THEORY AND THEMES: THE PROCESS OF PERSUASIVE LITIGATION

ACKNOWLEDGMENT

The following outline is a compilation of information and ideas which have been gathered over many years from seminars and attorneys throughout the United States. The content is not original to me. I have merely collected what I have learned from others, too many to list individually, to whom I am grateful. The outline and the presentation which accompanies it are very much works in progress.

DUTY TO DEVELOP A THEORY OF THE CASE

"During investigation and trial preparation, counsel should develop and continually reassess a theory of the defense." NLADA, Performance Guidelines for Criminal Defense Representation (1995), Guideline 4.3, p. 61.

"Developing a theory of the case that encompasses the best interests of the client and the realities of the client's situation will help counsel evaluate various choices throughout representation, from pretrial release and exploration of pretrial diversion programs and plea negotiation, through taking of a guilty plea or trial, and sentencing." NLADA, Performance Guidelines, supra, Commentary, Guideline 4.3, p. 61.

DEFINITIONS

THEORY OF THE CASE

"*That combination of facts (beyond dispute) and law which, in a common sense and emotional way, leads the jury to conclude that a fellow person is wrongfully accused.*"

- Tony Natale

"*One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.*"

-Mario Conte

"*A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocence or reduced culpability.*"

-Vince Aprile

THEORY OF THE CASE

THE THEORY OF THE CASE IS THAT COMBINATION OF FACTS (BEYOND DISPUTE) AND LAW WHICH IN A COMMON SENSE AND EMOTIONAL WAY LEADS THE JURY TO CONCLUDE THAT A FELLOW PERSON HAS BEEN WRONGFULLY ACCUSED.

Keep in mind we are talking about the THEORY OF THE CASE and not the THEORY OF DEFENSE. A THEORY OF DEFENSE conveys an attitude that there are two sides or versions, ours is merely one of them. While the THEORY OF THE CASE is a positive, affirmative statement as to what really occurred and what the law directs should happen to an individual who has been accused in this particular situation.

FACTS BEYOND DISPUTE - those facts which (no matter what you do or say) will be believed by the jury as true. It also includes those facts which you will be able to present either on direct examination or through cross examination or direct examination which the jury would likely accept as true.

LAW - those jury instructions which apply to the issues which arise in your case.

COMMON SENSE - ordinary people must believe based on their life experiences that our version of what happened is something they can live with and accept.

EMOTIONALLY - those feelings which ordinary people would have to what, how and why the case occurred. Remember, emotions motivate more decisions than logic.

LEADS A JURY - the facts, emotions and the law are presented such a clear, logical and emotionally consistent manner that the jury, on their own, (not you forcing it on them) comes to conclude that the accused has been wrongfully charged.

A FELLOW PERSON WAS WRONGFULLY ACCUSED - acknowledges that a crime may have been committed but not by the person who is on trial or that a crime may have been committed and committed by the defendant but not the crime for which he is charged (lesser).

CHARACTERISTICS OF A THEORY OF THE CASE

- ✓ Theory must be credible / believable
  - ➢ Consistent with bad facts
  - ➢ Explain away bad facts
- ✓ Theory must be interesting / entertaining
- ✓ Theory must be consistent with common sense / human experience
- ✓ Theory must showcase, channel and generate the emotions of the client's story
- ✓ Theory must reveal the true nature / character of the major players
- ✓ Theory must be client centered and jury driven

BENEFITS OF A THEORY OF THE CASE

- Directs pre-trial motion practice.
- Focuses and prioritizes voir dire questions.
- Functions as a “mini” opening statement.
- Measures the prejudice of prosecutorial actions.
- Places all witnesses in a defense context.
- Creates parameters for the scope of cross-examination.
- Reveals the appropriate attitude for cross-examining each witness.
- Organizes the presentation of the defense case.
- Serves as a checklist for eliciting essential information from defense witnesses.
- Dictates the essential defense instructions and reveals inappropriate instructions.
- Identifies and prioritizes issues for closing argument.

ELEMENTS OF A THEORY OF THE CASE

- Persuasive facts
- Strong emotion
- Legal basis for jury to find for client
- Vivid Imagery
- Concrete language
- Vocabulary choices that reinforce the theory
- Client-centered
- Compelling and believable story

WHAT'S NOT A THEORY OF THE CASE

- The defendant is not guilty (innocent) (not guilty by reason of insanity) (guilty of a lesser offense).
- Mistaken identification.
- Self-defense.
- Reasonable doubt.
- Inadequate police investigation.
- Coercion and duress.

