.

Capitalize on that reality that jurors assess all parties' power and choices to use that power. Some think only the defense gets measured by those criteria. Not true. Jurors regularly assess the plaintiff's level of power and exercise of choices based on that power. A theme taking this into account can be highly persuasive because it likely reflects the thinking of many on the jury.

Use compelling themes that rely on clever language and plays on words to grab and keep hold of the jury. Mnemonically, those who never saw the inside of the courtroom in the O.J. Simpson criminal trial still know that the defense's closing argument theme was, "If the glove doesn't fit, you must acquit." Embarrassingly cheesy? You bet. But it worked. Many seasoned trial attorneys (often grudgingly) grant that cleverly phrased themes carry the most bite for jurors.

When the case theme serves as the first sentence or two of your opening statement, this defining statement should be a teaser that piques the curiosity of the jury. Following that sentence, your next 60 to 180 seconds should serve as your "silver bullet" that encapsulates your case.

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Plaintiff's Theme

As plaintiff's counsel in a fictitious breach of contract matter where the plaintiff, CompuGo, is suing the defendant, SoftThinx, for underpayment of its invoices, consider the following theme that focuses more on what the plaintiff, CompuGo, did well, in comparison to what the defendant, SoftThinx, did poorly. Note that the theme mentions nothing about a contract. Breach of contract cases are ultimately about relationships and performance, not paper, and your theme should reflect that reality if, as plaintiff, you feel you have a problem with your contract language. Otherwise, pro-defense jurors will still need a constant focus on the written wording.

Consistent follow through was CompuGo's business mode. Consistent inconsistency was SoftThinx's. Immediately preceding introduction of the theme, plaintiff's counsel might use the following Silver Bullet, or this brief encapsulation of the plaintiff's position:

The key to good business is to make good on your word and to over deliver. CompuGo believed in doing both whenever possible. And the evidence will show that CompuGo followed through on that belief by going above and beyond its contractual requirements with SoftThinx. It wasn't required to and chose to do so for good business in its first year with them. But when there's any doubt about something gray in the relationship, the important guidepost is the contract. The evidence will make clear that CompuGo followed the contract in its second year with SoftThinx, too. But you will find that SoftThinx never has met the contract terms and CompuGo had to call a stop to its behavior in the second year of its relationship.

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Defendant's Theme

Now, contrast this approach with the defense theme. When defending breach of contract cases, choose a theme that emphasizes what the defendant tried to do well (without admitting liability) and how unfair it is to recognize how plaintiff restricted his options.

Actions speak louder than words—especially when the actions are specific and the words are not. Focus on the contract language for your defense jurors and on the parties' actions for your plaintiffs' jurors:

It happens. At the time of entering an agreement, everyone does their best to dot the i's and cross the t's. But despite everyone's best efforts, there are typically parts of the contract where someone's writing was a little blurry. So what do you do? You look to the subsequent actions of the parties to see how their behavior defines the terms of the agreement. And why do you do that?

Because actions speak louder than words—especially when the actions are specific and the words are not.

Plaintiff's jurors tend to focus more on the parties' behavior to understand the contract terms, whereas defense jurors tend to rely on the contract to define the parties' behavior. The above defense theme follows the inclinations of pro-plaintiff jurors, the plaintiff's theme follows the inclinations of the pro-defense jurors. Understanding how to craft a theme that appeals to your toughest audience and makes use of the fact that juries perceive and assess the power of both plaintiff and defense will help your opening statement move the jury's mindset in a direction that is receptive to your case.

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