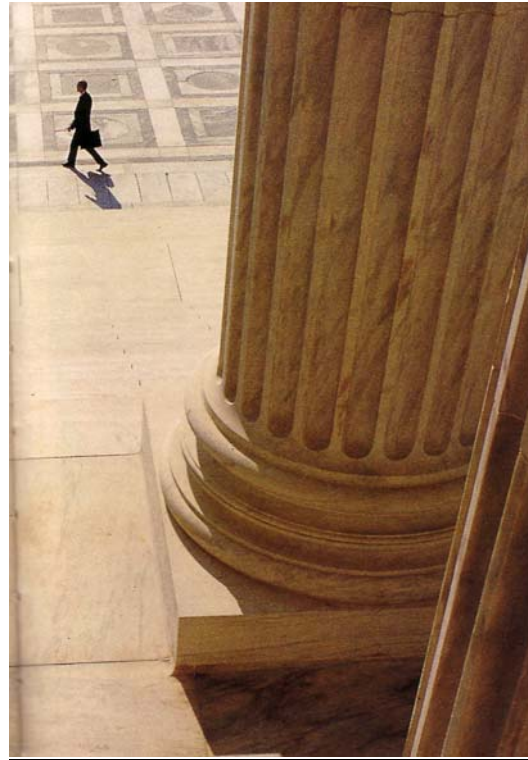


Conveying a Powerful Theme: The Secret to Inspiring Judges, Jurors and Arbitrators



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Trial advocacy experts and experienced attorneys talk about the importance of themes in winning a case in trial. However, one of the important things we don't learn in law school is what a theme is, why the right theme is so vitally important to convincing judges, jurors and arbitrators, how you discover the right theme(s) for a particular case, and how you build the right theme(s) into the case presentation during trial. The purpose of this article is to share with you some of the most recent information obtained through experience and many years of decision maker research, and in the process, take some of the uncertainty out of this topic.

Consider this scenario: It's an oppressively hot afternoon in August. A polite, well-dressed young man employed by a large international commercial loan broker has come to you to tell you the story of a disastrous business deal. The deal involves an \$80,000,000 loan made to an Arizona real estate developer that was never repaid. From his story you learn that he went to work for the loan broker immediately after receiving his masters degree from Harvard Business School. You learn that this business deal was the first opportunity given to him to negotiate and oversee by his new company and that because of the bad turnout, his future with the loan brokerage was in doubt.

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You learn that the real estate developer and his wife, an attorney, are longtime residents of a small resort community in Arizona and that a statue of the developer stands in front of the County Courthouse. You learn that in the process of negotiating the loan, the real estate broker and his wife hosted the young loan broker and his wife for many recreational weekends in the resort community. You learn that the real estate developer was represented in the negotiations by a well-known international law firm with a local office. The law firm's name appears often in the business dealings and loan files.

You learn that before the loan was made, that the real estate broker had produced certified financial records of his business along with a letter from the law firm stating that they had reviewed the records of his business and that they were accurate and reliable. Finally you learn that the resort project was to be built with the loan proceeds was never built and that more than \$34,000,000 had been filtered through the real estate broker's corporation and had been paid out in salaries and bonuses directly to the real estate broker over a two year period of time, contrary to the requirements of the loan documents.

Assuming that you are interested in taking his case and filing a lawsuit, what is the case all about? Is it about commercial loan paper? Is it about breach of contract? Is it about parole evidence? As a good trial lawyer you realize that these legal issues are involved along with many others.

On the other hand, what would a judge, or a jury, or an arbitration panel

say this case is all about? After all, if the case winds up in trial, the only thing that's going to matter is what the fact finder believes is important.

Looking at the situation as a whole, jurors and other courtroom decision makers might think that this case is all about broken promises. They might think it's about stealing. They might think it's about honesty and ethics and what we teach our children. They might think it's about lawyers who lie for their clients just to make lots of money. They might think it's about their reputation as a community and not trying to protect the local businessman who obviously did a bad thing.

What is a Theme?

A theme is a message that arises out of the evidence and characterizes an aspect of the case which is consistent with your position and which draws out a fact finder's sense of values, beliefs, and morals. Every work of art has a concept or "theme" that is the message that the artist wishes to convey. Theme, then, is the message that gives meaning to the audience. A theme may not even be expressed in exact words, but is apparent from the message in the presentation.

A theme motivates a judge, juror, or arbitrator to react in an emotional way or thoughtful way and to form a story about the case consistent with the decision maker's reaction. To judges, jurors and arbitrators, the truth is more important than the facts. A theme is the glue that holds the story together and gives it life.

