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Making the Most of Omissions: When Critical Facts are Left Unsaid

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The lynchpin of effective advocacy is persuasion, which can come in many forms. Capitalizing on the disclosure provided by the opposing party can be one of the most important jobs of any advocate in persuading a jury. Often times, trial attorneys focus only on the facts that are actually contained within the opposition's records. While it is unquestionably true that such a focus might, at times, prove fruitful (especially where such a record lists or spells out facts harmful to the opposition), focusing solely on those facts will, at other times, limit or prevent the most powerful arguments from ever being made. Weaknesses in the opposition's case are often not readily apparent in the facts contained in their own record. After all, the opposition created the record in the first place, and there is often a reluctance to include harmful facts. Nevertheless, powerful and persuasive weaknesses might well be found in what those very records do not say, but, indeed, should say. It is the job of the trial attorney to demonstrate to the jury the importance and significance of any omissions in the opposing party's records. Thus, the effective trial attorney should review all records with two goals in mind. First, the opposition's record should be carefully reviewed for what it says that is helpful to the client's case. Second, that same record must be scrutinized for what it does not say, that is, what it announces by omission. Working with such "negatives" can not only enhance your cross examination, but serve to create powerful and winning arguments on summation.

For example, take a typical personal injury case in which a bicyclist was struck by a bus. Assume that the Transit Authority conducted an investigation that it described at trial as being thorough and complete. Needless to say, investigative reports were prepared by the Transit Authority following the accident and the bus driver himself was interviewed in detail, as were other Transit workers. When these records were disclosed, it was apparent that they were silent in two significant respects. First, no mention was made of any witnesses to the accident. Second, not a single document stated whether the bus driver saw the bicyclist at any point prior to impact. During the deposition of the bus driver, it became clear that he never saw the bicyclist. It also became clear that neither the driver, nor any transit employee, obtained the name of any witness to the accident.

To properly create a winning argument on summation, these omissions must first be exposed on cross examination, or, as is often the case, during adverse direct examination of the driver. By patiently setting up the witness, the importance of the omissions becomes clear to the jury. Too often, however, attorneys fail to think through the importance of a proper setup and the impact of the omission is lost. It is as if the attorney is rushing to bring out the perceived weakness without considering the impact that a more thorough presentation would have made. Take the following example, which demonstrates how the presentation of these critical omissions can fall flat if not properly set up by the trial attorney:

Q: You didn't obtain the name of any witnesses did you?

A: Sir, I had just been in an accident.

Q: In fact, no Transit investigator obtained the name of any witness true?

A: They weren't there at the time the accident happened.

Needless to say, the above questions fail to control the witness and fail to emphasize the significance of the omission. A more thorough setup, with better control, will serve to drive the point home:

Q: On every bus there are trip sheets, true?

Q: These sheets are basically accident reports correct?

Q: And they are reports that must be filled out at the time of an accident, right?

Q: You had such a trip sheet on the bus on the very day of the accident, didn't you?

Q: And you filled it out and signed it while you were still on the bus, true?

Q: It was filled out shortly after the accident, right?

Q: (showing the witness) This exhibit, marked as Plaintiff's 1 for identification, is the very trip sheet you filled out and signed on the day of the accident, correct? (offer in evidence).

Q: At the very top of this exhibit it states "Bus Operator must list the names of witnesses and their addresses", true?

Q: And it's your understanding that this requirement was designed to assist in the accident investigation, right?

Q: Can we agree that independent witnesses, such as passengers, have the ability to support your position in the case, true?

Q: To show that you were not at fault?

Q: Or these witnesses can prove conclusively that you were at fault, true?

Q: Either way, these witnesses have the ability to provide information, correct?

Q: To provide non-biased information, true?

Q: And the report, if properly filled out, would provide the names of people who have no interest in the outcome of the case, right?

With this setup, and an appropriate follow up, the same question that was asked above can now lead to a powerful argument for summation:

Q: You didn't get the name of a single witness did you?

A: I had just been in an accident.

Q: You knew the bus was full of passengers at the time of the accident, true?

Q: You knew you were just involved in an accident with a bicyclist?

Q: You knew you had to bring the bus to a stop, right?

Q: And you knew you had an obligation to get the names of the passengers?

Q: Names of people who could support your version of the events, right?

Q Or completely discredit your version of those events?

Next, with a louder voice, a show of righteous indignation, and a touch of sarcasm, the following inquiry should be made by asking a low-risk open-ended question to which you already know the answer:

Q: Tell the jury how many names of witnesses you obtained?

A: None.

Q: You are aware that if you fail to get those names that we will never know who was on the bus at that time, right?

Q: But we know for sure that you don't have the name of one passenger who supported your position?

Q: Or one person, from that bus full of passengers, who said you were not at fault?

In the above example, the omission was obvious. The accident report defined an obligation, namely, to obtain the names of witnesses. The driver failed to satisfy that obligation. With a proper setup, and a forceful follow-up, the importance of this omission can be hammered home to the jury.

