DEVELOPING A THEORY OF THE CASE

From

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By

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Whatever you do, you need courage. Whatever course you decide upon, there is always someone to tell you you are wrong. There are always difficulties arising which tempt you to believe that your critics are right. To map out a course of action and follow it to an end requires some of the same courage...

Ralph Waldo Emerson

A Definition of a Theory of the Case

A theory of the case is a cogent statement of an advocate's position that justifies the verdict he or she is seeking. A theory of the case is not necessarily cast in the words that will be used with the jury, but words that are heard in the lawyer's mind as the case is prepared. The goal of the trial plan is to create factual support for the theory of the case.

Just as an artist paints a picture from a fixed perspective, so must the lawyer prepare the case from the perspective of his or her theory of the case. Had the advocate no theory of the case, the advocate would have no unifying focal point to the various portions of the case from voir dire through instructions.

The theory of the case is more than a strategy - it is a philosophy: It is the reasoning by which the advocate is entitled to the verdict she is seeking. The theory of the case is advanced through strategy. That is to say, all of the phases of the case are executed in a way to move the jury closer to accepting the advocate's theory of the case. It is possible to have a theory of the case and have no strategy whatsoever. This can be seen in questioning that is not goal oriented, or in a voir dire that deals with issues that have nothing whatsoever to do with the issues to be tried. Lawyers who ask jurors about their number of children, or where they work, when these things are highly unlikely to influence the jurors' perceptions of the lawyer's theory of the case, are wasting their time. They may have a theory, and they may have a strategy, but the two don't come together. Conversely, some lawyers try cases with a strategy, but with no theory of the case. They cross-examine to prove every inconsistency, though they put up no affirmative notion of what it is their side is saying. Such lawyers simply lash out at everything proved by the opponent without regard for whether those facts have any bearing on the outcome sought by the cross-examining party.

Without benefit of a theory of the case, there is no unifying tactic, and hence, the individual parts of the case are not only unrelated to each other, but may prove to be internally inconsistent. Without a theory of the case, one might cross-examine on incompatible theories, such as identity of the defendant as the perpetrator, and insanity of the defendant. All too often, insurance defense lawyers fight both liability and damages, when, in reality, they would have been better off conceding liability to the plaintiff, and pitching the battle on the damage issue alone. A theory of the case is the single dominant concept that links all other aspects of the trial. This overall strategy guides the trial. Its support is the goal of all trial tactics the trial lawyer adopts. By developing a theory of the case, counsel is able to define the field of battle. The theory of the case tells the lawyer

what battles must be fought and what issues are no longer material to the outcome of the dispute.

Necessity of Developing a Theory

At the conclusion of a lawsuit, there are a great many facts that are in dispute. Each side lays claim to what are the true facts, and what the inferences are to be drawn from those facts. It is the function of cross-examination to highlight those facts that are favorable, diminish the credibility of facts and inferences to be drawn from them that are unfavorable to the theory of the case, and introduce in cross-examination facts favorable to the theory of the case, thus permitting counsel, in closing argument, to argue inferences favorable to the theory.

Case preparation systems are designed to prepare lawyers to engage in cross-examinations best suited to accomplishing those goals. The techniques of cross-examination are designed to assist in delivering cross-examinations that accomplish those goals. *However, neither the science nor the techniques of cross-examination can assist in accomplishing the goals of a cross-examination unless those goals are linked to a theory of the case.* The theory of the case provides the goals not only for the overall strategic texture of the cross-examination, but the individual examinations themselves. By developing a theory of the case, the lawyer knows which facts are realistically needed to be proven and which inferences must be put in a position to forcefully argue them at the close of the case.

Law and Facts in the Theory

A successful theory of the case must be consistent with both the law and the facts; in fact, a theory of the case describes counsel's position on how the facts and law come together to justify the outcome being sought. The theory is more than a general hypothesis or a conclusory statement. It might be useful to think of a theory of the case as an extremely concise closing argument. When the advocate hears in his or her head the arguments intended to be made to the finder of fact, the advocate is hearing the theory of the case.

Developing A Theory of the Case

Usually a theory of the case becomes self-evident upon a first reading of the facts. In a criminal case, where some amount of discovery may be immediately available, generally a first-draft theory will spring to mind after reading the police reports and the incident reports. In civil litigation, where detailed discovery comes long after the case has been initiated, a rough draft of the theory can be developed based upon a thorough client interview, and informal investigation.

