

Understatement and Overstatement in Closing Arguments

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Understatement and Overstatement in Closing Arguments

In preparing to argue before a jury, a trial lawyer gives careful consideration to a myriad of factors which may affect jury reaction to the argument. These factors include such matters as where the lawyer should position himself or herself in the courtroom, what the tone and volume of his or her speech should be, and even what color he or she should wear to create the most positive impact on the jury. The trial lawyer may fail, however, to consider one very important aspect of the argument—how the manner in which he or she presents the information affects the manner in which the jury responds to the argument.

Trial manuals do sometimes address this issue, recognizing that understatement and overstatement represent two possible means of presenting an argument to a jury. Although the manuals frequently mention these two strategies, they fail to recognize the effect each strategy has on a jury's understanding of an argument. As a result, the manuals' advice regarding the use of each strategy is anecdotal at best, because they neither explain what is meant by the terms understatement and overstatement, nor indicate how these two strategies operate. They also lack evidence showing which strategy is more effective. This paper addresses these issues.

The first section briefly reviews advice given in trial manuals regarding the use of understatement and overstatement. The second section uses the linguistic theories of *conversational maxims*, *implicature*, and *bridging* as the basis for a characterization of understatement and overstatement and describes how each strategy works in practice. The third section reports on an experiment designed to examine the relative effectiveness of these strategies in terms of accuracy (ability to relate facts clearly) and persuasiveness (ability to convince or persuade). The fourth section offers guidance to lawyers concerning particular contexts in which the use of each strategy is appropriate and techniques available to mitigate the negative side-effects of the strategies.

I. PROBLEMS IN CURRENT TREATMENTS OF UNDERSTATEMENT AND OVERSTATEMENT

Although frequently referred to in trial manuals,¹ the strategies of understatement and overstatement are rarely ever adequately explained,

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1. The advice given in the trial manuals and the conclusions and advice put forth in this paper deal solely with arguments made at trial before a jury. Because of the differences between judge and jury trials and between oral and written argument (e.g. trial briefs), the conclusions reached in the paper are inappropriate to situations other than jury trials.

and the advice given regarding their usage is often conflicting. For example, many manuals argue in favor of overstatement. Vinson and Anthony advise that "it is not enough for the lawyer to merely lay out the information and hope the jury will arrive at a logical decision."² Matlon agrees, adding, "the art of developing explicit conclusions is essential for a closing argument to be logically persuasive."³ Mauet also refers to overstatement, offering that "overstatement and normal exaggeration" are the usual methods used to state a position "as forcefully as the evidence reasonably permits."⁴

In contrast, other manuals advise against overstatement, stating that it "may weaken the impact of the argument"⁵ and that "jurors tire of constant overstatement."⁶ McElhaney goes even further, claiming that "overstatement is dangerous. Understatement gets a lot more verdicts."⁷ Like McElhaney, many of these manuals put understatement forward as an alternative to overstatement. Mauet suggests that "understatement . . . can be a powerful argumentative tool."⁸ Jeans likewise argues that "few persons like to be hit over the head with persuasive facts. Leave some at least to the jury to 'discover' by themselves. Give a hint, but hold off the complete revelation."⁹

In sum, advice concerning understatement and overstatement is often conflicting and little more than anecdotal, thus of little use to trial lawyers. A short journey into the field of linguistics, however, can bring to the situation some needed clarity. By explaining the nature of "talk exchanges" and detailing how implied messages are transmitted and received, the linguistic theories of conversational cooperation, implicature, and bridging can be used to give a principled account of understatement and overstatement. In addition, an experiment can help to evaluate their effectiveness, thereby providing trial lawyers with at least some guidance in selecting the best trial strategy.

II. A CHARACTERIZATION OF UNDERSTATEMENT AND OVERSTATEMENT

A. *Linguistic Background*

To understand the particular linguistic concepts relevant to a discussion of understatement and overstatement, a lawyer should first be

