

4 Tips on Developing Effective Themes for Your Case

James L. McGarity, M.S.
Director, Medical Malpractice Division
R&D Strategic Solutions

Using effective themes to deliver the key points in your case can make the difference between winning and losing. Themes are extremely useful because they provide jurors with a framework to understand and appreciate the important facts, evidence, and testimony of the case in the manner that support *your* arguments. Themes also help jurors remember the key points of your case; they simplify larger “chunks” of information by helping jurors mentally organize the facts, evidence, and testimony into the “categories” that are created by your themes. Ultimately, when jurors embrace the themes of your case, they are better prepared to argue on your client’s behalf in deliberations because it’s easier for them to articulate and recall the essential elements of your case.

So, what makes a good theme? Effective themes should be a bit like a good advertising slogan: reflective of the important features of your case (the product); simple and easy to follow; and (whenever possible) consistent with values important to jurors. The following are some tips for the development of effective themes for *any* case:

1. **What are the key points you would want an 8th grader to take away from your case story?** To be clear, this does not mean to suggest that your jury will only be as intelligent as an 8th grader. What this *does* mean is that your case themes should be understood by the average 8th grader. That is, effective themes should be delivered in such a way that avoids confusing industry/legal jargon or unnecessary complexity. Instead, simplify your themes. Base your themes on simple takeaways that jurors can first understand, and that you and your experts and witnesses can build off of later. This is more effective for jurors because humans are “cognitively lazy,” which simply means that we’ll use the least amount of cognitive resources necessary to understand a new concept or idea. Thus, you want to make the first steps on the path to understanding your case as easy as possible. If you make your themes too confusing or difficult to follow, you risk losing jurors because they will think your case—as introduced—is too complex, confusing, or disjointed to follow. Here are some examples of some complex themes (using medical malpractice case examples) that are simplified into easier to follow themes—that an average 8th grader could follow (without insulting the jury’s intelligence):

Complex theme: *“There was nothing in the patient’s blood work or anything else that suggested a ‘downward trend’ indicative of a bleed in the immediate post-op period. Besides, her doctors and nurses were watching her closely.”* While this theme is not extraordinarily complex, it’s not very self-explanatory. It would take some explaining to set the context for the theme. Further, it sounds more like a response to the plaintiff’s experts’ criticism, rather than a true “stand-alone” theme that suggests confidence in the care provided.

Simplified theme: “For the first 24 hours after the surgery, Ms. Jones’ entire clinical picture was shaping up in the right direction. As soon as a ‘red flag’ appeared, the care team responded.”

Complex theme: “An imaging study at this point could have compromised the integrity of the disk fusion, and may not have offered any additional diagnostic information.” This sounds too defensive, and is not assertive enough in support of the care provided.

Simplified theme: “Given the patient’s fragile condition at the time and because there was nothing unusual going on with the patient, the doctor in consultation with the patient decided that the risk of doing an imaging study outweighed any benefit.”

- 2. Think about giving jurors reasons to feel good about finding for your client in your themes.** In every case, jurors want to believe they’re doing the right thing. They want to know why your client’s conduct was the *right thing to do*. Often, the best way to explain this is by building your themes around the idea of knowledge and control—which party in the case was in the superior position of *knowledge* (about the circumstances surrounding the dispute) and *control* (over the circumstances surrounding the dispute). Another way is to build themes around concepts that are important to jurors (e.g., sanctity of a written contract, “meeting of the minds” before a deal, honesty, etc.). Here are some examples of themes that offer jurors reasons to feel good about finding for a party:

“Both parties agreed to the terms of the contract before signing the contract. Only months after agreeing to the terms did the defendants decide not to honor this contract.”

“Dr. Smith met with the patient on two separate occasions before the surgery, to make sure the patient understood the risks of the surgery and answer any questions the patient had.”

- 3. Think about ways to make your themes connect.** One characteristic of effective case themes is that they “dovetail” together and tell a cohesive story. Once you’ve identified (and simplified) the key elements of your case story, the themes you create should connect in ways that let jurors know that there is more to the story. Not only should themes be separated to address different parts of the case, but they should also serve as helpful “home bases” that different witnesses can use in their testimony. During deposition or trial testimony, themes can be very helpful tool to witnesses, by providing a clear idea/concept to build answers to difficult questions around, while avoiding opposing counsel’s attempts to get the witness “off track.”
- 4. Revisit your themes.** Good themes take some time to develop, and the first draft of a theme rarely conveys the right information at the right level. It’s always a good idea to revisit and “fine tune” your themes throughout the lifespan of your case before trial. As you speak to witnesses, experts, or address judgments from the court about different issues, it may become necessary to tweak your themes to address changes in the case. This is preferable (for many obvious reasons) to trying to conform your case facts to your themes. It also never hurts to bounce your themes off people who can offer you useful feedback. Of course,

you want to choose carefully the people you seek feedback on your themes from. Avoid seeking feedback from people who have an interest in telling you what you want to hear, or may have difficulty being objective (e.g., subordinates at work, close family, spouse, etc.). The best feedback will come from people who don't know anything about your case and/or don't work with you (e.g., neighbors, friends, colleagues, etc.). Sometimes a great way to get useful feedback is to simply tell your "surrogate jurors" only what your themes are, and ask them if they can tell you what your case is about. If an objective audience can tell you what your case is about—with a reasonable degree of accuracy—then your themes are "on the mark."