In many cases, however, the omission (or “negative”) is not quite as clear. The second example set forth above, namely the absence of any mention in the Transit Authority records as to whether the bus driver ever saw the bicyclist, is representative of a situation where the trial lawyer must scrutinize the record more carefully in order to decipher the critical omission. While the reports may seem thorough upon first glance, a more careful reading reflects that

there is no mention of whether the bus operator ever saw the bicyclist prior to impact. Once again, a thorough setup of this issue during the examination of the bus driver will pave the way for a compelling argument on summation. Here, inquiry is made of one of the head investigators from the Transit Authority, a surface line dispatcher. Since credibility is always at issue, the setup might start by pointing out that thoroughness and fairness are the main goals of any accident investigation. The inquiry should make generous use of "Voice of Reason" questions,ⁱ that is, those questions that are designed to elicit agreement with the inquiry or make the witness look foolish for any disagreement:

Q: Can we agree that you conducted a thorough investigation of this accident?

Q: You conducted an investigation that was complete?

Q: And certainly one that was full and fair?

Q: Would you agree that to do anything less would be improper, right?

Q: You prepared written records of your investigation?

Q: Records that detailed your findings?

Q: And while we can agree that it would be impossible to spell out all facts in your written report, you made sure to include all important facts, right?

Q: In fact, fairness and thoroughness were the goals of every investigator working on this case, true?

Once the foundation for the impeachment with the "negative" fact has been laid, inquiry can be made to discredit the investigation:

Q: As part of your investigation you spoke with the bus driver, true?

Q: And one of your main areas of inquiry was the driver's observations immediately prior to the impact?

Q: You learned clearly that the bus driver never saw the bicyclist?

Q: Certainly, that is an important fact, correct?

Q: And you certainly wouldn't want to hide a fact that might hurt the Transit Authority, would you?

Q: That would be improper, wouldn't it?

Q: That would contradict the goals of fairness and thoroughness, correct?

Q: That's why we know that in your report you have nothing to hide, right?

Once the setup is complete, the attack, based on the omission, can begin:

Q: (showing the report) Show us where you indicated in any manner, shape or form that you learned the bus driver never saw the bicyclist.

Q: Can we agree that your report is not quite as fair or thorough as you indicated it was a moment ago?

Q: (handing all the investigative reports) Show us where in any report authored by the Transit Authority it says the bus driver never saw the bicyclist?

Q: And, of course, that's the way the Transit Authority conducted this full, thorough and complete investigation?

By thoroughly setting up the importance of this omission in the report, the attorney can clearly expose a weakness in the opposition's case to the jury, even though that weakness was not apparent on the face of the report, and even though it could only be seen after a meticulous reading of the entire record. The job of the attorney is to find these omissions in the record before trial, and then demonstrate for the jury that the omissions are as fatal to the opposition's case as an admission by that party.

In many cases, the conduct of the party, not just his or her report, will provide the fodder for cross examination in the form of a "negative" fact. Specifically, actions that should have been taken, but which were not taken, will provide similar impact on summation if properly exposed during the examination of the witness. Imagine a scenario in which a plaintiff claims to have been injured in an accident. However, he did not seek any medical treatment for more than one month after the accident. Here, working with the negatives -- those things that

were not done by the party -- can help pave the way for a compelling argument on summation.

To properly prepare for this cross examination, the plaintiff's affirmative acts -- those things that he actually did after the accident -- must be carefully explored during the deposition. By carefully questioning in this way, the things that the plaintiff did not do after the accident become even more significant. Once again, a similar set up on cross makes the final argument more powerful:

Q: You've just told this jury that your life was ruined by this accident, true?

Q: In fact, this was one of the most significant events in your life?

Q: And you knew that you were terribly injured on the day of the accident, correct?

At this point, all the "negatives" must be brought out in sufficient detail to undermine the credibility of the claim:

Q: Knowing that you were so badly injured, you didn't call the police?

Q: You didn't call an ambulance, did you?

Q: Knowing how badly injured you were you didn't go to the doctor on the day of the accident?

Q: In fact, you didn't even call the doctor, did you?

Q: You didn't even tell any family member about the accident, right?

As in the example above, a good mix of righteous indignation combined with sarcasm drives the point home:

Q: You didn't even call the doctor the following day, true?

Q: Or the following week?

Q: Or even the week after that?

Q: Did anyone prevent you from going to the doctor?

Q: Did anyone prevent you from even calling the doctor?

Q: One thing we know for sure is that you received no medical treatment in the month following the accident, right?

Q: And another thing we know for sure is that you received no prescription medications for more than a month, correct?

By focusing on the actions that the plaintiff failed to take immediately following the accident, the attorney can effectively undermine the plaintiff's current claim as to the significance of the accident, and its purported effect on his life. However, without a proper setup, the importance of this discrepancy may be lost on the jury.

An essential goal in every trial is to exploit the weaknesses in the opposition's case. Whether those weaknesses are apparent on the face of the record, or disguised as omissions of critical facts, the trial attorney must carefully set up the importance and significance of those weaknesses for the jury during direct and/or cross examination. Then, during summation, the attorney can shine a spotlight on those weaknesses to fully expose all the vulnerabilities of the opposition's case. Very often, that which is better left unsaid by one party is better brought to light by the other.

1. Rubinowitz and Torgan, "Trial Advocacy, The Voice of Reason: A Powerful Approach to Cross-Examination", NYLJ, April 19, 2002.

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