# THEMES

## A. CREATING AND ADAPTING THEMES

It is axiomatic that counsel should develop a theme during voir dire examination, carry it through opening statement, expound upon it in the evidence and use the fully developed theme as a cornerstone of summation. This paper will discuss how to effectively develop case specific themes, adapt standard themes, structure powerful themes, identify and test the best themes for your case and communicate the themes to the jury at each stage of the trial.

The utilization of one or more themes is an effective method of organizing and presenting the closing argument. Themes should be selected at the initial stages of case preparation. They can then be implemented throughout the trial--including voir dire, the opening statement, the trial of the case itself, and the closing argument. The theme gives the jury a title, a goal and a purpose within a vital framework for deliberations.

Thus, when structuring the summation, plaintiff's counsel should focus on those issues which will have maximum impact on the jury. Time is very precious during the closing argument and should not be spent on superficial or frivolous issues. Counsel can choose either a climax or an anti-climax order for the presentation of strongest points. The climax argument begins with points of lesser impact, then builds and culminates with those of maximum impact. The anti-climax argument is obviously just reversed. Counsel, however, should NEVER allow issues of main impact to be diluted by blanketing them in the middle of the argument.

### 1. Developing Case Specific Themes

If your client is catastrophically injured, such as paralytic, brain damaged or otherwise severely impaired, one means of effectively developing a theme is to spend the day with your client. It is your job as counsel for the injured plaintiff to convey to the jury a clear understanding of the physical pain and suffering, mental anguish, physical disability and other elements of damage which your client has suffered in the past and will suffer in the future. In order to accomplish this, counsel must acquire empathy with the client on these issues. We cannot effectively and persuasively convey to the jury that which we do not fully understand.

A second technique of client involvement is to have the client write their own thoughts with respect to the physical pain and suffering, mental anguish, physical disability and impairment to earning capacity which they are experiencing. In addition to gaining a valuable basis for proof and argument of damages, you may gain a considerable insight into your client's reasoning process and level of suffering and endurance.

Finally, conduct an in-depth general damages interview with your client, preferably with a medically trained person present. Ideally, we conduct these interviews on videotape with the video equipment being set up as unobtrusively as possible. By encouraging your clients to talk, as soon after the accident as possible, about the physical pain and suffering and mental anguish which they are experiencing, you acquire a new understanding of the depth and scope of their problems which will help you in developing, understanding and conveying your theme regarding damages to the jury.

2. Adapting Standard Themes

There are numerous standard themes which have been developed over the past few decades of litigation. There is no need to reinvent the wheel when we can stand on the shoulders of giants such as Harry Philo, Bill Colson and Scott Baldwin the people who have developed and successfully used these standard themes for decades. The standard themes include, for example, corporate greed vs. consumer safety, child safety, product safety, workplace safety or whatever category your client fits into in the case. The corporate greed theme is that:

> A corporation has no heart, it has no soul, it has no nerve center, it has only bank accounts. Corporations exists solely to produce profits and converse only in the language of accounting. But this corporation must receive the message that the citizens of Texas will not tolerate corporate greed over consumer safety. As jurors in this case, you have the opportunity to send that crucial message to the corporation in this case.

That is a standard theme which can easily be assimilated to fit your case. Standard themes are located in several books that have been written on the subject of summation.

Case Themes - The importance of case themes is so vital that every case should have a case theme. It may be a simple theme in a rear-end collision case revolving around damages and the value of human life. In a malpractice case you may use a series of impact words and phrases that describe why the plaintiff ought to win and the defendant ought to lose. A case theme which explains both the plaintiff's position and reverses the defendant's theme is the perfect case theme. The case theme should be short and perhaps use alliteration or other literary techniques to make it more memorable.

Here are some examples of case themes. In a rear-end collision a young man was struck so hard that his head broke the rear window of the truck and he sustained brain damage. The case occurred because a laundry truck driver was changing lanes quickly in heavy traffic and did not see the plaintiff bring his vehicle to a stop in front of him. The theme for that case was "an erratic lane change led to a catastrophic life change." That theme obviously said everything about the case. It said it was a serious case and that the injuries had substantial effect on the plaintiff's life. It states that the injuries occurred because the defendant was negligent in changing lanes. In an oil refinery explosion, the defendant contractor had installed 120 valves backwards and had valves which allowed volatile hydrocarbons to bleed into the atmosphere. In that case, the theme was, "Ladies and Gentlemen, they contracted to build an extension to the oil refinery, instead they built a bomb!" Throughout the case that plant became a bomb in the jury's eyes. Ultimately the reinsurance company, who sent someone over from London to observe the trial, decided they had enough of hearing about the bomb. They settled for substantial money on the third day of trial.

In an anesthesiology medical negligence case a child became anoxic due to a laryngospasm (a spasm of the larynx blocking off breathing). Instead of acting rationally and giving the drug Anectine to reverse the spasm, the anesthesiologist tried to force a laryngoscope (a tool used to insert a breathing tube) into the child's mouth. When he could not force it in, he flung it across the room. The theme in that case was, "A professional panicked. Professionals must not panic." This

theme like the others said all there is to say about the case. It showed why the plaintiff ought to win and the defendant ought to lose. He panicked and he should not have.

These are just some ideas of what we mean by a case theme. You have to design your case theme with each individual case and each individual set of facts. With a little experience we find ourselves thinking of each case as "this is the case of (blank)". Eventually we learn to develop great case themes and our presentation will become more effective. The case theme is repetitive. The key words are used in voir dire, driven home in opening statement, logically supported by evidence from witnesses, documents and demonstrative evidence, and driven home forcefully in closing argument. By repeating a case theme, we tie the case together in the jury's mind. We will now consider a technique which will encourage the jury to adopt your case theme.

3. Thematic Anchoring - Anchor the case theme so that the message contained is remembered and used. *See infra at B2 b.*

B. STRUCTURING POWER THEMES

1. Psychological Principle of Structuring

Jurors are influenced by the way the message is structured and delivered. Jurors are constantly trying to make sense out of their environment and/or attempting to resolve inconsistencies. Therefore, it is an important consideration to jurors as to how the information being conveyed by counsel is structured and delivered. Is the theme or message consistent, easily remembered and well delivered? Jurors are more likely to perceive the source as credible when the way in which the message is presented allows jurors to feel both competent and intelligent. If counsel presents data which is too confusing or too multifaceted, jurors will discredit the information rather than discredit their own capability to understand the information. Therefore, the skilled advocate will present information which is simplified which jurors can easily perceive and which make them feel competent in carrying out their duties as jurors. An attorney delivering a complex message does not convey the perception to the jurors that the attorney is intelligent. More likely, jurors will perceive the attorney as less intelligent and incapable of communicating a clear and simple message. Jurors look at the attorney as the source to find out what is wrong with the information presented.

2. Psychological Tools of Structure

Certain principles are now axiomatic in the field of psychology which can be applied with great effectiveness by the skilled trial attorney to a jury trial. These include, among many others, primacy, thematic anchoring, embedded commands, the Zeigarnik effect and the principle of recency.

a. Primacy

Jurors tend to place the greatest emphasis on information which they receive first concerning a person or an occurrence. Combine this with the communication principle that perceptions are organized and structured by jurors within a brief period of time and we learn that impressions, particularly concerning people, are formed based on very scanty information. The bottom line for trial lawyers with respect to the principle of primacy is that the information presented first is most decisive.

The skilled advocate will utilize the principle of primacy repeatedly throughout the trial. For example, the first witness in the morning, the first questions asked of that witness, the first questions asked after a coffee break when a witness is recalled, the first questions asked after the lunch break, the first questions on cross examination and, of course, the important use of primacy during the trilogy of persuasion. The first four minutes of voir direct examination, opening statement and each section of the summation are the most crucial to perception, formation, and persuasion. The demonstrative evidence introduced during the earliest moments of testimony of a witness, during the earliest part of the day and the earliest part of the trial, will be received, retained and recalled better by jurors than other demonstrative evidence.

In crucial debriefing of thousands of jurors, they invariably had a much better recall of the beginning and the ending of trials than of the evidence offered during the middle of the trials. This raises the next issue as to which has the most impact, the beginning or the ending, i.e., primacy or recency. The skilled advocate utilizes both primacy and recency as part of the persuasive process.

One of the important uses of primacy by the plaintiff's attorney is the opportunity to establish the issues in the case and the language which will be used to discuss those issues. Plaintiff's counsel should advise the jury from the inception, on voir dire examination, and opening statement, that the issues to be resolved by them are simple, state what those issues are in very simple, common sense terms, and warn the jurors not to be misled by attempts to confuse and complicate this very simple lawsuit, which will be the tactic of the defense.

Combining the principle of primacy with the communication principle that perceptions are organized and structured within a brief period of time, the Plaintiff's attorney must effectively utilize the first impression stage of the trial which includes voir dire, opening statement and the first witness. These three areas form the basis of the jury's first impression of the case. The goals of the Plaintiff's attorney during this crucial time frame should be to educate as to the issues in the case, disclosures of the weaknesses in the case, inoculation against the defendant's attack and clear simple repetition of plaintiff's themes.

The principles of primacy and recency can be interwoven into the closing argument structure. The principle of primacy maintains that listeners will tend to believe most deeply what they *hear first*.

b. Thematic Anchoring

(1) Anchoring Through Repetition

Anchoring is a well accepted psychological technique. Anchoring is a technique whereby a word, a phrase or a theme is repeated. It is repeated from the same spot, with the same gestures, with the same facial expressions, the same tone of voice, and with the same mannerisms. One use for anchoring that everyone can remember was done by the late great Jack Benny, who had a certain way of folding his arms, putting his hand under his chin, and saying the word, "Well...." Pretty soon he was getting laughs without saying the word and then he did not even need to put his hand under his chin. He just used part of the gimmick and the anchor worked. Anchoring causes an association of the subject matter anchored with an emotional response that is initiated by the repeated use of the anchoring technique. In essence, it communicates our theme impactfully on an emotional level. Because of the pipeline, the theme is easily recalled and therefore is more likely used. The key is that information which is anchored will be likely remembered and used. The

most important information you want a jury to remember and use is your case theme. It explains why your client should prevail.

The techniques that we have described here are excellent communication techniques. They are well documented in the social science literature. They can be used very effectively at trial, in personal relationships, in negotiations, and many other areas of life. They are techniques which have been scientifically studied. They are tools available to trial lawyers whose job it is to communicate effectively.

While understanding and using these techniques is no guarantee of success, they give the advocate who knows and understands them a persuasive edge. And in this age of high powered litigation in both large and small cases, any edge that an advocate can achieve is one he or she should have. It is our job to present our client's case in the best light. We can achieve this most effectively by increasing our understanding of how to communicate simply with jurors on all of the levels through which they receive information.

Anchoring is a technique of establishing a pattern of behavior to communicate with the listener's unconscious mind. It is an organized means of verbally communicating with a conscious mind while non-verbally communicating with the unconscious mind. Anchoring is used during voir dire examination to introduce the case theme followed by repetition and the use of a more precise statement supporting the case theme during opening statement. At some point in the beginning of the summation again anchor the case theme. That is, return to the language which sets out the case theme, say it in the same manner with the same gestures and from exactly the same position in the courtroom utilizing the same graphics and impact words and phrases which are the heart of the case theme. For example, when trying a case in which the theme is that defendant placed "corporate profit ahead of child safety", this impact phrase should be anchored in several ways: 1) verbally by repeating precisely the same words; 2) vocally by using the same tone of voice; 3) non-verbally by using the same gestures and movements each time the phrase is delivered; 4) physically by standing in exactly the same location in the courtroom when discussing that theme and at no other time; and 5) visually by referring to precisely the same piece of demonstrative evidence while delivering the phrase. Anchors ideally are used throughout every phase of the trial. In order to establish and maintain their effectiveness, they must be used consistently and precisely.

Anchors may be used effectively by plaintiff's attorneys and prosecutors in conjunction with the primacy concept. However, they may also be used effectively by defense attorneys, both in civil and criminal cases. The goal of plaintiff's counsel is to anchor a case theme through a highly emotional state while the goal of defense counsel is to anchor the defendant's theme through use of a logical, objective, factual state.

Anchoring is a technique that could be most closely likened to classical conditioning when an identified stimulus will elicit a particular response, e.g., Pavlov's Dog. Anchoring frequently occurs in the courtroom by attorneys who are using the device unconsciously.

(2) Anchoring Technique

For example, when an attorney punctuates the air with his eyeglasses in order to make a

particular point, it is a form of anchoring. However, if the same attorney punctuates the air with his glasses on a different issue, the anchoring process is lost. To be effective, anchoring must be consistent, repetitious and use identical methods for eliciting a particular response pattern.

(3) Collapsing an Anchor

It is also important for the skilled advocate to understand how to collapse an anchor. If you see your opposing counsel successfully anchoring his or her message or case theme in the minds of the jurors, you need to identify whether counsel is accomplishing this through verbal message, voice tone, non-verbal communication, spatial manipulation, use of exhibits or more likely, a combination of these. You can successfully collapse the anchor by standing in the same location, using a different voice tone, different non-verbal communication and a different graphic to talk about exactly the same subject matter. It is just as important to understand how to recognize and collapse anchors as how to create them.

(4) Anchor Recalls Entire Experience

Anchoring is a technique for locking in a particular experience, event, theme or evidentiary points in the minds of jurors for the crucial retention and recall during the deliberative process. The neuropsychological principle underlying anchoring states that any element of an experience, when repeated, replays all elements of the experience. Any associational method which triggers events in the mind, triggers recall of the entire experience surrounding the events.

c. Neurolinguistic Programming - Pacing

(1) Pacing to Create Similarities

Interactional pacing or neurolinguistic programming is used as a tool of persuasion. The jurors, in order to be comfortable, are looking for similarity. Pacing or neurolinguistic programming is a process where one takes advantage of this search for similarity in the jury's mind by creating similarities not only on the conscious level, but on the unconscious level. If jurors perceive us as similar, particularly on the unconscious level, we greatly increase the chance of jurors "liking us". We know since the Sanito and Arnold's study, that if they like us, we have a better chance of winning the case. This also ties in with the seminal principle: "All communication is based on perception." What we are trying to create is perceived similarity. This perception takes place on the unconscious level and the jurors or opponent are not aware of it. Anything we can do to increase or intensify the feeling of similarity helps.

Pacing can be the most effective technique that a trial lawyer can use. It is something which occurs naturally with people who like each other. It is not fake and not false. But being aware of the technique will help you to focus on the person with whom you are communicating and will help you create a bond or a feeling of liking between you and that person. Pacing jurors can help because whether they like us on the conscious or unconscious level, it is still easier to influence them if there is "liking" on either level.

(2) Matching and Mismatching

Basically, we are talking about interactional pacing which includes two basic types of pacing, matching and mismatching. In a relationship between you and another person or you and a group of people, you can pace them to create a feeling of similarity and a feeling unconsciously that they like you. Interactional pacing occurs naturally. When a couple is in love and the romance

is blooming, the couple matches one another. It is natural and occurs on the unconscious level. In an interactional situation we want to create this. That is, if we want the other party or parties to like us, we match them.

On the other hand, there are some situations where we want to create dissonance. We want the party or parties to feel they do not like someone. For example, in cross-examination, you may want the witness to feel uncomfortable. You may want the witness to be perceived to be squirming and out of step with everybody else. This is done by mismatching and thereby creating dissonance. The jurors, because the witness mismatches the lawyer, may on an unconscious level dislike him and not even know why.

(3) Pacing at all Levels

Interactional pacing takes place on all levels of communication. To pace a witness or a juror or a number of jurors, you must verbally match the juror's language. One listens to their language pattern and uses a similar language pattern. We pick up on their words and use them. We listen for their key phrases and echo them. In essence, we adopt their vernacular.

Besides matching verbal cues, one should match vocal cues. That is, we should attempt to match their rate of speech, their pitch of voice, and even their pauses. This does not mean we mimic their speech pattern, but only match it in one or two aspects.

In addition to matching vocal and verbal cues, one needs to match the nonverbal cues. In doing this we match their gestures, not deliberately or obviously, but comfortably. We also match their facial expressions, their eye movements, their blink rates, and even their breathing patterns. All of these things form part of interactional pacing.

(4) Pacing in the Primary Representational System

Another key method to matching a person through interactional pacing is by matching the primary representational system the person is using at the time. That is, we match the way in which they are processing information. If they are processing visually, we deliberately use phraseology which signals the unconscious mind of the visual person. If they are using the visual channel, we want them to "see it our way." If they are using the auditory channel to process information, we want them to "hear what we have to say." If we have determined that the person we are trying to influence is processing his or her information kinesthetically, then we tell them "how we fell" about the situation and try and match their feelings with both words and gestures.

d. Embedded Commands

An embedded command is a technique for engaging the conscious mind while communicating to the unconscious mind. The skilled trial attorney will understand how to use the embedded command to identify a specific action message which he wants delivered to the unconscious mind. The unconscious mind is analogous to a computer in that it acts on commands. The commands upon which the unconscious mind acts are those which the conscious mind allow to come through to the unconscious mind requesting specific action. The purpose of the embedded command is to bypass the conscious mind penetrating the logical and rational decision making process and communicate a command directly to the unconscious mind of the juror.

The unconscious mind is not selective in that when a command reaches the unconscious

mind it responds impartially. There is no analysis process in the unconscious mind.

(1) Communicate a Command to the Unconscious Mind

The embedded command reaches the unconscious mind and commands the person to perform, think or feel in a particular way.

(2) Preface, Pause, Voice Change and Command

In order to accomplish this, two steps are required, first, there must be a "preface" which causes the conscious mind to drop its guard. Secondly, the embedded command must come after a pause, a voice change and a command beginning with the word "you". The preface is delivered as a casual inquiry such as "I know you are wondering if". The command part of the statement is delivered, after a distinct pause, in a stronger and lower voice tone, as customarily utilized in giving a command. The shifts in voice tone and the pause pattern serve to cue the unconscious mind that the following information is for it. The role of the unconscious mind is to discern nuances and behavioral changes which are the keys to this form of behavioral cuing.

The embedded command to the unconscious mind then follows the pause, such as "I was wondering if ... you can feel the mental anguish involved in being a paraplegic?" This command, if delivered effectively to the unconscious mind, will cause the unconscious mind to perform by feeling the emotions which have been described by various witnesses during the trial that are inherent in being a paraplegic. This is a subtle but highly effective technique which can be used most effectively during summation in order to trigger emotional responses within the subconscious minds of the jurors.

Another type of embedded command deals with the establishment of evidence. This is accomplished using the phraseology, "I knew then what you know now". The use of this particularly effective command works to reconfirm the evidence in the jurors' minds.

e. The Zeigarnik Effect

When applied to litigation, the Zeigarnik effect is the psychological principle that jurors are more impressed with data which they discover for themselves over an extended period of time than with information which is spoon fed to them in bulk. The use of this principle in a personal injury case may be most effective with respect to proof of damages. Plaintiff's counsel may consider that instead of disclosing the full nature and extent of the plaintiff's injuries during voir dire examination and opening statement, it may be more effective to concentrate on proof of liability in the early portion of the trial and unpack the damages proof more slowly. In this manner, the nature and extent of the injury is continually increasing as more evidence is presented. Let each juror wonder as to the nature and extent of the injuries and they will watch carefully for additional evidence which answers the questions which are properly raised in their mind about "just how badly hurt is this plaintiff?". As the information develops slowly over a longer period of time it will have a greater impact on the jury than if they are told everything in the inception and pay little attention to the details of the injury as they are discussed during the evidence. In some cases the extent of the injury is obvious immediately, however, the Zeigarnik Effect can be used to relate to the jury the effects of the injury on the injured party and on the spouse, children, occupation, recreation, etc.

f. Recency

The psychological principle of recency is to the effect that people remember longest that which they hear last. Thus, recency relates to ease of recall as distinguished from primacy which relates to formation of a belief. Clearly, both primacy and recency have been reflected in jury studies since jurors can recall with specificity the opening and closing portions of trial but have only vague, if any, recall of the events that occurred in the middle of the trial.

The skilled attorney will utilize the principle of recency by finishing big at every portion of the trial. In witness examination, whether direct or cross, always finish on a high note. Close every portion of the proof, whether on break for coffee, lunch, or at the end of the day with a significant piece of evidence. Wrap up every portion of the trilogy of persuasion, voir dire, opening statement or summation with a compelling point.

