



To oversell or undersell, that is the mini question

DO YOU TALK ABOUT GOOD FACTS OR BAD FACTS IN YOUR MINI-OPENING STATEMENT?

I was torn on what approach to take. I had written out my mini-opening and rehearsed it, but why was I changing what I was going to talk about in my head right before I was going to address the prospective jury? “Chris,” my co-counsel nudged me. “Did you decide good or bad facts?” We had been talking about this for days and we had gone back and forth. I had been to enough seminars to know I should get the bad facts out and that was the rehearsed plan. I had done it both ways, but I really didn’t want the case to be judged negatively by strangers, especially when it was their first impression of the case. I also didn’t like that the judge was judging me and the bad facts. Part of me thought defense counsel was judging the case like they were hearing it for the first time, reaffirming why they were trying the case.

Wink emoji

I knew that if I only talked about the good stuff, it was possible that all of my fair jurors would be kicked. On a prior occasion I had delivered a triumphant mini opening that inspired nearly every juror to raise their hand and say things like they didn’t understand why they were in the courtroom; this was a clear case that was in plaintiff’s favor and she should be awarded millions; and they all thought that plaintiff was starting out way ahead in the race and couldn’t be fair to the defendant....and then they were each instantly kicked off my panel.

Why did my mini opening make me feel like we were already losing...

It turns out what I was feeling by talking about my bad facts is counterintuitive to what we want to do as

lawyers. We want to put our spin on the case and present it in a manner that is favorable for our client. What’s that called? Zealous advocacy? Basically, the way we talk about our cases to strangers at parties. In the event you didn’t know, the mini opening was codified a few years ago under California Code of Civil Procedure section 222.5, subdivision (d), which states that, “Upon the request of a party, the trial judge shall allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process.”

Billboard lawyer

On the other hand, I wanted to avoid coming off like a billboard lawyer: in your face too much and not at the right time. I had been called an ambulance chaser in

a negative tone by prospective jurors after only delivering bad facts and it hurt me. So, I decided to try a new approach and combine both good and bad facts.

“Mr. Montes de Oca,” our judge said with authority. “Are you ready to proceed with your mini opening?” “Yes, your honor. Prospective members of the jury, ‘Bad fact 1....’ Man, I hate when they look at me with those glaring eyes. “Good fact 1...” I think she nodded in agreement. “Bad fact 2...” I am getting a lot of head-shaking, arm-crossing scowls. “Good fact 2...” I have a couple more jurors with me; I am pretty sure one smiled. “Bad fact 3...” Oh boy, I really do not like how I feel so dirty; after all, I represent the good guys. What am I doing? “Good fact 3...” They are back with me. I feel like I didn’t leave a yucky feeling in their minds. I think they are thinking about what I said. Fingers crossed I am not starting out ahead. Did I really wish that?

In retrospect, I recommend you combine both good and bad facts in a way that makes fluid sense. Remember, you don’t have much time, but you need to talk about both good and bad facts in order to give a neutral mini opening so you can elicit their bias for your particular case and not sound like your case is garbage. What’s that idea – primacy and recency? The jury could unknowingly build up a wall in their mind where they have judged you for bringing a frivolous case.

“Mr. Montes de Oca,” our judge asked in front of the entire jury panel, “Are you on a billboard?” Gee, I thought, do I give a quick-witted joke like, “The TV adds 10 pounds; I can’t imagine what a billboard would add?” Or perhaps just let him know I don’t have any superpowers, a cool nickname, or look like Santa. I understand that lawyers are marketing, but I personally feel that this in-your-face advertising cheapens our profession. You don’t see doctors doing this. Why are we doing this? I am proud of what I do and am grateful to be active in a profession in which we get to help

others in their most vulnerable time of need. Why are we selling ourselves in a way that the public thinks is a joke? During jury selection in every jury trial I have had in the past five years, inevitably the prospective jury has brought up the billboard lawyer in a derogatory and insulting way. We must do better and challenge our colleagues to do the same.

How about a real-life example?

If you have an admitted liability motor vehicle-accident case, that fact should come out as a positive fact: “Members of the jury you are not here to determine liability as the defendant has admitted 100% responsibility for crashing into my client. However, you are here to determine whether that minor fender bender that left only the smallest scratch on my client’s car was the cause of his needing back surgery on lien treatment. The two bad facts that are jumping out are minor property damage and medical treatment on lien. In this particular case, my client was older, and the defense’s case was all about degenerative disc disease caused by natural aging instead of an acute injury to my client’s spine. In this instance, I questioned the jury about any preconceived notions of age or aging on a person’s body. It was important to find out if they had bias in determining that it was my client’s body that was old and therefore damaged. Trying to see which jurors would judge and which would inevitably state, “You can’t judge a book by its cover.”

Listening to potential jurors

It is hard to listen to a lot of opinions after you give that mini opening. The reality is that most prospective jurors give you an opinion and a couched question. I really, and I mean *really*, want to answer those questions, but I know that I must be patient and wait for opening statement. I will say that it can be very effective to answer those prospective juror questions in opening statement because I think the jurors feel listened to and acknowledged.

Separately, when you get the juror’s opinion, good or bad, toward your client’s case, please let them know you heard them by asking the other panel members, “who also feels like that juror?” No need to try and praise them or convince them they are wrong, just appreciation for sharing their belief or bias.

Even though the primary purpose of this article is to give you an insight into mini openings and jury selection, there is a subliminal message that we need to reflect on what we are doing as lawyers and the image we are presenting. We need to set the example that everyone is entitled to their own opinion, and it should be respected.

We joined an adversarial branch of the legal profession. Disputes are inherent in much of our caseloads. We must respect each other while we present our diverse opinions both in our personal and professional lives. It is the contemplation and collection of all these diverse opinions that make us so great as a nation.

9 out of 12, and it can be a different 9 each question...

In the end, every trial attorney should have a healthy respect for the power held by the potential jury that has just been empaneled. Why don’t you memorize this mantra and recite it to yourself the next time the jury has been sworn: “9 out of 12 and it can be a different 9 each question...9 out of 12 and it can be a different 9 each question...one more time, 9 out of 12 and it can be a different 9 each question”...

Jokes aside, a jury comprised of diverse members of the community is the ultimate truth finder and foundation of our legal system. We must trust in the process if we are to be great advocates for our clients.

Christopher Montes de Oca seems to keep learning what not to do in between Advocate articles. He is the proud recipient of the Consumer Attorneys Association of Los Angeles Rising Star Trial Attorney Award.