Structuring your mini opening: Know when to hold 'em

The judge must allow your brief statement before voir dire questions begin – make the most of it

By Sonia Chopra

I love mini openings. Done correctly, the mini opening is the best tool in your jury selection toolbox, yet I find some attorneys are either unaware of their benefits or are reluctant to use them. First things first – what exactly is a mini opening? Mini openings are a brief, three- to five-minute overview of your case, similar to but more detailed than the statement the judge would ordinarily read to the jury. Under Code of Civil Procedure (CCP) section 222.5, subdivision (d) the judge is required to allow a mini opening if either side requests it – even if both parties do not agree: "Under 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." You should always ask to do a mini opening in your pretrial conference when jury selection matters are being addressed.

Why are mini openings so great? Several reasons. First, they can reduce the number of people seeking hardship. Hearing more about what the case is about can cause potential jurors to be more interested and invested in the case. More importantly, mini openings set the stage for voir dire. A mini opening gives you an opportunity to preview your case to the jury just before you start to question them. Panelists will have some context for the questions you are asking, and as a result their answers will be responsive to your case issues as opposed to generalized beliefs about lawsuits or damages in general. When jurors know what the case is about, they will answer voir dire questions with reference to the case summaries presented by each side. This gives you valuable insight into how their experiences, attitudes and beliefs may influence their decision-making in your case.

Structuring the mini opening

When planning your mini opening, it is important to remember that the mini opening is *not* just a shorter version of your real opening. The mini opening is not about persuasion, it is not the time to swing for the fences and put on your best facts. If the company had internal documents suggesting they knew of the dangers, keep that to yourself. If the defendant driver was texting, stay mum. If there had been prior complaints about safety, hold that back. Instead, think about mini openings as an introduction to voir dire. The most important goal of jury selection is to identify the bad jurors. There are always going to be some people who will never see your side because of a given case issue, and those who will never award substantial damages, no matter what. Your time in voir dire must be spent trying to find these people and getting as many as possible stricken for cause. Before trial, identify the three to five areas of your case that you are concerned with. Include these issues in your mini opening. As counterintuitive as it may seem, you want to make sure that your mini opening includes topics that are likely to invoke juror bias against your case.

I have found that this concept is difficult for some of my clients to accept. They worry that if they don't have a strong mini opening, the other side will gain an advantage, that the jurors won't understand how great their case is, that the bad facts will take on too much importance. This is a mistake. What happens when you put on a no-holds-barred mini opening spelling out how egregious the defendant's conduct was, how righteous your plaintiff is, how horrific the injuries? During jury selection potential jurors will raise their hand and say, "I don't think I can be fair to the other side. It sounds like plaintiff has a really strong case and they should just pay them." You identify and lose your best jurors, either through challenges for cause or defense peremptories. The best thing about pulling your punches in mini opening is that the other side probably won't. The result will be that jurors inclined to favor the defense case from the gate will raise their hands and say so. It is very difficult for a defense attorney to turn around and try to rehabilitate someone who says they favor them based on what the attorney herself has just said the case will be about.

What should you include in your mini opening? Structure your mini opening like a slightly livelier neutral statement of the case. Say what happened, why the jury is here, and most importantly of all, what you are seeking in damages. You can incorporate the bad facts without adopting them yourself by introducing them as defense contentions. End by telling the jurors you look forward to discussing these issues with them in jury selection.

Example mini opening: Motorcycle case

On May 13, 2017 at around 5:45 pm, Jonathan Hammond, who was on the job for Acme Construction company at the time, was driving on the 405 freeway near the City of Westminster.

He was driving in the far-left lane. At the same time, my client Marcus Lopez was riding his motorcycle in the lane next to Mr. Hammond. Both vehicles were traveling at freeway speeds. Mr. Hammond attempted to change lanes and struck Mr. Lopez, throwing him from his motorcycle. Acme has admitted that their employee Mr. Hammond was on the job at the time of the collision. If you believe that Mr. Hammond was negligent, Acme will be legally and financially responsible for any injury Mr. Lopez has suffered which was caused by Mr. Hammond.