The principle of recency maintains that listeners will tend to remember longest what they *hear last*. It is imperative that closing arguments begin and end on issues of strength. The plaintiff's counsel can effectively use knowledge of primacy and recency to insert specific issues into the argument in the most effective manner.

3. Rhetorical Tools of Structure

A review of the great speeches from Cicero and Demosthenes through Abraham Lincoln, Winston Churchill, John F. Kennedy and Martin Luther King reveals that there are common threads which pervade the great oratorical works. The prevalent thread is the effective utilization of rhetorical devices as a predicate to persuasive oratory. Rhetorical devices are language techniques which are used to arrange words in distinctive and persuasive phrases, sentences and paragraphs in order to forge greater force and fluency. Through the use of rhetorical devices, attorneys can couch themes more clearly and persuasively. There is no technique more useful to lift language from the abyss of lackluster speech to the peaks of eloquence.

The effective closing argument is an art as well as a science. As with all art and science, certain devices, techniques and tools can enhance the finished product. The plaintiff's counsel must be able to use effectively the various rhetorical devices available to activate, stimulate and motivate the jurors. Although many rhetorical devices technically bring argument outside of the record, the facts of a case may be related to history, fiction, personal experience, anecdotes, Bible stories or humor. See *Sheffield v. Lewis*, 287 S.W.2d 531, 539 (Tex. Civ. App. -Texarkana 1956, no writ).

In *Beaumont Traction* the Court said:

> If the conclusion of fact he wishes to bring the jury to by his argument is such as the law makes applicable to the case, and there is any evidence from which such conclusion can be deduced, he may use all the strength of mind and powers of utterance he can command to bring the jury to such conclusion. He may illustrate principles upon which he builds his argument by drawing on history, fiction, personal experience, adjudicated cases, and may even appeal to the logic of the poets....

*Beaumont Traction Co. v. Dilworth*, 94 S.W. 352, 355 (Tex. Civ. App. 1906, no writ.)

The following is a partial list of rhetorical weapons that have proved effective in the closing argument arsenal.

a. Triad

One of the most frequently used techniques throughout the history of eloquence is the rule of three, sometimes referred to as the triad. As a means of communicating rhythmically, memorably, and persuasively, the rule of three is one of the most valuable tools available to trial lawyers. This is true because the conscious mind is able to best deal with three items in terms of reception, retention and recall.

The idea is to communicate in threes in any unit of language: words, phrases, clauses, sentences, paragraphs, or the development of the entire argument. A rule for advocates is to try to convey three major messages to your jury in such manner that the messages can be remembered. Instead of trying to cover every minor point and persuade on every minor issue, we develop themes which are repeated throughout the trial. You may wish to develop three themes which you will try and convey to the jury or one theme with three messages within the theme. From the viewpoint of trial lawyers the rule of three can be used for everything from effective use of three words through effective persuasion on three themes.

Consider the following well-known examples in which the triad achieves rhythmic eloquence:

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.
>
> ***
>
> We mutually pledge to each other our lives, our fortunes, and our sacred honor. (Thomas Jefferson).
>
> Never in the field of human conflict was so much owed by so many to so few. (Winston Churchill)
>
> With malice toward none, with charity for all; with firmness in the right.
> We cannot dedicate - we cannot consecrate - we cannot hallow this ground.
> And that government of the people, by the people, for the people shall not perish from the earth. (Abraham Lincoln)
>
> Duty - Honor - Country. Those three hallowed words reverently dictate what you ought to be, what you can be, and what you will be. (Gen. Douglas MacArthur)

The Greek philosopher and mathematician, Pythagoras, referred to three as a perfect number. This was predicated on the ancient Greek belief that the world was ruled by three Gods and the Greeks revered love, laughter and beauty. The ancient Chinese worshiped gentleness, frugality, and humility. In Scandinavian mythology the Mysterious Three sat on three thrones above the rainbow. The Hindu trimurti consists of three Gods: Creator, Preserver and Destroyer. Christians believe in the trinity by which God exists in three persons: Father, Son, and Holy Ghost;

Faith, Hope and Charity are the three Christian graces. Three wisemen paid homage to the newborn Jesus and brought three gifts: Gold, Frankincense and Myrrh.

The structure of man has three dimensions: Body, Mind and Spirit. Nature is divided into three: Mineral, Vegetable and Animal. Time has three aspects: Past, Present and Future. Government is divided into three levels: National, State and Local. Within each level of government there are three divisions: Executive, Legislative and Judicial. Psychoanalysts divide the human personality into three functional parts: Id; Ego; and Superego.

As we attempt to compose a summation or a persuasive theme the principles of composition are unity, coherence, and emphasis. Each summation or speech, according to Aristotle, should have a beginning, middle and end which are also termed as introduction, body and conclusion. Greek dramatists originated the concept of three divisions of drama: tragedy, comedy and satire. The three classical principles of dramatic construction are unity of time, unity of place and unity of action.

Thus, the rule of three is a basic tool for those who write prose, poetry, drama, humor, political speeches and persuasive messages. It should also be a powerful tool in the arsenal of the skilled trial attorney. As advocates, we can effectively use the triad during the trilogy of persuasion, the three times that we directly address the jury: voir dire, opening statement and summation.

Forensic psychologists tell us that grouping items in threes makes them easier to remember. The Rule of Three has been used by great orators throughout history to enhance the persuasive power of their oratory. The classic example is the following segment from a radio speech delivered by Prime Minister Winston Churchill to the citizens of England as the Battle of Britain was underway:

We shall fight them on the beaches,
we shall fight them in the streets,
we shall fight them in our homes,
we shall never, never, never surrender.

The use of the term "we shall fight them" to begin three consecutive sentences is the device of refrain. The phrases "on the beaches", "in the streets", "in our homes" illustrate the use of three word phrases at the end of three sentences. The term "never, never, never" illustrates the use of the Rule of Three in the middle of a sentence.

b. Parallel Structure

Parallel structure is an extremely effective technique for use during either opening statement or summation. It is particularly useful in a catastrophic injury case. As an example of this type of structure, consider the following excerpt from a speech by Senator William Fulbright:

There are two Americas.
One is the America of Lincoln and Adlai Stevenson,
The other is the America of Teddy Roosevelt and General MacArthur.
One is generous and humane,--the other narrowly egotistical;
One is modest and self critical--the other arrogant and self-righteous;

One is sensible--the other romantic.

Applying this technique to a summation can give the following results:
We have seen two Thomas Miller's in this case.
One an energetic and active father--the other a bedridden paralytic.
One a helpful and loving husband--the other a helpless patient.
One a hard working provider--the other a financial burden.
One a healthy happy Thomas Miller before this defendant's tragic mistake;
the other, Thomas Miller for the next forty years.

c. Antithesis

The rhetorical device of antithesis is used to balance contrasted ideas so as to highlight both ideas through the parallel arrangement of key phrases. Antithesis is used in conjunction with parallel structure to effectively counterpoise and contrast the past and the future, life and death, healthy and crippled, words and deeds, one and many, light and dark, mortal and immortal, age and youth, male and female, choice and determination and any number of other counterpoising principles. The effect of combining antithesis and parallel structure can create compelling and memorable summations.

For example, consider that President John F. Kennedy's speeches were replete with antithesis. The classic example of the use of antithesis was contained in John F. Kennedy's inaugural address wherein he entreated the American citizenry with the following challenge:

> We observe today not a victory of party, but a celebration of freedom, symbolizing an end as well as a beginning, signifying renewal as well as change.
>
> Let us never negotiate out of fear, but let us never fear to negotiate.
>
> And so my fellow Americans, ask not what your country can do for you, ask what you can do for your country.
>
> If a free society cannot help the many who are poor, it cannot save the few who are rich.

This technique, applied to the death of a child, may be used as follows:
In determining the damages in this case, don't look at the death of this child, but look at the life which never will be.

The technique of antithesis is also extremely useful during summation in order to assist the jury in assessing the damages for an extended period of time in the future. As Winston Churchill said, "The further backward we look, the farther forward we see."

Assume that you represent a twelve year old quadriplegic who has a sixty-four year life expectancy. One technique for making the jury appreciate how long sixty-four years of future mental anguish will be is to ask them to look back sixty-four years. The technique is to enumerate well known events which occurred from 1927 chronologically through 1991 such as Babe Ruth

hitting 60 home runs, the stock market crash, the depression, Pearl Harbor, World War II, Korea, the Kennedy Camelot years, Watergate, etc. up to the present. See, for example, the use of this technique in an actual summation on page 81.

In order to make the jury understand the mental anguish which is to be suffered by this child for the next sixty-four years, as you catalog each of the occurrences from history since 1927 you use the refrain that

> If this accident had occurred 64 years ago this plaintiff would have witnessed this significant event of 1929 from his wheelchair as he endured mental anguish everyday of his life.

Another effective technique to demonstrate future economic cost is to compare the cost of a Ford automobile, a gallon of gasoline, a loaf of bread and other items from a Sears Roebuck catalog from those years in order to demonstrate the extreme increase in prices which the plaintiff will be required to cope with over the next sixty-four years.

d. Repetition

Aristotle's third principle: Refresh the memory of your audience frequently.

(1) Repetition At The Beginning

Eloquent and rhythmic effects can be achieved by repeating a word or phrase at the beginning of consecutive clauses or sentences in order to form a rhythmic pattern which will capture the juror's attention, stir their emotions, and persuasively deliver the message. Consider the following phrases of Martin Luther King in his Lincoln Memorial speech in 1963 wherein he uses the repetitive phrase "one hundred years later" in referring back to the signing of the Emancipation Proclamation:

> But one hundred years later, we must face the tragic fact that the Negro is still not free.
> One hundred years later, the life of a Negro is still sadly crippled by the manacles of segregation and the chains of discrimination.
>
> One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity.
>
> One hundred years later the Negro is still languishing in the corners of American society and finds himself in exile in his own land.
>
> This repetition at the beginning of the sentence creates a refrain.

(2) Refrain

A review of Martin Luther King's "I Have A Dream" speech shows the brilliant use of refrain as he moves from the repetition of "one hundred years later" to repeating "I have a dream" which sequels into the refrain of "let freedom ring" which culminates in the climax of "free at last! free at last! thank God Almighty, we are free at last!"

Applying the triad/refrain technique to a summation may be illustrated as follows:
They gambled with our public safety.
They gambled with our judicial system.
They gambled with young David's life.
We know that David lost their gamble.
We know that his parents lost their gamble.
We know that they must never, never, never be allowed to win their treacherous gamble.

Abraham Lincoln, in the Gettysburg Address, utilized the Rule of Three "of the people, by the people and for the people" as well as refrain "We shall not desecrate, we shall not consecrate, we shall not hallow this ground."

(3) Echo Effect

The echo effect of repetition is achieved through the repetition at the beginning of successive sentences of one word or phrase which repeats the speaker's theme. This may be a declarative statement such as the "I have a dream" which was used eight times consecutively by Martin Luther King or it may be in the form of a rhetorical question which reminds the jurors of their power, such as "what is this child's life worth in our community?"

Politicians have understood the effectiveness of refrain in the echo effect by repeating phrases at the beginning of sentences for centuries. Consider the following example of repetition by Franklin D. Roosevelt:

Whoever seeks to set one nationality against another, seeks to degrade all nationalities. Whoever seeks to set one race against another, seeks to enslave all races. Whoever seeks to set one religion against another, seeks to destroy all religion.

(4) Augmentative Repetition

Daniel Webster coined the phrase "augmentative repetition" in order to identify and encourage the use of either the same word or a form of the same word for cumulative effect in conveying a message.

It has been the practice of English teachers to encourage the use of synonyms rather than repeating the same word. In fact, the standard rule in English has been promulgated to "never use the same word in a sentence - or within twenty lines". H.W. Fowler in Modern English Usage refers to this as a fatal influence. Consider the use of augmentative repetition by John F. Kennedy: "We will neglect our cities to our peril for in neglecting them we neglect the nation."

As was so often true with respect to the effective use of rhetorical devices it was accomplished brilliantly by Winston Churchill in his first speech as Prime Minister before Parliament in 1940. Note the use of sequel from war to victory to survival:

You ask, what is our policy? I say it is to wage war by land, sea and air. War with all our might and with all the strength God has given us, and to wage war against a monstrous tyranny never surpassed in the dark and lamentable catalog of human

crime. That is our policy.

> You ask, what is our aim? I can answer in one word. Victory. Victory at all cost, victory in spite of all terrors, victory, however long and hard the road may be, for without victory there is no survival. Let that be realized. No survival for the British Empire, no survival for all that the British Empire has stood for, no survival for the urge, the impulse of the ages, that mankind shall move forward towards its goal.

Napoleon, who was a great orator as well as a military genius, said "In speech making you need only one technique, and that is repetition, repetition and repetition".

(5) Repetition of the Central Theme

In addition to the repetition of a word or phrase, the most effective means for conveying a message to the jury is through the repetition of a central theme throughout the case. After voir dire is complete, your theme should be clear to the jury. Certainly by the time you've completed opening statement, your theme should be crystal clear to the jury. Repeat the theme effectively by approaching the same basic theme from several different positions in your proof. By the time the evidence is complete, summation should simply be a review of what each juror has heard and seen several times during the course of the trial. Every member of the jury should know precisely what your theme is before you rise for summation.

e. Thematic Reversal

In keeping with Aristotle's first principle of persuasion, i.e., to well dispose your audience to you and ill dispose them to your enemy, we use careful theme development in order to simply, forcefully and persuasively well dispose the jury to our case. However, the second half of the rule is equally important, i.e. to ill dispose them to your enemy. One of the most effective methods for accomplishing this is through the use of thematic reversal. This is accomplished by reviewing very carefully your opponent's theme and in addition to simple rebuttal of their theme, reverse it and use their own theme against them. One of the most eloquent example of thematic reversal emerges from the colloquy between Brutus and Mark Antony in Shakespeare's Julius Caesar.

Brutus, in his summation before the people of Rome immediately following Caesar's death, brilliantly stated the theme of the slayers that Caesar had to be slain for the good of Rome because he was ambitious. Mark Antony rebutting Brutus without either criticizing or directly disputing him accomplishes this in a brilliant display of thematic reversal by examining carefully the slayers theme that Caesar was ambitious. While constantly praising the slayers as "honorable men" and without directly attacking their motives or their actions, Mark Antony reverses the theme of ambition, demonstrating Caesar's lack of ambition, while speaking in positive terms about Caesar's slayers throughout the summation. As Mark Antony reverses the theme, he reverses the minds of his jurors also. In analyzing the comparative speeches of Brutus and Mark Antony, consider Shakespeare's use of the rhetorical devices which we are discussing herein. There is a reason why we are still watching, reading and enjoying his plays four hundred years after they were written. Consider the following "Summations":

> Brutus: Be patient till the last.
> Romans, countrymen, and lovers! Hear me for my cause, and be silent, that you may hear.

Believe me for mine honor, and have respect to mine honor, that you may believe. Censure me in your wisdom, and awake your senses, that you may the better judge. If there be any in this assembly, any dear friend of Caesar's, to him I say that Brutus' love to Caesar was no less than his. If then that friend demand why Brutus rose against Caesar, this is my answer: Not that I loved Caesar less, but that I loved Rome more. Had you rather Caesar were living and die all slaves, than that Caesar were dead to live all freemen? As Caesar loved me, I weep for him; as he was fortunate, I rejoice at it; as he was valiant, I honor him; but as he was ambitious, I slew him. There is tears for his love, joy for his fortune, honor for his valor, and death for his ambition. Who is here so base that would be a bondman? If any, speak, for him have I offended. Who is here so rude that would not be a Roman? If any, speak, for him have I offended. Who is here so vile that will not love his country? If any, speak, for him have I offended. I pause for a reply.

All: None, Brutus, none.

Brutus: Then none have I offended. I have done no more to Caesar than you shall do to Brutus. The question of his death is enrolled in the Capitol, his glory not extenuated, wherein he was worthy, nor his offenses enforced, for which he suffered death.

* * *

Brutus: Good countrymen, let me depart alone, And for my sake, stay here with Antony. Do grace to Caesar's course, and grace his speech tending to Caesar's glories, which Mark Antony, by our permission, is allowed to make. I do entreat you, not a man depart, save I alone, till Antony have spoke.

* * *

Antony: Friends, Romans, countrymen, lend me your ears! I come to bury Caesar, not to praise him. The evil that men do lives after them, the good is oft interred with their bones; so let it be with Caesar. The noble Brutus hath told you Caesar was ambitious; if it were so, it was a grievous fault, and grievously hath Caesar answered it. Here, under leave of Brutus and the rest--for Brutus is an honorable man; so are they all, all honorable men--come I to speak in Caesar's funeral. He was my friend, faithful and just to me; but Brutus says he was ambitious, and Brutus is an honorable man. He hath brought many captives home to Rome, whose ransoms did the general coffers fill. Did this in Caesar seem ambitious? When that the poor have cried, Caesar hath wept; ambition should be made of sterner stuff: yet Brutus says he was ambitious, and Brutus is an honorable man. You all did see that on the Lupercal I thrice presented him a kingly crown, which he did thrice refuse. Was this ambition? Yet Brutus says he was ambitious, and sure he is an honorable man. I speak not to disprove what Brutus spoke, but here I am to speak what I do know. You all did love him once, not without cause; what cause withholds you then to mourn for him? O judgement, thou art fled to brutish beasts, and men have lost their reason. Bear with me; my heart is in the coffin there with Caesar, and I must pause till it come back to me.

First Citizen: Methinks there is much reason in his sayings.

Second Citizen: If thou consider rightly of the matter, Caesar has had great wrong.

* * *

Fourth Citizen: Marked ye his words? He would not take the crown; therefore 'tis certain he was not ambitious.

* * *

Antony: But yesterday the word of Caesar might have stood against the world. Now lies he there, and none so poor to do him reverence. O masters! If I were disposed to stir your hearts and minds to mutiny and rage, I should do Brutus wrong and Cassius wrong, who, you all know, are honorable men. I will not do them wrong; I rather choose to wrong the dead, to wrong myself and you, than I will wrong such honorable men. But here's a parchment with the seal of Caesar; I found it in his closet, 'tis his will. Let but the commons hear this testament--which, pardon me, I do not mean to read--and they would go and kiss dead Caesar's wounds and dip their napkins in his sacred blood, yea, beg a hair of him for memory, and, dying, mention it within their wills, bequeathing it as a rich legacy unto their issue.

* * *

Antony: Good friends, sweet friends, let me not stir you up to such a sudden flood of mutiny. They that have done this deed are honorable. What private griefs they have, alas, I know not, that made them do it. They are wise and honorable, and will, no doubt, with reasons answer you. I come not, friends, to steal away your hearts. I am no orator, as Brutus is; but, as you know me all, a plain blunt man, that love my friend, and that they know full well that gave me public leave to speak of him. For I have neither wit, nor words, nor worth, action, nor utterance, nor the power of speech, to stir men's blood. I only speak right on; I tell you that which you yourselves do know; show you sweet Caesar's wounds, poor poor, dumb mouths, and bid them speak for me. But were I Brutus, and Brutus Antony, there were an Antony would ruffle up your spirits and put a tongue in every wound of Caesar that should move the stones of Rome to rise and mutiny.

* * *

Antony: Now let it work. Mischief, thou art afoot, take thou what course thou wilt.

f. Rhetorical Question

A rhetorical question is that device which a speaker can use to prompt the listener to ponder the answer of a question where both speaker and listener realize an answer is not expected. Rhetorical questions are frequently used in summation to empower jurors by having them answer a question in their own minds which makes them better understand that they have the power to resolve the issue raised in the question. For example, one of the most effective uses of the rhetorical question in a summation was the following wherein three rhetorical questions were used to close the plaintiff's rebuttal portion of the summation:

> Who will render full justice for this brave young man with a courageous heart beating in his useless body? If not you, who? If not now, when?

Rhetorical questions can be as simple as "what is this child's life worth in our community?", followed by the reminder that "this is your determination."

William Shakespeare, the absolute master of rhetoric, made a complete argument and conveyed a distinctive threat by asking six rhetorical questions designed to make the point that Jews and Christians are no different as human beings. In Shylock's speech from the Merchant of

Venice, Shylock asked rhetorically:

> Hath not a Jew eyes?
> Hath not a Jew hands, organs, dimensions, senses, affections, passions?
> If you prick us, do we not bleed, if you tickle us, do we not laugh?
> If you poison us, do we not die?
> And if you wrong us, shall we not revenge?

