

ABA
Spring, 2004

By Jeffrey J. Kroll

USING THEMES AT TRIAL

The ability to anticipate the *critical* issues that must be explained and simplified for the jury is essential to any successful trial lawyer. A theme is a phrase that brings a vision to jurors. Themes are the anchors around which the jurors visualize the case. You want and need your jurors to remember your themes. Sound bites make for effective themes. Think about it... a sound bite or a movie trailer grabs your attention. You see the clip. You want to see the movie. A theme is no different.

Your theme must be limited to a ten-word telegram that explains the case. No matter how complex your case is, your theme must be contained in ten words or less. Sound simple? It's not. We live in a world full of themes. We have theme parties, theme parks, theme songs and holiday themes. If you are invited to a theme party, you know exactly the reason for the celebration. Why is a theme important?

1. *You*, not opposing counsel, *control* the *definition* of *the case*. You influence the dialogue in the jury room.
2. We all want a simple solution; the master key, the secret formula... jurors are no exception. Provide jurors with the solutions. Give them the master key with your theme.

When developing a theme, ask yourself these questions:

-Is your theme based on justice or some technicality?
Jurors want to do the right thing. A theme based on a technicality will not work.

-Will the instructions at the end of the case coincide with your theme? "An improper lane change caused a life change" is a simple effective theme.

-Will the theme fit in with the values or beliefs of the jurors? (Alcohol consumption)

-Will the theme cast your client in a role with which the jurors can identify?

-Bottom line, what is the message that I want to transmit to the jury?

Below are some examples of themes that I have used, have known others to use or that are found in the literature:

- “The hospital is supposed to help not hurt.”
- “John Smith went into Mercy Hospital with a headache and came out with a broken back.”
- “A moment of carelessness causes a lifetime of misery.”
- “A lane change that caused a life change.”
- “This is a case of broken bones and broken dreams.”
- “This is a case about a machine that had every option... but safety.”
- “Safety, sense and science is what the defendant manufacturer claims it considered when building this product; death, injury and disaster are what the defendant overlooked.”
- “This is a case about a company that will not take responsibility for safety.”
- “This is a case about an over the road trucker that tried to drive day and night.”
- “A doctor was too busy to listen to a patient and missed the classic symptoms of the patient’s condition.”
- “If the doctor did not write it down, it did not happen.”
- “If a doctor should err, it should be on the side of caution.”
- “The first rule of medicine, do no harm.”
- “Profits over safety.”
- “Speed kills.”
- “Recipe for Disaster.”
- “This is case about the wrong person doing the wrong thing at the wrong time.”
- “With medicine, go low and go slow.”
- “It appears as if life gave up on John... John has not given up on life.”
- “The left hand didn’t know what the right hand was doing.”
- “One drink too many.”
- “Captain of the ship.”
- “Half truth is a life.”
- “What a tangled web we weave, when we practice to deceive.”

It is difficult to make jurors listen if you don’t know what they are thinking, so you need to influence the dialogue in the jury room. Force the jurors to concentrate on your theme. People remember things in threes, e.g., Blood, sweat and tears; Earth, wind and fire, so it is nice to have a theme with three words in it. For example, in a trucking case, I argued that truck driver should have slowed down due to the bad weather. The conditions were *obvious*, skidding was *predictable* and slowing down would have made the collision *preventable*.

By simply reading the newspaper or being “in-tune” with society, themes will leap out at you. Themes should be used in opening statements, throughout the trial with lay and expert witnesses and during closing arguments. Use themes as an effective way of communicating with jurors. By creating a case theme, you control the definition of the case. When you control the definition of the case, you control the dialogue in the jury room. When you control the dialogue in the jury room, a favorable result is not far away.

