

# Kenya School of Law

**ADVOCATES TRAINING PROGRAM**

**2015-16 ACADEMIC YEAR**

Trial Advocacy

**PREPARATION FOR TRIAL-THEME AND THEORY**

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# OUTLINE

**Theory**  
**Theme**

# Theory of Case-Black's Law online Dictionary

These are the facts that a law suit will be founded on and forms the basis of a right to sue.

Law Dictionary: [What is THEORY OF CASE? definition of THEORY OF CASE \(Black's Law Dictionary\)](#)

# Steve Lubet, “Modern Trial Advocacy”

Theory is adaptation of your story to the Legal Issues in the case.

Be expressed in a single paragraph that combines an account of the Law and of the facts in such a way as to lead trier of fact to conclude that your client should win.

# Theory-Steve Lubet, contd.

## Elements:

**Is Logical** -Founded on facts that lead in a single direction.

**Speaks to legal elements of the case** -Shows that the law entitles to the relief sought.

**Is simple**-Maximises on facts, minimizes on what is hotly controverted, implausible, inadmissible, or difficult to prove.

**Is easy to believe**-Takes from everyday experience and can even make logical force by encompassing the entire case of the opponent's side.

# NITA on Theory

(National Institute of Trial Advocacy)

A clear theory of the case:

- Shows how the facts fit into the law so that your client wins.
- For example, a “theory of the case” for a criminal charge of assault might be:
  - Identification
    - “It wasn’t him.”
  - Self defense
    - “He was protecting himself.”
  - Alibi
    - “He wasn’t there.”

# Theme

Black's Law Dictionary:

Theme linked to “Burden”, which is defined as:

“Core idea; A heavy load; A [responsibility](#), onus; A cause of worry; To encumber with a burden (in any of the noun senses of the word).

Law Dictionary: [What is BURDEN? definition of BURDEN \(Black's Law Dictionary\)](#)

# Theme-Steve Lubet

- ❖ Best expressed in a single sentence.
- ❖ Justify morality of your theory; appeals to justice of the case.
- ❖ Is a rhetorical or forensic device.
- ❖ Has no independent legal weight but gives persuasive force to one's legal arguments.
- ❖ Appeals to shared values, civic virtues, common motivations.
- ❖ Succinctly expressed; repeated at every phase of trial.



# Theme-NITA

Has to be persuasive

a) E.g., “Nude, but not Lewd”

b) Some methods to develop a theme:

- i. *Finish the statement*, “This is a case about...” to convey a theme that advances your client’s cause.  
**But do not actually use the phrase “This is a case about.”**
- ii. Use a dramatic bit of testimony or statement from an exhibit.
- iii. Use an old saying  
The “moral of the story”

# Class Theory Exercise

Based on case analysis done, sit as a firm and develop and write down

A theory in the Desmond Peters case for:

1. Prosecution
2. The Defence

# Class Theme Exercise

Based on case analysis done, and on side that represent in the Desmond Peters case (whether Prosecution or Defence), each individual to develop and write down a Theme.

# Q and A

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