Shakespeare, in conjunction with the use of six rhetorical questions, also demonstrates the effective use of short, powerful words. Of the 48 words in this message, 40 (83%) are one syllable.

g. Alliteration

The rhetorical device of alliteration is used to establish the flow and rhythm of your summation. It can be effectively combined with refrain, the Rule of Three and repetition in order to obtain an effective flow. Consider for example the following sentence:

> We would witness this fine family emerge from the depths of despair into the heights of happiness.

h. Understatement

Another verbal technique which is used in summation which is similar in nature to the rhetorical question technique is the application of understatements. The principle of understatement simply means that it is far better, in terms of impact of testimony, that the obvious not be belabored. A piece of dramatic evidence of disability or injury should speak for itself. Do not harp on that evidence or belabor it because it surely will lose its impact.

A few years ago two young and inexperienced lawyers began trying a quadriplegic case. The client was brought into the courtroom and remained on her stretcher during voir dire and opening statement. Her counsel, discussing the case with an experienced trial lawyer later that day said that he anticipated a big verdict because the jury would be overwhelmed by the sight of this quadriplegic client. The experienced lawyer correctly predicted that there would be a verdict for the defendants. Ten days later, the jury wasted little time in returning a defense verdict. The young lawyer went back to the more experienced lawyers and asked how he knew it would be a defense verdict. The explanation was simple. The inexperienced trial counsel had failed to apply the technique of understatement to the case. The most dramatic piece of evidence was the quadriplegic client. They were hoping that the severity of the injury would overcome the liability problems of the case. Sometimes it does, but by overexposing the jury to the horrors of the plaintiff's injury day after day, the jury became accustomed to the sight rather than being persuaded by the horror. A more successful approach could have been understating the evidence. Viewing the quadriplegic plaintiff briefly, combined with a viewing of a day-in-the-life film, will cause the jurors to retain the shock of seeing your client.

Properly applied understatement lets the jury use its imagination, and often the horrors that can be unleashed by the imagination are worse than what the actual evidence could show. This is illustrated by the emergence of modern television, which allows the graphic depiction of violence. The horror movies today do not have nearly the impact of the horror movies of twenty or thirty

years ago. What we imagine in our minds is far more horrible and devastating than reality. The most significant example of this is Orson Welles' 1938 radio show about an invasion from Mars, which caused the imaginations of millions of Americans to run wild while the whole nation panicked.

Another startling example of the application of understatement in summation can be illustrated by the effective application of that principle by the late Moe Levine of New York. He was trying a case for a man who had lost both arms. The defendants, the judge, and everyone connected with the case expected a long summation from Mr. Levine about a life with no arms. In fact, his summation was short, simple, and to the point. It was a masterpiece of understatement and resulted in one of the largest verdicts in the history of the State of New York at the time it was given. That brief summation, as paraphrased by Moe Levine himself, is:

> Your Honor, eminent counsel for defense, ladies and gentlemen of the jury: as you know, about an hour ago we broke for lunch. And I saw the bailiff came and took you all as a group to have lunch in the juryroom. And then I saw the defense attorney, Mr. Horowitz and his client decided to go to lunch together. And the judge and the court clerk went to lunch. So, I turned to my client, Harold, and said why don't you and I go to lunch together, and we went across the street to that little restaurant and had lunch. [Significant pause.]
> Ladies and gentlemen, I just had lunch with my client. He has no arms. He eats like a dog! Thank you very much.

Sweet, short, simple and to the point. It described the horrible injuries in that admitted liability case and emphasized them far greater by the application of understatement than if Mr. Levine had engaged in a long dialogue about what it is like to have no arms. A point can always be made more effectively and with greater impact when the principle of understatement is applied.

i. Grammatical Inversion

Many of the more persuasive speakers, particularly in our political history, have understood the effective use of grammatical inversion, i.e., displaying words more prominently by inverting the normal quarter of a sentence. In Lincoln's Second Inaugural, instead of the standard we fondly hope and fervently pray, Lincoln inverted the grammar so as to place more emphasis on the adverbs: "fondly do we hope, fervently do we pray." We should not only be careful in our selection of the precisely proper and powerful word to use but also discerning in the manner in which we structure the sentences and emphasize the key words.

j. Rhythm

The distinguishing characteristic between an ordinary summation and an eloquent, persuasive summation is that the eloquent speech is replete with rhythm. Rhythm in speech refers to the flow or movement of the language through patterns. The patterns that are used to create the rhythm in speech are rhetorical devices.

From the cradle to the grave, humans respond to rhythm. The rhythm of our breathing, pulse and heartbeat instill patterns into our most essential existence. The psychological effect of rhythm on humans has been understood for centuries as warriors, both ancient and modern, have

used the rhythmic beat of the drum to excite the troops and imbue them with the spirit of battle. Rhythmic speech can be used just as effectively as rhythmic music to move an audience emotionally and to capture and hold their attention. We have all sat through the seemingly endless classes of professors who spoke in a monotone, i.e., without rhythm to their speech. Compare the pacing, rhythm and delivery of John F. Kennedy, Martin Luther King or a multitude of other great speakers who understood and brilliantly practiced the art of eloquent speech. Examine closely their speech materials, such as Martin Luther King's "I Have A Dream" speech or John Kennedy's "Inaugural Address" and you will see that the starting point of eloquent speech delivery is the material with which the great speakers worked. These two great speeches are included in the appendix to this paper. After reading the section on rhetorical devices, review carefully these two outstanding speeches and notice the manner in which the devices are used brilliantly in order to create a rhythmic speech.

4. Verbal Tools of Structure

In structuring a persuasive presentation of any type, the skilled advocate will do well to study carefully the master orators and persuaders from the past: Pericles, Cicero, Demosthenes and from the present: John F. Kennedy, Martin Luther King, Teddy Roosevelt and the master of them all, Winston Churchill.

For American lawyers, studying Churchill's effectiveness as a speaker, brings us full circle to Churchill's early training as an orator. Churchill acknowledges that his role model as an orator was a New York attorney and congressman, Bourke Cockran, whom he met when he visited New York in 1895. Churchill states that "it was an American statesman who inspired me and taught me how to use every note of the human voice like an organ. He was my model. I learned from him how to hold thousands enthrall".

One of the most important lesson which Cockran taught to Churchill is equally important as a lesson for all attorneys today. Cockran stated "Only a speaker who is sincere can be eloquent, because sincerity is the name of eloquence. What people really want to hear is the truth - it is the exciting thing. Speak the truth."

The preparation technique which Cockran explained to Churchill is equally applicable to advocates today, i.e., to study in great detail everything he could learn about his subject; to carefully store and order in his mind the materials; to simplify the most difficult issues with carefully selected examples and illustrations; to concentrate on the strongest points, and in delivery, to build the material up to an irrefutable conclusion. After a career during which he received innumerable distinctions, Winston Churchill, the only person ever to receive a Nobel Prize with a citation for oratory, was kind enough to list the seven rules that he had followed in order to achieve his level of almost unparalleled eloquence. These rules are certainly useful for those of us who seek to achieve our most persuasive level before juries. Churchill's rules include the following:

1) Know, respect and love the English language.
2) See and hear eloquent speakers in action and study the text of their speeches.
3) Endure your handicaps if they can't be cured and turn them to your advantage.
4) Read good books to broaden your mind and stimulate your thinking, since much of eloquent speaking depends on both knowledge and thought.
5) Be sincere and use rhetorical devices to help your audiences understand and remember

what you say, and to stir their emotions.

6) Put forth your best efforts to prepare your speeches and seize every possible opportunity to practice them.

7) Let your feelings or personality show in your speeches.

Remember that the goals which we seek to achieve in structuring our messages include simple communication which aid jurors to understand, empathize, retain and act upon the information which we convey to them.

a. Power Word Choices

Words are the tools of the trade of the trial lawyer. Just as the plumber must choose precisely the right sized wrench, the trial attorney must choose precisely the right word from many with similar meanings. We are well advised to remember the advice of Mark Twain:

> Use the right word, not its second cousin. The difference between the almost-right word and the right word is really a large matter - it's the difference between the lightning bug and lightning. A powerful agent is the right word.

The great orators in our history have unanimously extolled the virtues of precise word selection. Franklin D. Roosevelt, in his famous radio address announcing Japan's sneak attack on Pearl Harbor, originally wrote the opening line: "December 7, 1941, a day that will live in world history." Upon reflection, he changed the broad term "world history" to the more precise word, "infamy", which connotes not only the historical event but the contemptuous attitude which the American public held towards the Japanese sneak attack.

> Words are the most powerful drug used by mankind. Not only do words infect, egotize, narcotize and paralyze, but they enter into and color the minutest cells of the brain" according to master wordsmith, Rudyard Kipling.

In order to maximize the effectiveness of the presentation to the jury, the skilled advocate must carefully consider the selection of the language of the case before each trial. There are impact words which are generic and can be used in every case but the development of catch phrases, or lay synonyms for technical language and medical terminology must be considered. There are several word choices to make, including impact words, catch phrases, logical or emotional words, short, long, old and new words, technical or lay language and significantly, the specific language of the case. In making these selections the attorney must also consider the particular make-up of the jury to whom the words are being addressed. Another consideration is the comfort level of the attorney in using the words "chosen". It is more persuasive to speak with rhythm and fluidity than to stumble over words with which the speaker is unfamiliar or has difficulty pronouncing. Counsel should also be cognizant of the possible synonymous meanings of a word since twelve jurors will be selecting their own definition and applying their own understanding to a word with numerous synonymous meanings. Remember, clarity is the goal, to convey to the judge and all twelve jurors precisely the message, since, as the German poet Goethe stated "everyone hears only what he understands".

In word selection, consider both denotative meaning and connotative meaning of each

power word. The denotative meaning is the precise meaning as defined in the dictionary. The connotative meaning consists of the ramifications which can be associated with the word. For example, "home" denotes the residence where a person lives but connotes far more, the comforts, privacy, warmth and intimacy of a person's "castle". Be specific and concrete in word selection.

The precise selection of words, metaphors, analogies and other rhetorical devices should be assimilated during trial to the specific type of jury before whom you are trying the case. In advance of trial, in establishing the language of the case and the rhetorical devices to be used, create alternatives which fit different types of juries. For example, if you draw a jury, the leadership of which is white collar business, you may choose not to use the same language of the case, metaphors and analogies which you would use if the jury leadership is blue collar, labor union members. Thus, it is necessary to review your word selections, analogies, metaphors and other rhetorical devices after voir dire examination and after you have learned as much as possible about the members of your jury so as to utilize language which will be most readily accepted, understood, retained and recalled by these particular jurors.

We use focus groups to establish the language of the case and to test arguments and rhetorical devices. While the use of focus groups in litigation is a recent innovation, the same concept has been in use by great advocates and orators for centuries. Consider the test which Abraham Lincoln used in his selection of language:

> I was not satisfied until I had put it in language plain enough, as I thought, for any boy I knew to comprehend. This was a kind of passion with me, and it has stuck by me; for I am never easy now, when I am handling a thought, until I have bounded it north and bounded it south, and bounded it east and bounded it west.

As advocates, we should replace Lincoln's "Any Boy I Know" test with choice of language of the case designed to persuade our particular jurors in each individual case, taking into account all that we know about each of the jurors which we have learned on voir dire examination and through careful observation of their non verbal communication in and out of the courtroom, throughout the trial.

In careful word selection we must distinguish between general versus specific; abstract versus concrete; short versus long; emotive versus logical; technical versus lay; old versus new; familiar versus jargon; and give additional thought to such matters as to whether to use slang or vernacular.

(1) Abstract vs. Concrete

In word selection, we have to choose specific words as well as specific terms. A word choice may be the difference between an "accident" or a "crash". Careful consideration of phrases leads a plaintiff's lawyer to totally avoid the use of "medical malpractice case".

In the choice of words with impact, a good starting point is to consider concrete words rather than abstract terms. Concrete words are those which refer to the use of our five senses, i.e., what we see, hear, touch, taste and smell, for example: scarring, screams, singeing, acrid or pungent. Abstract words create no tangible image and include such vague terms as justice, equity,

liberty, and democracy. The problem with the attorney's use of abstract words is that if you ask twelve jurors to give a definition of justice, you would get twelve completely different answers because each juror would interpret justice in terms of their own background, experience, education, ethnicity and intelligence.

Therefore, concrete words are more persuasive by their nature than abstract terms, particularly in group persuasion, and should be carefully selected by counsel to convey the proper concrete message.

(a) Simulative Concrete Words

The most effective use of concrete words is to use those which simulate the action they describe as well as suggesting the sound associated with the action. These words generally rely upon the opening consonants to compel the lips to move forcefully to suggest the sounds. Examples for use by attorneys include crash, crunch, crush, blast, blare, flicker, flame, or flare; shimmer, shiver, or shutter; fizzle, sputter, splash, roar, whistle, hush, whoosh or gurgle. These are words that create vivid mental images in the minds of the listener and have the added advantage of being very familiar, simple and easy to recall. Words such as crash, crunch and crush are very specific and lead to very little controversy with respect to their precise meanings.

(b) Deliberative Abstract Terms

Not only should we carefully choose concrete words, but the better part of discretion dictates that we should avoid the use of abstract words. Abstract words such as justice are left brain, contemplative words which lead to philosophical debates and discussions, precisely the opposite of the goal which we as attorneys have in persuading jurors. Our goal is to mold the minds of the jurors into a cohesive mind-set, culminating in complete accord on our side of the issue. Our purpose is not served by using words which stimulate debate. Once again Abraham Lincoln, demonstrating his brilliant understanding of the persuasive techniques that carried him to the White House and into the world's history books, explains the problem with abstract terms:

> We declare for liberty; but in using the same word, we do not all mean the same thing. With some, the word liberty may mean for each man to do as he pleases with himself and the product of his labor, while with others, the same words may mean for some men to do as they please with other men and the product of other men's labor. Hereto, not only different, but incompatible things, called by the same name - liberty. And it follows that each of the things is, by the respective parties, called by two different and incompatible names - liberty and tyranny.

In choosing the language of the case, choose carefully concrete words which most specifically describe the idea which you are trying to convey and avoid abstract terms which will merely move your jury to unwanted debate and philosophical discussion.

(c) Preloaded Word Selection and Avoidance

As a result of the extensive preload which has been imposed upon jury panel members before they walk into the courtroom through the mass media efforts of the insurance industry, the manufacturers of defective products, chemical companies and the health care professionals, there are numerous impact words which must be avoided by the plaintiff and which should be frequently

utilized by the defense in particular types of cases. For example, the term "medical malpractice" will conjure up in the minds of many prospective jurors that, 1) this is the type of case that is driving up my health care costs, 2) this is why doctors are leaving medical practice, 3) this is why the elderly can no longer afford insurance, and 4) most of these cases are frivolous. Obviously a medical negligence defense lawyer should utilize the term as often as possible. However, the plaintiff's attorney must speak in terms of "this is an ordinary negligence case that involves the failure by the doctor to meet the standard of medical care in this community. It is a simple medical negligence case. Nothing more, nothing less." In the automobile collision case, the plaintiff should never use the term accident. An accident connotes an occurrence which was not the fault of anyone. For the plaintiff the event was a high impact collision, a crash that resulted in the crunching of metal on metal and the crushing of the life from the driver.

There are other circumstances where the industry language may be unfortunately misleading and must be avoided. For example, in the entire area of closed head injuries, the language used by psychologists and neurologists to describe the nature and extent of the closed head injury are mild, moderate and severe. A plaintiff's attorney describing to a jury a moderate closed head injury will not "execute the required level of emotion" as Aristotle recommended 2300 years ago. The plaintiff's attorney should advise the neuropsychologist, psychologist or neurologist who is testifying with respect to the injury of the plaintiff to use terms other than mild, moderate or severe and to avoid the use of the term "closed head injury". Instead, more accurately descriptive terms such as permanent, irreversible brain damage go further to describe to the jury the true situation with respect to the plaintiff's plight.

In describing our own work we should give thought to our role as we stand before a jury. Would you prefer to portray yourself as an asbestos lawyer or an environmental lawyer; a product liability lawyer or a product safety lawyer; a criminal defense lawyer or a constitutional rights lawyer. The idea is to identify the adverse words which may be used during the trial and soften those which support perceptions adverse to your position and strengthen those which aid you in explaining your client's position to the jury.

(2) Catch Phrases

A catch phrase is an innocuous term which has been reworded so as to turn it into a thorn in the side of your opponent.

An example of a meaningful catch phrase is found in a case in which a customer in a grocery store bent down to pick up a package of candy off of the bottom shelf of a multi-tiered candy counter which was complete with shelf extenders with bags of candy attached. As she bent down she impaled her eye on one of the metal shelf extenders which was completed concealed by the cellophane packages. In preparation for trial it was realized that the term shelf extender was an innocuous meaningless term which would not "execute the required level of emotion". During the course of deposing the company employee who loaded the candy onto the display counters, he was asked what the company called the shelf extenders. He replied "we call those profit pegs". Profit pegs became the perfect catch phrase in the trial for the reason that those two words "profit pegs" perfectly embody the theme of the case, which is corporate greed over consumer safety.

The skilled attorney will give careful consideration to locating and utilizing catch phrases.

Catch phrases may often be found by searching the literature of the defendant. For example, Clark Equipment Company, the manufacturer of forklifts which have a tendency to tip over and either severely injure or kill the driver when the top of the forklift crushes the skull or various parts of the body, refers to that crushing phenomenon as "the fly swatter effect". This is found in their literature and demonstrates a rather cavalier attitude towards a problem which has rendered a number of their users paraplegic, quadriplegic, severely crippled or dead. Additionally, the fact that they have bothered to create a term for the phenomenon and include it in their literature, demonstrates clearly that they are familiar with the problem but chose to take no action to correct it.

Before each trial, search through the language of the case to determine if there is an innocuous term which you can develop into a thorn in the side of the opposition. Catch phrases are easy to create, easy to remember and easy to argue.

(3) Emotive Words

Emotive words are those words whose interpretation may be clouded by preloads; which invoke attitudes of hostility or which incite feelings which are rooted in such adverse emotions as prejudice or fear. Such words as demagogue, shyster, hick, wetback, dictator or quack have implicit messages which are derived from temperament, prejudice, background or experience of the jurors who hear such words.

Such emotive words are dangerous to use in the courtroom because they barricade the simple communication which we attempting to achieve with jurors. We encounter the additional problem that such words are generally chosen for the purpose of appealing to prejudice and have little to do with factual persuasion. Since we are proscribed to make prejudicial appeals, the avoidance of emotive words is recommended.

(4) Logical vs. Emotional Words

There are right brain emotional impact words and left brain, contemplative, philosophical words to describe the same event. For example, justice versus injustice. Justice is a left brain logical word which invites contemplation and philosophical discussion. It implies no call for action and seeks no remedy for a wrong. However, injustice is a right brain, emotional word which causes offense. It stirs people to action and inspires people to right a wrong.

If Martin Luther King had stood in his pulpit in Atlanta and called for "justice for the blacks in America", he would probably still be doing it. However, Dr. King chose to go into the streets, be attacked by police dogs, knocked down by fire hoses, placed in handcuffs, thrown in jail and subjected to numerous other indignities, all for the purpose of demonstrating injustice. His demonstration of injustice stirred people to action and has caused many of the wrongs which he confronted to be corrected.

The skilled attorney should give careful thought to whether you choose to make a left brain appeal by utilizing logical words or whether you wish to make a right brain call to action by utilizing emotional words. Obviously, both appeals should be prepared and a combination of logical and emotional words should be part of the language of your case.

(5) Short, Long, Old & New Words

In deciding whether to use short words or long words, once again the best advice comes from Aristotle: "what we need is a mixed diction". Through the careful mixing of short and long words, we gain the advantages of impact provided by the short words and rhythmic flow provided by long words. A review of some of the world's greatest literature indicates that the use of short words, preferably one syllable, is replete in the works of many of the greatest writers. Shakespeare understood the use of rhetorical devices as demonstrated in Shylock's powerful speech in the Merchant of Venice in which fifty-seven of the sixty-six words are one syllable. Page 33, supra.

