

Effective Use of Pretrial Discovery and the Case Theme
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I have attached suggested form interrogatories and production requests in automobile, premises liability and products liability cases, along with IL S Ct Rule 213 (f)(3) expert interrogatories. We all know that the effective use of pretrial discovery requires more than printing and sending “form interrogatories” to opposing counsel. Effective, meaningful and productive pretrial discovery requires the Trial Lawyer to consider the meaning and purpose of each case and the creation of a *case theme*.

The ideas that I will share with you are the result of the daily repetitive challenges we all face in the specialized area of trial practice. Many, or perhaps all of them, are already known to you. The tedium of pretrial discovery, reviewing medical records, contracts, corporate and other documents requires discipline, concentration and perseverance. We all have come to learn that the substitutes for thorough preparation, which leads to success, are extremely rare, if they exist at all.

Unfortunately, the continuous challenge to be thoroughly prepared before each contested court hearing and discovery deposition exacts a steady and heavy physical and emotional toll on the Trial Lawyer. These challenges, together with the physical, emotional and intellectual demands of being engaged in trial can ultimately deplete our energy, health and enthusiasm. For this reason, we must constantly strive to challenge ourselves to venture into new and different paradigms and experiences. We must seek those experiences and challenges that will provide us with new daily practice and discovery methods and trial techniques that will re-energize us and reward our worthy clients with success on their cases.

You must always remind yourself that *you* are the very best lawyer to be handling your client’s case. No other lawyer knows your client and the subject matter of his or her case better than you. When you are challenged by the constant demands of your practice, you must always remind yourself that you have been given the unique and challenging opportunity that has been given to no other lawyer. You have been privileged to be personally selected to represent and advocate for justice for a fellow human being, your client.

No other trial lawyer will ever have that specific and precise opportunity to achieve justice for your specific client. This is a gift that you must cherish, especially when the challenges of your client's case become most demanding. Come with me as we renew our energy and appreciation for the privilege of being a Trial Lawyer.

Meaning, Purpose and Direction-The Case *Theme*

Every case must have a theme. Creating a theme should be challenging and fun. As soon as the initial interview of the client is concluded, you should first consider a broad theme. (Some examples are: Needless surgery; Failure to see the obvious; Too busy to listen to his patient.)

The theme should be refined through the pretrial discovery process and perfected for use at trial. Often, you will ultimately perfect a theme that will be totally different from your original thought process.

What the Case Theme Means for the Trial Lawyer

A case theme is a simple concise explanation as to why the parties in the case (story) acted as they did. The theme allows the story, and ultimately the trial, to unfold in the manner in which *you* determine. Themes are the foundations upon which the case is developed and your client's story is told.

Themes allow you to remain structured and directed during the pretrial stage of your case. During trial, themes allow the jurors to picture and visualize the case in the way you choose. All cases can be organized around a theme summarizing your position on the evidence. The theme of your case explains why your client should receive a favorable verdict from the jury. You must thoroughly understand the theme, or you will never be able to convey your message to the jury. From the very beginning, consider the theme and structure your case, and your pretrial discovery, according to how the case theme will accomplish your goal.

The theme is the recurring concept that unifies the case. Every strong presentation of a case needs at least one theme. It may be the principal idea or foundation for the key contention or theory of the case. It gives the jury an impression of the key concepts of the case.

Re-examine and refine your case theme as you proceed with your pretrial deposition discovery. Allow your case theme to structure and guide you through the deposition discovery process. Upon completion of pre-trial discovery, and by the time of trial, the case theme should be reducible to a simple and clear message expressing why your client should succeed.

Importance of the Case Theme

The theme allows *you*, not opposing counsel, to *control* the definition of your case and the story you want to be told. You provide structure and a mental image for the jurors to clearly and better understand the case. A case without a theme may be too difficult for the jurors to comprehend and resolve in favor of your client. Jurors need something definite and specific to make order out of the chaos that makes up all trials.

