The Theory of the Case

JAMES W. MCELHANEY

At the time this article was written, the author was an associate editor of LITIGATION. He served as editor in chief from 1984–86.

The young lawyer was flushed with victory. The cross-examination—his first—was going marvelously. The witness was an important one for the other side, and the young lawyer's senior partner let him take the witness on cross-examination.

The high point for the young lawyer was his impeachment of the witness with a prior inconsistent statement. First, the witness was committed irrevocably to his direct examination statement, which was inconsistent with his deposition. It was not until the witness himself unwittingly cut off each avenue of escape that the young lawyer closed the trap and confronted the witness with the inconsistent deposition.

That was the crushing hammer blow, and it is easy to imagine the young lawyer's surprise on seeing the tight-lipped expression on the face of the senior partner.

"What is the matter?" asked the young lawyer in the hall during a recess. "I thought you would like that impeachment. It is just what you taught me to do."

"Oh, it was classic," replied the senior partner. "It was a textbook example of exactly how to impeach a witness with a prior inconsistent statement. I could not have done better myself. There is only one difficulty. You should not have done it."

"What do you mean?" asked the young lawyer.

Originally published in our Fall 1979 issue.

"What I mean," replied the senior partner, "is that although you impeached that witness, by the time you finished, the jury accepted the prior statement rather than his testimony on direct examination. The problem is they now think our client was going 15 miles per hour faster than when you started your cross-examination. Your technique was perfect. What happened was, you committed the cardinal sin of doing something that is inconsistent with the theory of the case."

And there it is. One of the most fundamental rules in trial practice. It comes before the rules of evidence, techniques of persuasion, impressive demonstrative evidence, and sophisticated touches of eloquence. It is simple, understandable, and nearly absolute.

Never do anything inconsistent with your theory of the case.

Just what is meant by the theory of the case is a study all itself. First, it includes the legal theories of the claim or defense, but it is not so narrow. A plaintiff can recover for negligence that causes harm, but that does not tell us very much. Then there is the factual theory. It might be the plaintiff's factual theory that the defendant ran into him because he was not paying enough attention to where he was going as he drove down the street. That tells us something more, but not much.

What is the theory of the case, then?

The theory of the case is the basic, underlying idea that not

only explains the legal theory and factual background but also ties as much of the evidence as possible into a coherent and credible whole. Whether it is simple and unadorned or subtle and sophisticated, the theory of the case is a product of the advocate. It is the basic concept around which everything else revolves.

A good theory of the case is the very heart of advocacy because it provides a comfortable viewpoint from which the jury can look at all of the evidence—and if they look at the evidence from that viewpoint, they will be led ineluctably to decide in your favor.

Little wonder that the theory of the case is a sort of home cave to be defended at all costs unless utter disaster commands that it be deserted in favor of some unfamiliar place farther up the hill.

What is the theory of the case?

Creative Advocacy

It is what the advocate creates out of the legal theories and the facts.

That your knowledge of the facts will influence your choice of legal theories is obvious. That your knowledge of the legal theories will influence which facts you investigate and develop is evident on reflection.

What is impermissible is to let the legal theory change any fact—a fundamental principle that shows why the defense lawyer's "lecture" on the law to his client in Travers's *Anatomy of a Murder* (reprinted in Legal Lore, 4 Litigation 39 (Spring 1978)) pushed (if not stretched) the ethical line.

There is more to it than choosing the legal theory that will be easiest to prove with the available facts. The applicable statute of limitations, the kinds of permissible damages, whether there is a right to a jury trial, whether the case is in state or federal court, and even the state where the case is filed—all bear on the theory of the case.

One of the distressing things about the theory of the case is that you are permitted to have more than one. Through the magic of the law, they are even allowed to conflict. As Irving Younger says, at common law you are entitled to reply to a plaintiff who claims his cabbages were eaten by your goat:

> You did not have any cabbages. If you did, they were not eaten. If they were eaten, it was not by a goat. If they were eaten by a goat, it was not my goat. And if it was my goat, he was insane.

There are instances when it may actually make sense to present conflicting claims or defenses. The problem is discussed in R. Keeton's *Trial Tactics and Methods* 280–85 (2d ed. 1973).

Sometimes the law itself is an obstacle to presenting conflicting theories of the case, but usually that is not so. Usually, the reason to avoid presenting conflicting theories is simple credibility.

