INTRODUCTION

This paper is intended for beginning attorneys who have limited trial experience. The use of themes in our trial work is standard fare and what follows are our general observations of the value of themes and how they are best utilized in employment-discrimination trial work.

I. WHY THEMES ARE IMPORTANT

The development of an employment-discrimination claim is a difficult proposition. The difficulty often lies in the complexity of the case and the emotional attachment your client has to the matter. These cases are complex because they may involve litigation of events occurring over many years and involve the analysis of detailed financial and personnel issues which serve as the background and basis for the employment decision.

Attorneys experienced in employment-discrimination litigation often remark that there are many similarities between a wrongful-termination matter and a divorce case. Both relationships can be of a long-term nature involving deep interpersonal relationships based on trust and support. As in a divorce proceeding, the “hurt” party in the break-up is
often shocked, confused, angry, and hostile. Keeping these types of emotions under control is a daunting task for many employee advocates.

Given the complexity and emotion of these matters, the use of themes is the only practical way that a plaintiff can keep focused on what is important and a jury made to understand the strength of a plaintiff’s case. A standard defense tactic is to raise issues which complicate the case so that the jurors lose focus of the strengths of the plaintiff’s presentations. The establishment and reiteration of themes will help the jury deflect the clutter caused by defense counsel in the courtroom and will assist the jury in arriving at a fair and just conclusion for your client.

Once the client fully appreciates the value of a theme, the client is better able to remain focused on the essence of the claim. Your construction of a theme (with your client’s help) will assist in preventing the client from engaging in self-destructive behavior during his or her testimony.

II. STANDARD THEMES

There are an unlimited number of themes which can be developed and pursued in employment-discrimination litigation. However, in our practice, we have isolated six themes which we believe are standard in this type of litigation. These themes are:

1) He helped build the company and look what they did to him;

2) Good people don’t turn bad overnight;

3) The supervisor from hell;

4) Corporations need a lesson in fairness;

5) Knowledge is power;
6) They ruined my life.

1. **HE HELPED BUILD THE COMPANY AND LOOK WHAT THEY DID TO HIM**

   This theme works best when you have a client who is a long-term employee of a small to medium size company. Often these individuals start with the founder or shortly after the corporation is formed. Generally, these individuals are terminated as part of an ownership change or reduction-in-force, and a claim for age discrimination or disability bias is brought claiming that the plaintiff was selected for reduction-in-force because of his protected status. A psychological “anchor” of this theme is to remind the jury of the long-term accomplishments of the plaintiff and to assist the jury in condemning the employer’s decision which did not properly take into account the long-term achievements and accomplishments of the plaintiff.

2. **GOOD PEOPLE DON’T TURN BAD OVERNIGHT**

   This theme is prevalent in at least 90% of the employment-discrimination cases we handle. This theme is a recurring theme for obvious reasons - clients who present cases where there is a long history of unsatisfactory performance or alleged misconduct do not make good plaintiffs in this type of litigation and, accordingly, we routinely reject those cases.

   In this scenario, the client has an established positive record of written performance evaluations covering several years with different supervisors. Generally, what happens is that a new supervisor, who harbors some type of discriminatory animus toward members of one or more protected classes, comes on the scene and begins providing plaintiff with extremely negative performance evaluations and feedback, usually within one year to eighteen months.
This theme can also be used in instances where the plaintiff had an excellent work record until he or she developed some type of disability, at which point, the supervisor seeks to get rid of the employee by unfairly evaluating his or her performance. As a result of the negative evaluation of the plaintiff’s performance, the plaintiff is demoted, terminated or forced to resign as part of a constructive discharge.

The technique involved in this theme is to highlight the achievements of the plaintiff prior to the arrival of the new supervisor and/or the existence of a disability. It is generally accepted that good performers don’t become bad performers unless there is some reason for it. If you can eliminate obvious external factors, such as divorce, substance abuse, or other changes in the plaintiff’s life, the jury will generally accept the argument that the alleged negative performance of the plaintiff is a function of the discriminatory bias of the supervisor as opposed to actual performance deficiencies.

