

Trial Themes and Analysis

What is Trial Theme?

Attorneys have varying opinions on the definition of "trial theme." It seems that, while most attorneys intuitively appreciate the need to use themes for their case, many are unsure of what makes a good theme. The best trial themes are composed of catch phrases that summarize key elements in the case. A good theme is like an advertising slogan; a great theme is like an advertising slogan that sticks with you long after the trial is over.

Trial themes can also be thought of as psychological anchors upon which the case depends to carry the case to fruition. A theme is a "bottom line" reaction which develops from asking oneself, "what is this case about?". For maximum impact, a theme should be repeated throughout all phases of trial, from voir dire to closing argument. A theme which has been carefully developed and tested will eventually become the life line of the case, upon which jurors depend when making their decision.

Development of Themes is Hard Work

Themes do not reveal themselves automatically. The importance of themes to one's case dictates that they not be taken lightly. Proper development of themes is hard work and requires considerable effort on the part of the attorney and/or expert in jury decision making.

The best ways to develop themes involve pretrial jury research, including mock trials, focus groups, and community attitude surveys. Presenting one's case to groups of jury eligible citizens is the best way to develop themes because it allows the attorney to pre-test his/her case with groups of people similar to the venire. Mock jurors' deliberations/discussion comments, along with their

individual responses to questionnaires developed by the consultant, are analyzed to determine trends in responding which are indicative of emerging trial themes. The attorney and consultant often brainstorm about the effectiveness of many possible themes, eventually choosing the themes with the best fit for the case. Conducting mock trials, focus groups, and community attitude surveys allow citizens to consider case issues and attorneys, along with their jury consultants, to develop the most persuasive themes based on the citizens' reactions to the case issues.

Recognizing that pre-trial jury research is not conducted on many cases, there are other, although less scientific, ways to develop themes. These include providing a brief case description to non-attorneys (and, preferably, to people unfamiliar with the legal arena) to gauge their reaction to the issues and conducting research for oneself on effective themes in similar cases. This latter method involves an examination of opening statements and closing arguments from similar cases as well as polling one's colleagues about effective themes in their cases.

Regardless of whether the attorney uses scientific, research based theme development or a more informal approach, it is important to remember that themes always emerge from an analysis of key case issues. The attorney must outline the key case issues in an inclusive manner, then determine how to develop the most persuasive slogan, catch phrase, bottom line reaction, or psychological anchor to capture jurors' attention in a way that puts the most positive "spin" on each issue. Stating the obvious, themes are case specific, not generic, such that new themes must be carefully developed for every trial. Because considerable analysis is required to develop a good trial theme, theme development is the last part of the trial analysis process.

Persuasion with Themes

Once the attorney has completed the research required for theme development, including

outlining the key issues in the case, the goal is to develop themes to persuade the jury that your side should prevail. Themes should communicate both liability and damages issues in a way jurors can understand. (Once again, advertising slogans prove the best analogy for effective themes; think of all the catchy ad slogans which have become a pervasive part of our society's collective memory.) Most cases have three to five themes which prove a foundation for the case as a whole.

The attorney's role at trial largely consists of effective communication and maximizing the power of persuasion. Trial themes enhance the attorney's ability to persuade the jury by providing quick, understandable, and memorable ways for jurors to conceptualize the complexities of the case.