Abraham Lincoln understood very well the power and effectiveness of one-syllable words. Consider the Gettysburg address, one of the most powerful and beautifully structured speeches in history, in which Lincoln conveys his message in 270 words, 203 of which (75%) are one syllable.

(Address delivered at the dedication of the Cemetery at Gettysburg)

> Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that nation might live. It is altogether fitting and proper that we should do this.
>
> But, in a larger sense, we can not dedicate--we can not consecrate--we can not hallow--this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us--that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion--that we here highly resolve that these dead shall not have died in vain--that this nation, under God shall have a new birth of freedom--and that government of the people, by the people, for the people, shall not perish from the earth. November 19, 1863

An interesting historical footnote concerning this address is that Abraham Lincoln did not deliver the Gettysburg address. The principal speaker at Gettysburg was Dr. Edward Everett, the President of Harvard College, who spoke for more than two hours while Lincoln delivered his "Remarks by the President of the United States" in 10 sentences, comprised of 270 very carefully selected words.

Winston Churchill recognized the power of short words but also suggested that "old words are best". The reason Churchill was devoted to the use of old words was their value in serving as an effective means of communication. Older words have the ring of familiarity and lead to clarity of understanding.

(6) Bilingual: Technical & Lay

It is necessary for the skilled attorney to be conversant with both the technical language to be used in the case and the layman's translation which the jury will need. However, the attorney must overcome the desire to show off his or her technical knowledge and remember the maxim to "communicate simply" with jurors.

While we often encounter technical language in product liability, toxic tort and many other types of cases, the place where technical language occurs most frequently for the personal injury lawyer is in the medical field. In Marshall Hout's excellent treatise, Lawyers Guide to Medical Proof, he gives two wonderful examples of medical jargon at its worst:

> In a wrongful death case the plaintiff's lawyer had to call the doctor who signed the death certificate. After the preliminaries, the exchange on the substantive question of death went:
>
> Q. Now, Doctor, can you, in popular language, tell us what the cause of this man's death was?
>
> A. (Uncertain) You mean, I presume, the causa mortis?
>
> Q. (Pleading) Well, Sir, it was my hope that you could put it in common down-to-earth, everyday, lay language that we could all understand. Can you please tell us what caused this man to die?
>
> A. (Supercilious and condescending) Well, it will be difficult but, I can try. The cause of death was cerebral edema, caused by thrombosis, or perhaps embolism, secondary to generalized arteriosclerotic brain disease moderate to severe, secondary to a subphrenic abscess, following a cholecystectomy.
>
> A JUROR:
>
> Well, I will be damned!
>
> THE COURT:
>
> Sir, I will not tolerate the use of such language in my courtroom and must caution you against any further outburst. Normally, I would find you in contempt and levy a fine. However, since you have done nothing more than give audible expression to a thought which wells up in the court's own mind, I cannot find it in my heart to punish you.

While this was an actual example from a trial, the poet, as is so often true, captures the essence of the problem in the following doggerel:

> With an erudite profundity
>
> And subtle cogitabundity,
>
> The medical expert testifies in Court;
>
> Explains with ponderosity
>
> And keen profound verbosity,
>
> The intricate nature of the plaintiff's tort.

Discoursing on pathology,

Anatomy, biology,

Opines with patient's orbit suffered thus:

Contusions of integuments
With ecchymosed embellishments,

And bloody extravasation forming pus.

A state of tumerosity

Producing lacrimosity,

Abrasion of the cuticle severe;

All diagnosed externally,

Although, he feared internally

Sclerotic inflammation might appear.

The jury sits confused, amazed,

By all this pleonasm dazed,

Unable to conceive a single word;

All awed, they think with bated breaths

The plaintiff dies a thousand deaths.

What agony, what pain he has endured!

Said then the counsel for defense,

Devoid of garrulous eloquence,

Would I be correctly quoting you

To say his eye was black and blue?

To this, the doctor meekly answered,

"Yes".

(7) Use of Jargon

In litigation we encounter the necessity to explain to jurors the nuances of numerous professions, occupations, product designs, medical procedures and innumerable other areas in which jargon has been developed by members of the group to communicate with each other. As a general proposition, it is best to avoid the jargon of a particular field in communicating with a jury simply because such jargon requires additional explanations. It is more efficient in terms of communication to identify lay terms which are synonymous with the jargon and use those lay terms in communicating with the jury.

(8) Slang

As a general proposition it is better to avoid slang in courtroom communications. Some slang is offensive, has double entendre meanings and creates images which may not be consistent with the goals of the speaker. It is generally better to use simple language which will more clearly convey to your listeners precisely your message without running the risk of offending your listeners.

(9) Vernacular or Colloquialism

Using the vernacular which is peculiar to a region may be helpful in communicating to the jurors from that region, however, the attorney should attempt to use vernacular only when it can be done so comfortably and with a clear understanding of all the possible ramifications of the vernacular. A native, hometown advocate can communicate effectively with native, hometown jurors by using the vernacular of the village. However, an outsider attempting to ingratiate himself to jurors through the use of local vernacular runs the risk of being spotted as a manipulator, and not having a clear understanding of all of the possible ramifications of the vernacular term. The simple suggestion is to avoid the vernacular unless it is clearly understood and comfortably used by the attorney.

(10) Language of the Case

If we are to communicate simply and successfully with jurors, the most effective way is to speak to them in their own language. Each case has its own peculiarities with respect to the language describing the events and the resulting damages.

As you discuss the case with the jury on voir dire examination, listen very carefully to the specific language which the jurors use in talking about the events, this type of injury or any other relevant parts of your theme.

One of the many valued services which focus groups can perform is to educate the attorney with respect to the language of the case. The technique is to give the focus group a simple, bland description of the events of the case and encourage them to talk about the case in terms of the questions which arise in their minds; their opinions about this type of litigation generally and this case specifically, and whatever other focuses you are attempting to achieve from the group. However, listen very carefully to the phrases and terminology which the focus group members use in talking about your case. This will give you the language which laymen use, understand and accept in discussing this case. You then adapt that language into your voir dire examination, opening statement, witness examination and summation as a vital part of presenting your messages

and themes to the jury in simple, communicable, lay language.

b. Analogies

Analogies are an extension of the two other comparative tools, metaphors and similes. The analogy, while being used to communicate a point clearly by comparison, stretches further than the metaphor or simile. Analogies often require more lengthy storytelling than a simple metaphor or simile but the end result is that the analogy most often will be the most effective means of clearly communicating a point to the jury.

It is suggested that analogies from everyday life and from the national press make excellent realms of comparison to the value of human life or the experiencing of physical pain and suffering and mental anguish. Analogies should be assimilated to the particular jury to which they are being argued. There are very effective sports analogies, art analogies and other types of analogies which can be used for comparative purposes. Consider the following analogy that was used in arguing damages for the death of a child:

> What is this child's life worth in our community? Counsel says 4 million dollars is too much money. However, ladies and gentlemen, we live in a society in which 82.5 million dollars was recently paid for paint on canvas. Why? Because it was the work of a master, Van Gogh. Ladies and gentlemen, if paint on canvas is worth 82.5 million dollars in our society because it is a masterpiece, is the greatest creation of the greatest master of them all, God's creation of a child, worth at least 4 million dollars in our community?

Sports analogies are particularly effective today because of the extremely inflated salaries which sports stars are receiving for playing children's games. Consider the following which was used in an argument shortly after the Spinks-Tyson fight:

> Ladies and Gentlemen, what is the reasonable sum of money to compensate this young man for the mental anguish which he will endure every day of his life for the next forty-five years as he sits confined as a prisoner in his wheelchair as result of the negligence of this defendant. Is 10 million dollars enough? We ask you to judge this by the standards of our society. We live in a society in which 23 million dollars was recently split by two men, Spinks and Tyson for 91 second in a boxing ring. If 91 seconds of dancing and punching each other is worth 23 million dollars can 10 million dollars even begin to compensate this plaintiff for 45 years of mental anguish?

Johnny Carson said that he had the world's easiest job. He simply read the paper each day and his monologue leapt out at him. The same is true with the use of analogies in summation. It is suggested that counsel should maintain a summation notebook that is filled with anecdotes and matters of common public knowledge. Use these as a basis of establishing societal standards from which to argue the reasonable value to compensate for catastrophic injury or death.

Analogies may be used to explain a point of law. For example, in an effort to explain the law of non-delegable duties in order to make the jury understand why a department store owner could not abrogate its responsibility to maintain its elevator in safe working condition by simply signing

a contract with an elevator maintenance company, the following analogy was used:

> Simpson's department store owes a direct duty to its customers to maintain the elevators in safe working condition. They would have you believe that they met their obligation by simply signing a contract with an elevator maintenance company. However, the law says differently. The law says that Simpson's cannot delegate their responsibility to the elevator company. Many of you may remember the sign that President Harry S. Truman had on his desk "The Buck Stops Here". The law places that same sign on the desk of Simpson Department Store and tells them that "the buck stops here" when it comes to providing safe elevators for their customers.

> The analogy is also a helpful tool in arguing the 5% disability case:
> Counsel says that the plaintiff is suffering only a 5% disability. However, the 5% figure is meaningless because the defendant did not inflict an injury solely on the plaintiff's low back. The 5% figure is meaningless when an injury occurs which afflicts physical pain and suffering and mental anguish on a worker to such an extent that it incapacitates him from performing the usual tasks of his job. The 5% figure is meaningless when we consider the effect of the back injury on the whole man. The 5% figure is meaningless when we consider where the 5% is located in the body. Mr. Jones is injured at L4-L5, the work horse part of the back; the portion of the body that is used for bending, lifting, stooping, and the many other tasks that Mr. Jones had to perform on a daily basis.

What is a 5% disability? The 5% figure is meaningful only when we consider the effect of the 5% on Mr. Jones' overall performance. For example, look at the clock on the courthouse wall. If that clock malfunctioned to the extent of 5% beginning now, by the time we return to this courtroom tomorrow at this same time, the clock would be 72 minutes behind; two days from now would be 144 minutes behind; three days 216 minutes, and then four days, the clock would be almost 5 hours behind. Mr. Jones experiences the same type of difficulty as he attempts to return to work and perform his usual tasks and finds that he gets further and further behind every day. The 5% figure is meaningless.

The same type of analogy can be used while demonstrating a sense of humor by good-naturedly poking a bit of fun at the defense counsel, in this fashion:

> Counsel ridicules the plaintiff's claim of a 5% disability to the body as a whole. However, if counsel takes his wife and two children on a boat in Galveston Bay this weekend and his wife spots a hole in the bottom of the boat with water pouring in, I have to wonder if counsel would tell his wife, "Don't worry, dear. That hole only represents a 5% disability to the boat as a whole."

> Just like the water rushing in to sink the boat, the physical pain and mental anguish which Mr. Jones is experiencing on a daily basis is sinking him financially, is sinking him physically and is sinking him emotionally. Only you as a jury can throw him the life buoy before he drowns in the disabilities which have resulted to him from his injury.

> A variation on this theme is the small leak in a chemical plant; a chip in the heel of a mighty

race horse; a small tear in a priceless da Vinci painting; a small cigarette burn in the new dress; a thorn in the paw of the mighty lion which incapacitates it; the small leak on the nuclear plant which represents only a 5% malfunction of the structure as a whole; a rotator cuff injury to Nolan Ryan's pitching arm, only 5% disability to the body as a whole, or, one which is easy for our jurors to identify with, a pebble in the shoe which annoys and distracts you throughout every minute of every day when you're on your feet, whether working or playing.

In a case involving the cut tendon and ligament, the analogy is to a puppet which breaks the string that controls the use of its arm. Analogy is drawn to the manner in which tendons, ligaments and muscles work like the string of a puppet. However, with the puppet you simply have to replace the string, but the tendon or ligament which limits motion cannot be repaired but will develop scar tissue which will render the disability permanent.

In death cases, the effective analogies are to the incredible amounts of money which we spend in our society to protect or save the life of one person. We could have flown to the moon long before Neil Armstrong landed, and at much less expense, if we had been willing to sacrifice the lives of two astronauts by leaving them there. Landing on the moon was the simple task compared to the Herculean problems involved in taking off from the moon and docking with an orbiting spacecraft for the return trip. However, the billions of dollars involved to return men safely from the moon were never questioned, and the thought of leaving them there was never considered. Why, because of the huge value which we place on human life in our society.

One of the best sources for analogies in a death case is the daily newspaper. Analogies of this type should be constantly updated since, to the credit of our society, we frequently spend large sums of money in life-saving measures.

c. Metaphors

The metaphor has been defined as "the application of a word or phrase to an object or concept it does not literally denote, in order to suggest comparison with another object or concept." An example of a common metaphor is "a mighty fortress is our God." Counsel effectively using a metaphor can rely on a familiar story or anecdote. Biblical stories make excellent metaphors. The effective metaphor is easy for the jury to understand. The jury is not threatened when listening to a metaphoric story.

d. Similes

The use of simile is a comparison of one thing to another. Martin Luther King used similes in the following powerful phrase from his "I Have a Dream" speech: "No, we are not satisfied and we will not be satisfied until justice rolls down like water and righteous like a mighty stream."

For example, in the trial of a case involving 15 defibrillation of a nine month old infant, the term defibrillation is a totally meaningless, innocuous and non-inspiring term which conveys absolutely no message with respect to the agony which the child endured. However, when an expert witness described defibrillation as being "just like electrocution", this predicated an emotional right brain appeal during summation based upon sending an electric shock through the body of a 38 pound infant with sufficient force to stop the heart from beating. Thus, electrocution became a highly electrifying catch phrase replacing the innocuous term, defibrillation.

Another example of use of simile in a product liability case is the following: "This defendant is like the criminal who killed his parents and pled for mercy because he was an orphan."

e. Establish Sense of Humor

One of the complaints about attorneys is that we appear unapproachable and are basically stuffed shirts. One of the best techniques for establishing approachability, credibility and common ground with the jury is through the use of humor. Neither the purpose nor the technique is to tell a joke or to attempt to entertain. The purpose is to simply establish in the minds of jurors that we have a good sense of humor.

Of the eight categories of humor: surprise, exaggeration, understatement, pun, irony, sarcasm, climax and anti-climax, the best techniques for demonstrating a sense of humor would be to utilize surprise, understatement or irony. Obviously avoid exaggeration, puns or sarcasm, which, if taken wrong in the context of a trial, could reflect very badly on the attorney's credibility. The techniques of climax and anti-climax may also detract from the seriousness of the proceedings.

The most appropriate time to use humor is during voir dire examination while initial impressions are still being formed and before the serious matters at issue are undertaken in the trial in chief. Humor may also be used in trial during particularly long, boring testimony offered by the opposition in order to demonstrate to the jury that you share their boredom and offer the humor as a brief respite. Demonstrating a sense of humor in colloquy with the court may also be helpful to demonstrate your good relationship with the court as well as your sense of humor.

You may purposely choose to inject humor into direct examination as a means of humanizing your witness or under cross examination as a weapon against the adverse witness. In direct examination of an expert witness, counsel made a mistake, which was promptly pointed out by the opposing counsel. As direct examination resumed, counsel apologized to his witness for the mistake and then inquired "Doctor, is that the first time you've seen an attorney make a mistake?" to which the doctor responded, "no, but it's the first time I've seen one admit it." The judge, jury, witness and counsel all laughed at the witness' remark. This served the valuable purpose of humanizing the witness, demonstrating his sense of humor and demonstrating that the attorney had a sense of humor and could take a joke of which he was the butt.

Some attorneys use sarcasm successfully as a weapon on cross examination. However, this is tricky and should only be used if it fits your particular style and you appear to be comfortable with it.

One of America's greatest advocates, Tom Alexander of Houston, wields the weapon of sarcasm with grace and style. For example, in cross examining a doctor in which Alexander's theme was that the doctor had performed unnecessary surgery, he began with the question "Doctor, are you aware that you are known as the fastest knife in the West?"

In cross examining a doctor who had been established to be a very frequent testifier for the plaintiff's bar, defense counsel stated: "I'll be brief, Doctor. I know you are needed in several other courtrooms."

However, the rule remains that the purpose is to demonstrate a sense of humor, to humanize the attorney, or to humanize the witness rather than to entertain the jury.

f. Anecdotes

Personal anecdotes are a great storytelling device. We all use them in telling a story to make a point in a conversation with friends. They are just as effective in conveying a message to a jury and have the added advantage of enhancing the approachability and the humanity of the attorney. For example, a lawyer arguing the wrongful death case of a father who had left a widow and a six year old son. Using classic storytelling techniques, he related the following occurrence:

> We see the young child as he stands on the platform at the train depot looking up at his father and thinking how big and strong he looks in his army uniform; we see the pride in his eyes as he looks around at all of the other soldiers waiting for the train and realizes that his dad is the best soldier of them all; we see him as the conductor calls "all aboard" and dad hugs and kisses mom and lifts the youngster in his arms as he thinks how lucky he is to have the best dad in the world; we see him as dad, with tears in his eyes, makes him promise to take care of his mother and mind her until he gets back from the war; we see him as he waves goodbye, his dad climbs aboard the train and rushes to the nearest window; we see him as mom raises him up to the glass so he can put his lips against the glass and give his dad one last kiss goodbye; we see him standing hand in hand with his mom and waving and waving and waving until the caboose is out of sight and only the trail of smoke remains; we see him bravely trying to hold back the tears, without success, as he realizes that he is the man in the family now and must not cry in front of mom; we see him 22 months later enter the living room as the man delivers the telegram to mom, the telegram that says that dad will never be home again.
>
> I can describe that occurrence to you with such vivid detail because the soldier was my father and I was the young man on the train platform. It was 50 years ago but I remember it as if it were yesterday. So when I tell you that I know what this young man has lost in losing a father, I speak to you from my heart and my experience.

g. Quotes

Quotations, when skillfully but sparingly placed in the argument, can also be an effective tool for conveying a complex situation to the jury. The quotation should come from a source that the jury automatically accepts as gospel on the point that counsel is attempting to make. Common sources for quotations are: 1) The United States Constitution, 2) The Bible, and 3) Notable heroic figures, such as Abraham Lincoln and Winston Churchill, 4) Poetry, 5) Prose and 6) Song Lyrics.

(1) Prose - By carefully selecting well known prose or poetry, we have the advantage of choosing language which already has the rhythm and the rhetorical devices built in. The idea is to pick and choose phrases from prose or poetry which create a link of commonality between counsel, client and the jury. The more familiar the prose or poetry that is used, the stronger the bridge of commonality that will be built.

Consider, for example, the wonderful prose "What is a Boy?" Obviously we would not

choose to quote this in its entirety. The idea is to pick and choose useful phrases which apply to your particular case.

WHAT IS A BOY?

Between the innocence of babyhood and the dignity of manhood we find a delightful creature called a boy. Boys come in assorted sizes, but all boys have the same creed: to enjoy every second of every minute of every hour of every day and to protest with noise (their only weapon) when their last minute is finished and the adult males pack them off to bed at night.

Boys are found everywhere--on top of, underneath, inside of, climbing on, swinging from, running around, or jumping to. Mothers love them, little girls hate them, older sisters and brothers tolerate them, adults ignore them, and Heaven protects them. A boy is Truth with dirt on its face, Beauty with a cut on the finger. Wisdom with bubble gum in its hair, and the Hope of the future with a frog in its pocket.

When you are busy, a boy is an inconsiderate, bothersome, intruding jangle of noise. When you want him to make a good impression, his brain turns to jelly or else he becomes a savage, sadistic, jungle creature bent on destroying the world and himself with it.

A boy is a composite--he has the appetite of a horse, the digestion of a sword swallower, the energy of a pocket-size atomic bomb, the curiosity of a cat, the lungs of a dictator, the imagination of a Paul Bunyan, the shyness of a violet, the audacity of a steel trap, the enthusiasm of a firecracker, and when he makes something, he has five thumbs on each hand.

He likes ice cream, knives, saws, Christmas, comic books, the boy across the street, woods, water (in its natural habitat), large animals, Dad, trains, Saturday mornings, and fire engines. He is not much for Sunday School, company, schools, books without pictures, music lessons, neckties, barbers, girls, overcoats, adults, or bedtime.