The theory may start as broadly as "the doctor did not do the tests necessary to diagnose my client's illness" or "the doctor was in a hurry, and that is how the bowel got perforated during surgery." In commercial litigation, the beginning theory might be "the landlord is hiding all kinds of unrelated expenses under the guise of common area maintenance fees, and thereby jacking up my client's rent." In criminal defense work, a review of discovery may lead to a theory such as "the witness has told so many stories, it is impossible to believe her beyond a reasonable doubt" or "it was the deceased who kept advancing and pushing the fight, forcing my client to shoot in self-defense."

In order to develop a theory, it is only necessary to begin to think in terms of how the advocate will persuade the finder of fact. If the lawyer can begin making closing arguments in his or her head, the lawyer is well on his or her way to developing a theory of the case. For those who are new to identifying a theory of the case, this closing argument thought process is a helpful method. Eventually, it will be more efficient for the advocate to think in terms of cross-examinations to be given and cross-examination to be defended against. It may be that the theory first developed is modified and perhaps even discarded, but the method of developing a theory is not changing, only one's prediction of its success. If the lawyer begins to modify the theory, soon the lawyer hears himself or herself giving different closings. This is again the hallmark of the

development of the new theory. Whether the case is criminal, civil, or domestic, there is no effective way to plan the case and execute the plan in the absence of a theory. A theory is, in fact, the guiding principle of the trial plan.

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Fact-Driven Theory

Every theory of the case is factually driven, regardless of the nature of the lawsuit. When lawyers say that they have a cold winner on the law, what they really mean is that they have facts of such a nature that a fair application of the law (the instructions) must inevitably lead to a successful verdict. (Such lawyers are usually wrong, but that is another story.)

Though a theory of the case may be developed based upon only a partially completed discovery process or on incomplete investigation, it is done so with the knowledge that theories must remain fluid in the face of ever changing facts. As more facts are developed, they may strengthen a theory, modify it, or extinguish its usefulness. Theories are responsive to facts, rather than facts being manipulated or forced into fitting a pre-selected theory.

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Once a theory is postulated, trial counsel will discover that many of the facts of the case are neutral facts - facts that neither conflict with nor support that theory. So long as the theory remains the same, the lawyer need not fight these facts or their inferences. However, if the theory is changed, the advocate must reanalyze facts that were first thought to be neutral to determine if they have now become negatives or positives to the new theory. Conversely, the advocate must constantly scrutinize supposedly neutral facts to see if there is a way of accommodating those facts and the inferences to be drawn from them into the chosen theory. Through this process, the lawyer is constantly seeking to convert "neutral" facts into facts that support the theory. While the incorporation of neutral facts into the theory is a helpful goal, such facts are not the limiting or driving forces in the development of a theory of the case. The facts that most limit the lawyer are "facts beyond change."

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Emotional Elements of a Theory

Every theory of the case has its own emotional level or pitch at which it is best delivered to the jury. If the advocate can determine the proper emotional pitch of the theory, and if jurors can feel that emotion as they hear the testimony, they are emotionally in tune with the theory of the case, then a juror's vote in the lawyer's favor seems to *feel* right. The emotional pitch of a theory of the case can be termed the "dominant emotion" of the case. If that emotion can be identified and used as the dominant emotion, the theory of the case becomes far more saleable and acceptable to the jury.

Identifying the Dominant Emotion of the Theory of the Case

The first opportunity to determine the dominant emotion is during the discovery phase of the case. Whether a civil or a criminal matter, when the lawyer reads depositions, reports, records, or interviews, he or she should be acutely aware of the emotions generated in him or herself. Does the lawyer become angry at the doctor who missed the diagnosis? Skeptical at the explanations of the opponent, but profoundly sad at the senseless death or injury of a party? Sympathetic to the victim who seems confused in his or her facts? In all manner of cases, in reading the discovery, the lawyer must be cognizant of the emotions generated.

Even where little or no discovery exists, a discussion with the client or witness concerning the facts of the case will generate some emotion. These are likely the same emotions that the jurors are likely to feel when *they* hear the facts related in the courtroom. While there may be instances when these emotions can be deflected, it is far better to inject these emotions into the theory of the case rather than fight them. Through this

process, the dominant emotion of the case is determined. While searching intellectually for the dominant emotion, the lawyer must be open emotionally to feel it.