PATHWAYS TO DEVELOP A THEORY OF THE CASE

Physical re-enactment

Psychological re-enactment

Legal re-enactment

If the accused is **not guilty** and a video camera was on all witnesses at all times what would we see? What would we hear? What would we not hear or see?

If the accused is **guilty** and a video camera was on all witnesses at all times what would we see? What would we hear? What would we not hear or see?

Compare to what we know to be the facts beyond dispute. What is consistent? What is inconsistent?

What would the jury expect a guilty person to do or say?

What would the jury expect a not guilty person to do or say?

What would the jury expect a true victim to do or say?

What would the jury expect a mistaken victim to do or say?

What would the jury expect an accurate witness to do or say?

What would the jury expect a mistaken witness to do or say?

What would the jury expect the competent police officer to do or say?

What would the jury expect the negligent, biased or indifferent police officer to do or say?

Compare all answers to the above questions to the facts beyond dispute. What is consistent? What is inconsistent?

Headlines

In 10 words or less convey how and why a person is wrongfully accused. For purposes of the exercise, it is okay to be as sensational as possible.

MANNER AND MEANS OF PRESENTING
THE THEORY OF THE CASE

People tend to learn in different ways:

Audio learners - prefer to listen
Visual learners - prefer to read or see
Kinetic learners - prefer to handle, feel how something moves and works

The more ways in which you present your theory of the case, the greater the likelihood that more jurors will understand.

Nickname witness
Different points of view
Pivotal event / moment of choice
Chronology - use flashbacks, use forward flash
Conversations / dialogue
Repeat themes, sayings, proverbs
Language of witnesses and jurors
Common life experiences
Listening hooks
Trilogies
Alliteration

THEMES IN GENERAL

Theme: An intellectual abstraction; the idea that unifies the structure and is represented by the actions of the characters as a whole dramatic piece.

Theme: A central idea in a literary work; usually suggested by the narrative action.

EXAMPLES: Virtue is its own reward.

Nice guys finish last.

DEFINITION OF THEME OF THE CASE

Theme of Case: A word, phrase or simple sentence that captures the controlling or dominant emotion and/or reality of the theory of the case. The case theme must be brief and easily remembered by the jurors.

EXAMPLES:

PUPPET OF FEAR
UNWILLING PARTICIPANT
FORCED TO ROB
UNWILLING PARTICIPANT: FORCED TO ROB
UNWILLING ACCOMPLICE
VICTIM OF FEAR
TWO VICTIMS
UNWILLING ACCOMPLICE, VICTIM OF FEAR, FORCED TO ROB
FRIGHTENED, FORCED AND FALSELY ACCUSED
FRIGHTENED, FORCED AND FRAMED
COERCED TO CRIME

FUNCTIONS OF THEME OF THE CASE

REPETITION AND REINFORCEMENT. Theme repeatedly reinforces your theory of the case in jurors' minds.

LABELS AND SLOGANS. Theme provides an easy catch-word or catch-phrase for jurors to use during deliberations.

JUROR RE-ORIENTATION. Theme enables you to re-orient the jury to your theory of the case quickly and easily.

CONTROLS PROSECUTOR. Theme forces the prosecution to argue against your theory rather than argue only the prosecution's case.

JURORS' INSTANT RECALL. Theme brings a vivid image and emotion to the jurors every time it is used.

UNFORGETTABLE. Theme must have memorability.

USES OF THEMES

Themes are used in:

Motion Practice
Negotiations
Voir Dire
Opening Statement
Defense Cross-Examination
Defense Direct Examination
Making & Meeting Objections
Closing Argument
Instructions
Post-Verdict Motions
Sentencing
Dealing With the Media

SUB-THEMES OR MINOR THEMES

Sub-theme or minor theme is the word, phrase or simple sentence used to summarize and characterize for the jury the dominant aspect of each segment of the trial which the defense has an opportunity to orchestrate. Although the sub-theme is normally not the theme of the case, each sub-theme must be consistent with both the theory of the case and the theme of the case.

