Proskauer

Leveraging Bad Facts to Win at Trial

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Jurors value honesty over perfection— your credibility is your most powerful tool in the courtroom. Proskauer partner David Fioccola shares how confronting bad facts head-on can strengthen your case and turn vulnerabilities into strategic advantages by mastering your narrative and leading with integrity.

Transcript

David Fioccola: Leveraging bad facts at trial are not fatal to your case. They're really just opportunities. When you're facing a bad fact, you really want to get it out in front of the jury in your opening. You want to get out in front of it so you can control the narrative and the tone, and you don't want the jury to think you're hiding the ball and have your opponent raise it for the first time.

You want to disclose them upfront and early. Otherwise, it looks like you're being dishonest, especially if your opponent raises it for the first time, and then it looks like you were hiding it from the jury.

"Jurors expect imperfection, not perfection, and your credibility is your greatest asset."

David Fioccola, Partner, Litigation

Jurors want to see witnesses that are vulnerable and that are genuine, and they don't expect technical perfection and they don't expect a too-perfect story. A lot of times when you're preparing witnesses, they'll get your themes, but what makes them most nervous? What puts that pit in their stomach? And I always ask a witness, what puts that pit in your stomach? Verbalize that to me. And then we can address it. And inevitably, their gut is a great barometer for what they think the bad facts are, and you better address them.

One of the key ways of addressing them is take the bad fact, put it in context, and then put it within your overall story and the themes for your case. What you really want to do is get the jury to understand the mindset of the client and what happened, because if they understand what happened and why, they're more likely to view that bad fact in context as opposed to an isolated event, or cherry picking, or trying to take advantage of you in ways that you didn't expect.

"Lead with integrity, master your narrative, and never let your opponent define your client."

David Fioccola, Partner, Litigation

Flip the script. Make it about the other side. You can take their emphasis on your bad fact and turn it against them to show that there's a weakness in their case. One example is they may be focused on one line in one email, and not the fact that their clients conduct cost our client millions of dollars in damages. You want to explain what it meant, what it didn't mean. And you want to humanize the conduct so that it's understandable.

And you want to work the bad fact into your broader narrative with the hope that it will strengthen your case, or at least neutralize the bad fact. Never let the other side control how the jury sees your client. And jurors will often forgive the bad fact if they understand the intent and motivation that led to it.

"You don’t win despite the bad facts – you win because of how you handle them."

David Fioccola, Partner, Litigation

Don't be afraid of your bad facts. Embrace them and figure out how you can use them to your advantage. It's not always going to be easy, but you can do it, especially if you've worked out the key themes for your case. And the bottom line is, you don't win despite bad facts. You win because of how you handle them.

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