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# **The Hook Brings the Jury Back: The Importance of Trial Themes and How to Use Them Before a Jury**

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# The Hook Brings the Jury Back: The Importance of Trial Themes and How to Use Them Before a Jury



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## ▶ To Theme Or Not To Theme?

- Some lawyers believe that themes are cheesy. Even if they are, they still work.
- A great theme becomes the song that plays in the jury's head when they deliberate.
- When you no longer have the power to speak to the jury and influence their decision, your theme can speak for you.
- A great theme can be a trial lawyer's most important tool, because a great hook brings the jury back to your best facts, your best arguments, and onto your side.

# What Makes a Theme So Effective?

- Effective trial skills are rooted in social and educational psychology.
- It is never a juror's fault if they do not remember an important fact once they go back to the deliberation room- the trial lawyer's job is to make them remember. All trial advocacy tools come back to this rule.
- A great theme will not *just* stick in the jury's head- it will make them remember your strongest facts and arguments.

# The Mere Exposure Effect (or “why do I like this song?”)

- Zajonc, R. B. (2001). Mere exposure: A gateway to the subliminal. *Current Directions in Psychological Science*, 10(6), 224–228. <https://doi.org/10.1111/1467-8721.00154>
- Bornstein, R. F. (1989). Exposure and affect: Overview and meta-analysis of research, 1968–1987. *Psychological Bulletin*, 106(2), 265–289. <https://doi.org/10.1037/0033-2909.106.2.265>
- How often do you feel neutral, or even negative, towards a new song on the radio, but start to like it the second or third time you hear it?
- People prefer songs, shapes, or really any stimuli that they are repeatedly exposed to- even just subliminally.
- Science says that if you repeat your best facts over and over through a memorable theme, your jury wont just remember it- they will actually develop positive feelings toward the phrase.

# How to Craft an Effective Theme

An effective theme follows three “rules”:

1. incorporates at least one of your best facts, but ideally more;
2. it is catchy; and
3. it is woven repeatedly throughout your trial.

# “Rule” 1: Determining your three best facts to craft your theme around

- Trial preparation starts when you first get the case.
- When you read your file for the first time, open a document and start making a list of your “good” facts and your “bad” facts.
- Every time you receive new information, add to those two lists.  
▼
- Eventually, as the case progresses, you can start putting your “good” facts in order of importance.
- Every fact on that list deserves attention, but the top 3 should be reflected in your theme.
- If you polled a jury after trial, and asked them the best 3 facts for your case, and they match your list, you did your job right (if you won the trial, even better!).

## “Rule” 2: Making it Catchy

- Rhyming- you may think it sounds cheesy, but it works! Our brains remember things with musical qualities.
- Alliteration is memorable for the same reason.
- Allusions to music, literature, pop culture, etc. Our brains remember information for which we have context.
- Metaphors, double-meanings, or any literary device.
- Even clichés or idioms.
  - Hapenelt vs. Elephant- same letters, but which is easier to remember? Context is everything.



## Examples

“If the glove doesn’t fit, you must acquit.”

- Everyone *still* knows who said this and who it was about.
- It follows all 3 rules: the fact that the glove did not fit was a top 3 fact for the defense, it rhymed, and it was repeated many times.
- The fact that we all still remember it demonstrates why these tools work.

## “The Defendant Could Have Blown This Case Away”

- In a DUI trial where a Defendant refused a breath test, the refusal itself is one of the top 3 facts for the prosecution.
- In Florida, if you refuse a lawful breath alcohol test, you lose your license for 1 year for a first violation, and 18 months for a second violation. And the second violation is an additional criminal charge. Florida Statute § 316.1932.
- Paperwork is provided on the spot making sure that the person knows all of this.
- So- if a person is sober and refuses the test, they just lost their license and went to jail when they could have kept their license and gone home.
- Double meaning makes it catchy.

# Frankenstein

- Products liability case where the Plaintiff heavily modified a recreational vehicle to increase the horsepower, and one of the modified components broke apart at a high rate of speed, seriously injuring him.
- Plaintiff's theory was that the manufacturer was aware that its customers make modifications, and should be responsible to protect them from things that can go wrong due to those modifications.
- Most people are familiar with the story of Frankenstein, giving the jury context and a moral lens through which to view the facts.
- Frankenstein is universally understood to be 100% responsible for his own demise.
- When the jury considered Plaintiff's arguments that the manufacturer should have protected the Plaintiff from the dangerous modifications he made, the allusion to Frankenstein would remind them that we are all responsible for our own actions.