A case theme allows the jurors to grasp a central concept or principle around which they can organize the information given during the trial. You also provide a mental image for yourself. In the same fashion as a case theme gives the jurors a generalizing principle around which information can be organized, so too does it give you, the trial lawyer, direction and focus.

The consistently effective and successful trial lawyers understand and emphasize the need for an overall strategy. The case theme provides the framework and direction within which to promote your persuasive and winning theory.

As a trial lawyer it is your responsibility to provide guidance for the jurors throughout every phase of the trial. In this way, you not only promote the theme and theory of your client's case; you also enhance your professionalism and credibility with the jury.

From the beginning of the trial to verdict, the effective and successful trial lawyers give the jurors that guidance, in the form of the case theme. If you have created a good case theme, and organized your case succinctly and consistently around that theme, you will give the jurors an excellent guide through the informational morass which makes up a trial.

Establishing a case theme enhances your professionalism. You share with the jury that you see the case in a very specific, defined and consistent way. The precision with which you prosecute your client's case within your defined theme, will enhance your professionalism and competence with the jury.

The case theme is the primary mental organizer that helps jurors to remember the key facts of the case. A proper theme allows jurors to look for evidence that is consistent with your client's position in the case. During final deliberations, jurors surely rely on their memories of what happened during trial as well as the evidence and their notes. Your goal is to provide the jurors with the factual framework, created by your theme and trial lawyer skills, they will use during final deliberations.

A case theme will aid the jurors to channel their thought process in the manner directed by you. The theme will assist the jurors to remember the evidence that best supports your client's position.

Consider the promotion and advocacy of *one* central theme. Each of us in life, as well as during trial, more readily remembers a simple, concise general principle or central theme, easier than individual details.

Deliberating and resolving conflicting trial evidence and testimony is extremely difficult and challenging. Jurors search for that one truthful explanation, that one central theme that best reconciles the greatest number of factual discrepancies inherent in all trials.

Use your theme to tell your client's story. Simplify and organize your emotional, factual and visual trial presentation so that the jurors can understand it.

Developing and Selecting the Case Theme

As the pre-trial discovery proceeds, testimony and documentary evidence that will be *admissible at trial* will allow you to further develop and refine the case theme. The theme must be based on the *admissible* evidence; most significantly, it must be cohesive, logical, and persuasive.

Ultimately, a singular and unique case theme must be developed and perfected. By the time you begin your final trial preparation, you should be able to state your case theme in one sentence of, ideally, no more than ten (10) words.

Simplification is the key to developing and selecting a persuasive and powerful theme. Even the most complex case should be reduced to its essential elements so the jury can readily understand it.

On behalf of your client, you have the burden of proof. Often, it is your opponent that strives to confuse the jury. You will have great difficulty persuading the jurors if they are confused. Lawyer talk or legalese and complex or rambling expressions and questions have no place in the arsenal of the effective trial lawyer. The more direct your speech, the clearer and more powerful it will be.

Simplicity is the mandate for developing and using a theme. The effective trial lawyer stresses the simple and never the complex. If you cannot state your theme in, ideally, ten (10) words or less, then you most likely will not have developed an effective theme.

Simplicity and *clarity* are your goals. The following guidelines will be helpful:

- (a) Use simple English, not legalese;
- (b) Avoid any words that are not absolutely necessary;
- (c) Avoid the use of lofty or legal concepts;

(d) An effective theme should be short, easily understood, catchy and clear in the proposition it advances.

In developing your theme and theory of liability you will continuously consider the admissible testimony and documentary evidence. You must be certain that your theme is supported by testimony and evidence that every juror will understand and believe to be *based on common sense and be absolutely true*.

If it is appropriate and truly credible, try to elevate your theme to a higher cause. Subtly provide the jurors with the feeling of the possibility of making their community health care safer, preventing needless deaths or catastrophic injuries; give them the opportunity to right some fundamental wrong.

The theme is often introduced by giving the case a title. Effective trial lawyers share the case theme with the jury in their opening statement, or in *voire dire* if possible. For example, “This case is about the destruction of a heart and the death of a Sweetheart”; “This is the case of the defendant doctors’ *failure to communicate with each other*”; or “This case is about how the defendant doctors *did not follow the written rules of the hospital*,” and “This is a case of *lack of experience and inadequate surgical preparation* by the defendant doctor.”

