VISIT US ONLINE WWW.SFTLA.ORG

Serving The Members Of SFTLA Since 1950

The Trial Lawyer

WINTER 2020

Social Media Discovery: "Privacy" is a Pink Elephant

by Emily McGrath 12

Using Your Mini Opening To Out Unfavorable Jurors by Boone Callaway

"We use mini openings for the express purpose of disparaging our case."
—Brent Wisner, Baum Hedlund, Aristei Goldman, plaintiff's counsel in Johnson v. Monsanto

Since 2018, C.C.P. 22.5(d) gives us the right to do brief mini openings upon request in every jury trial, and there is a consensus that they are powerful tools that should be used. Thus having a strategy for getting the most out of your mini is a must. Throwing the mini opening in the mix can be like playing with fire though. Adding advocacy before voir dire can have a big effect on how people respond to your case. Ironically, giving a persuasive mini opening runs the risk of getting an overly rosy view of people's attitudes, a view which will not last for all of them if the defense can put on a plausible case. One of the ways to avoid this is to downplay the strength of your case in the mini opening. But standing up in front of prospective jurors and bad mouthing your client's case? Who would want to do that? None of us. But it is an effective way to encourage panelists to share their negative feeling about the case, and we all want that to happen.

So how does the mini opening help unveil negative-minded jurors? And what should be included in a mini opening? Is it just a cramped version of a full opening, or a preview of the opening to come? When properly done, the mini opening will be none of these things. Instead, the mini serves as a tool to facilitate your voir dire. The mini opening can replace the statement of the case – in my last two trials, the juries never even heard a statement of the case. It's so much better than the bland, uninformative statement of the case in any event. It's a way to quickly get the jury up to speed on what the case is really about. By giving the panel members a more richly detailed description of the case before you start talking to them, the mini opening facilitates a much more meaningful voir dire. How often have your heard a juror respond to a voir dire question by saying that he or she doesn't know enough about the case yet to comment? Mini openings leave prospective jurors with a basic understanding of the case, which can be a catalyst for them to express their initial reactions. But while you're delivering this overview of the case (typically 3-5 minutes) you should hold your fire on advocacy.

It's often said that there is no such thing as jury selection, there is only de-selection. But how often have you talked to someone in the panel who clearly seems biased against your client or case, but just won't acknowledge it? Persuasive advocacy in your mini opening can actually discourage the honesty we need to support cause challenges. If people are even temporarily thinking that your client has a good case, experience shows they are far less likely to disclose their preconceived biases against plaintiffs. Conversely, if they get the impression that this could be one of those weak or even "frivolous" cases, it can open the floodgates on their negative feelings about tort cases and plaintiffs.

For as long as I can remember, there has been a lot of discussion of using voir dire to win your case, to "precondition" the jury. Of course those are all objectives for your opening, and your voir dire. But the mini opening is different. The first and only thing you should be trying to accomplish in your mini opening is to set the stage to see how many bad jurors you can get excused for cause. We all want to out the defense minded jurors, and we know that some of them are "sleepers." How many of us have discovered after a verdict that a juror we thought was sympathetic actually had been vocal against the plaintiff all along? Both the mini opening and questionnaires are powerful tools for avoiding that unhappy surprise, or even having to burn challenges for bad jurors.

But even with these goals, and the strategic choice to avoid putting your best foot forward in your mini, you aren't going to want to actively trash your own case, despite the epigram of this piece. So what should you do? It's really simple: Give a fairly neutral statement of your case, and omit some of your best facts. By making it appear that your client may be bringing a less-than-strong case to trial, you free people up to share their negative feelings about plaintiff cases. You can also take some wind out of the defense sails. If defense counsel follows up with a persuasive mini opening, they may well fail to see some plaintiff-leaning members of the panel for what they are.

This approach fits nicely into the Nick Rowley school of thought about the importance of being completely welcoming of even the worst opinions of plaintiff lawyers and cases, the case

Continues on page 30 »

Boone Callaway is a trial attorney at Callaway & Wolf, focusing on personal injury and catastrophic medical malpractice cases. He serves as the Secretary of SFTLA, and is also a member of CAOC, AAJ, and ABOTA.

» Closing Argument continues from page 32

at hand, etc, looking for their "brutal honesty." It won't feel good giving a mini opening that's not strongly positive and persuasive, but like a lot of unpleasant things in life, it'll be good for you and your client's case. TL

» President's Message continues from page 4

As a longtime member of this legal community and working closely with the SFTLA over my career, I am an ardent supporter of the programs and efforts this organization makes to adapt to the legal, social and political challenges of our day. I am thankful for the wealth of experience and knowledge that comes from my association with you. As President, I will be committed to listening to the ideas of members and sponsors about the organization to ensure we continue to be relevant, competent and at the cutting edge of litigation. Only then can we best serve our community.

To that end, some of my primary goals of this year include updating our website to make it more modern and user friendly; adding new members, particularly of underrepresented legal disciplines, along with educational programing that is relevant to litigators across many disciplines; finding new ways to promote our sponsors; and, preserving the integrity of this great organization. I wish all of you a safe and healthy 2020! TL

» CAOC Corner continues from page 23

audio and video recordings at any point, obliterating important evidence.

As we head into 2020 and beyond, we face challenges and opportunities. One challenge will be the State Bar Task Force's report on Access Through Innovation of Legal Services (ATILS), which could dramatically undercut the practice of law by opening it up to corporate takeover. Additionally, CAOC plans to introduce legislation in 2020 to modernize our outdated Financial Responsibility minimum mandatory auto insurance limits.

As always, thanks for your support of CAOC's legislative program. TL

» Practice Tip continues from page 19

for no more than 14 hours of total deposition conducted by the defendants if there are more than 20 defendants appearing at the deposition.

(c) The court may grant the additional time provided for in paragraphs (1) and (2) of subdivision (b) only if it finds that an extension, in the instant case, is in the interest of fairness, which includes consideration of the number of defendants appearing at the deposition, and determines that the health of the deponent does not appear to be endangered by the grant of additional time. TL