

Dealing With Weaknesses and Maintaining Credibility

By Ben Rubinowitz and Evan Torgan

While many trial lawyers focus on the credibility of their witnesses, a truism remains: No one's credibility is more important than your own. If you have lost credibility before the jury, you have gone a long way to losing the case. Conversely, by making tactical decisions to enhance your credibility, you will help your cause even when the facts are difficult. The trial lawyer who discloses his weaknesses bolsters his credibility with the jury. The goal at all times for the trial lawyer is to be viewed as the speaker of truth, the impartial arbiter and the voice of reason. By volunteering a weakness, you will be in a position to have the jurors conclude that you, as an advocate, have gone out of your way to present the whole picture to them and not just the favorable parts of your case.

Some trial lawyers will argue that admitting a weakness is a bad decision. The argument is that the jurors will view the confession as a self-serving event. Since the trial lawyer will never admit that he should lose the case, the jurors will be skeptical and cynical of the attempt to enhance credibility by admitting a weakness. We disagree. Few things have the potential to hurt more than concealing a weakness that should have been disclosed.

Quite often the weakness in the case is known by all parties. Typical issues of concern include a prior criminal conviction, a prior vicious or immoral act, a pre-existing medical condition undermining causation or videotaped surveillance footage of your client portraying him in a harmful light. In each of the above examples, the trial lawyer has a choice to make: Deal with the weakness head-on or wait and try and explain it away at a later point during the

trial. By introducing the weakness as early as possible, the trial lawyer may well take the punch or sting out of his adversary's arsenal.

Consider the following scenario: Your client, a passenger in an automobile accident, was injured through no fault of his own. He suffered significant soft-tissue injuries resulting in what is commonly referred to as reflex sympathetic dystrophy (also known as complex regional pain syndrome). The problem from a medical perspective is that this type of injury is not easily understood by doctors and lawyers (let alone jurors). There were no fractures; the pain, however, has been unrelenting. Repeated visits to a pain clinic and daily administration of pain-killers have not resulted in relief. The medical issues may well boil down to one of credibility. The problem from an overall perspective is that the client committed a robbery 10 years ago, was convicted, and served 5 years in jail. The accident occurred 1 year after he was paroled. The plaintiff's and defendant's theory of damages could not be more divergent: To the plaintiff's lawyer, his client has suffered a life changing, permanent injury. To the defense lawyer, the plaintiff is a convict, a malingerer and one who is trying to milk the system.

The first opportunity to deal with the weakness - the conviction - is on jury selection. Imagine what would happen if the plaintiff's lawyer chose to ignore this fact. While the defense lawyer could address the conviction on jury selection during his voir dire, the more skilled or seasoned defense attorney will delicately address the issue of credibility during jury selection, not saying one word about the conviction at this time, and wait for cross to move in for the kill. Consider the defense voir dire:

“Ladies and Gentlemen there are many issues that you will have to deal with.

One of them is credibility of all witnesses including the plaintiff.

Q: Do you believe that just because someone claims to be injured that that necessarily means that they are injured?

Q: Would you agree you have to carefully scrutinize the plaintiff and his background before making an award of monetary damages?

Q: How would you determine whether someone is telling the truth?

Q: Do you think it's possible for someone to be faking his injuries in order to receive a large amount of money at the end of the case?

Q: Why do you say that?

Q: I'll ask you to listen closely about the plaintiff, his background, and whether or not he is truly believable. You determine whether he should be entitled to an award of money or whether something else is going on that would make him undeserving of such an award. Would you be willing to do that?"

Clearly, the plaintiff's lawyer, in failing to deal with the conviction up-front, has put himself in a bind and has lost the opportunity to start immunizing the jurors to the bad fact. Imagine, however, what would have happened if the plaintiff's lawyer chose to address the weakness early on in jury selection, fully anticipating what the defense lawyer might say if he chose to ignore the issue:

Ladies and Gentlemen, I'll tell you right now something you need to know about (my client). It's something you should be aware of and I want to be the first to tell you so that you can evaluate all the facts surrounding this accident.

(My client) was convicted of robbery 10 years ago. It's not something we're proud of, but you need to know it. He served 5 years in jail. He paid his debt to society, and restarted his life after his release from prison. This accident occurred through no fault of his own, after he was discharged from jail.

Q: Are you the kind of person who is going to say: If he's a convict, that's it, I'm not going to listen to anything he has to say, or are you the kind of person who wants to know more?

Q: Why would you want to know more?