Whenever possible, your case theme should *focus on the conduct of the defendant*. The theme should emphasize the defendant’s choices and failure to accept responsibility. The theme should ultimately establish that the plaintiff’s case is authentic and not frivolous.

Repeat your theme as much as possible throughout the pretrial discovery process and again during trial. This may be able to be done with almost every deponent and witness. For example, as an introductory transition statement before you question the witness about the hospital policies, rules and procedures that have been admitted into evidence, consider asking: “Now, doctor, I would like to discuss with you how the *defendant chose not to follow the written rules and procedures of the hospital*”.

Or, as an introductory statement before you question the witness about his or her review of the deposition testimony of the defendant physicians consider asking: “Now, doctor, I would like to discuss with you whether the evidence shows that there was a *communication breakdown* between the defendant internist and defendant orthopedic surgeon”.

Once you have developed and refined your simple and logical case theme, you must consider how you will consistently promote the theme during the trial. The promotion of your theme during trial should prove to be fun and exciting for you.

Technology Tools to Promote the Case Theme-the Ever Present Challenge

Efficiency and effectiveness should be goals that we strive to achieve and refine daily. Whether you are providing *pro bono* services, or services based on an hourly, contingent or flat fee, your time and advice are two of your most precious commodities. Technology and software should enhance your practice and your professional and personal life.

Technology should provide you and your clients with a strategic edge that is mandatory in today's trial practice. Your case theme can be advocated and promoted through the appropriate use of technology.

Presentation graphics and *deposition transcript management* software are critical programs for the promotion of your case theme as you prepare and try your case. These technology tools, along with *case management* software and *word processing* programs, are critical tools needed to create and organize your trial preparation and persuade the jury.

These trial lawyer technology tools should serve to keep you challenged and excited in your practice. They are essential for every effective and successful trial lawyer as she and he develop and successfully prosecute their clients' cases. I will share with you some of the tools and techniques you may consider when promoting your case theme and developing and trying your client's case.

Presenting Real and Demonstrative Exhibits in the Courtroom

Presentation software, such as *Sanction*® and Microsoft® PowerPoint¹, is mandatory in order to promote your case theme, successfully satisfy your client's burden of proof and enable you to persuade the jury to return a verdict for your client.

During trial, in order to most powerfully promote your theme, "seeing is believing". You must be keenly aware of the demographic makeup of today's

¹ Microsoft® PowerPoint is provided with most versions of Microsoft® Office software; therefore, it may already be available for your use. The program is easy to use; however, it lacks the organizational, magnification and other demonstrative features of presentation programs like Sanction.

Although unrelated to our discussion of digital document presentation during trial, Sanction® may also be used to organize medical records and other documents, electronically, for your day to day efficient use.

jurors.² Today, it is mandatory that you be able to present all of your exhibits almost immediately and projected on a screen or monitors.

In most cases, even those that are document intensive, by the time you are ready for trial there are usually not more than ten to twenty key documents or records that are crucial to persuading the jury in favor of your client's position. These are the documents that should most effectively promote your case theme, support your theory of the case and persuade the jury.

Never rely solely on oral testimony and the spoken word in any case. Real evidence is inherently credible and usually independently created before the lawsuit was filed. This documentary evidence promotes your credibility, gives you a persuasive edge and, most importantly, provides the jury with visual evidence with which it can decide the key issues and verdict in favor of your client.

The key documents should be presented and used during your opening statement, during the direct and cross-examination of as many witnesses as possible and finally, during your closing argument. These documents will be presented digitally by way of your notebook computer, a digital projector and screen or monitor(s).

These are the documents you want to arm and provide to the jury for their use during deliberations in order to arrive at a decision in favor of your client. Remember, you are in control as you promote your case theme; and your presentation graphics tools provide you with the tools to retain this control over the evidence and its presentation to the jury.