The first theme (he helped build the company and look what they did to him) overlaps with this second theme. In order to establish both propositions, you will have to take the jury carefully through the performance record of your client. Although there is a risk that the jury may become somewhat impatient by your presentation of evidence of good performance ten or fifteen years prior to the incident in question, it is essential that you persuade the jury that the company prospered because of plaintiff’s high achievement and nothing really has changed except for the bias of a new supervisor or plaintiff’s development of cancer, heart disease or some other disability status.
3. **THE SUPERVISOR FROM HELL**

This technique is to put the supervisor responsible for the plaintiff’s termination on trial. Plaintiff and coworkers can be called to establish the irrationality, patterns and practices of discriminatory employment decisions, arbitrariness, prejudices and incompetency of the supervisor who has somehow managed to engineer your client’s termination. By putting the supervisor on trial, the supervisor’s credibility is seriously undermined, his or her prejudices exposed, and the jury can be easily persuaded to reject the supervisor's reasons for taking adverse action against plaintiff.

There is some risk attendant with pursuing this type of theme. Defense counsel sometimes raise the argument that the plaintiff’s characterization of the supervisor as a racist or biased person is damaging to the supervisor’s reputation and that the trial is as much about vindication of the supervisor as it is about the plaintiff’s quest for justice. A clever defense attorney can turn around the “supervisor from hell” theme by suggesting that plaintiff is unfairly characterizing the supervisor as a prejudiced individual or is misperceiving the supervisor’s behavior much as the employee did during his or her employment situation.

Normally, a successful motion in limine will prevent a defense attorney from arguing that a defense verdict is a vindication of the supervisor’s character and reputation. This type of argument is a direct appeal to sympathy and, accordingly, most judges should prevent defense counsel from making the argument. However, if you overplay the “supervisor from hell” theme, you may open the door for defense counsel to argue that a defense verdict is necessary in order to correct the slander you and your client have dumped on the supervisor’s head.
4. **CORPORATIONS NEED A LESSON IN FAIRNESS**

In order for this theme to work effectively, there must be facts in the case suggesting that the corporation, or its agents, acted in an unfair manner toward the plaintiff. Unfairness is manifest in several different ways. First, it is only fair that an individual faced with charges of misconduct be given a timely and specific statement of the alleged misconduct and a meaningful opportunity to respond. Corporations often skip over this part of the fairness process and terminate employees for misconduct without presenting the allegations to the employee for comment and discussion. This often occurs when a corporation is motivated to terminate an employee for discriminatory reasons and it is using the alleged incident of misconduct as a pretext for its actions. The company rushes to judgment before giving the employee an opportunity to respond and/or rebut the allegations of misconduct because the alleged misconduct is not the real reason for the employee’s termination anyway.

This theme also works where the corporation has violated its own policies and procedures relative to the action taken against the plaintiff. For instance, if the employer establishes a disciplinary policy which requires progressive discipline before termination, it is generally viewed as unfair, and possibly discriminatory, for the employer to ignore those policies and procedures it established for the benefit of its employees. This theme often applies in discrimination cases where the plaintiff is asserting disparate treatment on the basis of his or her protected class status. In those cases where the employer has acted contrary to its own policies, the theme of corporate unfairness will work most effectively.
This theme also works where there is evidence of unethical corporate behavior. For instance, we have had cases where written performance evaluations have been changed by management in order to ensure that the plaintiff (and others in a protected group) is selected for layoff or other adverse employment action. If this type of evidence exists in a pattern and practice discrimination case involving a large number of layoffs, it can be devastating to the employer’s defense.

5. **KNOWLEDGE IS POWER**

This theme is prevalent in sex-harassment claims or claims based on other forms of hostile work environment. Generally, this theme will work when you can establish that management had the power to prevent injury to plaintiff based on its knowledge that the plaintiff was being harassed by his or her coworkers or members of management but failed to take prompt and appropriate remedial action. In this scenario, the evidence suggests that the employer was aware of the harasser’s conduct because of previous complaints and should have foreseen that the harasser would injure the plaintiff if it did not take effective remedial action.

This scenario also works where the plaintiff, or some other member of the workforce, has made a complaint about bias or harassment and management fails to take any measures to prevent foreseeable retaliation by the alleged harasser. In this type of a case, management should be on the alert to make sure that no retaliatory action is being taken by the criticized supervisor. Any adverse action by the criticized supervisor should trigger a detailed investigation by management to make sure that there was not a retaliatory motive for the action. Failure to undertake such a close review of the criticized supervisor’s employment action will result in the jurors condemning management for its
negligence.

This theme is anchored in common sense and a full appreciation of human nature. When management fails to take any action or fails to take appropriate action, compelling arguments can be made that management tolerated the harassment, acquiesced to it and, in some cases, actually encouraged it by its inaction.