The lawyer must seek to mold the dominant emotion into part of the theory of the case. An entrapment defense is, in essence, the feeling of "that's not fair." Self-defense is based on fear, and assault on a bully is based on anger or humiliation. Some medical malpractice cases have at their heart the greed of care givers, while other such cases are generated by a feeling the doctor was lazy, and some are predicated on well-meaning, but overworked institutions. The lawyer must see how the case *feels,* and engrain that feeling into the theory of the case.

Emotion Becomes Fact

In so doing, an effort is made to transform the emotion of the theory of the case into a "fact" of the case. The advocate tries to make the jurors feel that dominant emotion, through the presentation, sequence, and timing of the facts. When the jurors feel betrayed, angry, cynical, skeptical, or any other emotion that has been targeted as part of the theory, they are determining the "fact" of the emotional aspect of the case to be valid. The object is to make the jury feel as the client did.

Mentally, they are concluding that the client should feel the same way. The jurors are therefore feeling what the client was feeling. In the closing argument, the argument (theory of the case) to be made is in tune with what the jurors are feeling. The jury's emotional receiver, their humanity, is in tune with the theory of the case. They are therefore more receptive to the lawyer's theory of the case.

The more that the case can be postured so that the jurors feel the dominant emotion of the theory, the more likely the lawyer's success. In order to assist the jurors or allow the jurors to feel the targeted dominant emotion in all phases of the case, the lawyer must move them toward the dominant emotion. By doing so, the lawyer is moving them toward acceptance of a critical "fact" of the theory.

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The Best Theories of the Case

The best theories of the case are those that are consistent with ordinary experience of the emotions of the jurors. By selectively refreshing those memories and emotions during voir dire, the jurors are reminded that the dominant emotion of the case is an emotion that they too have felt under parallel (though not necessarily similar) circumstances.

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Converting the Theory of the Case into a Theme - Theme Lines, Phrases, and Words

A theory of the case is that *concise statement* that the lawyer spoke to herself in defining how to convince a jury of the rightness of her position. But, that statement, short as it might be, is too cumbersome to convey to a jury. In order to use a theory of the case as a persuasive tool, there is a need to convert it into a theme. The theme distills the essence of the theory of the case into a one sentence refrain, a refrain capable of being formed into a question on cross-examination.

A theory of the case might have only one theme that distills the essence of that theory. A theory of the case may have multiple themes that, when coupled together, distill the essence of the theory of the case. If the theory supports multiple themes, the themes must be consistent and capable of being interwoven together to completely support the theory. The theory may be distilled further in that the theme becomes stated in a theme line, phrase, or word capable of capturing and making memorable the theme, and therefore the theory.

Theme lines can be sentences, or phrases, or simple words. While themes may be distilled further into theme lines, phrases, or words, that does not necessarily mean that a simple word, phrase or theme line will represent the entire theme or theory. In other words, theme lines, phrases, and words are shorthand efforts to state a theme and theory, but may not capture all of the theory in a shorthand presentation. They will only represent that theory.

One of the most memorable examples in turning a theory into a theme is found in Dr.

Martin Luther King's speech delivered in the march on Washington, August 28, 1963. The portion of his speech best remembered, and, in fact, the words that have come to best symbolize Dr. King's work, are set out below:

> I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I *still have a dream.* It is a dream deeply rooted in the American meaning of its creed, "We hold these truths to be self-evident, that all men are created equal."
>
> *I have a dream* that one day on the red hills of Georgia, sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.
>
> *I have a dream* that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.
>
> *I have a dream* that my four little children will one day live in a nation where they will not be judged by the color of their skin, but the content of their character.
>
> *I have a dream* today!
>
> *I have a dream* that one day down in Alabama-with its vicious racists-with its governor having his lips dripping with the words of interposition and nullification-one day right there in Alabama, little black boys and black girls will be able to join hands with the little white boys and white girls as sisters and brothers.
>
> *I have a dream* today!
>
> *I have a dream* that one day "every valley shall be exalted and every hill and mountain shall be made low. The rough places will be made plain and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together."

In presenting his case to the nation and to the world, Dr. King's theory was clearly that America ought to offer liberty and justice equally to all people regardless of race. As a vehicle for advancing his theory, he adopted the phrase, "I have a dream." That phrase symbolized not only the fact that racial equality was still missing in America, but also the hope that it could be achieved. His effectiveness in synthesizing a very complex theory into a memorable theme and a theme line is borne out by the fact that in the United States, and many parts of the world, people who never heard the speech, nor have ever read it, can identify the theme, "I have a dream," and correctly translate its meaning into their own words. In this way "I have a dream" has been transformed into a theme and a theme line symbolizing the much more complex theory. When that theme line is heard, people immediately envision the facts of racial injustice and the hope for a fairer world, upon which the theory is built.