## “80,000 pounds”

- Theme for Plaintiff in a trial advocacy exercise where a woman in a sedan was hit by an 18-wheeler
- This was a case where the negligence by the truck driver was garden-variety and a question of fact- there were differing accounts of whether he rolled through a stop sign while getting onto the highway.
- Most people have rolled through a stop sign- including the jurors.
- Where the actual negligence involved was not compelling, we decided to focus on another element- the driver's DUTY.
- We learned through an obscure document hidden in the case file that the truck weighed approximately 80,000 pounds.
- This does not fit neatly into any of the categories of how to make a theme “catchy,” but it is memorable because it is so descriptive of what we wanted to convey about our best fact- the huge weight of that truck driver's duty to others on the road.

## ▶ You Have a Great Theme- Now How Do You Use It Effectively?

- Rule 3- Repeat, Repeat, Repeat!
- Repetition does not just make the information more memorable, it actually makes people *believe* the information.
- Stating a fact just two times increases its believability as opposed to saying it one time. Each repetition increases that effect.
- This is known as the “illusory truth effect” in the scientific literature. We are lawyers with ethical obligations, so we use this information for good, not evil. Do not mislead.

Many, many studies have produced these conclusions. A recent meta-review of the literature and a study showing that the effect begins in childhood are good reads:

- Dechêne A., Stahl C., Hansen J., Wänke M. (2010). The truth about the truth: A meta-analytic review of the truth effect. *Personality and Social Psychology Review*, 14, 238–257.
- Fazio, Lisa, and Carrie Sherry. 2019. “The Effect of Repetition on Truth Judgments Across Development.” PsyArXiv. October 14. doi:10.31234/osf.io/36mqc

## Ways to Weave Your Theme Through Your Presentation

- Opening and closing: 1-2 times in first and last paragraphs, and 2-3 times in the middle. With most themes, you can make it the very first thing you say.
- Directs and Cross Examinations: Take 10 extra minutes while preparing your trial outlines to see where you can weave it into a few questions here and there.
  - To police officer: “if the Defendant submitted to the breath test and it was under a .08, would you have arrested him?”; “so the Defendant could have blown this case away?”
  - To engineer on direct: “was this Vehicle anything like the one you manufactured?” “no, the Plaintiff created a monster after he purchased it.”
  - To Defendant driver: “the truck you were driving when you hit my client was 80,000 pounds, correct?”


## Humanizing the Corporate Client Through Sub-Themes

- Injured plaintiffs often win through sympathy. The deck can be stacked against corporate defendants, who jurors often hold biases against.
- Studies show that based on the same set of facts, juries hold corporate defendants to a higher standard than individuals.
- Viewed as faceless entities with endless resources.
- Plaintiffs will try to paint the picture that the corporation chose profits over safety.





- Defense lawyers hope that juries will decide the case on the facts and law.
- Juries do what they feel is right- and this involves emotion.
- Defense lawyers cannot make the mistake of ignoring the jury's emotions.
- Must work to create an emotional connection with the jury.
- Just like the plaintiff's attorney will tell their client's story, defense counsel must tell the story of the people who make up the company- those who work for the company, those who benefit from the products, and the company's values and mission.

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- Thematic language will take that testimony further and have a much more lasting effect.
  - Prepare the witness to use the language you will to weave throughout the rest of the trial- use words like people, family, care, etc.
  - Weave the words that the witness uses through each examination 1, 2, or 3 times when referring to the company, and in opening and closing.
  - This song will not actively play in the jury's head- it will be more like the song that they heard subliminally, and don't even know why they like it.

## “What is going on here?!”

- Asking this question is a highly effective sub-theme to highlight important facts when you need the jury to read between the lines.
- Making the jury read between the lines is important for three reasons:
  - 1: You are not allowed to make arguments in your opening statements;
  - 2: Human beings hold more tightly to beliefs that they formed on their own;
  - 3: Keeps them an engaged part of the process rather than just telling them what to believe.
- When you ultimately tell them what is going on here in closing, they will feel accomplished that they figured it out first. If you made them feel smart, you gain favorability points.