

Trial Strategy: The secret to developing trial themes

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As every good trial attorney knows, your case needs a theme - a pithy phrase to give the jury something to latch onto and organize the evidence around.

But how do you come up with a theme that will resonate?

Many lawyers are relying on themes that are based on clichés, not tailored to the case, or out-of-touch for younger, diverse juries.

Another common mistake is to confuse a theme with a legal theory.

"You come up with a legal theory logically, but you come up with a theme emotionally. A theme doesn't work until it grabs your heart and gut," said Patricia McEvoy, PhD, a trial consultant at Zagnoli, McEvoy & Foley in Chicago.

What's in a theme?

A theme should encapsulate the main issue of the case in a short phrase.

"If you're putting your case in a nutshell, it's a simple statement of the issue as you are framing it," said David Graeven, president and senior trial consultant at Trial Behavior Consulting in San Francisco.

A good theme is succinct and universal - and it must ring true, said Katherine James, a jury consultant and co-founder of Act of Communication in Culver City, Calif.

James, who has a background in theater, said that a trial theme is something you want the jury to bring to the deliberation room the way a theater audience might leave a show humming the title song.

For example, "Rocks are hard, water is wet" is a theme James used in a contract dispute where the lawyers wanted to persuade the jury to read the contract strictly.

"Time changes everything" ended up being a powerful theme McEvoy developed for a client defending a claim that it infringed another company's patent.

Julie Huck, a trial consultant and CEO of The Huck Group in Los Angeles, worked with the Justice Department in a case against Enron to come up with the theme "inside-outside" to show that what was going on inside the company didn't match what was happening on the outside.

A trial may have more than one theme, such as one theme for liability and another theme for damages, McEvoy noted.

Finding authenticity

Although they can sometime be recycled, a theme must come across as authentic in the individual case.

"You can't start with a theme. I may have a slip and fall case and I could easily come up with a logical theme within seconds, but it may not work for that case," said McEvoy.

Lawyers are sometimes too close to their own case to come up with a theme.

As a result, trial consultants recommend brainstorming with others.

One exercise James uses to teach lawyers how to find a theme is to pretend you are describing your case in a 10-word telegram.

Another exercise is to take a nursery rhyme and turn it into a legal situation, such as turning the "Three Little Pigs" into a premises liability case and then developing themes from it.

One of the best - and perhaps overlooked - places to find a trial theme is from your own client.

This is especially true for damages themes, James said.

For example, in a case involving a small family business, she figured out the trial theme from the client one day when he said, "Every day I look at the case and think to myself: What would Dad have wanted?"

"The theme came straight from the lips of the son of the founder of the company: 'What would Dad have wanted?' The jurors became charged with making sure the outcome was the same as what this man, who had been dead for 15 years, would have wanted," said James.

Another way to find out what theme resonates with a jury is through focus groups and mock juries.

Brian LaBovick, a trial attorney at LaBovick & LaBovick in West Palm Beach, Fla., swears by them.

In one case in which he represented a plaintiff hit by a car while filling his tires with air in a gas station parking lot, he tried the case to a mock jury based on a theme that the driver should have looked first. Instead the mock jury focused on what they thought was a badly designed parking lot.

"We got an architect and, lo and behold, it was negligently designed. The gas station put in the air pump without city clearance and never got a permit. [Before the mock trial], we had never even thought about the gas station; we were just suing the driver," said Bovick.

Weaving theme into a trial

Now that you have a theme, how do you work it into the trial?

While you want to introduce your theme to a jury as early as voir dire, and then again in the opening and closing arguments, you also want to make it a recurring thread during the trial.

"You want the jurors to be using the theme during deliberations as part of the story," said McEvoy.

One way to do this is for the theme to be repeated in different words through the evidence, said James.

For example, in the "rocks are hard, water is wet" case involving a contract provision, one of the experts might testify, "If it's not on the page, it's not in the contract."

But avoid the temptation to beat the jury over the head with it.

"Jurors often say that attorneys talk down to them. One way they do this is to make all the conclusions. You have to respect a jury's decision-making abilities," Graven said.

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