6. **THEY RUINED MY LIFE**

This is perhaps the most compelling damage theme you can articulate on behalf of your client. In those cases where plaintiff alleges a serious psychiatric or psychological disability resulting from workplace harassment or discrimination, plaintiff’s counsel can artfully portray the plaintiff as a victim of corporate harassment, discrimination, abuse and mismanagement.

As in the “supervisor from hell” scenario, it is possible for a plaintiff to overplay this theme. In cases where there is a preexisting psychiatric history or where the defense counsel can raise credible allegations of malingering, exaggeration, or manipulation by the plaintiff, utilization of this theme could actually backfire. Overstating a damage claim before a jury is usually fatal to a plaintiff. If you elect to make this a significant damage theme in the presentation of your client’s case, look for ways in which a defense attorney could turn this theme around on your client and make it appear that the plaintiff is attempting to ruin the life of the defendant with false and exaggerated claims. This theme is powerful in the right case but can be a nightmare if asserted where a plaintiff is vulnerable as described above.
III. **USE OF THEMES IN VOIR DIRE**

In those jurisdictions where attorneys are still able to directly address prospective jurors during *voir dire*, the seeds of these themes should be laid. For instance, if the theme of the case is “good people do not turn bad overnight”, the plaintiff’s lawyer may inquire of the jury if they have ever had an experience at work where they were suddenly viewed by certain members of management as being unable or unwilling to perform their jobs in a competent fashion. Moreover, the “knowledge is power” theme can easily be interjected into the *voir dire* process by questions relating to whether the prospective juror has ever made a complaint to management regarding the conduct of a supervisor or a coworker and what the expectations of the prospective juror were as a result of the complaint.

IV. **USE OF THEMES IN OPENING**

The opening statement is the first opportunity that you will have to fully articulate the themes you have identified for the case. It is often helpful to start your presentations to the jury with a recitation of your theme. For instance, you might say, “this is a case about how a corporation forgot about the value of a long-term dedicated employee once the employee developed a heart condition and thereafter sought to get rid of him, not because he wasn’t performing his job, but because he was perceived by the company as a liability due to his disability”.

As you move through the substance of the opening statement, loop back to the theme of corporate unfairness and bias on a regular basis. For instance, if your claim is age discrimination and the employer’s defense is that the plaintiff was selected for layoff because of poor performance and not his age, you might want to reiterate the unfairness
theme during the time that you are talking about the pretextual nature of the employer’s action. You might say something such as:

“The employer in this case will argue to you that its decision to terminate John Smith was based solely on performance issues and had nothing to do with his age. We will demonstrate to you that this is a cover-up for its age-bias toward plaintiff, its true reason for taking the action. You will see that the employer had an employee handbook which set forth specific progressive disciplinary steps that were to be followed before terminating an employee for poor performance. This corporation, without regard to its own procedures, selected plaintiff for termination without so much as a warning or opportunity for him to respond to the allegations of poor performance. If this corporation made its decision based on performance issues as it claims, why did it fail to follow its own procedures in notifying plaintiff of these alleged deficiencies? John was entitled to be apprised as to what his deficiencies were and provided with an opportunity to correct them. Anything short of this is extremely unfair, and the type of evidence which you may take into account in deciding whether the reasons given for the corporation are a camouflage for bias toward plaintiff because of his age”.

V. THEMES IN DIRECT/CROSS-EXAMINATION OF WITNESSES

Plaintiff’s counsel should incorporate as many of the active themes as possible during direct examination. During cross-examination of management decision-makers, direct reference to the theme of the case is also beneficial. For instance, in a “supervisor from hell” scenario, upper-management can be questioned regarding the repetitive complaints received about the particular supervisor and you can actually summarize the allegations by saying something to the effect “if the jury believes all of the allegations regarding supervisor Jones, wouldn’t you agree that supervisor Jones would fit the category of a supervisor from hell?”
In a “knowledge is power” scenario, you can aggressively cross-examine the member of management who was aware of the negative influences in the workplace and negligently fail to take preventive or corrective action.

VI. **USE OF THEMES IN CLOSING**

By the time you reach closing, the jury should fully understand and appreciate the themes that developed during opening statement and the examination of witnesses. At this point, repeating the themes could be dangerous in the sense that you may alienate the jury through unnecessary repetition.

Your final statements in the closing argument, especially in rebuttal, should weave together as many of the trial themes as possible so that the final words spoken by you on behalf of your client can serve to refocus the jury and, hopefully, channel its energy into doing justice for your client.