

Prime time

Mini-openings, neutral statements, and overselling in the name of primacy


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By Miles B. Cooper

The defense counsel insisted. The neutral statement, in the defendants' contentions section, *must* say defendants contend plaintiff waived his right to bring a lawsuit by signing a contractual waiver. After much argument, the phrase stayed in. The contention, a primacy effort, came back to haunt the defense during jury selection. The red state, tort-reforming types latched on to the statement. They said they had already decided the case. How could someone who signs a contractual waiver go back on a promise not to sue?

The primacy concept

Jury consultants tell us jurors make up their minds within 30-45 minutes of exposure to the facts. That's primacy. Information that appeals to how that individual makes decisions is tremendously important within the primacy window. Once the primacy window closes, swaying opinion becomes difficult. The decision has been made. Facts presented after that get filtered. Is the fact consistent with how the person views the case? That fact's a keeper. Inconsistent? The information is not credible. While a bombshell moment may blow people off a position, those are few and far between. Primacy thus becomes a significant concern when talking about neutral statements or mini-openings.

Neutral statements

One of the traditional pre-trial requirements is a neutral case statement. The statement is supposed to be read to the jury panel after the 75 or so folks first shuffle into the courtroom. Most neutral statements are the intellectual equivalent of book paste – turgid, dull, and forgettable. The jury panel, after hearing it, will usually have a notion this is an injury case, not a robbery or something at least vaguely interesting. Jurors don't typically retain much else. They've just been herded in and are taking in a lot beyond the statement.

Mini-openings

Years ago, courts were given the option of allowing a brief "mini-opening" statement before jury selection began. This 3-5 minute statement by each counsel was seen as a way to try to inject life into the process. The goal was to increase interest and thus reduce potential jurors' efforts to avoid jury duty.

Not all judges were receptive, and mini-openings did not take over. The Legislature took another run at it in 2018 with the changes to jury selection. The wording is now "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." (Code Civ. Proc., § 222.5(d).)

Passionately self-sabotaging

Imagine the trial lawyers first given this theoretically golden primacy opportunity. An opportunity to lay down phat stacks of primacy. Those lawyers then watched their impassioned potential jurors get knocked off for cause, either by their own admissions or by astute opposing counsel.

It seems counterintuitive, but the best play for a mini-opening is to undersell and highlight bad facts. Your client is a former methamphetamine addict and the jury will hear this evidence? Consider noting it in the mini-opening so those with biases identify themselves.

Finding the right balance for an effective mini-opening can be difficult. As a result, many jury consultants recommend against mini-openings.

I thought you said crossing the streams was bad …

Axioms are good – that's axiomatic. Strategy sometimes requires they be questioned, however. We've tried cases with mini-openings and cases with neutral statements. We have not encountered negative primacy problems when we've given a fact-neutral mini-opening that identified bad facts. Quite the opposite – we found we were able to identify and eliminate those with prejudices against our bad facts. At the same time, we've encountered neutral statements with contentions (signing a contractual waiver, for example) that created problems for the side trying to effect primacy.

Don't oversell

We've all had the experience of hearing about a movie that everyone agrees is the Best Movie Ever! We go in with high expectations and it is, well, after the expectations were set so high, kind of meh. Similarly, we hear mediocre reports about a movie and when we finally do come across that film, find it is far better than expected. How does that apply to neutral statements or mini-openings? The vehicle matters less than the pitch. Since neutral statements get vetted, they tend to be less loaded. The learning? Don't tell the panel this is the Best Case Ever! The facts won't meet expectations and one will get punished when the case falls short.

Outro

Back to opposing counsel and the signed contractual waiver. By the second day of jury selection – necessitated in part by the number of folks who cause-challenged themselves off the panel – the opposing counsel changed course. The opposing counsel started asking folks whether they could wait for all the evidence, including looking at the waiver to see whether it was even valid. But transitioning from overselling to underselling is a tricky maneuver …

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