Q: Would you agree that the conviction is something you should be made aware of?

Our position is that this robbery has nothing at all to do with this accident.

Q: If you believe he is not telling the truth, say it in your verdict. If, on the other hand, after you've scrutinized the facts and scrutinized his testimony, you believe that he is telling the truth and that he is deserving of compensation, would you be able to vote in his favor even though he was once convicted of a crime?

Q: Why would you be able to do that?

The purpose of such questioning is two-fold. Most importantly, you will avail yourself of the opportunity to learn which jurors admit to an inability to put your client's past aside, which

may well lead to a successful challenge for cause. Indeed, any juror who expresses even the slightest equivocation regarding his/her ability to follow the judge's charge and render a verdict in accordance with the facts as he/she perceives them and the law as instructed by the Court must be disqualified.

This does not mean, of course, that you can expect to elicit a commitment from every juror that he/she will disregard your client's criminal record when deciding the case. You are, however, entitled to a promise from all of them that they are open to the possibility that your client is being totally truthful when describing his current condition. Any juror who expresses any doubt about the possibility that your client may be completely in the right should be excused from the panel.

Secondly, jurors who do offer only their begrudging commitment to keeping an open mind (evinced by statements such as, "Well, **if** the medical testimony supports the plaintiff's story, I **could** render a verdict in his favor") should move to the top of your list of potential peremptory challenges. Knowing that the defense is likely to focus heavily on your client's past, the decision to omit reference to the prior criminal records leaves you selecting the jury without obtaining any information regarding juror attitudes about a crucial area of the case. Just as no baseball manager would select his batting order without knowing the identity of the opposing pitcher, no trial lawyer should be exercising challenges without having learned as much as he can regarding a juror's preconceived beliefs and notions.

Whether or not a jury would penalize a lawyer for failing to disclose a bad fact is an unanswerable question; however, by failing to address the bad fact during jury selection the lawyer has precluded any opportunity to explore juror attitudes on the issue. While some bad facts may be insurmountable, the straight forward discussion of the issue, at least, allows the trial

lawyer to know what he is up against. (“The devil you know is better than the devil you don’t know”).

The presentation of bad facts is not limited to jury selection. Indeed, careful consideration must be given to the appropriate time to disclose a bad fact. In the event of videotaped surveillance of your client, for example, you might be better off presenting the video during the plaintiff’s direct examination rather than allowing your adversary to cross examine with this tool.

Consider the same factual scenario as outlined above. In addition to those facts assume the defense has a surveillance video of the plaintiff riding a bicycle in a park. Here, the plaintiff’s attorney would do well to address this fact during opening and later offer the video during the plaintiff’s direct examination. By addressing this seemingly bad fact during opening, the trial lawyer has the opportunity to present damaging evidence in the best possible light:

As a result of this accident (the plaintiff) has felt pain every day. He is tough-minded and tries to be strong. He has gone on with daily activities such as taking out the garbage or even riding his bike. It is not something we have denied. In fact, the defense went out and videotaped (my client) engaging in such activities. The one thing that the tape will not show, however, is the amount of pain he was experiencing before, during and after the event.

On direct examination of the plaintiff his lawyer can again put the bad fact in the best

light:

- Q: Have you been made aware that you were videotaped riding a bike?
- Q: Have you had an opportunity to view the tape?
- Q: Was that a fair and accurate depiction of you or your bike on 9/30/08?

After marking the tape for identification and laying the appropriate foundation, the plaintiff's attorney should be the one offering the tape in evidence. At this point the plaintiff's attorney must follow up with appropriate questions:

- Q: How often do you ride your bike?
- Q: Why do you ride the bike?
- Q: How did you feel prior to the ride?
- Q: How did you feel during the ride?
- Q: Describe how you felt after the ride?

In short, we believe the only time that "bad" facts should not be broached in this manner occurs when you believe that the other side's introduction of them is highly unlikely to influence the jury's decision. In that case, where the supposed harmful facts are so attenuated from the heart of the case, or so irrelevant that you believe the jury is likely to dismiss them out of hand, it may be a mistake to lend credence to adversary's position by discussing it. Rather, on summation, you can hammer home the point that the other side wishes to distract you with irrelevant matter due to the fact that it knows it cannot win on the merits.

In all cases, however, where you have legitimate concern that certain tangential facts can affect the verdict, we strongly advise getting them out there first. Despite the difficult nature of initiating the topic, often the effort will be rewarded with a favorable verdict.

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