Nobody else is so early to rise, or so late to supper. Nobody else gets so much fun out of trees, dogs, and bruises. Nobody else can cram into one pocket a rusty knife, a half-eaten apple, 3 feet of string, an empty Bull Durham sack, 2 gumdrops, 6 cents, a slingshot, a chunk of unknown substance, and a genuine supersonic code ring with a secret compartment.
A boy is a magical creature--you can lock him out of your workshop, but you can't lock him our of your heart. You can get him out of your study, but you can't get him out of your mind. Might as well give up--he is your captor, your jailer, your boss, and your maker--a freckled-face, pint-size, cat-chasing, bundle of noise. But when you come home at night with only the shattered pieces of your hopes and dreams, he can mend them like new with the two magic words--"Hi, Dad!" See p.23, *infra*.

(2) Poetry - Poetry, if carefully selected, can be a very useful tool in conveying a message to the jury. If you can find poetry which coincides with and conveys your theme, the jury can be persuaded that your theme has a commonality which has been adopted by the poets and should also

be adopted by the jury. We must be cautious in the selection of abstruse poetry which must be studied to be understood. Remember that the jury is receiving the poetry only through the auditory channel and does not have the opportunity to read the poem and study its meaning. By making a careful vocal presentation of the poem, counsel may also reach the kinesthetic channel by invoking the feelings of the listeners. Jim Perdue, in his excellent book, Who Will Speak For The Victim, has suggested the following lines of poetry from "The Broken Wheel" by Edgar Guest. Consider the effective use of this wonderful poetry in a case in which a defective product has been placed on the market by the manufacturer:

We found the car beneath the tree.

The steering knuckle broke, said he;

The driver is dead; they say his wife

Will be an invalid for life.

I wonder how the man must feel

Who made that faulty steering wheel.

Perhaps the workman never saw

An indication of the flaw;

Or seeing it, he fancied it

Would not affect his work a bit,

And said; It's good enough to go -

I'll pass it on. They'll never know.

It's not exactly to my best

But it may pass the final test;

And should it break no man can know

It was my hands that made it so

The thing is faulty, but perhaps

We'll never hear it when it snaps.

Note the effective use of short words by Edgar Guest in order create impact, combined with

the use of longer words to achieve rhythmic flow. Of the 121 words in the poem, 99 (82%) are one syllable.

(3) Biblical Quotes & Parables

The Bible is an excellent source of quotations. However, a caveat is to be very careful in using biblical quotes or parables which are subject to multiple interpretations. Remember how many different denominations there are that interpret the same basic scriptures in very different ways.

Particularly in the interpretation of the Bible, it could be disastrous for counsel to offer an example to make a point with which a juror disagreed on the interpretation or which opposing counsel could interpret to their benefit. Examples of Biblical quotations which may be helpful include:

> if he rise again, and walk abroad upon his staff, then shall he that smote him be clear; only he shall pay for the loss of his time, and shall cause him to be thoroughly healed. Exodus 21:18,19

> Rachel weeping for her children refused to be comforted: because they were not. Jeremiah 31:15

(4) Song Lyrics

Quotes from song lyrics can be particularly compelling when properly incorporated into an argument. For example, in the case of a 22-year-old college coed who was a paraplegic and who testified as to her mental anguish when she helped the other young ladies prepare for dates for the big game on Saturday night, counsel effectively used the lyrics from *"They're Writing Songs of Love, But Not For Me."*

(5) Literature

Familiar quotes from literature are very useful tools. Once again, the more familiar the quote, the more useful in establishing commonality with the jury. Consider, for example, Shakespeare's quote concerning the value of a person's reputation, which may be useful in a defamation case.

> Good name in man and woman, dear my Lord, is the immediate jewel of their souls. Who steals my purse steals trash; but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed. OTHELLO, ACT III, SCENE III

> The purest treasure mortal times afford is spotless reputation. RICHARD II, ACT I, SCENE I

Shakespeare may also be useful if the defendant or defense counsel has shown a cavalier attitude towards the plaintiff's pain and suffering: he jests at scars that never felt a wound. ROMEO & JULIET, ACT II, SCENE II

(6) Witnesses/Parties

Of course, often the most persuasive quotes in the case will come from the witnesses and the parties, either during the trial or in previous correspondence, publications, depositions or other

writings. Once these have been introduced into evidence, a particularly relevant or poignant quote should be enlarged, mounted on fiber board and shown to the jury during summation.

In order to obtain these quotes, search carefully the literature of the opposing party and their experts; trial and deposition transcripts from other cases and, of course, quotes from the case at bar. Also search through all records, reports or other writings by your opposition, their experts and witnesses, with a particular eye to pulling out quotes which may be enlarged and used in the persuasive process during summation.

(7) Medical Quotations - The following quotations are from an accumulation in a sample notebook by Thomas J. Murray. Once again, the full quote may not be necessary in order to support your position, but they are offered as useful sources from which you may choose the relevant portions.

Quote 1

"In severe sprain, the ligaments are torn, the synovial membranes are contused, or bruised. Cartilage may be loosened from bone. There may be hemorrhage into and about the joint. The muscles are stretched or torn. Tendons are stretched, torn or displaced. Blood vessels are contused. Nerves are damaged. The skin is contused." [p. 368, Sec. 25, 27; Gray's Attorneys Textbook of Medicine, Vol. 1]

Quote 2

"In addition to torn ligaments, frequently small blood vessels also are injured. Blood escaping from these vessels may form a hematoma; this is composed more of tissue fluid than actual blood." [p. 858; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 3

"From the clinical standpoint, there are multiple organic pathological factors involved in radiculitis that follows a whiplash injury. It is reasonable to assume that there is trauma of the spinal ligaments because of the characteristic symptoms of a sprain of the neck, and, in some severe ligamentous injuries, an actual subluxation can be demonstrated by roentgenographic examination. It is likely that there is some hemorrhage and edema in the region of the damaged ligaments that may be a source of nerve irritation. Later on, fibrosis and cicatricial changes may be a chronic source of irritation of the nerve roots. At the instant of the whiplash, direct trauma of the nerve roots from stretching, compression, or even trauma of the spinothalamic pathways in the lateral columns of the spinal cord may conceivably occur.

In the acute case, swelling and vascular congestion of the nerve root and narrowing of the foramen due to protrusion of the intervertebral disc or swelling of adjacent ligaments may be important factors producing symptoms. In chronic cases, fibrosis, which is the late counterpart of hemorrhage and edema, may involve the nerve root directly, produce adhesions between the spinal ligaments and the nerve root, or cause a relative narrowing of the vertebral foramens. An additional factor may be the abnormal mobility of the vertebral joints because of damage of the ligaments." [p. 1703; Journal of the American Medical Assn., Vol. 152, No. 18, Aug. 29, 1953, Common Whiplash Injuries of the Neck, by Gay and Abbott]

Quote 4

"Such simple activities as stooping, shaving, brushing the teeth, hanging curtains, painting or papering ceilings, making a bed, driving a car, working under a car, etc., may aggravate the

symptoms because these activities usually produce hyperextension of the neck." [p. 77; The Cervical Syndrome, by Jackson]

Quote 5

"At any rate, the result of neck-lashing injury is sprain or stretching or tearing, or avulsion of the ligamentous and capsular structures, with or without immediate compression or irritation of the cervical nerve roots. Sudden compression of nerve roots give immediate symptoms. If the symptoms are delayed a few hours, irritation of the nerve roots probably occurs because of hemorrhage or swelling in the surrounding structures. The symptoms may be so mild at first that they are ignored, but as time goes on further stretching and relaxation of the ligamentous and capsular structures may occur and permit more mechanical derangements." [p. 73; The Cervical Syndrome, by Jackson]

Quote 6

"Degenerative changes initiated in a disc by a severe sprain may occur long after the injury and give rise to delayed symptoms." [p. 74; The Cervical Syndrome, by Jackson]

Quote 7

" There is considerable evidence for the belief that in many cases the lesion may be a tear of the posterior longitudinal ligament (which keeps the intervertebral disc from protruding), a tear of the annulus fibrosus (the outer part of the intervertebral disc), or traumatic changes within the disc substance." [p. 399; Handbook of Orthopedic Surgery, 4th Edition, by Shands]

Quote 8

"Usually, the roentgenogram are found to be negative immediately following and or some time after the rupture due to the fact that the degenerative changes take place slowly. Usually, by the end of a year, narrowing of the affected interspace will begin to take place, and after several years, condensation and proliferative changes of bone characteristic of traumatic arthritis will develop." [p. 109; Lewis' Practice of Surgery, Vol. II]

Quote 9

"Many of these cases of low back strain present a variable degree of the hypertrophic type. When confronted with a case of this type, a surgeon who has had much experience usually gives a guarded prognosis, especially in regard to time and completeness of relief of symptoms, because it is quite well known that these cases tend to hang on and become chronic even when properly treated for the acute strain, and that once they become chronic, they are frequently more difficult to relieve than are similar cases in which there is no evidence of arthritis." [p. 393; Fractures, Dislocations and Sprains, 5th Edition, by Key and Conwell]

Quote 10

" More than one-third of all spines roentgenrayed for any purpose have shown congenital abnormalities. Most of these do not cause symptoms, but congenital defects are probably an important factor in producing weakness of the architecture of the spine, leading to points of lowered resistance to strain. In these patients, the spine is probably more vulnerable to injury than in normal persons." [p. 1032; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 11

"Roentgenographic evidence of degenerative changes in the spine is found almost universally in patients past the age of fifty years. Such changes vary considerably in severity, however, and significant symptoms are produced in only a small percentage of cases." [p. 583] "Only about five percent of individuals past fifty have clinical symptoms." [p. 531, Arthritis and

Allied Conditions, 4th Edition, by Comroe]

Quote 12

"Since the roentgenographic findings described above frequently are asymptomatic and may appear as a physiological manifestation of aging, one must not accept these findings without careful appraisal of the symptoms and signs. In the absence of actual mechanical impingement or compression of nerve fibers by narrowed intervertebral discs, one must proceed cautiously before attributing symptoms to degenerative joint disease. Even when these changes are present, each case must be evaluated by the composite picture of all factors." [p. 540; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 13

" The period between the injury and the production of traumatic joint disease may vary from days to several months. Pain and limitation of motion may persist for years following a single strain or contusion even without obvious anatomic change." [p. 855; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 14

"It must be kept in mind that trauma may precipitate other forms of arthritis (rheumatoid, tuberculous, syphilitic, pyogenic, gouty, etc.), the traumatized joint often being only the first joint involved. Also, any form of joint disease (but especially degenerative joint disease) may be aggravated following trauma." (Degenerative joint disease, hypertrophic arthritis and osteoarthritis are all one and the same disease. They are merely different terms used to describe the same condition.) [p. 853; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 15

" Injury produces a two-fold effect on joints: (1) mechanical damage such as a capsular tear, detachment or laceration of cartilage, articular fractures, compression, splitting or detachment of articular cartilage, etc., and (2) joint reaction of such trauma." [p. 855, Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 16

"The primary pathologic reaction is a synovitis. The synovia, however, rarely is affected alone. When articular structures other than the synovial membrane are injured, pathological changes resembling those of degenerative joint disease result almost invariably. Such changes are hastened by overweight (in weight-bearing joints), overuse or the continued presence of loose bodies." [p. 855; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 17

" Roentgenogram are often of little help toward making a positive diagnosis. They are of great assistance, however, in ruling out conditions such as neoplasms or tuberculosis." (Also fractures, and troublesome abnormalities and arthritic changes.) [p. 403; Handbook of Orthopaedic Surgery, 4th Edition, by Shands]

Quote 18

"From a pathological standpoint it must be realized that this disease is chronic and cannot be cured. Since worn or damaged cartilage regenerates poorly, at best, and since osteophytes cannot be reabsorbed, such changes, once manifest, are irreversible and permanent. Nevertheless, much can be done to relive symptoms and to prevent, or at least retard, progression of the pathological conditions." [p. 550; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 19

"That this disease (degenerative or hypertrophic arthritis) does exist in the spine is undisputed, but it is necessary to review carefully the history, physical examination, laboratory tests and roentgenogram (x-rays) before such a diagnosis is made. Often marginal lipping is the result, rather than the cause, of disease in the spine. Thus, lipping often has been demonstrated following degeneration of the intervertebral discs." [p. 537; Arthritis and Allied Conditions, 4th Edition, by Comroe]

Quote 20

"For many years I have been increasingly annoyed by the tendency of my conferees to stigmatize as 'psychoneurotic' any symptom complex for which an organic cause could not be easily demonstrated. I cannot accept as true that authors' (Gay & Abbott, J.A.M.A. 152:18, Aug. 29, 1953) statement that 'a persistent psychoneurotic reaction' is responsible for prolonged disability in victims of whiplash injuries. The authors' own statements make this improbable. They mention the probability of various degrees of rupture of intervertebral ligaments and admit that herniated cervical intervertebral disc was clinically diagnosed in 26% of their series.

I have personally observed innumerable automobile collisions ranging from trivial to the severest. For some years I was one of the autopsy surgeons (full time) to the coroner, Los Angeles County, California. I have performed autopsies of quite a number of persons who were killed by the worst of whiplash injuries -- 'broken neck'. I have performed autopsies on at least a dozen persons in whom the skull was completely dislocated from the spine by such injuries. In hospitals I have seen quite a number of very serious but non-fatal fractures of the cervical spine by whiplash injury. Drs. Gray and Abbott describe the less serious, non-fatal whiplash injuries. Even in the less serious whiplash injuries, who can say how much intervertebral ligamentous tearing exists? Who can say how much hemorrhage occurs at the site of the injury and how much subsequent fibrosis and adhesions develop around nerve roots or into or between cervical muscles? Certainly such things may be expected to result in some degree of prolonged or permanent impairment. Even worse, who can say how much or how little trauma of the cervical cord in incurred?

Certainly the x-ray cannot give the answers to these questions. By the same token early treatment and physiotherapy may be expected to minimize sequelae, and delayed treatment can be difficult or futile. Prolonged immobilization--necessary or unnecessary--could be expected to similarly result in prolonged or permanent difficulty not detectable by x-ray.

The neck being a highly mobile structure, it seems reasonable to expect that any post-traumatic fibrosis around nerve roots or into or between muscles, even though rather slight, could be expected to give more prolonged symptoms than elsewhere along the spine. It seems to me that one should be very reluctant to categorically state that 'More than half the patients in this series...were seriously handicapped in this way, i.e., by 'persistent psychoneurotic reactions'. Many symptoms are due to real factors that cannot be objectively demonstrated. Not a few persons die of causes that cannot be demonstrated by the most thorough autopsy. Such persons do not die of psychoneuroses." (underscoring supplied [p. 974; Journal of the American Medical Assn., Vol. 153, No. 10, Nov. 7, 1953 - Letter to the editor from John H. Schaeffer, M.D., Los Angeles]

h. Adapting Standard Arguments

There are numerous standard arguments which have been developed over the decades which can be readily assimilated by counsel to your individual case. The following are simply a few of the more useful:

(1) Pain and Suffering:

(a) Measuring Physical Pain and Suffering. How do you measure the reasonable value to be placed upon the physical pain and suffering of the plaintiff. One way is to determine what we will pay to avoid physical pain. In our society, we think nothing of paying $30.00 for a novocaine shot in order to avoid thirty minutes of physical pain in the dentist chair. If we will pay one dollar per minute to avoid physical pain, is $5.00 per hour enough to compensate for the constant enduring of physical pain?

(b) Constitutional right to be free from pain. Even the state which can, under our constitution, inflict death, cannot inflict physical pain.

(c) Pain is life's window into hell. People in anguish and pain pray for death. No one prays for pain.

(d) Job ad - catastrophic injury:
Ladies and gentlemen assume that tomorrow we run an ad in the Houston Post that reads as follows: 'Job available, no experience necessary. No education necessary. Pay: $100.00 per day. Only two conditions: first, you must suffer pain every waking moment of your life, and secondly, you can never resign.' Ladies and gentlemen, how many applicants do you think would apply for that job?

(e) Minimum wage:
Ladies and gentlemen, we pay $4.20 per hour for the most menial tasks in our society. Shouldn't this be at least the very minimum compensation for the constant suffering of physical pain?

(2) Value of Human Life:

In maintaining a summation notebook, keep current examples of the value placed on human life within our society. For example:

When Jessica McClure was trapped in the well in West Texas, the entire country was breathless for 56 hours while Herculean efforts were made to save the child's life. The country breathed a collective sigh of relief when the young child was saved. At no point did anyone stop to inquire as to the cost of these efforts and whether the life of the child was worth the cost.

(3) Full Justice:
Ladies and gentlemen if this lawsuit concerned the death of that magnificent racehorse Seattle Slew in an automobile accident instead of the death of this husband and father, the owners of Seattle Slew would be in this court as plaintiffs seeking 10 million dollars and that would be what full justice would demand. Why, because 10 million dollars was paid to purchase the horse. If the jury decided, after hearing the evidence, that despite the fact that 10 million dollars was actually paid for the horse, that 10 million dollars was just too much money and awarded only 5 million dollars, that would not be justice. That 5 million dollars would represent half justice and anything less than full justice is injustice. We have proven that full justice demands 5 million dollars in compensation to

the widow and children of this fine man and anything less than that amount will not represent full justice. Therefore, when you deliberate on damages in this case, please remember that you agreed on voir dire examination to render full justice in this case; that full justice demands at least 5 million dollars to compensate this plaintiff, and that anything less than full justice is injustice. For the use of this argument in a summation, see page 78, *infra*.

C. PERSUASIVE COMMUNICATION OF POWER THEMES AND MESSAGES

Individuals send messages out on three levels. Lawyers are basically wordsmiths. For years we have been concerned about what impact words and phrases we should use or what analogies we could make to drive a point home. In essence, our focus as lawyers was on what "we said." Unfortunately, words alone are the component of communications which contribute the least to the overall impact or persuasiveness of a message. When social science researchers talk about words alone, they use the term "linguistics". When they talk about how a person says the words, voice modulation, intonation, pauses, etc., they use the term "paralinguistics." Nonverbal communication is everything else that goes along with the message such as facial expressions, eye movements, body movements, etc. For our purpose we shall break a message down into three components, but for ease of understanding, we shall use lay terms. Those three components are 1) verbal-words alone, 2) voice - how you say it, and 3) nonverbal - body movements, facial expressions, etc.

When social science studied the impact of a message as relating to those three channels of delivery, the results were quite surprising in terms of the impact of a message. Words alone account for only 8% of the impact! How we say it or voice alone counts for another 37%. But the majority of the impact persuasiveness or believability of a message, 55% relates to the nonverbal content. Therefore, the majority of a message's impact comes from its nonverbal content. This is not to say that all three parts of a message are not important. Of course you have to have the right words. Of course you have to use impact words and phrases. Of course you have to drive home points home with analogy. But even when you do that effectively, you cannot ignore the fact that how you say it, how you move, where you stand, and how you use eye contact in giving the message plays a primary role in determining whether or not that message is going to be believable and persuasive.

Messages are received and processed through one of three primary channels or representational systems. Even when we are focusing on what we are saying, how we are saying it, and making sure that our messages are sent effectively on all three levels; we may still not communicate effectively. To communicate effectively we must understand that human communication is a two-way process. A message must not only be considered as to how it is sent out, but we must look at how the messages are going to be received. In essence, we must be aware of the person or group of persons to whom we are sending the message. This is often referred to as having a "they focus". That is, most lawyers have an "I" or "we" focus. They focus on themselves, the judge, the law, the facts, etc. Many lawyers do not realize that they should be focusing on only one group in the courtroom and that is the jury. To be really persuasive one has to be constantly aware of the jury's changing moods, attitudes and reaction. It is part of having a "they focus."

Messages are received not only through preconceived notions, ideas, and beliefs, but they are

processed through what social science calls a primary channel or representational system. There are three recognized channels by which people process information with. Those channels are 1) visual, 2) auditory, and 3) kinesthetic.

The person who is using a visual channel sees the message in his minds eye. He visualizes the information in order to understand it. On the other hand, if the person is using an auditory channel to process the information, he has to hear it in order to understand it. In essence, in his mind he hears the information, repeats it, or says it to himself in order to process it, remember it, and store it. This person is said to be using the auditory channel or representational system. Some people use the kinesthetic channel to process information. That is they process information through their guts or with their feelings. People using this kinesthetic channel have to touch an object to assess it and understand it. Most people are using either the auditory or visual representational systems to process information most of the time.

