Catch Phrase

A powerful trial theme can help jurors comprehend a complicated case, convince them of your point of view and sway their verdict

By David Hunter

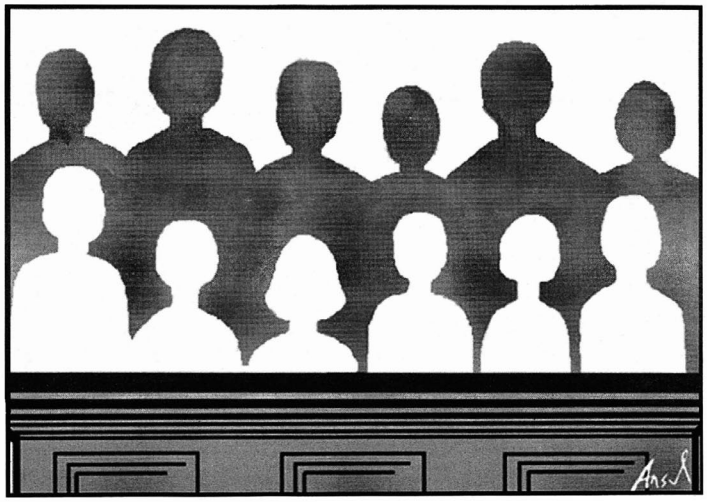
'If it doesn't fit, you must acquit." Johnnie Cochran uttered those now-famous words repeatedly in a crucial part of the 0.J. Simpson criminal murder trial. The catchy mantra helped persuade jurors that they should acquit Simpson because the alleged murder glove didn't fit him and that there was a whole truckload of evidence that didn't "fit" as well.

The Simpson trial exemplifies how a powerful trial theme can make it easier for jurors to understand a complex case, convince them of a point of view and ultimately sway their verdict. Unfortunately, many attorneys either don't use case themes or have trouble coming up with good ones.

"Really good lawyers use case themes," says Laurie Kuslansky, a New York senior trial consultant who worked on the Simpson case. "Others fail to use themes because it's not part of their method."

A theme can come from any important aspect of the case, such as the injustice that caused the plaintiff to sue or why it's wrong to blame the defendant.

According to Chicago senior trial consultant Cindy Andrews, a theme also can "provide jurors with a mantra they will rely on to argue your case during deliberation. It should give them a psychological anchor for understanding and believing your case."



What's more, she says, a theme can "transcend the case" and "fit with juror preconceptions and their desire to do the right thing and act as a social conscience of society."

So what makes a powerful trial theme, one that can win your case? Here are five key characteristics of a good theme:

It organizes and simplifies your case

"A case theme gives jurors a structure to think about the case," says Leslie Ellis, a Chicago trial consultant. "Developing a case around a theme gives jurors a way to categorize evidence."

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An effective theme tells the jurors the "why" of your case – its real heart and soul – rather than mere facts. It helps jurors cut through all the clutter to make sense of what they're hearing.

Jurors, like anyone who hears a story, organize their thoughts around the basic theme of the story. Some of the best trial themes use the "rule of three," says Los Angeles senior trial consultant Lara Giese. "Repeating a theme's three main points throughout the trial process enables jurors to easily recall key issues during deliberation," she explains.

For Chicago senior trial consultant Daniel Wolfe, a winning case theme is all about direction and believability.

"It should provide a road map that gives the decision maker directions, a compass that points the decision maker in the right direction and conviction that gives the decision maker a reason to believe in it," Wolfe says.

It fits the case and the evidence

Ask yourself, "Will the theme communicate with jurors in light of their education level? Is it appropriate for this specific type of case?" A theme that works for a personal injury case might not work in a property damage case.

Does your theme represent your client in a believable way? If he's a 300-pound billionaire bodybuilder, it will be tough to portray him sympathetically as David in a David-and-Goliath theme.

There's also the danger of "pseudothemes" that "resonate with the trial team, not the jurors," Kuslansky says. She points out the "mountain of evidence" repeated by the prosecution in the Simpson case as not being a good theme. Why not? Because it invited scrutiny of evidence and of the prosecution who presented it, she says, and, thus, took the focus off the defendant.

Your charts, time lines and exhibits should convey your theme or evoke its images at every turn. All testimony and witness accounts also should reflect your theme.

It works well in juror surveys or mock jury sessions

The best case themes emerge after testing themes through jury research and mock jury sessions. Some good themes actually come from comments made by the mock jurors themselves.

Research shows that people integrate information into their preconceived notions and core beliefs. Once jurors are given a case theme they can believe in, they search for facts and evidence that fit into that theme; and they discard information that doesn't. Without a theme to work with, however, jurors fall back on their core beliefs to filter the evidence. This could spell disaster for your case.

Sometimes jury testing can produce surprising results. In a case several years ago on the East Coast, a product manufacturer was sued when one customer died and another was injured using the product. Plaintiffs' counsel contended that misleading and incorrect product information in the manufacturer's catalog caused the death and injury.

The defense, which maintained that the plaintiffs misused the product, tested a humorous "Death by Catalog" theme ("Do you think the catalog killed him?") in mock jury research and received a positive response.

It uses memorable wording

Your case theme should tell in as few words as possible what your case is all about. The words should be simple, catchy and emotionally appealing. Most of all, however, the words of your theme should be easily remembered by the jury.

There are many ways to develop theme wording. You can use rhyme, alliteration, clichés, famous quotes, poetry or mythology. A word of caution: Make sure that any cliché or famous quote is known and respected by your jurors. A line from Shakespeare, for instance, might go right over their heads; conversely, they might look down on a simple rhyme or cliché as foolish.

Use concise English, not stilted legalese. If your theme includes a word that could be unknown by a potential juror and require the use of a dictionary, find another word. And cut out unneeded verbiage.

One-word themes are especially compelling. "Apathy" is a good one for wrongful death suits, and "greed" could be appropriate for commercial cases.

It makes an impact on jurors

A successful theme appeals to jurors' emotions, rationale and values. It must connect with something jurors "feel" in a universal sense like "good versus evil."

Jurors will respond to compelling themes. A theme that connects emotionally with your jury, for example, can be a big winner. But not always. "Emotional appeal doesn't always win out," Kuslansky says. "You can trump emotion with fact."

She cites a personal dispute involving a cancer victim who sued because she didn't get insurance coverage. For the defense, the theme was, "This case is about a contract." Did sympathy for the cancer victim override the jury's sense of propriety? It didn't – the plaintiff lost. When deciding if an emotional theme will have an impact on jurors, therefore, you must look at the case as a whole.

Whatever your case, a strong theme is one that successfully weaves all your evidence and key points together. It can help the jury navigate your case's complex twists and turns. Guided by your theme, jurors are more apt to be persuaded of your point of view.