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FINDING OUT WHAT WORKS WITH A JURY: Developing and Testing Case Themes

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I. Introduction

The consensus among jury consultants and experienced trial attorneys is that in order to prevail in a product liability or toxic tort case, it is imperative to develop persuasive trial themes. Research in a variety of applied fields has demonstrated the significance of themes in organizing information and making decisions. To persuade a jury, an attorney needs to develop case themes that help organize the diverse case facts and convey the case theory. Case themes serve as a bridge and can provide a way for jurors to understand what they are learning during a trial. Themes provide a vehicle to influence jurors on the issues of responsibility, blame, and justice.

II. Three Approaches to Theme Development

There are techniques that can be used to develop case themes. While these approaches may be used intuitively by many attorneys, there is a research tradition that supports and explains why these approaches work.

A. Attribution Theory/Choice Theme

When a plaintiff engages in a certain behavior, one of the critical ways of looking at that behavior involves determining whether the individual had a choice. When judgments of responsibility and blame are being made, it is important to know whether or not there was any choice involved. Attribution theory looks at the choice factor and supports the notion that when someone chooses to do something, they are then seen as responsible for the consequences of that choice. To the extent that the plaintiff or the defendant is seen as having a choice in their conduct, jurors will feel they are responsible for the consequences of that choice.



Some examples of choices:

- ▶ The plaintiff chose not to wear the required safety gear when working with a specific piece of heavy machinery.
- ▶ The manufacturer made a choice to ignore the recommendations of its safety engineer in designing the product.
- ▶ The defendant chose not to test the groundwater for signs of
- ▶ contamination on a consistent basis.

Most attorneys use a version of the choice theme when they introduce the notion of personal responsibility. Jurors reach conclusions about personal responsibility when a decision is presented using the choice theme. In other words, if someone chooses to do something, he/she is more likely to be seen as personally responsible for what happens. The difference between presenting the theme as a choice or as personal responsibility is that with the choice theme, jurors will conclude on their own that the individual is responsible rather than being told that he/she is responsible by the attorney.

It has been our experience that jurors are more accepting of the choice approach than of the personal responsibility approach. The choice approach, therefore, is more persuasive. For example, in an insurance-related case involving the inability to agree on a settlement value, jurors decided the plaintiff chose to make a non-negotiable demand and chose not to engage in any discussions of the realistic value of the claim. The policy holder's choice not to negotiate resulted in a lengthy arbitration process which caused the delay in settlement. In that case, jurors felt there was no bad faith, because the plaintiff was responsible for the delay as a result of the choices made.

In an employment case involving a claim of age discrimination, the plaintiff alleged that the defendant terminated his employment in order to hire a younger employee at lower pay. The defendant argued successfully that the plaintiff chose not to avail himself of training available to improve his computer skills, even though he was told that he would have to do that in order to keep his job when the company moved to a new accounting system.

B. Counterfactual Thinking

Another way of approaching theme development is to use counterfactual thinking. Counterfactual thinking occurs when a person evaluates an event by how easily it could have been undone to create a different, usually more positive, outcome. The ease with which a juror can undo the negative event with a counterfactual affects the amount of blame he or she attributes to a party. In a premises liability case, the question raised is what either side could have done to prevent this problem from occurring. If it is hard for



jurors to develop reasonable counterfactuals, or “if only” statements, it will be harder for them to attribute responsibility, and thus blame, to the person or company. On the other hand, the more counterfactuals a juror can create to prevent the negative outcome, the stronger their feelings of blame toward the party who they feel could have changed the outcome of the event.

The question answered by a counterfactual usually takes the form “if only...” or “what might have been...” An example of a counterfactual would be, “If only there had been a window on the swinging door allowing the employee to look out before opening the door,” or “If the door was cordoned off to prevent the public from coming too close to the door, the plaintiff would not have been injured.” A counterfactual creates an alternative way of looking at a situation, an alternative reality.

