

“Conceding the Obvious During Opening Statement”

WHY PICKING EVERY BATTLE IS A RECIPE FOR FAILURE

By Elliott Wilcox

It was a *great* opening statement...

Within the first 15 seconds, it was obvious that the jurors were hooked. They leaned forward in their seats, eager to hear every detail as the prosecutor weaved a gripping story and brought the shooting to life right there inside the courtroom. As he described each gunshot striking the victim, you could see the jurors wincing in reaction. It was as if the young man was being shot again, right before their very eyes: first in the chest, then through the neck, and finally, the fatal shot to the head...

As the prosecutor delivered his final call to action, several jurors quietly nodded their heads in agreement. He paused, making eye contact with each of them as if to acknowledge their special bond, and then returned to his seat.

Silence filled the courtroom. The prosecutor's opening statement had been so powerful that even the judge was involuntarily caught up in the emotion of the occasion, and it seemed like several moments passed before she finally asked, “Would the defense like to make an opening statement?”

Everyone in the courtroom wondered what he was going to say. They had just seen the prosecutor deliver one of the best opening statements ever presented in that courthouse, using a combination of vocal dexterity and verbal mastery to etch an indelible image into their minds. They could only think, “How was the defense going to compete with *that!*?”

The defense attorney rose from his seat, buttoned his jacket, and then pushed his chair back beneath the table. Standing beside his client and placing his right hand

on the man's shoulder, he began by formally addressing the judge, “May it please the court?”

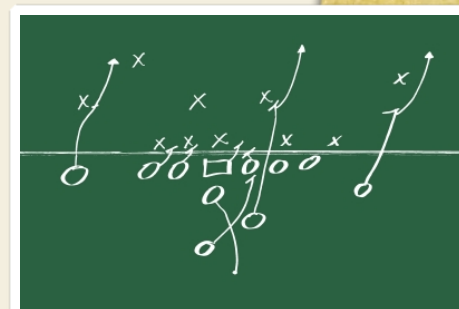
After she replied, “You may proceed, counselor,” he turned towards the prosecutor, politely acknowledged him with a nod, and then moved to the well of the courtroom. When he reached his preferred speaking position (a spot six feet back from the rail and exactly in the middle of the jury box), he paused for a moment and made eye contact with each of the jurors.

Then, and only then, did he speak to the jury. And the first nine words out of his mouth were a shocker. He began by saying, “We agree with everything that the prosecutor just said...”

Normally, you never expect to hear concessions like that during opening statement, do you? After all, if the purpose of a courtroom is to conduct *adversarial* proceedings, there's no reason to be there when the parties agree on every issue, right?

Don't worry, the defense attorney wasn't selling his client up the river. The first nine words of his opening statement may have shocked the courtroom observers, but it was the tenth word he spoke that set the tone for his entire opening: “We agree with everything that the prosecutor just said, **except...**” He paused for a moment to let the weight of his concessions sink in before continuing, “...the shooting was **justified**, because he was forced to act in self-defense.”

The Power of Concessions. It's not appropriate in every case, but sometimes,



Not all plans are created equally!

“Knowing the place and the time of the coming battle, we may concentrate from the greatest distances in order to fight.”

- Sun Tzu

issuing a gigantic concession at the beginning of your opening statement can dramatically improve your persuasive power with the jury and help you focus your winning argument to a razor sharp edge. As I've previously written ["Sifting the Issues with Stipulations," *Trial Magazine*, July 2008], you don't always need to argue *every* fact and *every* issue in your cases. By deciding which facts really matter to your case and which facts you should concede, you can focus your case like a laser beam.

In this particular case, the defense attorney knew that he couldn't argue that his client wasn't there, because the client had been apprehended at the scene. He knew that he couldn't argue that his client hadn't fired the fatal shots, because the client's fingerprints were on the firearm and Gun Shot Residue (GSR) tests confirmed that he'd recently been in the proximity of a discharged firearm. Knowing he couldn't raise reasonable arguments against those issues, he conceded them at the very beginning of his opening, taking those issues off the table and minimizing their impact. That allowed him to shift the jury's attention away from those damning facts and towards a different, equally plausible version of events.

By conceding obvious facts and working them into your case theme, you can achieve three goals.

First, you bolster your credibility with the jury.

We've all met attorneys who treat every case they have as if it's the strongest case in the world. Doesn't their inability to discern strong cases from weak cases affect their credibility and handicap their ability to negotiate with you? You don't want to mimic that behavior when you're in front of the jury. By making concessions, you help the jurors see, "Ok, this guy's not trying to exaggerate his case or waste my time. I'll listen to what he says." Concede the obvious, and you'll become more believable.

Second, you diminish the impact of your opponent's most emotionally charged facts. By conceding those facts, you steal their power and allow the jury to focus on your arguments. ("Yes, my client shot him - we're not disputing that. But there's a valid reason *why* he had to shoot him...") Now the shooting is no longer the major issue in the case, the reason *why* he shot him becomes the focal point of the trial.

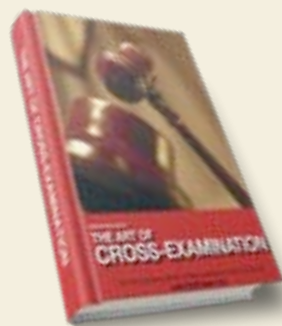
Finally, focusing all your attacks on a single point increases your chances of breaking through.

Imagine trying to start a fire with a magnifying glass. If you wave the magnifying glass from point to point, you'll never get anywhere. But focus the energy on a single spot, and you can set it ablaze. The same can be true during trial. Sometimes, focusing on a single issue and hammering it relentlessly may be your best bet to win the case.

Like I said earlier, concessions aren't appropriate in every case, but take a moment to consider whether or not they'd be appropriate for your next trial. If concessions would work in your case, don't be afraid to disclose them at the very beginning of your case. If you do, it can shift the focus of your entire case presentation, and dramatically change how the jury focuses their deliberations. ■

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