An important point to remember here is that the person with whom we are communicating uses all three representational systems to process information at one time or another. What we are concerned with is what is the primary channel being used when we are trying to communicate with that person. Most people tend to favor one channel over another. Some people use the visual channel most of the time. On the other hand, some people use the auditory channel most of the time. But do not forget that people switch channels from time to time. Still identifying a person's primary method by which he or she processes information can be a critical asset if we want to communicate effectively.

The reason it is critical to know the channel which a person generally processes information is that if we use that channel to send that information, it makes it easy for the person hearing the message to understand and retain the information contained therein. Therefore, whether we are communicating with the opposing counsel during negotiations, or a judge drawing a pretrial conference, or the jurors during the trial we should try and ascertain the primary representational system that person is using at that time. If we do this, we can send a message out which communicates easily with that representational system and therefore the person is much more likely to understand the information, accept it, and believe it.

We should consider two methods by which we can identify a person's primary representational system or channel for processing information. The first is to listen to the words a person uses when they are sending out a message. Words and phrases people use can reveal that person's primary channel for processing information. Secondly, when we give that person information to process, we can watch their eye movement pattern. Neuropsychologically, the eye patterns differ when information is processed differently.

First we will start with a chart taken from "Courtroom Communication Strategies" which list verbal predicates a person uses depending upon the channel from which they are sending the message. Notice that the verbal person uses words and phrases like "see what I mean." Whereas the auditory person will say often things like "do you hear what I am saying." A kinesthetic person will use phrases like "I want you to feel right about this." Practice identifying the channel by which a person with whom you are communicating is processing a message. If you use the same verbal predicates back, you will then be matching that person's channel for processing information

or representational system and the other person will feel very comfortable with you. You increase the probability that they will accept your message and that it will have greater impact.

Further, one can assess a person's representational system by watching the eye movement patterns of that person. Before checking the eye pattern movements of a person, however, you have to give them information which you ask them to think about or process. Be sure that they are processing information when you check their eye movement patterns. A person's eye movements, if they are not processing information, can be insignificant. If one is processing information visually, the eyes move up to the right or left. Therefore any time the eyes move up, either right or left, one can assume that the person is processing the information visually--he is seeing it in his mind. If on the other hand while the person is processing information the eyes stay even and move from side to side, one can assume that person is processing information auditorially - he is listening to the information in his head. On the other hand, if a person's eye movements are down, it generally means the person is trying to get in touch with his emotions. He or she is processing the information kinesthetically getting in touch with his or her feelings about the information.

Remember it's a two-way process, therefore, it is crucial to always have a "they focus." One can be sending out a message beautifully, communicating with impact on all three levels. But if one does not have a "they focus", the great elocution may fall on deaf ears. The message cannot be sent with impact until we are sure of a person's attitude, beliefs, and representational system to whom we are sending the message. This is why we should always think of the jurors or anyone else with whom we are trying to communicate as a loving, caring, fellow human beings. Jurors should not be just a number. We should know by memory each jurors first and last names. In your mind, think of them by their first names. We should have positive feelings toward them so they can have positive feelings toward us. This type of "they focus" is necessary when we want to communicate with another human being whether that be our opposing counsel, the judge, the juror, or anyone else.

1. Non Verbal Communication

Aristotle taught that orators could "heighten" the effect of their words with suitable gestures, tones, dress and dramatic action. Cicero, Rome's greater orator said "delivery is a sort of language of the body-the management, with grace, of voice, countenance and gestures. Demosthenes, Greece's greatest orator taught that delivery is the greatest pathway to success and successful oratory. He listed the three most important ingredients of oratory as action, action, action. Shakespeare's advice to actors was "suit the action to the word."

You can often tell the experienced from the inexperienced lawyer by the way they handle objections. When an objection is made against evidence being offered by an inexperienced lawyer and the judge rules against him, the inexperienced lawyer hunches his shoulders forward, and looks nonverbally whipped. He is visibly shaken. The experienced lawyer understands that the jury has a difficult time distinguishing between the plaintiff and the defendant. Jurors have no idea of the significance of legal objections and particularly do not understand the difference between "sustained" or "overruled". The experienced lawyer knows he should always look like the winner no matter what happens. Whatever the judge says after the other counsel has objected, whether it is sustained or overruled, it should not matter nonverbally. Counsel should deliberately hold his head high, look at His Honor and say "thank you" no matter what the ruling. The jury will think

you have won even if you have lost. Never lose face in front of the jury. Always remain confident and in control.

a. The Importance of the Pause

Often, the most important thing an attorney can say is nothing. The pause for dramatic effect has been used by great orators over a number of millennia. The pause serves two major purposes for the orator:

First, the pause allows the statement immediately preceding it to soak in thoroughly; and secondly, the pause will recapture the minds of those who have strayed and cause those who have been listening to pay more close attention to the statement that follows the pause.

Often, inaction is the most effective means of non-verbal communication, i.e., the use of the emphatic pause.

The major uses of the pause during oratory include the following:

1. To arouse the anticipation of the listeners;
2. To stress importance of each phrase;
3. To accentuate humor;
4. To allow the rhetorical question to be answered;
5. To initially capture the attention of your audience;
6. To emphasize the theme during repetition;
7. To dramatize a climactic ending.

Consider the following brilliant use of pause in the delivery by Winston Churchill of two of his most famous sentences (slant lines \ indicate pauses)

> Never \ in the field of human conflict \ was so much owed \ by so many \ to so few.
>
> Let us, therefore, \ brace ourselves to our duties, \ and so bear ourselves \ that, if the British Empire and its commonwealth \ lasts for 1000 years, \ men will still say, \ 'this \ was their finest hour.'

In structuring the use of the pause, a simple guideline is to use the pause as punctuation in the sentence. Without punctuation we would have a stream of consciousness run on sentences which run the risk of failing to convey to the reader the message which the author wished to convey. Similarly, speeches without pauses fail to utilize all of the tools available to the speaker in order to most effectively convey the message.

b. Pacing the Jury

In addition to using verbal, vocal and nonverbal cues to create the appropriate mood for your case, it is necessary to pace the jury during summation. The attorney has paced the individual juror during voir dire and he has watched the jurors closely during trial. The attorney knows which jurors relate to one another, which jurors like humor, and what cues elicit desired responses, and what phraseology and verbiage to use. He also has some information regarding their background. Pacing in summation is based on weaving that information into the phraseology and nature of the

summation. The nature of the summation is based on the intensity of the emotional impact to be conveyed to the particular jury type that you are facing. A conservative upper class jury will not be persuaded by a summation loaded with emotional impact. On the other hand, a blue-collar-type jury is more likely to react favorably toward an emotional summation containing a strong theme, pictures and impact words and phrases. All of these factors should be considered when pacing the jury in summation.

c. Movements and Gestures

Movements or gestures form part of the style of summation. The more flamboyant the attorney's style of delivery, the more movements and gestures are used. Some movements and gestures are essential. An effective summation cannot be given by standing in one spot, rigid and stiff. On the other hand, too much uncontrolled movement is distracting. The speaker who paces back and forth in an uncontrolled fashion, like a caged lion, actually distracts the jurors with his movements and gestures.

No attorney should use gestures or movements with which he is totally uncomfortable. A background in some type of public speaking is helpful in developing appropriate movements and gestures. Most communities have toastmaster clubs or other such clubs where the neophyte attorney can develop important speaking skills. He will find that the practiced gestures become more natural as he learns to use his movements to correctly emphasize important points.

As effective means of developing gesturing skills is by the use of videotaped practice sessions. This allows an individual to learn about his own style and gestures and how to use them most effectively. If we attempt to communicate through the nonverbal channel with inappropriate and improperly timed gestures, jurors will perceive a lack of authenticity, at least on the subconscious level. Generally, most of the attorney's movements during summation ought to be restricted to the upper torso. He can move from side to side, but generally should be stationary for many moments at a time, never appearing to be nervously pacing. Movements of the upper torso appear more like gestures of nervousness if made too close to the body. Arm and hand movements need to be full and robust, and certainly at no time should the attorney stand with his hands in his pockets. Nor should his hands be clasped tightly behind his back as such movements are distracting and definitely affect credibility. The only object which should be held during summation is one you intend to use, i.e., a piece of evidence to be shown to the jury or a pointer of some type used as an extension of your arm. A collapsible-type pointer is recommended because it looks more professional and projects an air of authority and competence.

d. Touching the Client

The jury searches for and is impressed by an apparent relationship between the attorney and the client. This is particularly true where the attorney is representing an individual rather than a corporation or some other nonpersonal entity. If the attorney is representing an individual in a personal injury claim, some physical touching of the client is essential during the course of the trial and during summation because touching is interpreted as a sign of affection. Although it is nonverbal, it will surely be picked up by the "Sherlock Holmes" of the jury. It is a nonverbal cue that can only be narrowly interpreted. It projects the attorney's belief in the client and the warm relationship that exists between them. Touching projects that the attorney, like the juror, has feelings about and empathy for human beings and their suffering.

The caveat regarding touching the client is that it must always be appropriate and almost incidental. The sex and age of the client and the attorney must be considered to avoid all sexual connotations potentially associated with the touching. The young male attorney should never touch a young female personal injury client, nor should a young male client be touched by a young female attorney. An older fatherly-type attorney may appropriately put his arm around or touch the client of either sex. An older female attorney can be seen as mothering younger client by her touch. The touching of older clients by younger attorneys, regardless of the sex, is usually permissible as long as the touch can be interpreted as indicating that "I believe in this client," or "I have feelings for this client."

e. Dressing for Summation

As the trial progresses, the attorney's dress should become progressively more conservative. An attorney representing a seriously injured client in a civil case will be making a somber summation emphasizing the serious injuries and damages suffered by the client. Appropriate dress for the delivery of such a somber message approximates the visual image of the minister who has come to the house to tell the widow that her husband died in an accident. The attorney wants to be identified with the archconservative banker-type, dressing in dark blue or gray. As discussed previously, the attorney's dress obviously varies according to the sex and personality of the attorney.

2. Mood Transference

Well trained actors and orators create moods by the use of verbal, vocal, and non-verbal cues. The words they choose to use and how those words are used, combined with eye movement and gestures, can be an effective means of mood transference. Great actors repeatedly create a mood every night, sometimes for years, while doing a Broadway show. The great actors do not go through the emotional turmoil of feeling that mood night after night, rather, they create the mood by pure acting.

However, this is where the actor and the advocate part company. For example, in order for a plaintiff's attorney to fully and completely generate empathy in the hearts and minds of jurors with the plight of the paralytic plaintiff, it is necessary for the attorney to understand, appreciate and feel that plight at a gut level. Merely verbalizing the words, describing the horrors of paralysis is not sufficient because it is absolutely essential that the verbal content of the summation be consistent with the vocal and non-verbal behavioral cues which the attorney conveys to the jury.

In order to maximize the consistency between the verbal, vocal and non-verbal communication on the issue, the attorney must fully empathize with the client's plight, i.e., feel the loss. This is because, whether we realize it or not, whether we attempt to control it or not, the attorney, during summation, will transfer his mood to the jury through behavioral cues, voice inflection and verbal content of the persuasive speech. One of the reasons that the jury system in America works so magnificently is that the collective wisdom of the jury far outweighs the persuasive talents of counsel. The lawyer who attempts to mislead the jury through the power of oratory, without substantive evidence, will most often be spotted by the jury because the non-verbal behavioral cues are inconsistent with the message which the attorney is attempting to convey.

There is a definite role for a more profound understanding of the channels of communication with juries. For example, the plaintiff's attorney who is attempting to persuade the jury as to the seriousness of a client's injury, at the crucial point of conveying sadness, should lower his eyes towards the left side while gesturing downward with the left hand, in such a manner as to cause the jurors to lower their eyes towards the lower right hand corner. This eye position of jurors allows greater accessibility to kinesthetic communication and opens the jurors up for experiencing the emotional feelings which counsel has attempted to convey.

Making emotional statements also affects the breathing patterns of the attorney. The more depressing the news, the more slowly the rate of breathing. Therefore, conveying a sad mood requires the attorney slowing the breathing rate while breathing more deeply. On the other hand, indignation or rage about a person's conduct is best conveyed by more rapid shallow breathing. These behavioral cues are communicated to the jury more effectively than the verbal content of the message, particularly when the verbal and non-verbal messages are inconsistent.

Pacing and Leading to

Create a Mood Transference

Transferring a mood in the courtroom is the process of leading jurors to experience a particular emotional state. This state might be a state of anger, empathy, or pity. Or, the attorney may want the jurors to view everything in a very logical, detached type of perspective. In almost every instance, the attorney is probably trying to counter the emotional state that opposing counsel is attempting to create.

It is very important that you understand how to create a mood or emotional state that jurors experience in the courtroom. Your opening statement and closing argument, as well as everything that has transpired in the courtroom, has to support the way you are trying to lead the jurors. Keep in mind that these are not individual strategies to be used by themselves, but to be used collectively. The following sections discuss how to transfer feelings, factual information, and visual information.

a. Transferring a Feeling

Before we can understand how to transfer a feeling, it is important to understand what behavioral cues tend to go along with a person experiencing a particular feeling. When you want jurors to experience the state of extreme empathy, the trauma of a tragedy that has taken place, the deep emotional feeling and concern for a family that lost a loved one, then you must not only display certain behavioral cues, but you must lead the jurors to use these cues themselves. If you have already established rapport with the jurors, when you use these behaviors they will begin to pace you. Of course, this is the true test of your being able to lead the jurors. If you want jurors to experience a particular state as you are presenting your opening or closing statement, for example, you need to use those behaviors (vocal, verbal, and nonverbal cues) that correspond with the particular drama that you are trying to create. Too often trial attorneys will deliver a very emotional argument in terms of the verbal content and not use the correct vocal and nonverbal behaviors. If the verbal content is in itself emotional, but the vocal and nonverbal behaviors are not, the attorney will not be able to transfer an emotional state to the jurors. Given a contradiction between vocal and nonverbal behaviors and verbal content, jurors will believe the behaviors. Therefore, your behaviors will nullify the effect of the emotional story or picture that you are trying to paint.

For example, to convey a feeling of empathy for a tragic emotional experience of your client you will want to utilize the following behaviors:

A slower voice tone
A lower voice tone
Extremes in vocal patterns from soft to loud
Dropping the eyes to lower right
Using left-handed gestures and hand movements that pull the eyes of the jurors down to their lower right
Using a slower movement pattern
Using a slower breathing pattern
Using dramatic pauses

Beginning with the first item on the list, it must be recognized that a slower voice tone correlates with a depressed emotional state. When a person is experiencing a feeling, his voice pattern tends to become slower and his vocal tone tends to drop lower. This is the way we express concern.

By using extreme vocal tones of going from soft to loud, you will be able to create the drama that is associated with feeling. This means being able to develop the voice so that it will go through all ranges and all types of pitch patterns. An individual can best process kinesthetic information when the eyes are dropped down to the lower right. It increases the jurors ability to experience what you are describing. You must remember that if you are not genuinely feeling the effect that you want to create, it will be impossible for jurors to feel that same state. You need to bring about the particular behavioral state by feeling the emotion you wish to transfer. Drop your eyes down to the lower right, collapse the upper chest cavity as though you have sighed, and let out your air. Theses are the appropriate nonverbal cues to use to create a feeling of tragedy.

The next step is to make sure the jurors start to process the information on a kinesthetic or feeling level. To do this, use left-handed gestures. Keep the gestures low enough so as to pull the juror's eye contact down into their lower right hand corner. When done properly, they are in the mood to process kinesthetic information. Therefore, you want to deliver your most important and dramatic lines when their eyes are in this position. Save this type of motion and gesture for the key points.

Slower movement patterns are also indicative of conveying an emotional state to jurors. To convey the tragedy, therefore, you do not want to be fast or flip. Rather, you want to be slow and draw it out when describing it.

A very critical consideration with the kinesthetic transference of mood is the use of slower breathing pattern. When a person is feeling emotional, he usually breathes from his abdominal cavity, there are more pause patterns, and he tends to sigh. In order to convey and transfer this feeling, you will need to use the same behaviors.

The other feeling that counsel may want transferred in certain very limited situations is when counsel is trying to instill anger on the part of the jurors. In other words, arousing their feelings so that they are angry at an injustice that has taken place. Anger has several other behavioral characteristics that go with it. In order to transfer or display the characteristics of anger, the following behavioral patterns must occur:

A fast vocal tone
Usually a higher vocal tone
Louder vocal tone
Eyes moving straight across
Direct eye contact
Gestures that are mid-waist to upper level
Gestures that are firm and definite
Quicker movement patterns
Decisive movement patterns
Dramatic pauses

The sense of conveying anger has an altogether quicker movement pattern. When a person is angry, he tends to breath in his upper chest area, so his breathing pattern is very different. He moves at a different rate. In order to motivate people to become angry, both the attorney's speech patterns and movement patterns must be quicker. To convey anger, you have to come forward and be aggressive in your behaviors. Do not be afraid to point, as long as you are pointing at opposing counsel or his client. Never use the pointed finger at your own people.

The best way to practice the transference of a kinesthetic feeling is to first take the feeling that you are trying to convey and put yourself in the same body position and state of mind. Before going into the courtroom, you should experience whatever state you are trying to convey on a personal level. For example, to convey the feeling of anger, practice being angry. Practice feeling the emotional state yourself and try to perceive behaviors that you have in that state. Observe yourself. When you are unhappy, notice what you do. When you are happy or carefree, notice

your behaviors. Also become a watcher of people and study basic human nature. You will notice the behaviors that people use in displaying anger or passion or empathy are very similar. All you have to do is understand those behaviors, use them, feel the state, and then transfer the mood to the jurors.

b. Transferring Factual Information

There are times when you want to convey to jurors that the information being presented is just factual. The last thing the attorney wants to do is lead jurors into an emotional state. In order to do this, you need to follow several behavioral cues. These cues include the following:

Keeping the eyes level
Keeping the breathing pattern even
Using a moderate rate of speaking
Avoiding extremes in vocal tones
Keeping all behaviors in moderation

If you want jurors to treat information as a matter of fact, you must treat it as a matter of fact. The behaviors you use for transferring factual information to jurors are very nondescriptive and moderate. The eyes stay at an even level, neither moving up or down, just appropriate eye contact. Breathing tends to be even so jurors will not see an extreme in the breathing patterns. The one risk that is run in transferring factual information is that it can become boring. Thus, when you do transfer information that is factual, you will want to break it up by emphasizing key points or making something more exciting simply to maintain the attention of the jurors.

c. Transferring Visual Information

In many types of cases, there is a need to describe a picture, scene, or event for the jurors. This definitely involves the transfer of visual information. Some jurors will pick up these visual pictures very quickly because they will be visually oriented. Other jurors who are kinesthetically or auditory-oriented will need the attorney's help in obtaining the transfer of information. Behavior cues used to transfer visual information include the following:

Using quick vocal tones
Breathing in the upper chest
Keeping the eyes moving up to upper right or left
Using gestures that are above the waist and expansive
Pointing up to a chart
Maintaining a fast pace

Using these behavioral cues is most appropriate when the attorney is telling a story. If the attorney asks the jurors to picture or focus on some object, he should pick up his rate of speech, pull his hands up and get the juror's eyes moving to the upper right and left. Remember, what you are trying to do with the eye movement pattern behaviors of the jurors is to keep their eyes in the quadrant corresponding to the state you want them to experience. When you want them to have an emotional feeling, you want their eyes going down to the lower right. When you want them to have an auditory or more factual type of feeling, you want the eyes level. To visualize or picture a particular event, you want the eyes moving to the upper left or right. To do this, you need to point up.

One way of getting jurors to visualize information is through the use of charts or graphic displays. With the proper use of a chart, the attorney can induce the proper eye movements. If you want the jurors to be assisted in visualizing or seeing what you are saying, make sure that you are using hand motions to pull their eyes up. Point to the uppermost part of the chart, or to the top of the screen. This will pull their eye contact up. Try to keep the chart high enough so that when you point to it you are pointing in an upward direction. If you want the jurors to visualize an event, you should never pass out material to them. When they are looking at such material, their eyes are looking down.

Thus, learning how to effectively communicate moods and feelings to jurors can be a very valuable tool in delivering themes to the jury.

We know turn to the social sciences with an article on theming by one of the world's premier trial consultants, Dr. Amy Singer, President of the Singer Companies in Ft Lauderdale, Florida. In this article , Dr. Singer discusses trial theme development, why it is so essential for attorneys, and how the trial theme that "achieves the widest possible level of acceptance" can be realized.