The way to use counterfactuals to look at case themes is to consider what “if only” arguments the plaintiff and defendant could make in a product liability case. It is often the case that the plaintiff will have several “if only” arguments.

Examples include:

- ▶ If only the cheap plastic wedge had been installed...
- ▶ If only the manufacturer had issued a recall in a timely manner...
- ▶ If only the product had undergone more testing before release to the public...

The manufacturer defendant, of course, can develop its own themes by employing arguments using the “if only” form. For example, “If only the driver had not parked on an incline without using the required blocks...” and “If only he had curbed the wheels of the truck...”

One way for the defendant manufacturing company to defend against counterfactuals is with an “even if argument”. For example: “Even if the wedge had been installed, we could not have prevented this accident, caused by the inebriated driver kicking the gear shift out of position...” Another example is: “Even if we had recalled the part, it would not have prevented the truck from rolling.”

Counterfactuals and the choice theme are two different ways of thinking about blame and judgments of responsibility. Since they both focus on responsibility, they often deal with the same set of facts. For example, in a securities case, the defendant could argue:

- ▶ Choice Theme: “The plaintiffs assumed the risk involved in investing in limited partnerships when they purchased a share of the venture.”



- ▶ Counterfactual: “If only the plaintiffs had more carefully read the prospectus and the accountant’s report, they would have been aware of the problems faced by the company in the next fiscal year.”

C. The Story Model

The story model assumes that jurors organize the evidence of a case into a coherent explanation or story. This narrative structure is then compared to the verdict categories to determine the best match (Hastie, R. (Ed.), *Inside the Juror*, New York: Cambridge University Press: 3-37 (1993)). Trial attorneys have used the story model for years in crafting case presentations. The point is that jurors actively engage in creating their own story about a case, and they may or may not include the attorney’s version of the story. The story model, in the hands of most attorneys, is a way of presenting case themes, metaphors and analogies. This short hand version tells what happened and why it happened. Counterfactuals and arguments based on the choice theme can be integrated within the case story.

Some attorneys are gifted storytellers. Creating and fashioning a story for most of us takes time and effort. Questions to raise about the story of the case are: Does it make sense? Does it convey themes? Does it explain what happened and why? Is it compelling?

III. Obstacles to Juror Acceptance of Themes

A. Juror Confusion and Anxiety

At the beginning of a trial, jurors are often anxious about having to serve on a jury because of the effect jury service will have on their personal life, as well as concern about the job they will have to do. This confusion about their role is enhanced if they feel they do not understand what the case is about. Confused and overly anxious jurors are often lost during a trial and can become so frustrated that they give up trying to understand the case (Graeven, D. “Juror Anxiety.” *The National Law Journal*, September 26, 1994: A21). Since this confusion can interfere with acceptance of case themes, it is important that jurors understand what their role will be. Attorneys need to do what they can to facilitate juror understanding of their role and the decisions they have to make. At a minimum, case issues should be pointed out during voir dire, and the verdict form should be discussed during closing arguments.



B. Hindsight Bias

Hindsight bias is one of the psychological concepts that affects jurors' decision making when attributing cause and responsibility to an individual for an event. Hindsight bias is an individual's tendency to see events as expected after they have occurred, even when they were seen as unlikely prior to their happening. This tends to increase feelings of confidence in judgement after the fact, and can lead to continued use of faulty decision strategies. (Heath, L. & Tindale, S. "Heuristics and Biases in Applied Settings." In: L. Heath, R. S. Tindale, J. Edwards, E. Posavac, F. Bryant, E. Henderson-King, Y. Suarez-Balcazar, J. Myers (Eds.), *Applications of Heuristics and Biases to Social Issues*, New York: Plenum Press: 8-10 (1994)).

Most defense attorneys are well aware of Monday Morning Quarterbacking and the way it can be used to second guess a decision by a defendant. A number of studies have shown that hindsight bias is very difficult to overcome, even among sophisticated decision-makers. If hindsight bias is present in a case, one of the few things that can be done is to educate jurors about hindsight bias: "If something bad happens, we have a tendency to think that we should have known it would have happened." The hope is that at least one juror understands that idea and could use it in deliberations.