Mr. Lopez's right leg was fractured in multiple places and required surgery including having a metal rod inserted into his femur. He also had a fractured toe. His right arm was also fractured in multiple places and he had surgery to insert a plate extending from his index finger to his arm bone. Mr. Lopez also suffered a compression fracture to his spine, which did not require surgery. Marcus Lopez was 30 years old at the time of the collision. He was working as a drafter and illustrator and was making about $70,000 a year. He also pursued art as a serious hobby. We contend that because of the injuries to his wrist, and the chronic pain he suffers, Mr. Lopez will no longer be able to work as a drafter and illustrator, and that because of his pain, he will likely not be employable at all. We will be asking the jury to award damages for future wage loss in excess of $3 million dollars.

In addition to the medical costs and wage loss that Marcus Lopez has suffered, this jury will be asked to award money damages to compensate Mr. Lopez for the physical pain, mental suffering, loss of enjoyment of life, and emotional distress that he has experienced since the collision, and that he will continue to experience for the rest of his life, an anticipated 50 years. We believe that this loss is much greater than the financial losses that Mr. Lopez has experienced, and will be asking the jury to make an award in the tens of millions of dollars for Mr. Lopez's pain, suffering, loss of enjoyment of life and emotional distress.

The defense contends that Mr. Lopez was partially responsible for his own injuries because he was not fully aware of his surroundings and should have anticipated Mr. Hammond's lane change. They further contend that he has had a remarkable recovery, that he continues to draw and create art and is not only employable, but wants to return to work. They will argue that he has suffered no brain injury or permanent mobility issues, and that he is able to participate in almost all of the daily activities he enjoyed before the collision.

I look forward to talking with you more about these issues in jury selection.

While doing the job of explaining what the case is about, this mini opening also introduces the areas of potential juror bias that you will want to address in voir dire. Namely, motorcycles, employer liability, comparative fault, the assertion that your client will not return to work, and millions of dollars in noneconomic damages.

Introduce your damages

In my experience, jurors' reactions to the type and amount of the damages being sought are almost always the best identifier of pro-defense vs. pro-plaintiff inclination. Tell the jurors in your mini opening the amount of money you will be seeking for future medical care, future wage loss, and a range (e.g. multi-millions, tens of millions) that you believe is warranted for your client's past and future pain, mental suffering, loss of enjoyment of life and mental distress resulting from her injury.

As a practice note, try not to use the term "noneconomic damages" when speaking with jurors. First, no one knows what that means. Second, saying something is "noneconomic" can have an unintended consequence of suggesting, even subconsciously, that these kinds of losses are not to be equated with money. In your mini opening and in your voir dire questioning focus on the lesser known elements of CACI 3905A like loss of enjoyment of life, anxiety, humiliation, mental suffering and emotional distress. Even some tort reform jurors will concede that pain should be compensable, but they will usually take issue with money for emotional distress and loss of enjoyment of life. In part this is because of the misconception that paying for pain medication or therapy sessions is what is being sought. Make it very clear during both your mini opening and in your questioning what the jurors will be asked to compensate – it is the *experience* of having undergone the injury and having to live with the effects.

Talking dollars

There is a great deal of variability in terms of judicial practice regarding plaintiff's counsel mentioning specific numbers in voir dire. Some will allow the actual amount being sought, others will permit a range, and some will preclude any mention of amounts at all. The latter prohibition is worth fighting over. In every single jury selection that I have participated in there have been potential jurors who admitted that they would not be able to make a multi-million-dollar award in the case, no matter what the evidence showed. They just will not do it. Absent some type of barometer indicating the size of damages being sought, jurors cannot honestly answer questions about whether they are open-minded regarding damages. The defense will almost always get to ask the jurors if they would be comfortable sending the plaintiff home with no money or, in essence, awarding zero dollars. You can argue to the judge that in turn, you should see who would not be comfortable making a multi-million-dollar award for loss of enjoyment of life and emotional distress. Another tact is to cite section 222.5, subdivision (b)(1) which states: the trial judge shall permit liberal and probing examination calculated to

discover bias or prejudice with regard to the circumstances of the particular case before the court. The nature and amount of damages being sought is a potential area of bias specific to the case.[1]