Lawyers, like salespeople, must believe in their products. The effective argument is usually the one that conveys the lawyer's belief in his client to the jury. In fact, if you do not believe in it yourself, it is virtually impossible to convey the necessary confidence in your client's case.

Why? If you do not believe in what you are arguing, your body language will give your insincerity away, even if your words do not. As John Stefano said in *Body Language and Persuasion*, 3 Litigation 31, 55 (Summer 1977):

> What it comes down to for the lawyer is this: If you have correctly understood the situation, if you know what you are doing, and if you believe in it, your body, voice, emotions, and intellect will work together in the act of communicating with other human beings. Like the tightrope walker, you will be primarily conscious of your point-of-concentration: the rope, the witness, the jury. If, on the other hand, you do not know what you are doing, or you do not believe in it, or you are afraid of revealing what you feel, your body and voice will betray you, no matter how much you attempt to manipulate them.

Please understand that this is not a suggestion that a lawyer ever *tell* a judge or jury that he personally believes in the justice of his client's cause. That is specifically forbidden by the Code of Professional Responsibility, DR 7-106(C). The ethical prohibition forbids saying you believe in your client. Effective advocacy suggests you actually believe in your client.

It is a point worth remembering. If you ask for more damages than you believe in, it will show. Cut the case down to a size you can honestly argue. If it means dismissing the case against an innocent party you are unable to believe is responsible to your client, do it.

Client No Good

If there are things you do not like about your client, do not hide them—bring them out. It can even turn a terrible weakness into a telling strength.

The story is one told by Judge Gerald T. Wetherington of Dade County, Florida, to a group of students at the 1978 National Institute for Trial Advocacy in Boulder, Colorado.

A lawyer's client lost his leg when it was run over by the defendant's streetcar. The difficulty with the case was that the plaintiff was a derelict, with no visible means of support. He was mainly known for rambling through town, begging the price of a cheap bottle of wine.

A more experienced lawyer friend was consulted on how to go about cleaning up the plaintiff to make a good impression at trial. The friend was all in favor of having the plaintiff be *clean*,

but argued against trying to dress him up or trying to make him look like something other than what he really was.

That advice resulted in a theory of the case that produced a classic final argument:

> Clean sheets he never knew, but did they have to take his leg?
> A warm meal he seldom had, but did they have to take his leg?
> An education, a good job, fine clothes—all were strangers to him—but did they have to take his leg?

What you believe in is not the only test. Your sincerity helps persuade the jury but, except in the rarest cases, will not lead them to accept things they feel are implausible.

Plausibility—what the jury feels is more likely true—is a constant advocate. The closer your case is aligned with basic probabilities, the better.

A simple example makes the point. A lawyer was getting ready to defend a trucking company in an unfortunate accident involving one of its trucks and a young child who did not cross at the walk. It is the sort of case called a "child run-down" by plaintiffs' lawyers and a "child dart-out" by defendants.

Because of the jurisdiction's approach to contributory negligence and the tender years of the child, contributory negligence was not a defense. Still, the lawyer realized that the plaintiff had to show that the defendant's driver was causally negligent in the first place.

He was discussing his plan to call some witnesses who would help give the impression that the truck driver was driving slowly immediately before the accident. His friend advised another approach:

"John, for heaven's sake, don't try to slow that truck down too much. People will never believe it was going that slow. And if they do, they will surely think that the driver should have been able to stop in time. Don't try to slow down the truck—speed up the kid. He didn't stroll into the middle of the street—he ran."

What is the point? Either way the lawyer can believe in his client. The more telling theory is the one the jury is likely to accept as probable.

The next step is to make it simple.

Surprisingly enough, simplicity is often achieved by taking into account as many of the facts as possible. The more facts your theory of the case explains—that is, the fewer facts there are that do not fit your case—the simpler and more believable it will be. Achieving simplicity takes work, but it is worth the effort.

Suppose, for example, that your opposition calls an unbiased eyewitness. You have two equally attractive theories (something that can happen only in hypothetical cases). One requires you to attack the unbiased witness as a liar. The other theory explains how the witness believes she is telling the truth but is understandably mistaken. Chances are the second theory is better than the first.

Your own sincerity and a simple, plausible theory are marvelous assets, but it is possible to want even more.

A truly superb theory of the case will fit comfortably into the value scheme of the judge and jury.

Good trial lawyers tend to be voracious readers, watchers, and listeners. They crave information about the world around them.

One of the interests that trial lawyers tend to share is a desire to understand the values of the communities in which they try cases.

