I. INTRODUCTION

A winning trial attorney recognizes that to reach the goal of a successful verdict, you must first develop a plan of action. The plan that you use to prepare and present the case must have meaning and direction. In order to achieve this, your trial plan should be built around a theme that will define the case and will allow the jury to rally around that theme.

To be victorious at trial you need to do more than just present the facts and the law so as to allow the jury to decide the case. It is important to discover the heart of the case early enough in the litigation so that the winning theme may be developed through discovery and properly presented to the jury. Once established, the theme should tell the jury in very few words what the case is really about.

II. HOW TRIAL THEMES BRING CASES TO LIFE

Trial themes bring cases to life. They also help the jurors form impressions that will assist them in understanding the case. It is important to appreciate the power that certain words have and the responses that they create in the jury’s collective mind. A good theme that uses powerful words will prove to be very persuasive and effective.

III. DEVELOPING PERSUASIVE AND EFFECTIVE ARGUMENTS

Attorneys are often described as storytellers. The difference between a storyteller and an attorney is that the attorney is required to prove that his or her client’s story is true. By starting the story with the theme and presenting evidence that supports that theme, the attorney lets the jurors follow the story and determine that the evidence and facts in the case support it. This will lead to a successful result at trial.

IV. CREATING A SUCCESSFUL TRIAL THEME

Creating a successful trial theme is not easy. We are not trained in law school to do this. Attorneys are taught to think logically and to worry about proving every element in a case. Unfortunately, jurors do not necessarily think that way. What you feel is important and what a juror may think is important may be completely different. Thus, it is essential for you to present concepts the jury can relate to while supporting the record with then necessary proof required to survive a motion for a directed verdict.

How do you create a theme? After you have fully discussed the case with your client and reviewed the key documents, then sit around your office with your associates, partners, or paralegals and brainstorm. Consider using a flip chart to write down
different suggestions, concepts, and ideas during this initial session. Discuss all ideas, suggestions, and comments regarding the type of case and how it should be developed. Reach a consensus on what plan of action to follow, and then narrow the key points, concepts, and themes for further discussion. As discovery progresses, meet again with your team to select the theme for the case.

V. PREPARING FOR THE CLOSING ARGUMENT

Another way to prepare a winning theme is to visualize the perfect closing argument in the case. Picture the jury accepting and understanding everything you say about the case. Consider the types of witnesses that you are using, the experts that you have hired, demonstrative evidence that you have shown, and the arguments you are making. Visualize the best argument you have ever made and the best result you have ever obtained in a jury trial. After you have visualized this scenario, go back and identify what the case is really about. Once you have identified the theme, hire the experts, propound the discovery that you need to support the theme, and develop the case based upon the successful theme and argument that you visualized.

In order to visualize meaningfully, you must have peace and quiet. Close the door, shut off the computer, unplug the telephone, and concentrate on your case. If you are going to have others in your office, make sure that they are all doing the same thing that you are doing, concentrating on the case and assisting you in developing a winning strategy and theme.

Some believe that themes should be developed with the assistance of jury consultants and focus groups. Using jury consultants and focus groups can be very helpful but, unfortunately, very expensive. You should consider hiring a trial consultant to assist you in theme selection and development if your client can afford this type of assistance. If you cannot afford a jury consultant and formal focus group, consider rounding up people that are not involved in the legal field and discussing the case with them without telling them who you represent. Listen to their ideas and concepts and note how they respond to your case. Take notes on the key issues they identify. This will greatly assist you in choosing the correct theme and preparing a persuasive case.

VI. USING THE TRIAL THEME THROUGHOUT THE TRIAL

Although they may have great courtroom skills, many attorneys do not know how to develop strong themes for their cases or how to use them in the courtroom. Some attorneys are able to create a trial theme, but are unable to integrate it into the case. The trial theme should be used throughout the trial. It should be introduced in voir dire, discussed during opening statement, expanded upon during direct examination, used as a tool in cross-examination, and developed and explained in closing argument.