Voir dire after mini openings

Jurors do form opinions based on the mini openings. They very well may say that they are leaning in favor of the defense because of certain factual circumstances or say they cannot be impartial based on the amount of money you are seeking. That is a *good* thing. These are the jurors that were always going to be against you. Better to find out now and keep them off the jury than get surprised at the end of trial with a defense verdict or low award.

A good mini opening will almost always generate a more productive voir dire. Jurors will have something to say, either about the size of damages, who the defendant is and how the big award will affect them, or what your client must have done wrong. A good mini opening also almost always generates more challenges for cause. Come to court with a copy of CCP section 222.5, subdivision (b)(1)(C) and memorize the language: "Actual bias" is defined as the "existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of the parties." The key words are not, "can you be fair," or "can you follow the law." The standard is, "can you be entirely impartial." No one wants to say they are not fair. It is easier to say you are not impartial with regards to any given case because of the facts and circumstances. When questioning jurors who are potential cause challenges, use the code language, "Would you say that, at least on this issue, the issue of awarding money for emotional distress and loss of enjoyment of life, you are not able to be entirely impartial?"

In some courtrooms, it is enough for the juror to say that based on what they understand the case to be about (or the damages being sought) they have already formed opinions which they cannot set aside and which would prevent them from being entirely impartial. On the other hand, I have found that for some judges, the more that potential jurors cite specifics from the mini opening (be it the dollar amount, the nature of the collision, preexisting injuries, etc.) when expressing their inability to be impartial, the less inclined they are to grant cause. Rather than base your cause challenge inquiry on the facts outlined in mini openings, make your questioning based on hypotheticals. For example, in a case where your client was riding a bicycle and was hit by a large truck that the defense contends he should have seen, rather than say, "have you already formed the opinion that Mr. Jones should have seen the truck and therefore must share responsibility," you can say, "in a situation where there is a bicyclist riding along the right curb and a very large truck to his left, would you start out believing that the cyclist always shares some responsibility if he gets hit?"

Jurors' referencing specific dollar amounts or even ranges (multi-million, tens of millions, etc.) alluded to in mini openings tend to make judges even more prickly when it comes to cause. It's a good idea to start out by questioning jurors about their thoughts regarding the *concept* of awarding money for things like loss of enjoyment of life, emotional distress and mental suffering. Next, ask them about upper limits or caps on this particular category of damage – virtually every judge will let you ask about caps, but the next step is to ask what that cap is. If you've introduced the idea that you are seeking "tens of millions," they may very well say, "it's something less than tens of millions." Then you can use the juror's number to establish that they would not go above that amount no matter what the evidence shows. For example, rather than say, "You've heard me say we are seeking tens of millions of dollars for Ms. Williams' pain, suffering and loss of enjoyment of life, would you say that is an amount you could never award?" you can say, "In a case where someone is able to walk, talk, and even return to work, would you agree that you personally would never be able to make a multi-million dollar award for something like loss of enjoyment of life and emotional distress?

Conclusion

Well-crafted mini openings make voir dire more productive by helping you identify problem jurors and get more challenges for cause. There is another advantage that comes from underselling your case early on. Those who make it on the jury are mostly going to be those who did not express significant concerns with the weaker version of your case – they are going to be blown away when they find out how good it really is. You have nowhere to go but up, and you will be presenting the strong case to the jurors most receptive to you.


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Endnote:

[1] See, Nicholas Rowley, (*Advocate* magazine, June 2019, www.advocatemagazine.com) How to think about, discuss, and present money damages in voir dire and opening statement. Advocate for legal authority and practice guidelines useful for arguing the right to give numbers in voir dire.