C. Failure to Understand the Law

Jurors often spend a considerable amount of time in deliberations trying to understand the laws that apply to a case. Research on jury deliberations has shown that the most common source of jury error is not difficulty understanding the facts, but trouble understanding the legal instructions (Ellsworth, P. "Are Twelve Heads Better Than One? *Law and Contemporary Problems*, 55: 204-224 (1989)). Since defendants often benefit from jurors' use of the law, there are several things defense counsel needs to do to improve juror understanding of the law.

It is important that the verdict form be clearly explained to the jury in closing arguments. It is not uncommon in complex cases for jurors to be confused about which way they should vote on a certain issue if they favor a certain side. That confusion needs to be eliminated.

Another approach to improving juror understanding of the law is for defense counsel to ask the court to pre-instruct the jury on the law prior to hearing any evidence. Pre-instruction of the jury maximizes the effect of the law on the jurors' reactions to the case arguments.



IV. The Process of Theme Development

Developing case themes and arguments can be assisted by the three approaches described above. However, the creative aspect of case theme development should not be overlooked. Arguments, metaphors, analogies and imagery to use for an argument can come from a variety of sources. Cab rides, taking a shower, and brainstorming sessions are often the sources of the best ideas. The process of developing ideas is not scientific, but is often critical in developing case-winning themes.

On the other hand, testing case themes to determine how effective they can be is scientific. Mock trials can be used to evaluate and determine the effectiveness of various approaches to case argument.

V. Evolution of the Use of Mock Trials

The use of mock trials has evolved considerably over the past twenty years. In the past, mock trials were primarily used for large cases, lasted more than one day, and involved several juries. As trial consulting and the advantages of jury research have become more widely known, mock trials and focus groups have become routinely used in all types of litigation.

Another change in the use of mock trials is that insurance companies and corporate counsel are now aware of the use of mock trials as a method of case evaluation. Ten years ago, in-house counsel were somewhat reluctant to use mock trials to evaluate cases. Outside counsel often had to work hard to convince corporate counsel that a mock trial and the use of litigation consultants were a valuable addition to their trial preparation.

Today corporate clients are frequently the ones initiating the use of trial consultants. Sophisticated corporate clients are aware of the benefits of using a mock trial, and they expect their outside counsel to be aware of these services as well. Similarly, the plaintiff's bar is more open to obtaining mock juror feedback as part of their trial preparation and settlement strategy. It is not unusual for the results of mock trials to be mentioned or used as part of a mediation effort. Clients now can say that it is not a question of how jurors will react, because they have conducted a mock trial and already know how jurors evaluate the case (Ric Gass, J. "The Constructive Use of Jury Consultants in Discovery and Preparation for Trial or Mediation." *Defense Research Institute on Damages*, March 1999).



For toxic tort and product liability litigation, particularly claims involving personal injury, the stakes are often extremely high and both sides have probably conducted at least one mock trial. Mock trials are used to develop persuasive themes, to make sure jurors understand the case, and to anticipate questions that jurors want answered. Plaintiff mock trials are most often primarily concerned with developing persuasive arguments. Mock trials conducted for the defense, in addition to dealing with issues and themes, often include an evaluation of whether jurors can understand and accept the scientific elements of an argument. Another goal of a mock trial is to explore whether jurors simply accept an argument, or whether certain jurors are able and willing to convince other jurors about the merits of their position.

VI. Focus Groups v. Mock Trials

A. Focus Groups

Focus groups are designed to be exploratory, creative sessions and are often used early in the discovery process. They usually involve a facilitator, or moderator, explaining the case facts, followed by a question and answer session with the participants. The number of participants for this type of research ranges from seven to ten. Since the focus group is an interactive forum, the facilitator can conduct an in-depth examination of what jurors do and do not understand about the case issues. Focus groups can be designed to test a specific witness, an expert's approach, damage arguments and the impact of a particular bad fact.