Integration Throughout Case

Themes, theme lines, phrases, or words are key phrases that synthesize and symbolize the theory of the case. Themes can be repeated in the opening statement, direct examination, cross-examination, speaking objections or responses, and closing argument. To be effective, a theme must capsulize the more complex theory so that the very uttering of the theme line, phrase, or word calls to the jurors' minds the essence of the theory of the case.

Common Themes in Cases

In self-defense cases, cross-examiners often claim the theory that the victim was the initial aggressor. A theme, or one of the themes, was that the defendant retreated, but the aggressor continued the attack. Possible theme lines might be "but he didn't stop," "but he wouldn't stop," "but he just kept coming," or "he kept pushing it." In order to create these themes, the cross-examiner must search for and develop facts within the case that permit the lawyer, through cross-examination, to demonstrate that at several opportunities, the victim either didn't stop the action, refused to stop the action, or kept initiating action. The cross-examiner is seeking to create opportunities to require opposing witnesses to admit or verify a theme line, which verifies the theme, which verifies the theory. After establishing the appropriate facts that made the theme line true, the cross-examiner adds a leading question that incorporates the theme line, and forces the witness to give an admission as to that theme

line. By this method, the facts are introduced that support the theory of the case, then make the theory more memorable by forcing admission of the selected theme line by requiring witnesses who are not our allies to verify the accuracy of the theme statement. In this way, facts beyond change become inextricably interwoven with the theory.

In a contract case where one party is insisting that the contract be performed and the other party is attempting to have the contract declared null and void, a possible theme line might be "she gave her word," "her word is her bond," or "a contract is a promise."

In a road wreck case where the defendant was highly intoxicated, a theme line of plaintiff's counsel might be "she knew she would have to drive home, but she kept on drinking," or "she knew she was drunk, but she got in the car anyway."

In a domestic relations case where custody is an issue, a theme line for the wife may be "she always put the children first," or "whatever sacrifice it took, the children always had as good as she could provide."

Inserting Themes Throughout the Case

Having researched the facts in order to prepare opportunities to introduce the theme line in cross-examination, the lawyer begins its use *no later* than opening statement. In opening statement, the lawyer will set forth his or her facts with great particularity. The theme line is then added as an emphasizing statement. In this way, the theory of the case is cemented in the jury's mind in the opening statement, and the theory, as expressed in theme lines, theme phrases, and theme words, becomes familiar, comfortable, and, thus, more memorable.

The following short section of opening statement shows introduction of the theme:

> James Donaldson came to the door. It was a screen door. He could see out. He could see Danny. And James Donaldson could have stopped there, but he didn't. He slammed open the screen door and ran outside. He could have stopped there, but he didn't. He ran at Danny. He ran fifty-one feet down the sidewalk toward Danny. He could have stopped at any point - but he didn't. And as he got closer to Danny, he made his hands into fists. And he cocked back his right arm. He still could have stopped, but he didn't. And he brought his right arm back, by his ear to get ready to hit Danny. Still he could have stopped, but he didn't. And finally, as he came charging into Danny, fists at the ready, five foot seven, sixteen-year-old Danny pulled out the knife and he stabbed six foot one, twenty-two-year-old James Donaldson. He stabbed this bigger, older man who so many times could have stopped, but didn't.

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Of course, in closing argument, the lawyer is free to use the theme lines, phrases, and words. The best use of it is as a summary line following a recitation of groupings of facts that made its use appropriate. After the lawyer has discussed with the jurors the supporting facts that prove out the theory of the case, the lawyer can then state the theme line, such as, "but he didn't stop." In this way, the theme of the case can be made the dominant discussion point of jury deliberations. Furthermore, this method solidifies the theme line in the jurors' minds as it symbolizes the key aspects of our cross-examination. Therefore, any juror who recites or remembers our theme line or slogan will recall the outlines of the theory that translates the best cross-examination materials. In essence, the facts have been organized around the theme line so that a fact finder recalling the theme phrase or line will automatically recall our best factual material.