USES OF SUB-THEMES OR MINOR THEMES

Sub-themes also are used in:

Motion Practice
Negotiations
Voir Dire
Opening Statement
Defense Cross-Examination
Defense Direct Examination
Making & Meeting Objections
Closing Argument
Instructions
Post-Verdict Motions
Sentencing
Dealing With the Media

Sub-themes may label:

A person (“always looking out for No. 1")

An action (“forced to flee”)

An attitude (“bent on revenge”)

An approach (“no stone unturned”)

An omission (“absent-minded professor”)

VOCABULARY OF THE CASE

SOURCES OF THE VOCABULARY OF THE CASE

Internal Sources. Much of the vocabulary of the case and, more specifically, of your theory of the case, must be elicited or extracted from the case. The internal vocabulary is found in the documents of the case (police reports, witness statements, official records, personal documents, etc.) and the spoken words of the witnesses, both lay and expert.

External Sources. Some of the vocabulary of the case and, more particularly, of your theory, is introduced or injected into the case by the defense. The external vocabulary may result from the defense suggesting more vivid synonyms for a witness' own word choices. This defendant may initially say "I was too upset to run away," but later be willing to say "I was frightened to death when I saw the 7-11clerk on the floor and the gun pointing at me." Thus, your interviewing skills and your theory of the case allow you to assist the witness in altering or changing the vocabulary of the case. Similarly, the language of the expert witnesses can generate a whole new vocabulary of the case. Finally, the defense lawyer can introduce a new vocabulary into the case through word choices in voir dire and opening statement.

REMEMBER: that the vocabulary extracted from internal sources must be accurately retrieved and recorded. Accuracy and precision are essential. External vocabulary must be consistent and credible with the normal vocabulary of the witness who will speak it during the trial.

REMEMBER: that the vocabulary introduced into the case from external sources must be adopted by the witnesses and must not be exaggerated or over-dramatized.

The key vocabulary of the case can be impressed upon the jury through repetition, literary devices (such as trilogies, alliteration and vivid imagery), and speaking techniques (such as dramatic pauses, use of soft and/or loud voice, and appropriate pacing).

To advance your theory of the case you must identify the vocabulary of the case to be extracted from or introduced through each witness, whether prosecution or defense, and plan your examination to reveal each word or phrase of that vocabulary.

EXAMPLE:

THEORY OF THE CASE

When called into the 7-11, Ross Nolan was shocked to discover his friend, Bruce Hanson, had shot the 7-11 clerk and was now pointing a gun at him. Terrified and confused, Ross, fearing for his life, obeyed Bruce's commands to take the money and give it to Bruce. Under these circumstances, Ross is NOT GUILTY of any crime because he was coerced, under threat of bodily harm, into participating in the robbery.

Headline

Frightened Friend Forced at Gun Point to Assist in Robbery

Themes

"Frightened Friend"

"Forced to Follow"

FACTUAL COMPONENT

[Defendant / Ross] [was] called into the 7-11.

[Defendant / Ross] discover[ed] his friend, Bruce Hanson, had shot the 7-11 clerk

[Defendant / Ross] discover[ed] his friend, Bruce Hanson, was pointing a gun at him

[Defendant / Ross] obeyed Bruce's commands to take the money and give it to Bruce.

EMOTIONAL COMPONENT

Shocked [defendant / Ross]

Terrified and confused [defendant / Ross]

Fearing for his life [defendant / Ross]

LEGAL COMPONENT

Coerced

Under threat of bodily harm

Into participating in the robbery

NOT GUILTY

VOCABULARY OF COERCION

Shocked

Shot 7-11 clerk

A gun

Terrified

Confused

Fearing for his life

Obeyed

Commands

EXAMPLE:

THEORY OF DEFENSE [CASE] INSTRUCTION

If you believe from the evidence that, when called into the 7-11, Ross Nolan, was shocked to discover his friend, Bruce Hanson, had shot the 7-11 clerk and was pointing a gun at Ross, terrified and confused, Ross, fearing for his life, obeyed Bruce's commands to take the money and give it to Bruce, you must find, under these circumstances, that Ross Nolan is NOT GUILTY of any crime because he was coerced, under threat of imminent bodily harm, into participating in the robbery.

V.D. QUESTIONS

Ms. Juror, would you share with us a time when you felt threatened, coerced and/or terrified?

Mr. Juror, have you ever been in a situation where you believed you had no choice?

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