For example, if a juror believes evidence that a party was greedy and reacts adversely to that party, the juror will likely form a story about the case that includes that party's greedy motivations. If a juror believes and accepts evidence that a corporation is made up of people who really care about other people, the juror will likely form of story about the case that includes an image of the corporation that is benevolent.

Most fully developed cases will have more than one theme. Some themes will be major themes that characterize major aspects of the evidence and parties. Other themes will characterize minor aspects. Regardless, all of the themes should be consistent and help to tell a coherent and persuasive story.

It is interesting, though, that different lawyers may use different themes and yet receive the same result from a judge or a jury.

Why Are Themes So Important?

Research which has studied the decision making of judges, jurors and arbitrators over the past thirty years leads us to one important conclusion: verdicts are message-driven and issue-driven, not evidence-driven. In other words, fact finders decide the resolution of a case by their emotional and thoughtful reaction to a message or issue, not the evidence. There is substantial research to support the conclusion that all courtroom decision makers filter their perceptions of the facts and evidence so that they are consistent with their emotional reaction to the case.

This method of perception and

reaction by judges, jurors and arbitrators is involuntary and cannot be deactivated.

As human beings we have been subjected to messages and emotions since the moment we emerged from our mothers womb. We learned our first lessons about life and survival from the early life experiences. We did not acquire the ability to distinguish and separate facts until several years later. Likewise, we did not learn about contracts and legal concepts until much later.

Over the last ten years, educational, cognitive, and social psychologists have concluded in that judges, jurors and arbitrators make decisions based on a narrative or story they construct around the psychological messages present in the case.

Therefore, themes are in reality psychological messages borne out of and are part of every person's life experience.

Courtroom decision makers will form attitudes about the specific issues in a case from their values and beliefs, which are expressed in terms of a psychological message. Therefore, they will judge the case based upon comparisons they make between their values and beliefs, and the values and beliefs expressed in the case.

Fact finders can relate to the message of the case even if they cannot relate to the parties, the facts, or the transactions.

Most judges, jurors and arbitrators are fully capable of understanding and applying basic values and morals in the most complex of trials, despite the occasional frustration felt by some people that jurors may not grasp all the fine details. For example, in a recently tried patent case, the parties' dispute dealt with the question of whether or a company's

refrigeration compressor regulators infringed a prior patent which had been issued by the United States Patent Office. Most of the jurors in the case certainly did not understand the schematic drawings attached to the patent, but they had no problem in finding that the manufacturer had stolen the idea for its product from the inventor.

The O. J. Simpson criminal trial provided strong examples of these concepts. In the criminal trial, the jurors were subjected to highly complex DNA evidence that was characterized as being either conclusive proof of guilt (prosecution argument) or as being fraught with holes and exceptions (defense argument). Then came that fateful day when the prosecution forced Simpson to try on the glove and it didn't fit.

Assuming that the jurors were split in their reactions to the complicated and somewhat inconclusive DNA evidence, all their doubts evaporated in one dramatic minute. There stood Simpson, only two feet away, trying to force his huge hand into a glove that the police stated clearly was the killer's glove. And it didn't fit. If there ever was a theme handed to an opposing party on a silver platter that was it -- "If it doesn't fit, you must acquit".

Where Do The Most Persuasive Themes Come From?

Themes are borne out of the triumphs and tragedies that people experience day after day, year after year. They are borne out of people's daily life experiences. Our parents, our teachers, our religious leaders, and other significant figures in our lives teach them to us.

Themes are all around us. They are present in the stories and myths that underlie our culture. They are present in each of the books, newspaper articles, tabloids, advertisements, television shows, movies, public speeches, and discussions with which we come into contact every day.

Some of the clearest and most interesting sources of themes are collections or anthologies of myths, fairy tales, and fables. In addition to explaining phenomenon such as the creation of the universe, Native American and Greek myths, for example, provide fascinating and educational revelations about ethics, morals and appropriate conduct which could apply to the most complicated modern business arrangements. Likewise, traditional and modern fairy tales teach children and adults about good and evil conduct.

In order to discover the themes that would be most persuasive to a particular audience (a judge, a jury, or an arbitration panel) in a particular case, one must understand the values, beliefs and specific attitudes held by that audience. Educational and cognitive psychologists who have studied the development and learning processes of people tell us that in order to persuade another person, one must understand that person's life experiences and how his or her thoughts are shaped by those experiences and by the culture in which he or she exists. Then, the fact finder's perceptions of the world must be accepted and incorporated into the themes and trial strategy.

