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May 2012 Jury Tip: “Time to LOSE your opening statement”

For anyone who has a forceful, alpha personality, taking your foot off the pedal can be incredibly difficult. Taking a passive position seems especially difficult for trial attorneys; you are seemingly hard-wired to argue, persuade, and advocate for your client at all times. 99% of the time, that's a terrific quality to have. But in trial, there are a few specific situations in which you are far more effective when you slide over into the passenger seat, or into the back seat if you're the type who might be tempted to reach over and grab the wheel.

One situation I've already discussed (last September) is the first half of your opening statement. My gist was that it's tempting but incredibly counter-productive to criticize the opposing side, express opinions, and tell the jurors what to think before you've told the story of what happened and given the jurors the facts to begin drawing their own conclusions. Many lawyers believe in trying cases fiercely, loudly, and emotionally, but at the beginning of your opening statement, your jurors have no reason to believe you yet. And no matter how much you're itching to tell your jurors that the plaintiff or defendant is lazy or unethical or irresponsible, you cannot attack the other side too soon. It will backfire. Not only will your jurors not believe you—because they have no reason to trust you yet—but they'll resent you and become distrustful of you throughout the rest of the trial. You cannot force-feed your jurors and tell them what to think. They hate it. They'll view you as manipulative and pushy. To the jury, attacking the other side before you've given your jurors your reasons sounds like you're jumping to conclusions. They'll view you as unreasonable, even though you know the case backward and forward. Any judgment slipped into your opening statement too early, no matter how well-meaning, alienates the jury. Instead of telling your jurors what to think, you have to show them first. Jurors want to think for themselves. Tell a clear story without editorializing or summarizing.

This month, I'm going to focus on one unique situation in which it's smarter to take a passive, back-seat role than to aggressively try your case: in a "mini" opening statement. For those of you who haven't been asked to present a mini-opening, it is a brief opening statement that your judge asks each side to present to the jury before the voir dire process, usually in lieu of the judge reading a boring, neutral joint statement of the case. I have seen judges give the lawyers anywhere from 2 to 5 minutes for a mini-opening, and the purpose is to give the jurors a flavor of the case to get them interested and to put the jury selection questions in better context. I'm guessing that many courts and venues don't do "mini" openings, so this advice may not apply to you, but more and more judges across the country seem to be switching to mini-openings, so don't be surprised if you are asked to give one sometime in the next few years.

Here's my advice, which I understand is incredibly counter-intuitive: lose your mini-opening. Take a dive. I'm being a little overdramatic, but what I mean is this: don't try to win your mini-opening. Don't be persuasive. Be happy if the other side makes their case seem like the stronger case, and be even happier if the other side oversells their case. I realize that my approach probably conflicts with every instinct you have as a lawyer, but the mini-opening is the worst time to persuade your jurors, and you will not have lost your case by losing the mini-opening.

Winning the mini-opening might seem like a good thing; first impressions are the most important, and it's never too early to start persuading your jurors, right? Winning your mini-opening is incredibly dangerous, and it's because voir dire comes next. Even though they are instructed that the mini-opening and the real opening are not evidence, jurors don't know the difference. To your jurors, the facts are the facts, and once they've heard your mini, they believe they've heard the facts and the evidence. They begin making up their minds. And time and again, I have seen lawyers be so persuasive in the mini-opening that they end up losing all of their best jurors for cause. Before they hear an opening statement, your best jurors don't know they will be immediately receptive to your case. Once they hear a persuasive mini-opening, they'll know it; the toothpaste will be out of the tube. And one by one, your best jurors will tell opposing counsel during his or her voir dire that they cannot believe what their client did and cannot be fair. By giving a persuasive mini-opening, you are making the opposing side's voir dire incredibly easy. And I can't stress enough how often I've seen a persuasive mini-opening end in a great number of jurors being excused for cause.

On the other hand, losing the mini-opening is the best way to make your voir dire incredibly easy: by glossing over your best facts and arguments, and by focusing the jury on the issues in your case that are your biggest concerns and weaknesses, you can set the stage for your worst jurors to criticize your case, air their concerns, and talk their way off the jury. If the other side is too persuasive (and they often are), you could have an easy time getting your worst jurors off for cause. And even if the other side's mini doesn't get your worst jurors off for cause, it makes it incredibly easy to identify your worst jurors.

The key to giving a good mini-opening is to highlight the warts in your case, while glossing over your strongest evidence. Pull your punches, and save them for your real opening statement. Present the other side's best arguments for them ("it is true that the plaintiff was fired just a week after she became pregnant"), but hold back and don't give your jurors your persuasive facts. Just tell them "but we will present evidence that the plaintiff was fired for other reasons, not because of her pregnancy," instead of telling them how compelling your evidence will be ("the plaintiff was caught stealing from the cashier two days before she told anyone she needed a medical leave").

Perhaps the best part about losing the mini-opening: you haven't lost your opportunity to persuade your jurors, and losing your mini only lowers your jurors' expectations for your case. I can't stress how many times I've seen my clients lose the mini-opening, select a panel that thinks it's skeptical of our case (but is actually a good, receptive jury), and wow the jurors during the actual opening statement. You can see the surprise in their faces when they hear our best facts for the first time, realize how much stronger our case is than they suspected, and you can see their skepticisms dissolve. At the same time, winning the mini-opening only raises expectations. I love when the other side oversells their case in the mini-opening, because the jurors react negatively when they realize that a case they thought was a slam-dunk turns out to be flawed.

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