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May 2015 Jury Tip: "Don't share your good facts until your opening"

Some lawyers subscribe to the school of thought that good lawyers should try to argue their case as early as possible: during jury selection, or by crafting an aggressively-worded statement of the case, during a mini-opening if your judge lets you give one, and even in the jury assembly room, if you were allowed in there. And while I agree that lawyers should never waste a golden opportunity to subtly persuade your jurors, overt pre-conditioning backfires more often than it helps.

First let me differentiate between "overt pre-conditioning" and "subtle persuasion" so that we're clear about what I'm advocating and what I'm cautioning against you doing. When I say "overt pre-conditioning," what I mean is sharing specific, good facts about your case with your jurors, and even suggesting or implying what your good facts are going to be, before your jury is seated and you give your opening statement. Overt pre-conditioning also includes any thinly-veiled "hypothetical" facts and scenarios that you present to the jury during voir dire. Your jurors can read between the lines and understand that you're really feeding them facts about the case. There is a world of difference between overt pre-conditioning and "subtle persuasion," which involves using lines of questioning in voir dire that get jurors thinking about the eventual issues and facts that they'll later hear in trial your way, without actually sharing any specifics or connecting the dots between their experiences and your facts out loud. When a lawyer tells the jury in voir dire "the school district left the students unsupervised for an hour, does anyone think that's okay?" that is overt pre-conditioning. But when a lawyer asks the jury "for those of you who have young children, what steps do you take to make sure your child is always safe?" that is subtle pre-conditioning.

So besides being technically inappropriate in court, what's wrong with advocating as early as possible and trying to win over your jurors at the first opportunity? The answer lies in the fact that your jurors haven't yet been selected and sworn yet. The problem with overt pre-conditioning is that, no matter how many times you or your judge instructs the jurors that they haven't heard any facts or evidence until it comes from the witness stand, 90% of jurors don't differentiate. Once you've told them what you say the facts will show, your jurors will be convinced that they've heard some evidence. That's why drawing objections and the wrath of your judge aren't the only reasons that you shouldn't overtly pre-condition your jurors during jury selection, or even the best reason. Losing your best jurors (likely to cause challenges) is that best reason.

I've seen it countless times during jury selections; once jurors start believing they know what the facts are, they start expressing opinions about the facts and merits of the case, not just the issues involved. And once they start forming and expressing opinions during voir dire, it's incredibly easy for the other side to get them excused for cause. Essentially, the better you've pre-conditioned your jurors, the more you've done the other side's work for them: identified your best jurors, and brought their biases to the surface. If only you

had waited until your jurors were seated and sworn to convince them, those great jurors might still be on your panel.

Now I realize that this advice may seem obvious, but the reality is that many lawyers don't realize that they're engaging in dangerous pre-conditioning. Sometimes the pre-conditioning is obvious and intentional: for example, prefacing voir dire questions with facts about the case simply to get those facts in front of the jury. But sometimes the pre-conditioning is inadvertent, accidental, or meant to be subtle. So give some serious thought to whether you've been guilty of doing any of these things:

Have you ever crafted a "neutral" statement of the case to be read to the jury that included allegations of facts, not just your causes of action or defenses?

Have you ever been allowed to give a "mini-opening" to your jury before voir dire that you tried to make convincing? I've written on the dangers of giving a convincing mini-opening before (read it if you haven't already), but I'll summarize my advice: the purpose should be to make it easier to identify your bad jurors in voir dire by highlighting your bad facts, not your good ones. Don't try to "win" your mini-opening. Instead, tell your jurors what you are alleging without sharing your good facts; instead of sharing those specifics, tell your jurors "we'll show you evidence on that" without tipping your hand. Save it for your actual opening; you'll be surprised how well jurors respond when they realize that your case is stronger than they imagined.

Have you ever tried to be subtle and asked jurors about "hypothetical" scenarios in voir dire that were identical to what your good facts will be? Jurors are smart; they know what you're trying to do, and they are fully aware that you're telling them actual facts in your case. Many judges will get upset and sustain objections to these fact-loaded hypotheticals, but that obscures the main point: no matter how you disguise your facts, your jurors will be convinced they've heard "evidence" and express pre-judgments if they were moved by it.

Long story short, keep your good facts to yourself until your opening statement, after your jurors have been selected and seated. It's dangerous for both sides, but let me also say that it's especially dangerous for plaintiff's lawyers, because the other side gets to go last in voir dire and has the opportunity to sweep out the jurors you've convinced too strongly. Plaintiff lawyers have double the reasons not to do it, and defense counsel should absolutely use it to their advantage when a plaintiff has gone too far.

Don't worry about losing a golden opportunity to win over your jurors; your jurors will wait until at least your opening statement to pass judgment on your case. They won't expect you to prove anything before then. In reality, the only way you can "lose" your case before opening statement is by losing personal credibility: by coming across poorly, not listening to them, and forcing the law and attitudes down their throats. Trying your case too early is actually the worst example; jurors don't like to feel manipulated. Don't worry about leaving your facts for later and simply promising them that "we'll show you evidence on that" whenever you tell them what you're alleging.

With all that said, a good jury selection should absolutely include some pre-conditioning, as long as it's subtle persuasion. You do need to ask questions that get jurors thinking about your case issues in ways that match the themes of your case, and there are ways to do that without sharing any facts from your case. My apologies if you're going to trial this month or next, because I'm going to save that topic for the next jury tip.