Indeed, one important reason for conducting a jury voir dire examination is to take the opportunity to study the members of the jury to see what sorts of people they are.

Why?

To adjust unconsciously the way questions are asked and arguments are constructed to make them fit the fundamental values of the jurors.

Community Values

As between two equally simple, plausible theories that are both presented with equal sincerity, the one that more comfortably fits community values is more likely to be accepted.

That proposition sounds good as an abstraction, but does it work in real life? Certainly. Take the difference between charity and paying a debt. As Craig Spangenberg demonstrated in his excellent article, *Basic Values and the Techniques of Persuasion*, 3 Litigation 13 (Summer 1977), Americans tend to think people should pay their debts. In fact, some of the best plaintiff's jurors are those who feel that paying a debt—and paying it on time—is an important part of their lives.

Charity, on the other hand, is an important value according to Spangenberg, but not so high with many people as paying the debt. The man of wealth satisfies his conscience with a quarter in the Salvation Army bucket at Christmastime.

It follows, then, that in a personal injury action, a theory of the case that is articulated as an obligation owed because of the wrong that was done—rather than as an appeal for pity because a person got hurt—is more likely to bring an adequate award.

To be sure, there are times when you may not have the luxury of a theory. But they should be rare—just as rare as the times when you have a professional obligation to assert a theory in which you have no confidence.

Cockroach Defense

In criminal practice, there is even a name for this uncomfortable situation. It is called the cockroach defense. That is when there is no real defense, and all the advocate can do is act like a cockroach and crawl all over the other side.

Does that work?

Sometimes.

More often, it is just a long drawn-out guilty plea.

When it works, it is usually because there is a more credible underlying theme. Often it is that the government's proof simply is not good enough to justify conviction, and under our system of justice, that means the jury should acquit.

Once you have a solid theory of the case, it will help throughout the trial.

Take the opening statement.

Sadly, too many lawyers use the first minutes of their opening statements to lecture the jury about the function of the opening statement.

It is an unfortunate waste.

The signal you send when you refuse to put very many eggs in any one basket is that you do not trust the basket.

During the first few minutes of the opening statement, the jury is highly attentive, and accordingly receptive. They are eager to learn what the case is all about.

It is the perfect time to give them your theory of the case.

That is exactly how an opening statement should begin. Instead of some standard words about opening statements, give them the theory of the case—carefully distilled into a memorable theme that will stay with them and shape their understanding throughout the trial.

One example will have to suffice. It is taken from Trial Notebook, *Opening Statements*, 2 Litigation 45 (Summer 1976). Here it is, the first words to the jury in the opening statement of a contract dispute:

> Ladies and gentlemen, as I was driving my six-year-old boy to school this morning before coming down to the courthouse, he asked me what this case was about. I knew I really could not tell him about options and sales and breaches of contract, so I put him off. Well, he persisted. "What's it about, Daddy?" So I tried to think of a way to explain it to him, and I finally said, "Son, this is a case about two men who both gave each other their word, and now one of them wants to break it."

The theory of the case helps decide which witnesses to call. A difficult choice to call or not to call a particular witness can often be answered from the perspective of whether it will really advance the theory of the case.

It also helps decide the order of witnesses. Start strong and end strong, to be sure, but let the order in which they testify be one that helps explain your theory of the case.

Once the witness is on the stand, the principle still applies. Certainly, there are important background matters and bits of foundational information that must be presented. But beyond that, the rule is simple: Limit your questions to those asking for information about your theory of the case or those tending to attack your opponent's theory.

As with our beginner who unfortunately wound up accelerating his own client's car, it is probably easiest to forget about the theory of the case during cross-examination. For that reason, more care is needed in cross-examination than anywhere else.

Final argument is the time for the theory of the case to triumph.

The troubling thing for some lawyers is to commit the case to one theory. Even in a simple negligence case, the defense might be:

> We were not negligent. If we were, you were contributorily negligent. Even if we were negligent and you were not contributorily negligent, you were not hurt. Even if you were hurt, you were not badly hurt.

Crazy Goat

You will notice that this is more than a little like the crazy goat.

The problem is either to articulate these ideas so they do not detract from each other, or to abandon those defenses that are not seriously arguable.

Why?

The signal you send when you refuse to put very many eggs in any one basket is that you do not trust the basket.

Surely, the point in constructing a theory of the case is to get a basket big enough and strong enough to carry all the eggs you need. ■