D. DR. AMY SINGER: CASE THEMES

1. Jury–Validated Trial Themes

How to Establish, Enhance, and Employ Such Themes for Courtroom Success

A jury trial is a dramatic debate waged by two star orators—attorney for the plaintiff (or prosecutor) versus attorney for the defense. But far more depends on the outcome of this electrifying exchange than who takes home the silver loving cup at the end of the evening. For criminal trials, the defendant's liberty, even his or her life, can hang in the balance. For civil trials many thousands, even millions, of dollars may be awarded from one party to another. Persuasion is the key—and the jury decides all.

Persuasion is a story-telling skill that depends on a clearly-defined and broadly-accepted theme to be successful— "Give me liberty or give me death," "We have nothing to fear but fear itself," "Ask not what your country can do for you but what you can do for your country." Strong themes such as these crystallize complex concepts and arguments while at the same time making the ideas they represent impossible to forget and many times even impossible to deny.

Despite their abundant other courtroom skills, many attorneys don't know how to develop strong themes for their cases most effectively or put them to optimum use in the courtroom. They are further at a loss when it comes to integrating the trial theme throughout all the important trial segments—*voir dire*, opening statement, direct examination, cross examination, closing argument—and thus constantly reinforcing the theme in a positive way in the mind of the jurors. Such attorneys are less effective trial advocates as a result.

2. Few Attorneys Think Thematically

It should come as no surprise that many attorneys find it difficult to determine and develop compelling trial themes. Attorneys are not trained in law school to think thematically, nor are they encouraged to do so at most law firms. They are taught instead to focus with laser intensity on the law in all of its sometimes mind–numbing minutiae.

It would be absurd to suggest that any individual can hope to become an adequate lawyer without a thorough understanding of the law. But too rigid an emphasis on strict "*legalistic*" thinking can become a major problem at trial time. What's important to the attorney may prove to be of little interest to the jurors (the old problem of lawyer perspective versus juror perspective). While the attorney may be arguing convincingly regarding CRITICAL LEGAL ISSUE 'A' the jurors may instead be concerned about CRITICAL NON–LEGAL ISSUES 'B' or 'C' (or, for that matter, ISSUE 'Z,' which may not even show up on the attorney's radar screen).

The great humorist Will Rogers once said, "The minute you read something you can't understand, you can be sure it was drawn up by a lawyer." A narrow "legal issues–only" viewpoint often makes it difficult for attorneys to communicate with non–lawyers. As a result, many attorneys are unable to develop trial themes that jurors will find compelling. Their tendency is to focus case development primarily on complex or arcane legal issues that jurors *may neither understand nor care about.*

For example, a large number of attorneys mistakenly believe "negligence" to be a workable theme upon which to build a case. "Negligence" is not a theme, however, but rather a *theory* that attorneys try to prove in court. More to the point, "negligence" is a dry legal concept that creates no emotional or psychological valences with juries.

While "negligence" is a perfectly acceptable legal theory, "an ounce of prevention is worth a pound of cure" is a theme to which everyday folks (jurors) can relate.

Another problem: some attorneys' trial themes, even though workable, may not resonate as strongly with most juries as the attorneys would have preferred or as other more appropriate themes might have done.

3. Rhetoric Requires Themes

Remember high school composition class? The instructor tried repeatedly (*probably valiantly but vainly*) to drum home the importance of theme development. The reason is simple. Theme development is the rock upon which all writing and oratory are constructed. It is the most basic and essential concept for planned and structured communications. You can't have the chicken without the egg, and you can't communicate in any sustained and meaningful way without a theme.

4. Themes Essential for Juries

The idea of theme development is particularly fitting when it comes to all forms of persuasive communications, including courtroom argument and debate. Attorneys should consider the following trilogy of truths regarding trial theme development: 1) trial themes *personalize* case issues, 2) themes help jurors *form* impressions, and 3) impressions *win* lawsuits.

Along these lines, over three decades of scientific jury research show that: 1) jurors *deliberate* in themes, 2) the case theme is the primary mental organizer that helps jurors remember the facts, 3) a good theme enables jurors to look for evidence that "fits" the story and to disregard evidence that does not "fit," and 4) themes facilitate evidence comprehension and enable juries to reach pre–deliberation verdict decisions.

As these and other findings indicate, trial theme development is a subject that should merit the most intense scrutiny, interest, and attention on the part of trial attorneys.

5. What Makes a Good Trial Theme?

A trial theme is a summary of the attorney's case, it's *raison d'être*. It should be able to be expressed in a few words or less. "Safety first, not last" (for accident cases), "David *vs*. Goliath"[1] (valuable for many commercial cases), "paying for someone else's mistake" (for negligence cases) "destruction of a Van Gogh painting" (for damages) are examples of such themes. These make excellent trial themes because they are easy to explain and easy to understand.

Even better than themes of a few words are *one–word* themes— "indifference" (for medical malpractice and accident cases), "accountability" (for liability cases), and "greed" (for commercial cases). Other popular *one–word* themes include "integrity," "prejudice," "conspiracy," "arrogance," and "protection."

One–word themes act as laser beams of meaning and significance to illuminate and clarify the case and make it understandable for the jurors. They help jurors focus on the key idea or concept essential to a favorable disposition of the case (the case's *pivotal point*).

One–word themes *bind* the entire case together. They are like life rafts that jurors can hold onto throughout all the trial's tempests and tumult, complexity and confusion, bewilderment and brouhaha. They help jurors rationalize away all the case conflicts and justify the desired point of view.

A good trial theme should also be memorable. "He couldn't hit a curve with an ironing board" is the way Hall of Fame pitcher Bob Feller described retired NBA Hoop God Michael Jordan during Jordan's Spring 1994 tryout with the Chicago White Sox. Feller's colorful description is a great theme summary because it describes Jordan's baseball–playing abilities in a few words—and because it's *easy to remember*.

Additionally, a good theme should be consistent with the evidence and the jurors' beliefs. And it should create a sense of shared value between the attorney (and thus his or her client) and the jury.

6. How *Not* to Determine Themes

Much misinformation exists among trial attorneys regarding how to determine the best trial theme most effectively. Some believe that a random gathering of colleagues and support staff, organized to listen and deliberate on a presentation of the case, is an adequate way to determine the best trial theme. This could not be further from the truth. Such an arbitrary group's intuitive grasp of the case, *vis–à–vis* the most appropriate trial theme, may differ substantially from how a jury will consider things.

Some attorneys learn to their chagrin that the recommendations of such *ad hoc* groups can

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[1]. Dozens of valuable themes involving pain, riches, wisdom, good versus evil, and so on can be found in the Bible. Along this line, the "*Seven Deadly Sins*" make powerful themes for commercial cases.

lead *away* from the best trial theme and strategy! Relying on any such group's intuitions concerning the best trial theme and case strategy is a highly unreliable way to forecast jury attitudes. A theme developed in this haphazard fashion often proves to be a shocking disappointment for the attorney at trial time—and a disaster for the client.

7. Intuition

Intuition has its uses. The methodology by which novelists, artists, poets, and other creative individuals develop themes for their work is usually intuitive. Intuition is also an indispensable forecasting technique for persons occupied in many other colorful fields of endeavor, including sports handicapping, professional gambling, prospecting for gold, and weight–guessing at carnivals.

However, theme development for the courtroom should *not* be based on intuition, instincts, or guesswork. The attorney has a professional responsibility to determine—*with as much certitude as possible*—how the jury will judge the merits of the case as presented. The trial theme is the heart of the case. A flawed theme can *kill* the case. To determine the best trial theme, the attorney must make sure to employ the most rigorous theme–testing methodology available—and not a random sampling of opinion.

8. Finding the Ideal Trial Theme

The most effective way to determine the best trial theme is through jury focus groups and other jury simulations. This parallels the *test–marketing* of products common in the commercial sector and of issues and individuals in the political sector.

Major corporations never introduce their products without first thoroughly testing their appeal with consumers. Political parties use opinion polls and primaries to test a candidate's appeal with the voters before they sponsor any individual for public office. Similarly, the trial attorney should use jury focus groups and jury simulations to *test–market* alternative trial themes and case strategies.

Not just any jury focus group or jury simulation will do the job. Some mock juries organized for attorneys often prove to be no more reliable in predicting jury attitudes than the *ad hoc* groups attorneys organize.

What jury focus groups and jury simulations genuinely work? A textbook definition will be helpful:

*Meaningful results* in determining a trial theme that will gain the *widest possible level of acceptance* (*i.e.*, the theme that is most consistent with the jury members' thought processes) can only be achieved by carefully constructed and controlled social science experiments using *scientifically valid* jury focus groups and jury simulations; and precise theme–choice recommendations based on *statistical and other sophisticated analyses* of the results of these experiments.

This definition is extremely precise—and for good reason. Each of its deliberate qualifiers and conditions is needed to describe the type of surrogate jury research that can predict jury

attitudes and behavior with reliability. Take a look:

*Meaningful results*—Attorneys are assured that the procedures outlined—*i.e.*, scientifically valid jury focus groups and jury simulations—can determine the best possible case theme with real certitude. The theme recommendation is validated by the scientific methodology employed.

*Widest possible level of acceptance*— Determining the best trial theme for the typical *red light, green light*–type case is usually not too difficult. Finding themes with the broadest possible appeal for more complex cases is a far more demanding task.

*Scientifically valid*—Anyone can organize a meeting of colleagues and friends to try out various trial themes and then make a recommendation on what he or she deems to be the most popular theme. But this is not valid scientific methodology. Any theme recommendation developed in this manner will have no quantifiable significance regarding the appeal it may have with a jury. (*It may have none.*)

*Statistical and other sophisticated analyses*—Even if the surrogate jury is properly organized and administered, all comments and opinions expressed by the surrogate jurors must be scientifically evaluated and interpreted to achieve meaning. A lawyer is professionally able to interpret the law. But it is the social scientist (generally a psychologist specializing in jury research) who is needed to professionally analyze and interpret the deliberations of subjects in controlled psychological studies. These include jury focus groups and jury simulations.

Only jury focus groups and jury simulations that are organized and evaluated on a scientific basis can reliably determine a true *jury–validated* theme—*i.e.*, one that is *guaranteed* to develop the widest possible appeal with the jury. An *ad hoc* group cannot. Maybe such a group will come up with the right theme—*and maybe it won't*. The attorney won't know for sure until the verdict is read.

9. Litigation Research

The organization of jury focus groups and jury simulations is not an art—*it is a science.* This field of science is known as Litigation Research. It employs actuarial methods based on experimental design[2]. Its product is the statistical analysis and interpretation of systematically collected scientific data concerning probable jury responses to selected stimuli[3]. *Nothing is intuited.*

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[2]. Experimental design is the plan for a scientific study in which all the variables are controlled except for the one of interest (*e.g.*, the best trial theme). It is a scientific "frame" put around a piece of the physical world (*e.g.*, the jury pool) to observe it in detail and to test the effect(s) of imposing a change (*a variable*) on it.

[3]. The extent of trial "stimuli" presented to surrogate jurors depends on the type of jury simulation to be conducted. Such stimuli include: copies of the jury instructions, verdict forms (different versions of this form are evaluated to discover which will prove most advantageous for a particular case), *voir dire* questions; the fact pattern; any pictures, graphs, and other presentation materials that will be used in court; "Day–in–the–life" videos (if applicable); relevant dispositions; plus opening statements and closing arguments.

Litigation research is concerned with juror predispositions, beliefs, opinions, and attitudes.[4] The findings that derive from this branch of psychology are not foolproof. However, they do significantly increase the probability of developing *jury–validated* trial themes and of impaneling the best possible jury for a particular case.

The product of Litigation Research involves scientific results and findings which often are presented as a series of "*if–then*" statements— "if this theme is used, then jury response 'X' will occur"; "if this evidence is presented, then 'Y' will occur." Such information can be invaluable in planning courtroom strategy. Much of this information derives from surrogate jury research. How are these research projects organized and what can they achieve?

10. Surrogate Juries

Jury focus groups and jury simulations function like a Rorschach test, illuminating jurors' cognitive processes. They consist of abbreviated versions of an upcoming trial presented before a carefully selected sample of surrogate jurors. The deliberations of these jurors are professionally evaluated and interpreted to determine jury attitudes concerning the case and all of its key aspects. This includes the basic theme of the case and its presentation.

Formats for surrogate juries vary considerably. The choice of format depends on such factors as the experimental design to be used, the specific issues to be determined, the type and complexity of the case, and so on. Each surrogate jury conducted is always "case specific."

Surrogate juries usually are conducted in the venue where the trial will take place. This aids in recruiting surrogate jurors whose values and beliefs will match the jury pool's. The number of surrogate jurors generally will be the same as that of the actual jury.

In most cases, two separate series of jury simulations are conducted. (A typical series involves a presentation that is repeated with different groups of surrogate jurors at least three to 10 times. As in any other scientific test, this repetition is essential to ensure the validity of the results.) The first series of jury simulations takes place at least 90 days before trial or before discovery is complete. It is organized to determine the issues of importance for potential jurors, along with the best trial theme and strategy. The second series of jury simulations is performed again shortly before the trial is to take place. It helps determine how jurors will perceive the facts, evidence, and arguments once discovery is completed.

The specifics concerning how surrogate juries are organized and evaluated are too technical to be of interest to anyone but psychologists and other social scientists. What is of interest is the uncanny amount of precise information concerning juror attitudes that jury simulations and jury focus groups can uncover regarding a particular case.

Just as a crystal ball into the minds of jurors, jury focus groups and jury simulations can reliably indicate what jurors will think and feel about the case; what "personality types" will perceive the case facts favorably (and unfavorably); what are the relevant attitudes that may

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[4]. Studies show that jurors are most influenced by personal biases, secondarily by legally inadmissible information acquired during the trial, and only third by legally admissible evidence

predispose jurors to be less than neutral; what issues jurors will consider most important; what trial theme and case strategy will have the most appeal; what *voir dire* questions will work best; what information jurors will need to hear (and even *when* they want that information presented); what areas of the case are subject to faulty perceptions by the jurors; what are the problem areas of the case; what case issues and facts are likely to be misunderstood; what is the assessment of damages; and what questions, if left unanswered, will stay on the jurors' minds...and possibly destroy the case.

Once armed with this invaluable data, the attorney can determine a winning trial theme and presentation strategy. He or she learns how to answer every question and address every issue that the jury simulations show are critical to a favorable verdict. It's like a poker player knowing in advance what his hand will be—and exactly what cards each other player will be dealt!

11. Who "Owns" the Theme?

A psychological principle known as "*Attribution*" theory predicts how individuals will place blame. It is a key determinant regarding the method by which jurors reach decisions in court cases. Attribution theory posits that blame devolves to a decision between "person" versus "situation." Did the patient die due to the fault of the doctor (*person*)? Or did death result because the patient was very sick (*situation*)? Did the plane fall out of the sky because of pilot error (person)? Or because of weather conditions (situation)?

Certain linguistic signals "cue" specific juror responses regarding how they place blame. One type of signal cues a blame response towards the "person"; a different signal cues a blame response towards the "situation." Through our firm's research we have discovered that these special linguistic cues are "owned" either by the plaintiff or the defendant. (*We have termed this status "Ownership" theory.*) Recognizing such cues and knowing how to put them to use can make the difference between success and failure in the courtroom. The following example will help demonstrate the point.

In the winter of 1993 I worked on a product liability case with Buddy Payne (*R.W. Payne Jr., Spence, Payne, Masington & Needle, Miami*) concerning a vehicle roll–over. When we first tested the case, we found that the surrogate jurors spent much of their time speculating on how the driver probably "*over–corrected*" his steering, thus resulting in the roll–over. Who owns "*over–correction*?" The driver does...so the jurors blamed him for the incident.

We recast the deliberations by introducing two new terms— "*steer–ability*" and "*steer–worthiness*." Who "owns" these terms? "*Steer–worthiness*" clearly "belongs" to the vehicle manufacturer...and guess whom the jurors now blamed for the incident? The manufacturer, of course.

We repeatedly tested "*steer–abilit*y" and found that this possible trial theme achieved broad acceptance with different groups of surrogate jurors. We proceeded to trial and won the case handily for the plaintiff. The vehicle manufacturer lost because: 1) it "owned" the "steer–ability" theme, and 2) we made sure to hang the theme on them whenever we could during the trial.

It is important to understand the power of certain words and the responses they can "fire off"

in jurors. For example, the attorney representing the plaintiff in a medical malpractice case should avoid use of the word "*disease*" because it is "owned" by the client. Safer words to use are "*treatment*" or "*solution*." "Why did the doctor not come up with the right treatment?" "Why was the right solution not developed?"

Is the proposed trial theme "owned" by the plaintiff or the defendant? Who benefits and who loses due to its use? Any determinations concerning what trial theme to employ should be made with these key considerations in mind.

12. Using Themes Effectively in the Courtroom

The theme is an invaluable tool the attorney can use to build the strongest case possible. To do so, the attorney must understand how to maximize use of the theme in court. One of the best ways is by "*enveloping*" the theme so it is integrated into every aspect of the attorney's presentation—*voir dire*, opening statement, direct examination, cross examination, and closing argument.

This strategy of "enveloping" the trial theme is like packaging and sending a message (*i.e.*, the theme) that the jurors are *guaranteed* to receive. To demonstrate, consider the following example: A negligence case has been brought against a defendant—a large hotel. Jury testing indicates "*prevention*" to be the ideal theme for the case. The attorney must "envelope" the theme throughout all the key segments of the trial:

*Voir dire*— "Do you believe it's important to *prevent* bad things from happening to people?" "What do you think about companies that don't do anything to prevent avoidable injuries from taking place on their properties?"

*Opening Statement*— "The basic issue in this case is simply, ‘Could the defendant have *prevented* the injury from occurring to my client?' Why is *prevention* apparently not an important concept to them?"

*Direct Examination*— "As a major hotel with over $—— million in assets, couldn't they have been more concerned to *prevent* people from being hurt when on their premises? What steps could they have taken to *prevent* this type of horrible injury from paralyzing my client?"

*Cross Examination*— "Please look at this chart showing the many injuries that have taken place at your hotel since 19—. Can you tell us how many of these injuries could have been *prevented* if proper safety measures had been implemented?"

*Closing Argument*— "We've been here for six days but not once has the defendant described a single step it has taken to *prevent* injuries from taking place, like the one that has condemned my client to a wheelchair for the rest of his life."

A great trial theme is like a Swiss Army knife—it can be used in 1,001 different ways to win the case! And it can be used in conjunction with many powerful rhetorical techniques:

*Analogies & Metaphors*—If members of a jury don't understand what you are talking about,

they probably will not find in your favor. That's why the use of analogies and metaphors are so important. If the theme is your trial story, then analogies and metaphors are the language you must use to tell that story so jurors will understand it. "The defendant's failure to *prevent* this injury from occurring is like failing to move a pair of dangerous children's roller skates from the middle of the cellar steps."

*Rhetorical Questions*—The use of rhetorical questions will produce more favorable results with juries than statements where strong arguments are employed. (Studies show that introducing a counter–attitudinal message with questions leads to a more intensive processing of the message's content than introducing it with statements.) Use of rhetorical questions is predicted to increase award, diffuse more responsibility on the decision–makers (jurors), and make the presentation more interesting. "Is the defendant simply too arrogant to worry about *preventing* this type of injury from taking place?"

*Expectancy Statements*—Framing statements to the jury by saying, "You can expect us to show that..." is an excellent way to get the jurors to anticipate (*and wait for*) trial theme messages and other key information you plan to introduce later. In psychology, this is termed gaining the "selective attention" of the subjects. This means that jurors will unconsciously look for information that supports the case argument and disregard information that doesn't. You can expect us to show that the defendant could have *prevented* this injury from happening—but failed to do so."

*Visual Aids*—Jurors take an essential first step toward forming opinions through a memory process called encoding. Attorneys must help jurors encode with pictures and visual aids. All demonstrative evidence should support and enhance case themes. Colors that evoke associations with feelings or symbols—*e.g.*, red for stop, green for go—should be used. For example, a PREVENTABLE ACCIDENTS chart that lists in red all *preventable* injuries that have taken place at the hotel will help *show* jurors what the attorney has been *telling* them throughout the trial.