The session identifies:

- ▶ Initial impressions of the parties
- ▶ Reactions to the claims and defenses
- ▶ Historical perspective; (what was known when?)
- ▶ Juror assumptions about the claims
- ▶ Irrelevant issues
- ▶ Reactions to bad facts
- ▶ Metaphors and analogies

B. Mock Trials

The purpose of a mock trial is to determine how best to present a case. Most trial lawyers understand the value of comments obtained from jurors after the verdict. The mock trial allows the attorney to obtain some of those insights while there is still time to use them.



Some of the more common reasons to conduct a mock trial are to:

- ▶ Evaluate jury reactions to case themes
- ▶ Evaluate alternate case strategies
- ▶ Assess the performance or credibility of key witnesses
- ▶ Determine the type of juror who is least accepting of your case strategy
- ▶ Determine how best to teach the jury, or to see if they will understand the evidence
- ▶ Evaluate demonstrative evidence

VII. Elements of Mock Trials

A. Size of a Case

In a significant case, the decisions about a mock trial usually focus on when it should be held and what issues should be covered. In most large cases, at least one side and often both sides use trial consultants and conduct a mock trial. In these instances, mock trials are usually held early in the discovery process to evaluate themes.

For smaller cases, we have found that uncertainty about settlement often pushes the mock trial to within weeks of the trial date. As the prospect of a reasonable settlement diminishes, the cost benefits of a mock trial improve considerably. In serial litigation, where the same types of issues are going to be retried, we have also seen an increased use of mock trials. Although the value of one of these cases may not by itself justify a mock trial, the serial nature of many types of litigation justifies the research costs.

Of the many do's and don'ts in conducting a mock trial, the one that is most critical in developing a realistic case assessment is having a good solid presentation of the opposing position. The difficulty is ensuring that the other side is adequately represented and that the individual playing the role expresses the themes and emotional tone of the opposing argument. This is often accomplished by having the senior attorney give the presentation of opposing counsel.

C. Evaluation of Witnesses

With the increase in the use of video depositions, there has been a corresponding increase in the number of cases where video deposition testimony is presented to a mock jury. Although producing edited video testimony is time consuming, this testimony provides the opportunity to assess key players and adds realism to the process.



D. Use of Written Questionnaires

Written questionnaires provide the opportunity for feedback on key issues. Throughout different points during the mock trial, questionnaires are administered. Usually jurors are asked which way they are leaning as well as which arguments they accepted and rejected. Rather than arbitrarily separating jurors for deliberations, using questionnaires enables us to divide jurors into groups based on their leanings.

E. Jury Deliberations

The most informative part of the mock trial is the opportunity to observe jury deliberations. By observing deliberations, the trial team can learn which issues or questions need to be addressed more thoroughly. In preparation for the actual trial, the attorney can make sure that questions that may be raised by jurors are answered in the case presentation. These questions often seem insignificant, but in answering them the attorney can lower juror anxiety about a case and help jurors focus on the key issues. Besides raising questions, jurors often come up with images, metaphors, analogies and themes that help the attorneys tell the story. These images are extremely important in helping attorneys pitch the case to the jury.

F. Debriefing of Jurors

After jurors have deliberated, debriefing the jury often provides additional feedback. A consultant probes into the jurors' decision-making process by asking a series of systematic questions about the case. Questions that went unanswered during deliberations can be posed to the mock jurors at this time. The opportunity to ask hypothetical questions also presents itself here.

VIII. Practical Considerations Affecting Cost and Quality

A. Length of a Mock Trial

Mock trials are typically held either in a full-day session or a half-day session. On occasion, in complex litigation, where a more extensive evaluation of the case is important, a mock trial can last several days. It is also common in complex cases for components of a trial to be presented in separate four-hour sessions with different juries (see appendix 1 for a sample half-day mock trial agenda).

B. Live or Videotaped Attorney Presentations

One debated issue among trial consultants is whether to have the attorney presentations live or on videotape. Some trial consultants favor the use of attorney videos to present



the case. The argument is that video presentations are more controlled regarding length, tone and content. If there is a mistake, a video presentation can be redone. Video displays also provide flexibility as to when to conduct the mock trial, since the attorney need not be present.