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Vague Theories: A Roadmap to Disaster

The theory of the case, while it is not an elaborate position on all of the facts, is something more than a conclusory statement such as "there exists reasonable doubt," or "plaintiff has proved her case by a preponderance of the evidence," or even "the plaintiff has proved the defendant ran the stop sign, which caused the accident, and thereby injured the plaintiff." Such theories are too vague, nebulous, and hazy to serve as a focusing mechanism for winning trial strategies. Furthermore, there is nothing remotely

memorable about such a "theory," since it is pure lawyer talk. It does not compel a juror to any emotion or passion nor does it remind them of any case-specific concept. The successful theory must be case specific, that is to say that generalizations and conclusory statements will not suffice. Jurors need some handle on how the facts of this particular case compel a particular decision. In the absence of such specificity, there truly is no theory of the case. Therefore, the lawyer is incapable of including material leading toward the chosen theory, or excluding material as being irrelevant to that theory, since the theory is a free-floating suggestion that the lawyer is entitled to win without a supporting philosophy to guide the jury.

In criminal cases, the ultimate non-theory is: "The defendant is not guilty." This is no theory at all, but a purely conclusory statement. By saying that the theory is "the defendant is not guilty," or even, "the evidence does not prove guilt beyond a reasonable doubt," it can be seen that no guidance is offered as to the critical facts to be produced in cross-examination. Similarly, this naked conclusion does not assist the lawyer in excluding facts or areas that are irrelevant to the theory. "Not guilty" is a desirable verdict, but it is not a path to that verdict.

The theory of the case must be specific enough to narrow the scope of the cross-examinations the lawyer needs to deliver, and to provide a sense of direction or goal in each of the components of the cross-examination. (see chapter 9, *The Chapter Method of Cross-Examination).* When a vague theory is created, the case is left adrift. By leaving open any course of action, the lawyer compels herself to no particular course of action. Some lawyers term this maximizing flexibility. It is nothing of the sort. Its supposed virtue, flexibility, is, in reality, its fatal weakness - lack of goal. When theories drift, the cross-examinations lack focus, and the jurors become confused over what is trying to be proved. Since the jurors do not comprehend the goal, they cannot tell if the goal has been achieved it. The advocate's lack of clarity is penalized by the jury's verdict.

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Analysis of the Thought Process Involved in Creating a Theory of the Case

When discussing how to develop a case theory efficiently, it is sometimes difficult to conceptualize the thought process.

Begin by locating facts beyond change. A likely starting point to find facts beyond change is in places where the facts by definition cannot change. Documents, photographs, tangible evidence, physical evidence, audio and video tapes, and the natural laws are likely starting places.

Analyze the testimony of all potential witnesses to find additional potential facts beyond change. Remember - beyond *change* does not mean difficult to change - it means *impossible.*

Then determine if the facts beyond change give rise to inferences beyond change that then in and of themselves become facts beyond change.

During this process, "feel" the dominant emotion or passion created by these facts. The dominant emotion or passion will be discerned while finding facts beyond change. It will color and influence the facts beyond change, and, in most cases, will become a fact beyond change itself.

Taking these facts beyond change that include the dominant emotion of the case and coupling it with the legal principles permitted, a theory of the case will now be developed. In developing the theory, the facts beyond change must be consistent and run with the grain of the theory, not contrary to or against the theory. Likewise, the theory must be supported in law by legal principles with which the court will instruct the jury.

A theory will then be distilled or broken down into a theme or themes that are consistent one to the other. Themes perhaps can best be described as human experiences that we all have that parallel, but may not be similar to, the parties' human experience in this case. In this way, jurors can be made to "feel" the position of the advocate's client.

Themes are further distilled into theme lines. That is, they are made into memorable sentences, phrases, or perhaps words that crystalize and capture the essence of the theme and the theory. These theme lines will be integrated and used repetitively through voir dire, opening, direct, objections and responses

to objections, closing, and, most importantly, the advocate's cross-examinations and resistance of the opponent's cross-examinations.

Whenever possible, these theme lines will be coupled with and used in connection with facts beyond change. In this way, the theme lines are made believable because of their connection with facts beyond change.

As can be seen, this thought process becomes somewhat circular in the sense that facts beyond change start the cycle but are also incorporated into the last stage of the cycle. Because trial lawyers deal with human beings and human experiences and because trials take place not in the past but in the present tense, this circular type evolution is not stationary. It is a self-generating process that continues throughout the trial and moves in a direction. It is a positive feedback system.

The key to the proper theory of the case is identifying the proper, dominant emotion of the case so that as the theory evolves in the case, it will evolve in the direction of the dominant emotion of the case, which will further heighten the effectiveness of the advocate's theory.