During voir dire, prepare the jury to accept the theme so that the jury will be ready, willing, and able to find in your client’s favor. Ask open-ended questions that will
require the jury to think about the theme of your case. For example, in a medical malpractice case with the theme “sloppiness and carelessness” consider asking: “Do you think that a radiologist should be sloppy and careless when reading an X-ray?” and “What can happen if a radiologist is sloppy and careless?” In that example, “sloppiness and carelessness” are the operative words.

During your opening statement, you should deliver the theme and give a complete explanation as to how the facts in the case will support it. Deliver the theme early in the opening. Tell the jury that this is a case about a sloppy and careless radiologist. Tell the jury the plaintiff would not be here if the defendant had been careful rather than sloppy and careless in reading an X-ray.

During the presentation of the case-in-chief, every exhibit introduced in evidence and every witness that is called to testify should support the theme. All of the evidence in the case should help support the theme that the injury could and should have been prevented had the doctor been careful and not sloppy and careless.

During cross-examination, use the key points that establish the basis of your case theme as a tool in questioning the adverse witnesses. Ask questions that will force the opposing witness to concede points consistent with your theme, such as “Do you agree that a radiologist should carefully read an X-ray and that a sloppy and careless reading could be dangerous?”

Use visual aids throughout the trial to support the theme and develop the concepts you are attempting to prove. If you constantly deliver the theme throughout the case, you will be in a position to orient the jury’s focus as you deem appropriate and important.

During closing argument, put the story together so that a clear picture supporting your theme begins to emerge. This will help the jury to view the evidence in a manner consistent with your client’s view of the facts. Using our example, the jury should be left with the feeling that if the doctor had been careful rather than sloppy and careless, the Plaintiff would not have to be in court.

The closing argument is especially significant if the outcome of the case is too close to predict. At that point, the closing is the attorney’s last chance to persuade the jury to find in favor of his or her client.

The summation is the attorney’s chance to bring all of the evidentiary pieces together and to present the case in a strong, fluid, and persuasive manner. You must explain completely all points that help prove the elements establishing the theory of the case in a simple and precise way.

Do not use the podium. Instead, walk around freely. The podium blocks communication and sends a message to the jury that there is something between you and them. Present the closing argument without notes or with as few notes as possible.
If you must use notes, then use flash cards or very well organized papers so that you are not fumbling through documents while addressing the jury. Stand no closer than six feet from the jury. If you get too close, you will be encroaching on the jury’s comfort zone.

Begin the closing argument with a basic greeting. Almost all trial attorneys will thank the jury for their patience and attention before formally beginning the summation. This should not be patronizing but sincere and honest. You should also explain what the summation is all about. Give the jury a roadmap explaining what you are going to do and how you are going to do it.

Use simple and plain English. Leave legalese at the office, and avoid using excessively flowery language or complex legal terms. If you must use complex scientific, medical or legal terms, make sure those words and terms well before you use them during the closing argument.

Next, discuss the difference between a civil and criminal trial. The jury should understand that a civil trial is not conducted like a criminal trial and that at the end of the civil case, no one will go to jail or lose any privileges. The jury should understand that monetary damages are sought.

After that, discuss the standard of proof. Compare and contrast the standard of proof in civil cases from that of criminal cases. Provide examples of how the standard of proof works in civil cases. For instance, the trial attorney may explain that the greater weight of the evidence is like the scale of justice. That is, if the scale tilts to one side just a little bit, that is enough to be considered the greater weight of the evidence. You can use examples, such as the difference between 51% and 49%. These examples help the jury understand the standard of proof and how to decide the case.

Follow that discussion with a complete and interesting explanation about the basis of the lawsuit. Present a short summary of the theory of the case and the establishing evidentiary facts should be to the jury at that point. Deliver this portion of the closing as if telling a story.