We all know that the courtroom is not the place to fumble and dig through papers and files looking for a paper document that you then present only to the

² Today, over 40 percent of all jury panels are comprised of Generation X—the 78.2 million Americans born between 1966 and 1976. Generation X jurors tend to want more data and the source behind it; however, they want it presented in a concise, technological (screen-view or monitor) way. They are far more visual in how they obtain information than their parents' generation.

Generation X jurors want trial exhibits and information in 30-second clips and preferably on a television screen. That is how they are used to receiving information and, as a result, have little patience for long-winded recitations of the evidence. They want the "bottom line" on conclusions the experts draw and they want it quickly.

Generation-Y jurors are our *youngest jurors* and were born between 1978 and 2000. Generation-Y jurors want even more evidence presented technologically than the technologically savvy Generation-X jurors. Regardless of the judge's instructions, we can expect them to look at the Web sites of the attorneys and the witnesses. At the very least, anticipate and expect that these young jurors will Google the attorneys and witnesses. attorneys and the witnesses. At the very least, anticipate and expect that these young jurors will Google the attorneys and witnesses.

witness for questioning. You are trying your case to the jury. It is your duty and responsibility to persuade the jury that your case theory is believable, correct and just. You will only be able to fulfill your duty and have your best chance to persuade the jury by having each and every evidentiary exhibit readily available and digitally presented with the press of the “enter” key on your computer.

Therefore, your trial exhibits must be pre-numbered, indexed and scanned into your presentation program. The exhibits, by number, must be incorporated into the outlines of your opening statement, direct and cross-examination and closing argument, so that each exhibit can be immediately projected and demonstrated to the jury.

Digital Deposition Transcript Management

In order to efficiently and properly remain organized during the discovery phase of your client’s case, and most effectively prepare for trial and promote your case theme, you must use a deposition digital transcript management program.

Programs such as *CT Summation*® and *LiveNote*®³ may be used for deposition (and records/document) management. Word and phrase search features for single, multiple or all deposition transcripts are powerful. These programs allow you to easily digest the key questions and answers and add notes of your mental impressions and strategy.

These programs are extremely useful when preparing and responding to motions for summary judgment; creation of direct and cross-examination outlines; closing argument outlines and trial and appellate briefs.

If you receive digital daily transcripts of trial testimony during trial, you can easily search critical testimony during trial and during the jury instruction conference. These features are extremely advantageous when arguing and defending motions for directed verdict and supporting your allegations of negligence during the jury instruction conference.

Advancing Your Case Theme Using Word Processing: “Cutting and Pasting” Through Discovery and Trial

The promotion of your case theme must be consistently done during pretrial discovery; and finally from opening statement through closing argument. Efficiency, accuracy and consistency are hallmarks of the effective and successful trial lawyer.

³ Other programs such as RealLegal® E-Transcript™ and Microsoft® Word are either *free* or may be already in use by you. Although they are not as powerful as Summation, they allow you to digitally organize, digest and search your transcripts. You will secure a digital copy of the deposition transcript by email along with a copy of the free E-Transcript viewer from the court reporter.

You must use your word processor and your dictation program, *not* your paper “legal pad”, in the creation of your deposition outlines, digital deposition indexes, direct and cross-examination outlines, opening statement and closing argument outlines.

In this way efficiency, accuracy and consistency may be attained. Your documents will be filed electronically and you will be able to access them and modify them easily as your case and thought process develop.

Outlines of direct and cross-examinations of witnesses should promote your case theme and, when possible, be based upon the specific pre-trial deposition transcript answers of the witness. Your outline will include the specific deposition page numbers which support each of your questions, when possible. Your outline will also include reference to specific “Plaintiff Exhibit #’s” when relevant.⁴ (To illustrate this technique, a deposition index and cross-examination outline of a defense retained expert witness ENT surgeon are attached)

Once the direct and cross-examination outlines are completed, you can then digitally “cut and paste” the key proposed witness testimony and trial exhibits into the outline of your opening statement. In this way, you will know that what you say and advocate in your opening statement will most likely be specifically supported by the proposed witness testimony and real and demonstrative exhibits.