While some mock trials are done with video attorney presentations, most involve live presentations. The jurors get more involved during this type of presentation. We have noticed that they take very few notes during a video attorney presentation. Live presentations produce greater ego involvement from jurors and provide a good opportunity for the attorney to rehearse the presentation.

C. One Jury, Two Juries or More

In major cases, three to six juries may be used in a mock trial. For most cases where a mock trial is conducted, using one or two juries is typical. Since a particularly aberrant, strong juror could influence a jury, it is more common to use two juries. Cost considerations require a cost-benefit evaluation, since a second jury could double the expenses. Additional expenses include videotaping, space rental and refreshments.

D. A Representative Jury

Trial consulting firms provide representative juries for a mock trial from the venue in which the case is being tried. For most major urban areas, the mock trial is held in the city in which it will be tried. For small rural locations or in high-visibility cases, an alternate venue with similar demography and industry is selected. Jurors are usually recruited to represent the age, education, gender, ethnicity and occupation of the actual jury pool. The methods used to recruit jurors vary.

Some consultants recruit mock jurors through classified advertisements, while others use employment agencies. These techniques enhance the risk of discovery by interested parties, and are biased by having only individuals who are looking for work. The best method is phone recruiting, either randomly or from existing databases. This ensures that jurors will be screened for possible conflict and allows for the most accuracy in matching the venire.

The process of recruiting mock jurors needs to be carefully monitored so that every effort is made to avoid skewing the results of the mock trial. Certain criteria are developed to exclude individuals who would normally be stricken from the jury and those who may potentially leak information. One criterion for exclusion is employment in any form of media. Other exclusion criteria include relationship/employment of self or family members with any of the parties and difficulty understanding or speaking English.



E. Where to Hold a Mock Trial

For realism, the best location to hold a mock trial is a courtroom. However, courtrooms are extremely hard to come by, and very few firms have their own state-of-the-art trial facility. For the most part, commercial focus group facilities or hotels are used to conduct mock trials, the former being the preference. Focus group facilities are convenient because they are wired for sound and offer two-way mirrors and viewing rooms. Hotels sometimes present logistical problems, but in smaller communities they are often the only sites available.

IX. Predicting Trial Outcomes

At the end of a mock trial, attorneys usually feel more confident about the way they will present the case at trial. Most often they discover that the troublesome facts they have been worrying about can be handled effectively. Nevertheless, one question may remain in their minds: Is the result of the mock trial a good indication of the actual trial outcome? Most experienced trial attorneys and most trial consultants would probably say a mock trial cannot predict the outcome of the trial.

In the actual trial, a dynamic can develop that can be significantly different from the mock trial. A witness can do a poor job, certain evidence may or may not be allowed in, or there may be an errant juror during deliberations. These uncontrollable factors produce an element of unpredictability. The same facts can say different things to different jurors. Yet, using a well designed, properly run mock trial, an attorney can evaluate the impact of the good and bad facts and discover the most persuasive way to present the arguments.



Appendix 1: Sample Half Day Mock Trial Agenda

<u>Time</u>	<u>Activity</u>	<u>Time Duration</u>
1:00-1:15	Jurors Arrive/Snacks/Initial Survey	15 minutes
1:15-1:35	Introduction/Voir Dire/Case Summary	20 minutes
1:35-2:10	Plaintiffs' Presentation	35 minutes
2:10-2:30	Questionnaire 1 & Break	20 minutes
2:30-3:05	Defendant's Presentation	35 minutes
3:05-3:20	Plaintiffs' Rebuttal	15 minutes
3:20-3:30	Questionnaire 2	10 minutes
3:30-3:40	Jury Instructions & Division Into 2 Juries	10 minutes
3:40-4:30	Jury Deliberations	50 minutes
4:30-5:00	Consultant Debriefing of Jurors	30 minutes