After you have created the general picture, break down the case by elements in the order that they will be presented to the jury in the instructions. For example, in a negligence case, you should explain what the elements of liability are and how the elements were met in the case. Show how the evidence supports the theory of the case.

You should discuss the testimony of the witnesses and the documented evidence supporting the claim at that point as well. It is important not to simply rehash all the evidence presented during trial. If you present the entire case during closing, this will become too boring and you will quickly lose the jury. Instead, point out the highlights of the testimony and the key pieces of the evidence.

Never misstate the evidence or your position in the case. Jurors do not forget
these things, and they collectively remember everything that happens in the trial. Jurors can and will forgive a lawyer if he is kind and honest, but if they think the lawyer is lying to them or misstating the evidence or the law, they may never forgive that lawyer and the client may suffer as a result.

Make sure to use demonstrative evidence when explaining the key points in your case. The jury will need to see and hear the important parts of your argument. Use of demonstrative evidence greatly increases the effectiveness of the closing argument because it allows the jury to completely understand the case.

It is important to anticipate the arguments that the other side may make. You should prepare to rebut those arguments before they are made. However, it is important to avoid attacking the other side’s attorney directly. Juries do not appreciate this type of argument and it often backfires. Never engage in a personality battle with the opposing party or counsel.

After your discussion of damages, conclude with a strong ending. State the heart of the case, followed by a request that the jury find in favor of your client. Thank the jury for their attention, then sit down at counsel table and appear confident that justice will be served.

Always remember to deliver the summation convincingly, clearly, and in an organized manner. Great closing arguments are rarely spontaneous. They require proper preparation, organization, practice, and inspiration. If delivered properly the closing may make all the difference in the result of the trial. Thus, you should devote sufficient time and effort to properly prepare the closing argument.

A. Personal Beliefs Should Not Be Asserted During Closing Argument

When presenting closing argument, never assert your personal belief about the facts in the case or about anyone’s credibility at trial. A trial lawyer may not vouch for the credibility of a witness or even opine that a witness should be believed or not believed. It is also improper for a trial lawyer to state that he or she believes that his or her client was seriously injured during an accident. Further, it is forbidden to state a personal belief during closing as to whether a party acted reasonably or unreasonably in causing the accident being litigated.

Rather than personally attacking the opposing party or counsel, simply point out the inconsistencies in the opposing side’s testimony and the bias and lack of credibility that the evidence has shown, followed by a simple question presented to the jury focusing on who the jury should believe. If the plaintiff’s witnesses appear credible and have good qualifications and backgrounds, and if the defendant’s witnesses have made inconsistent statements or have questionable motives for testifying the way they did during trial, the plaintiff’s attorney should then compare and contrast the testimony of the plaintiff’s witnesses against the defendant’s witnesses and ask the jury “who they are going to believe.” By raising credibility issues in this fashion, the problem of the
opposing side in this fashion, the attorney may highlight what the problems are with the opposing side’s witnesses without basing it upon the attorney’s own opinion.

During closing argument, remember to keep your personal beliefs out of the presentation. Instead, direct your comments to the evidence and the law and explain to the jury what conclusions should be reached without stating what “you believe.” Teach the jury, use logic, tell stories, but do not provide the jury with your personal opinions about the case. If you do, your case may be reversed.

1. **The Golden Rule**

   During closing argument, the attorney for the plaintiff may not ask the jury to put themselves in the place of the plaintiff when deciding how much should be awarded as compensation. If this occurs, the defendant’s attorney will immediately object and move for a mistrial since this is considered a violation of the “Golden Rule”.

VII. **CONCLUSION**

   Your ultimate goal with respect to creating a winning theme for trial should be to have the jury listen to all of the evidence in the case, as well as the closing arguments, and enter the deliberations with your theme deeply embedded in their minds. This will allow the jury to view the entire case from your perspective. In deliberations, the jury will analyze every piece of evidence to determine whether it is consistent or inconsistent with your trial theme. Using a theme at trial allows you to present an exciting story that will lead to a happy ending.