*Parallelism*—One good way to get jurors to pay closer attention to what you have to say is by parallel structure in language. "The injury to my client was *preventable* because it was avoidable. It was avoidable because it was foreseeable." (This example also illustrates the power and energy of *rhythmic* language.)

*Rule of Three*—Studies in communications research show that an idea must be repeated at least three times for it to be remembered. "*Prevention! Prevention! Prevention!* If only the defendant had given some thought to this basic concept, none of us would have to be here today."

*Use of Double–Binds*—Characterizing the opposition in "either–or" terms that are both negative is an effective way to minimize juror sympathy for the opposition. "Did the defendant fail to *prevent* this injury because they were negligent...or because they were arrogant and just didn't care about *preventing* injuries to their guests?"

It is important to understand that jurors use an idiosyncratic approach to handle information from a case. Repetition, key phrases, analogies, visuals, tone of voice, and other non–evidentiary factors have an extremely powerful effect on each juror's subconscious and the way he or she processes information and reaches decisions.

By constantly "enveloping" the theme throughout every point of the trial, the attorney is able to acutely orient the viewpoints of the individual jurors to the case *as he or she wants them to see it*. The theme becomes the jurors' primary trial "road map"—showing them the best route to take to a good verdict decision.

However, the trial theme cannot guide the jurors to a successful verdict *if it is the wrong theme*. Indeed, repeated mentions and use of the *wrong* theme throughout the trial will likely irritate the jurors and turn them off.

This is why the trial theme must be thoroughly tested through jury simulations before its actual use in court. If this vital step is not taken, there's no reliable way to tell whether jurors will react positively or negatively to the proposed trial theme. It's a roll of the dice either way.

13. The Best Jury Research Format to Test Trial Themes

There are special jury focus groups and other special jury simulations that are planned and designed specifically to test a particular trial variable or variables—the most effective *voir dire* questions, the case's true settlement value, the effect of a particular witness's testimony, and so on. What special jury focus group or jury simulation format works best to determine the right trial theme?

After planning and organizing more than 5,000 jury focus groups and jury simulations during the past 17 years, our firm has determined that one specific surrogate jury research format—the "interactive" focus group—works best to test trial themes.

This distinctive jury focus group is organized on an informal basis to encourage the surrogate jurors' full and open participation and interaction. The surrogate jurors can sit, stand, or move about as they desire, *hors d'oeuvres* and other refreshments are available, and the overall setting is kept as casual as possible to promote a relaxed "social–type" ambience. (An ideal setting for the "interactive" focus group is a hotel suite with one or more sofas and numerous easy chairs.)

Both sides of the case are presented during the focus group proceedings, followed immediately by comprehensive deliberations among the surrogate jurors. A behavioral scientist is present to stimulate but in no way lead these deliberations. His or her primary goal is to keep the discussion focused on what the surrogate jurors determine to be the basic issues of the case.

The surrogate jurors are subtly encouraged to simplify the case—to break it down into its fundamental components and issues. They are further encouraged to develop answers for some essential questions: What is the significance of the case? What is it all about? What is its underlying message? What word of phrase best describes the case and brings it all together? *What is its theme?*

In addition to a professional analysis of the group's deliberations, each surrogate juror is interviewed privately to determine his or her attitudes concerning the basic issues of the case. These individual responses are evaluated psychometrically (the methodology for quantifying mental and other subjective data) *vis–à–vis* the various trial themes being investigated and/or

tested; and each individual response is again measured psychometrically against the surrogate jury's *group* deliberations concerning the theme of the case as they envision it.

Through this highly focused investigatory process, the basic theme for the case clearly emerges. This special "interactive" focus group testing is then repeated again and again with different sets of surrogate jurors to ensure the validity of the results as established—*i.e.,* the trial theme *guaranteed* to achieve the widest latitude of acceptance with potential jurors.

14. Must Use the *Right* Theme

While it is important to build your case around a basic theme, it is critical to use the *right* theme, *i.e.*, a theme guaranteed to achieve the widest possible appeal with a jury. The problem is that too often, attorneys tend to rely on intuition, hunches, and guesswork to come up with the right themes for their cases.

Intuition has its uses. The methodology by which novelists, artists, poets, and other creative individuals develop themes for their work is usually intuitive. Intuition is also an indispensable forecasting technique for persons occupied in many other colorful fields of endeavor, including sports handicapping, professional gambling, prospecting for gold, and weight–guessing at carnivals.

However, theme development for the courtroom should *not* be based on intuition, instincts, or guesswork. The attorney has a professional responsibility to determine—*with as much certitude as possible*—how the jury will judge the merits of the case as presented. The trial theme is the heart of the case. A flawed theme can *kill* the case. The client deserves more than an educated guess concerning what the best theme for his or her case should be.

This means that the theme should be thoroughly *tested* prior to trial. The attorney who does not take this essential step often learns only *after* the jury has ruled against his or her client that the selected theme was wrong. Perhaps it did not support the case facts and was not considered credible by the jurors; it may have run counter to the jurors' beliefs and prejudices, or it was inappropriate in some other essential way.

Testing a theme to make sure that it will develop the widest possible appeal with jurors does not mean trying out various themes, *ad hoc*, on a random assembly of colleagues and office staff. Such an arbitrary group's intuitive grasp of the case, *vis–à–vis* the most appropriate trial theme, may differ substantially from how a jury will consider things. Some attorneys learn to their chagrin that the recommendations of casually–organized theme–testing groups often can lead *away* from the best trial theme and tactics!

The bottom line is clear: to determine the ideal trial theme, the attorney must make sure to employ the most rigorous theme–testing methodology available—and not a random sampling of opinion.

15. Developing the Right Trial Theme

The best way to determine the ideal trial theme is through jury focus groups and other jury simulations. This parallels the *test–marketing* of products common in the commercial sector and of issues and individuals in the political sector.

Jury focus groups and jury simulations function like a Rorschach test, illuminating jurors' cognitive processes. They consist of abbreviated versions of the upcoming trial, as presented before a carefully selected sample of surrogate jurors. When professionally organized and evaluated, jury focus groups and jury simulations can reliably determine a true *jury–validated* trial theme, *i.e.*, one that is guaranteed to develop the widest possible appeal with the jury.

Additionally, jury focus groups and jury simulations provide a wealth of other useful information, such as the most effective voir dire questions to ask, the best way to structure the opening statement and closing argument, how to handle direct and cross examinations, the likely impact of expert witness testimony, and so on.

16. Trial Theme Discovery

Focus groups are the optimum research tools available to determine the all-important trial theme. What is a theme? A theme is a brief—often one or two words— summary of the case, it's *raison d'être*. A strong theme is absolutely essential to courtroom success; indeed, theme development is the most basic and essential concept for all planned and structured communications. You can't have the chicken without the egg, and you can't communicate in any meaningful way—in court or out—without a compelling theme.

Theme development is particularly fitting when it comes to all forms of persuasive communications, including courtroom argument and debate. Attorneys need to consider the following trilogy of truths regarding theme development: 1) trial themes *personalize* the primary case issues; themes help jurors form *impressions*, and 3) *impressions* win lawsuits.

Decades of jury research indicate that jurors *deliberate* in themes. The trial theme provides essential meaning to the jurors, and helps them organize and remember the case facts. A strong theme will prompt the jurors to look for evidence that supports the theme while ignoring evidence that doesn't. The right theme helps jurors rationalize away all the case conflicts and justify the desired case viewpoint.

Some examples of worthy trial themes include "David and Goliath" or "arrogance" (for commercial cases), "an ounce of prevention is worth a pound of cure" for negligence cases, and "covering all bases" for medical malpractice cases.

It is essential that the attorney find a theme that will achieve the widest possible level of acceptance with juries (*i.e.*, the theme that is most consistent with the jurors' thought processes and metaprograms). This can best be achieved through focus group research.

When you find the right theme, you will know it—the whole case comes swiftly together and falls neatly into place. The jurors' individual frames of reference shift positively towards you; and it suddenly becomes clear that your point of view regarding the case dispute is the right one and the other side's is wrong. A good facilitator does not rest until he or she finds the ideal theme.

In a recent disposable lighter case in which I assisted, the manufacturer had a childproof patent for years, but did not make it available to the marketplace. The mother in the case had kept the manufacturer's *non*-childproof lighter well hidden. Nevertheless, her small son was severely

burned after finding the lighter and playing with it.

The lighter met all applicable standards and worked precisely as intended. For these reasons our focus group participants did not accept any of the various concepts proposed by the plaintiff—*i.e.*, that the lighter was unreasonably dangerous, that it was defective, or that the manufacturer had been negligent in its failure to warn of possible danger.

The case was going nowhere fast. Then, during additional focus group research, the concept of "*effort*" suddenly surfaced. It was as if someone had turned on a giant spotlight in the room, brightly illuminating and clarifying the case so all could understand and agree on it. The surrogate jurors felt in unison that while the mother had at least made an effort to prevent an accident by hiding the lighter, the lighter manufacturer had made no effort at all to market a safer product, even though it was fully capable of such action. The "effort" theme was subsequently employed in court to win a substantial award for the plaintiff.[5]

Once the appropriate theme is discovered, it needs to be rhetorically adjusted to the jurors' key metaprograms so that it will resonate most strongly. In our lighter case, for example, a valuable and revealing voir dire question was developed via this technique: "Why is it important for a manufacturer to put forth some *effort* to prevent injuries, even if their products meet the prevailing standards?"

17. Enveloping the Theme

The theme is an invaluable tool the attorney can use to build the strongest case possible. To do so, he or she must understand how to maximize use of the theme in court. The best way to accomplish this is to "envelope" the theme throughout every segment of the trial.

The attorney may have learned during pre-trial research, for example, that the jurors will consider "precaution" to be a primary issue for the premises liability case he or she is planning. The attorney has decided therefore to use "precaution" as the basic theme for the case. He or she should then "envelope" the theme throughout the various trial segments:

*Voir dire*— "As a homeowner, sir, do you take *precautions* to prevent accidents from occurring? How do you feel about another homeowner's failure to take the same *precautions* that you do?"[6]

*Opening statement*— "The key issue of this case is whether the defendant could have taken *precautions* to prevent this grievous injury from occurring to my client. Why didn't they? Was it

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5. A powerful trial theme distills all of the arguments and focuses the jurors'attentions to the desired point of view. Along these lines, nothing motivates jurors more than clever analogies, metaphors, and/or similes describing key case facts. These should be the attorney's primary persuasion tools. Analogies, metaphors, and similes give meaning to complex arguments and facts. They simplify concepts and provide essential "hooks" upon which jurors can hang their deliberations. A good analogy, metaphor, or simile teaches, persuades, and relaxes jurors, all at the same time—*e.g.*, "the doctor was asleep at the wheel," "he went into the operation strong as an ox," or "the defendant is as rich as Croesus."

6. Pre-trial litigation research can help design the perfect voir dire. Once the theme has been identified through jury focus groups, it can be employed to develop useful questions that will shed much light about the jurors and their basic attitudes concerning the case.

because they were negligent, or because they just didn't care about instituting adequate *precautions* to prevent injuries from occurring to their guests?"[7]

*Direct Examination*— "Sir, when you entered the premises, did you notice whether the defendant had set up any safety fencing, had posted any warning notices or signs, or taken any other *precautionary* measures, to advise against possible hazards due to the renovations taking place above?"

*Cross-Examination*— "Four people have been injured at your office building during the past three months. What type of injuries do you think could have been prevented, if you and your staff took some preliminary safety *precautions* at the property?"

*Closing Argument*— "In four days of testimony, the defendant has not been able to detail a single action it took as an essential *precaution* to protect people visiting the office building while the extensive ceiling renovations were under way."

18. It Don't Mean a Thing If it Ain't Got That Theme

Remember high school composition class? The instructor drilled repeatedly that strong writing and public speaking depend on a clear *theme*—the most basic concept for planned and structured communications. It was and it remains a valuable lesson: You can't communicate in a sustained, meaningful, and convincing way without a theme.

This universal maxim is equally valid when it comes to trial planning, preparation, and presentation. A vivid and powerful trial theme is absolutely vital to effective courtroom communications; indeed, it's the *raison d'etre* of the attorney's case. Presenting a case to jurors means telling them a convincing story they will be able to readily accept. This is impossible without a compelling theme.

A trial theme frames the case so the jurors will see it in a specific desired way—an essential factor in winning the case. Consider, for example, the probable difference in verdicts if the jurors are led to regard a particular trial dispute as a "*darting child*" case instead of a "*child knock-down*" case. Research indicates that jurors *deliberate* in themes. Struggling to make sense of the confusing and conflicting facts presented to them during the trial, jurors attempt to organize this information into certain well-established paradigms. They accomplish this best through themes. It is essential therefore that you, and not the opposing counsel, supply the jurors with the key theme they will require, *and will be looking for,* in order to bring meaning to the trial and thus reach their verdict.

What constitutes a good trial theme? This should be a basic and memorable concept that summarizes and headlines the case in a few words—"arrogance" for a commercial case, "murderous rage" for an assault case, "thou shalt not steal" for an intellectual property case. (The Bible is filled with numerous valuable themes that work well in trials. In this regard, the "Seven Deadly Sins" often make excellent themes for commercial cases.)

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[7]. Note the use of the *double-bind* in the attorney's opening argument. Employing "either-or" terms that both are unattractive about your trial opponent is a proven way to turn the jurors' potential positive feelings away from the opponent.

An effective trial theme is the putty that holds the case together for the jurors. It helps them eliminate all of the confusion regarding the various trial conflicts and justify the desired case viewpoint.

Clearly, a workable trial theme is a key factor to be successful in court. But not just any theme will do. Indeed, the wrong theme can work *against* your client's best interests. (A flawed theme can kill the case!) You must find the ideal theme—that is, one certain to achieve the widest level of acceptance among jurors. This trial theme should not be intuited nor developed through an *ad hoc* grouping of colleagues and friends. (What appeals to these individuals may have no relationship at all to what the *jurors* will consider important.)

The ideal trial theme can only be determined through rigorous testing via jury simulations and jury focus groups. Such litigation research is similar to the test-marketing that is conducted before a commercial product or service is introduced, or a political candidacy or issue is floated.

Jury focus groups and jury simulations involve surrogate jurors who are carefully recruited and organized to evaluate the case and its specific key issues. Various trial themes are rigorously and repeatedly tested with different groups of surrogate jurors to see which will be most preferred. Through such repetitive jury research the ideal trial theme will emerge. The attorney can then use this scientifically-validated trial theme to plan the case with confidence.

For the attorney who has never worked with jury focus groups or jury simulations, the results can be astounding. Such litigation research provides a unique crystal ball into the minds of jurors, uncannily and accurately revealing what they will think and feel about the attorney's case.

Once the ideal theme has been determined, it should then be put to maximum advantage inside the courtroom. Attorneys are familiar with the concept of primacy—jurors remember (*learn*) best what they hear first. It is important, therefore, to strongly hammer home your theme with the jurors during the opening statement. Additionally, the theme should be referenced at key points throughout the other trial segments—direct examination, cross-examination, closing argument, and even voir dire.

In terms of voir dire, the attorney can reference—and thus introduce—his or her theme through questions to the panelists concerning it. If it has been determined, for example, that the best theme for a negligence case is "prevention," the attorney could ask the panelists what their attitudes are regarding taking safety precautions to "prevent" injuries to others.

This process of punching up or "*enveloping*" the theme on a continual basis sends the jurors a message—the theme—they are bound to receive. Such regular repetition of the theme throughout the trial will firmly reinforce it in the minds of the jurors; and in the process, provide them with the basic schematic they will require to organize their deliberations. The attorney's theme becomes, in effect, the all-encompassing motif by which the jurors are able to make sense of the trial—and thus determine who should win it.

19. Identifying the Conversation

During focus group or mock trial deliberations, the astute trial consultant and attorney will

key in on juror conversations which may occur during the actual trial. Deliberations are simply conversations among the jurors. Jury focus groups are excellent strategic planning aids because they demonstrate in vivid fashion how the jurors will likely converse about the case and its key issues. Normally there is one critical conversation regarding the defendant and another critical conversation regarding the subject of damages. Consider the following example of a deliberation conversation concerning pain and suffering:

Juror No. 1: No amount of money will compensate her.
Juror No. 2: I agree. How can we even consider this?
Juror No. 3: You're right. It's very difficult to get a handle on just what is the responsible thing to do.
Juror No. 4: It's difficult, but does that mean she gets nothing?
Juror No 1: No, let's give a fair amount.
Juror No. 3: What is fair?
Juror No. 1: Well, I guess that's for us to decide, isn't it?
Juror No. 5: In that case, what will the money be used for?

Note that during their deliberations, the jurors constantly pose questions to each other (and to *themselves*); all questions must be answered before they have discharged their duties and can go home. If pre-trial litigation research is conducted properly, it can be anticipated that the same questions will be raised during jury focus groups and jury simulations that will also be raised during deliberations. Armed with this key information, the attorney can rhetorically pose these questions during the trial, then immediately *answer* them. The jurors will then have ready answers to these questions during deliberations.

Pre-trial litigation research enables the attorney to anticipate the deliberative "conversation" that will take place; and thus be in an excellent position to influence its overall content and direction. This capability provides the attorney with tremendous power. In the "pain and suffering" conversation described above, the jurors will be more psychologically predisposed to rely on the attorney's answers as a useful framework when they must consider these issues.

20. Complex Cases Require Strong Themes

The most able litigators know that you always need a good trial theme in order to effectively present and successfully win your case in court. This is particularly true when it comes to complex commercial cases such as intellectual property disputes.

A good theme summarizes the sometimes difficult to understand intellectual property case in a few words so the jurors can make sense of it. It frames the case so that jurors see it the way the attorney *wants* them to see it. And it provides jurors with an essential peg upon which they can hang their deliberations.

This means that the case will be discussed in terms favorable to the client. Furthermore, accentuating the theme throughout all aspects of the trial helps to establish the tone and rhythm of the case. As in tennis, it's like keeping the ball in the opponent's court for the entire match.

The trial theme binds the case together. It is a life preserver jurors can hold onto throughout

all the trial's tempests and tumult. It helps jurors rationalize away all the case conflicts and justify the preferred viewpoint concerning the case facts.

The trial theme is essential for juries. You can't have the chicken without the egg, and you can't communicate in any sustained and meaningful way with jurors without a compelling theme.

21. Themes Can Spice up “Boring Cases

Intellectual property disputes generally lend themselves well to strong themes. Stay Electronics, a relatively small computer software firm, recently beat mighty Microsoft Corporation in court over a patent infringement suit regarding disk compression technology. "David and Goliath" is the ideal theme for such a case—a small company battling for their rights against an industry giant. When presented in such a way, the jurors are predisposed to side with the plaintiff, because natural sympathies almost always are with the "little guy" in a fight.

"Thou shalt not steal" is another strong theme that often works well for many copyright, patent, trademark and similar infringement cases. A couple of years ago the humor columnist Art Buchwald, and Alain Bernham, another plaintiff, were awarded $900,000 in damages by Paramount Pictures, producer of "Coming to America." Mr. Buchwald claimed that he thought of and presented a story similar to "Coming to America" to Eddie Murphy four years prior to the movie's production.

Mr. Buchwald was able to argue successfully in court that his idea had been stolen and used by others to enrich themselves. When employed as the theme in such a case, "Thou shalt not steal" creates a sense of shared value between the jurors and the plaintiff. Everyone agrees that it is wrong to steal.

(*Note*: Dozens of valuable themes involving riches, wisdom, good versus evil, and so on can be found in the Bible. Along this line, the "Seven Deadly Sins" make powerful themes for commercial cases.)

A great trial theme locks the jury's attention to the case's pivotal point (*e.g.*, Microsoft Corporation arrogantly appropriated for themselves the hard–won technology of a much smaller firm). It crystallizes complex legal concepts and arguments, while at the same time making the ideas they represent impossible to forget, and many times even impossible to deny.

E. CONCLUSION:

Astute trial attorneys, recognizing the significance of theme development have made trial consulting the fastest growing part of the trial industry. The merger of law and social science is a marriage of overlapping skills which combine to give the field of persuasion a new, modern look. The attorney who is not armed with help from the social sciences but must confront opponents in court who are heavily armed runs the risk of finding himself or herself at a distinct disadvantage.

The goal of this paper has been to acquaint legal professionals with the myriad aids which are available from trial consultants, focus groups, social sciences and psychologist in our ongoing efforts to most effectively represent our clients best interest at the courthouse.