In other words, discovering and shaping the most persuasive themes in a case is a matter of homework and

research that focuses on possible themes which arise from the evidence and how they match up with the likely judge or jury who will decide the case. Themes rarely magically appear, although with effort and experience, a database of previously successful theme candidates is a welcome resource.

The recent introduction of social science into trial advocacy (trial science) has provided lawyers and clients with methods of answering difficult questions about trial preparation and courtroom presentation. Research methods used by psychologists and sociologists to understand the behavior and mental processes of people are easily adaptable to the courtroom as many successful trial lawyers have discovered.

Over the past thirty years, psychological researchers have focused increasing interest on the judge, jury and arbitration decision making processes. Quantitative and qualitative methods have been devised using mock bench trials, mock jury trials and mock arbitration hearings to identify the most powerful and compelling issues and themes for a party in a given case. These same methods can be used to experiment and test likely juror reactions to evidence, attorney style, particular witnesses, and specific demonstrative aids.

Many successful trial lawyers will testify that high-level scientific research by a reputable trial science firm can increase the odds of winning a case. They will testify that a trial scientist is a regular and welcome addition to their trial teams. They will also testify, however, that such support can get expensive.

Even a simple experiment like this one would provide usable information that would be of enormous value to the trial team. The biggest advantages in using a trial science firm are in the areas of experience and reliability. Trial scientists are experienced researchers trained in trial advocacy and social science. They are able to obtain information about the underlying causes of juror behavior and mental processes and are able to make reliable recommendations for enhancing the persuasiveness of a case.

Expressing Themes In Demonstrative Aids

The use of themes in demonstrative exhibits and demonstrative aids is based upon a simple concept: demonstrative exhibits and demonstrative aids can express themes and messages, just like the spoken word. It is true that some demonstrative aids, such as graphs, pictures or computer animations, clarify complex issues or sets of facts. Others bring attention or focus to small parts of larger things. Still others, such as videotapes and models, recreate physical evidence and bring it into the courtroom to be examined by the judge or jury.

Regardless of the characteristics of the demonstrative exhibit or demonstrative aid, the purpose for its use is to help the jury to learn about particular aspects of a case or to adopt a particular perception about the case. The objective to be achieved, however, is always to persuade.

Although it is not the purpose of this article to discuss ways to make demonstrative aids more persuasive, it is important to note that demonstrative aids which can successfully convey themes consistent with the story of the case, can also be powerful and compelling in their impact. For example, in the defense of a pharmaceutical company which has been sued for manufacturing a drug alleged to have caused serious injury or death, one of the natural themes might be, "we care about people".

In the course of the trial, the company might choose to show a videotape of the research that was conducted relating to the drug in question.

In addition to showing the careful and methodical laboratory processes, the company might also choose to show videotaped interaction between a real patient who had been part of the testing process. This interaction might involve gentle and caring behavior of company researchers had contact with the patient.

Another example of a more evidentiary nature might convey both a theme and theory. Take the example of a recently tried bad faith/toxic tort case where a commercial insurance company denied coverage to a company that owned a building that had burned to the ground. The insurance company denied the claim under a provision that required the company to carry out regular fire and safety inspections as a condition for coverage.

The company filed suit under a competing provision in the insurance policy that provided for coverage, nonetheless, when a fire was "sudden and accidental". At trial, the plaintiff

company might use a computer animation that would demonstrate the origin and path of the fire, and thereby show that the fire was indeed "sudden and accidental".

Finally, and most importantly, the message and information conveyed by the demonstrative exhibit or demonstrative aid should reflect life experience. In other words, the demonstrative aid should reflect images and concepts with which a juror can easily identify and incorporate into that juror's version of the case story, which hopefully is consistent with your case.

In Conclusion

There is no substitute for a powerful and telling theme. The test of a good theme is whether the people listening and watching detect the theme and react strongly to it in a way that is favorable to you.

Developing a compelling and persuasive theme requires insight into the fact finder's view of the world as well as some old-fashioned homework. Some of the most helpful homework is contained in scientific jury research before trial.

About the Authors

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

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The Advocates' clients include major law firms and corporations all over the United States (www.theadvocates.com).

The Advocates is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The trial consultants and jury consultants with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, [*Courtroom Psychology and Trial Advocacy*](#), published by American Lawyer Media.

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