Similarly, you can use the same process when preparing the outline of your closing argument, supplemented by any additional important evidence generated during the trial. Most significantly, you will be able to digitally “cut and paste” the key jury instructions into your closing argument outline. Explaining and discussing the law, and how it supports your client’s case, with the *actual jury instructions* the jury will receive, is absolutely *critical*.⁵

Promoting Your Case Theme Through Cross Examination (and it’s Preparation)

Because cross-examination is one of the most critical skills used in the promotion of your case theme, it will be discussed from a practical perspective. My discussion with you is not about the “art of cross-examination”. The outstanding written, tape, digital and video treatises on this art are legion.⁶ Rather, my comments will focus on

⁴ When creating your outlines, you will have up and running on your computer the following: relevant digital deposition indexes on your word processing program, CT Summation® to allow you to cross check the accuracy of your deposition index and proposed leading question with the specific witness deposition transcript testimony and Sanction® illustrating all of your trial exhibits.

⁵ It is *mandatory* that you digitally project and illustrate for the jury the key jury instructions during your closing argument. You will explain the law to the jury and assist the jury in understanding how the law, when applied to the facts of your client’s case, requires a verdict for your client.

the *physical preparation* of your cross-examination *outline* and some courtroom cross-examination techniques to consider.

The trial and your case theme are all about *persuasion*. Persuasion requires more than merely presenting facts. Persuasion requires creating an impression. An impression as to why you, the trial lawyer, can be trusted; why your client's story is correct; why your opponents and their defenses are wrong; and, why it is fair for your client to be worthy of the jury's verdict. Effective cross-examination requires a focused effort to elicit testimony, *consistent with your theme* that leaves the jurors with those impressions.

Therefore, cross-examination must focus on how the witness can reinforce the trial story and theme you are presenting, or how the witness's story does not fit into the believable trial story.

Always follow, advance and promote your case theme during cross-examination. The theme will keep you focused, directed and "on track". Consider including the written theme at the top of each examination outline.

If the witness has previously been deposed in your case (or any other case) always create a digital written index of the witness's deposition testimony. The deposition index has numerous helpful aspects, including the simplification of the creation of your cross-examination outline.

At the outset, consider and determine the *topics or subjects* you wish to cover in the examination, all consistent with your case theme. For example, in a recent medical negligence trial, some of the topics for the cross-examination of the primary defendant doctor included: "Neurologically Normal", "Communication Breakdown", "Failure to Follow the Rules", "Cause of the Stroke".

Once the topics are determined, go through the witness's discovery deposition index and digitally "cut and paste" each line of indexed testimony that supports the specific topic. As you go through the digital deposition index from beginning to end, you will be jumping back and forth from topic to topic and "pasting" the various selected key lines of indexed testimony and specific deposition page references into your cross-examination outline. (This can be as succinct or detailed to satisfy your personal style). As you refine your cross-examination outline, you will most likely modify these "pasted" deposition index statements so they best provide you with your leading questions.

⁶ See, for example *The Art of Cross-Examination* by Irving Younger, published by the ABA Section of Litigation; *The Art of Cross-Examination* (Mass Market Paperback) by Francis L. Wellman; and *Cross-Examination—Homicide or Suicide, Sequencing, Direct Versus Collateral Attack*, Roxanne Barton Conlin, Roxanne Conlin & Associates, P.C. 319 7th St. Suite 600 Des Moines, IA 50309 (most recently presented at the AAJ Annual Conference, Chicago, July 2007).

Significantly, you will also be specifying in your outline which trial exhibits, *by number*, you will be working with during the specific questioning.

Conclusion

Long ago, society conferred on our profession an exclusive franchise. It is our most valuable holding. We, alone, are authorized to counsel as to the law. As Trial Lawyers, we have been given the most challenging and special gift of working in the courtroom to secure justice for our clients.

Empower and direct yourself with your trial theme, as you persuade the jury to understand, *and believe in*, the truth of your client's case.