

EXPERTADVICE

JURY PRACTICE

Using Themes to Succeed at Trial

BY DANIEL J. CALLAHAN

Jurors are everyday people. They favor honesty, loyalty, trustworthiness, stability, and fairness and have a deep desire to perform their civic duties consistent with the community's social mores. Sometimes, those mores conflict with a strict interpretation of the law. In such cases, juries often latch on to an argument that allows their values to prevail.

Although the jurors will be told they must follow the instructions given at the end of trial, they often ignore those that do not coincide with their fundamental beliefs—relying instead on instructions that permit them to reach a result that leaves

them feeling that they have done the right thing. To attempt to change the jurors' fundamental viewpoints through well-reasoned, even brilliant, argument is a sure ticket to failure. Instead, shape the facts of the case into a theme that fits within the jurors' preconceived notions of justice. The theme should be simple and compelling. Justifiable reliance v. an obscure technical legal defense, David v. Goliath, loyalty v. betrayal, honesty v. deceit.

UNDERSCORING THE THEME

There are three critical times in a trial for developing trial themes: voir dire, opening statement, and closing argument. During voir dire, the jury is

actively watching trial counsel, his or her staff, the court staff, and everyone else in the courtroom. This is the time the jury is most in search of understanding what will follow. The questions that counsel asks the jurors can alert them to what is coming. For example, asking jurors whether they have had an opportunity to judge the credibility of another person and whether they feel they can differentiate between a lie and the truth alerts them that the case is likely to have conflicting testimony—a basis for the theme of

Daniel J. Callahan is managing partner of Callahan & Blaine in Santa Ana, where he specializes in complex business litigation, severe personal injury, and procuring insurance coverage for clients.

EXPERT ADVICE

honesty v deceit. Questioning jurors about whether any moral, philosophical, or religious reason would inhibit their abilities to award large damages sends the message that high numbers and evil conduct may be presented. It also causes jurors to be less fearful of a high award and more watchful for evil conduct when it arises at trial.

The opening statement also is extremely critical to developing trial themes. Even though jurors will be instructed that the lawyers' comments are not evidence, studies show that jurors form opinions after opening statement that nine times out of ten will not change. Jurors form opinions based on the opening statement as to what happened, who was right, and who was wrong—and use those opinions to filter all evidence presented. Normally, a matter that goes to trial has several issues in dispute, with evidence going both ways. A juror who

has made a preliminary determination of the merits of the controversy after opening statements will place greater emphasis on the facts supporting that opinion and discount the evidence inconsistent with it.

Assuming you have properly developed your themes during prior phases of the trial, the closing argument is also critical. Closing argument is the time to sum up all the facts that have come in over a prolonged trial—funneling all of them into the themes espoused from the beginning. Emotion—coupled with a sincere belief in the merits of a case—are strong weapons during closing argument. When combined with a theory consistent with the jury's fundamental values, they lead to a successful verdict.

A THEME IN ACTION

One example of the successful use of trial themes occurred in the recent

case of *Beckman Coulter v Flextronics* (Orange Cty Sup Ct Case # 01CC08395). The main theme was the contrasting business philosophies of the plaintiff and the defendant. My client, plaintiff Beckman Coulter, a medical device manufacturer, has a corporate philosophy that promotes personal integrity and the public good. In contrast, I was able to characterize the defendant, Flextronics, as having a corporate philosophy that rewards unfettered greed and a disregard for others—including lying to the jury at trial and harming the public. In fact, in my closing argument, I characterized Flextronics' motto as "Worship at the altar of the almighty dollar."

Due to the powerful images and messages communicated by this theme, the jury returned a verdict of \$934 million dollars in favor of my client—the largest jury verdict in California in 2003. 