2. D. Vinson and P. Anthony, *Social Science Research Methods for Litigation* (1985), at 34.

3. R. Matson, *Communication in the Legal Process* 273 (1988).

4. T. Mauet, *Fundamentals of Trial Techniques* 276 (1988).

5. J. Sontseng, *The Trialbook* 343 (1984).

6. T. Mauet, *supra* note 4, at 276.

7. J. McElhaney, *Effective Litigation* 126 (1974).

8. T. Mauet, *supra* note 4, at 276.

9. J. Jeans, *Trial Advocacy* § 16:17 (1975).

familiar with the goals and methods of linguistic study in general. Dr. Frank Parker describes linguistic theory as "a set of categories, rules, and principles devised by linguists in order to explain observations about language."¹⁰ These categories, rules, and principles relate to the "psychological system of unconscious knowledge that underlies [every native speaker's] ability to produce and interpret utterances in [his] native language."¹¹ The most important point to note here is that linguistics describes a system of *unconscious* knowledge. A speaker¹² does not consciously refer to these rules and principles when speaking; in fact, most speakers are unable to articulate the rules at all. Although a speaker cannot actually describe his language system, he subconsciously works within and manipulates the system each time he speaks. Linguistics, as a means of articulating and thus bringing to the level of consciousness this psychological system of unconscious knowledge, can help a speaker to understand exactly what he is doing when he speaks and, as a result, can help him to exercise greater control over what and how he communicates.

The first linguistic concept necessary to an understanding of understatement and overstatement is a theory of conversational cooperation articulated by H.P. Grice in his 1975 article "Logic and Conversation."¹³ In this article, Grice describes a normal "talk exchange" as a cooperative effort in which the participants recognize a particular purpose or aim of that exchange. In order for the conversation to be effective, each participant contributes to the exchange in a way which is consistent with this recognized aim or purpose. This idea is spelled out in what Grice calls the Cooperative Principle.

The Cooperative Principle: Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged.¹⁴

10. F. Parker, *Linguistics for Non-Linguists* 2 (1986).

11. *Id.* at 4.

12. Throughout this article, the terms "speaker" and "hearer" will be used to denote the participants in a "talk exchange," which is essentially any situation in which one party communicates information of any kind to another party or parties. The general linguistic concepts and theory described, however, apply with equal force to written communications and, as such, "speaker" and "hearer" are interchangeable with the terms "writer" and "reader," respectively. It is essential to remember that although the general linguistic theories apply to both oral and written communications, the conclusions drawn from these theories in this paper apply only with respect to oral argument before a jury.

13. H.P. Grice, *Logic and Conversation*, in 3 *Syntax and Semantics* (P. Cole and J. Morgan eds. 1975), reprinted in H. Grice, *Studies in the Way of Words* (1989).

14. *Id.* at 45.

Grice also proposes four maxims which act in accordance with the Cooperative Principle: quality, quantity, relation, and manner. Only the Maxim of Quantity is relevant to a discussion of understatement and overstatement. The Maxim of Quantity relates to the amount of information given by speaker to hearer during the course of a particular exchange. This maxim is divided into two submaxims:

1. Make your contribution as informative as is required.
2. Do not make your contribution more informative than is required.

In other words, in order to communicate a point most efficiently, a speaker should give enough and only enough information to allow the hearer to understand the speaker's point. Take, for example, the following question and answer sequence.

- A: Did you see the thief clearly?
B: Yes, I saw him clearly.

Here, B responds directly to A's question, giving A exactly enough information. As a result, A immediately understands what B is saying and maximally efficient information exchange results. It is important to note here that the Cooperative Principle and the Maxim of Quantity refer to a talk exchange in which the purpose is to convey information as quickly, clearly, and efficiently as possible. This is by no means the purpose of all talk exchanges, and it is certainly not the only purpose of the presentation of arguments in litigation. In fact, as will later be shown, other purposes such as influencing and directing the actions of others can also be attained through the manipulation of the principle and maxim by the speaker. Such manipulation can increase the overall effectiveness of a lawyer's closing argument.

In understanding how the Cooperative Principle and the Maxim of Quantity work in conversation, it is necessary to consider the individual roles of speaker and hearer. Most important is the fact that a speaker does not consciously construct his conversational contribution in exact accordance with these principles. However, because a single message can be communicated in a variety of ways, the particular manner in which the speaker communicates his message has great impact on how the hearer interprets that message. For instance, if the speaker's message is, as in the previous example, in exact accordance with the Maxim of Quantity, that is to say, if his message gives the hearer exactly enough information, maximally efficient exchange of information results. However, conversation by no means breaks down when the speaker's contribution violates the maxim by giving more or less information than required. Even when the speaker violates the maxim, the hearer assumes that the conversation is consistent with the maxim and proceeds on the basis of the information provided to construct an answer which complies with the maxim.

One example of such a violation might take the following form:

A: Did you see the thief clearly?

B: Well, it was kind of dark.

In this example, B does not respond directly to A's question, nor does he give as much information as the question demands. Although an insufficient amount of information is given, A would undoubtedly understand B's intended point—that he in fact did not see the thief clearly. B could easily have answered directly by stating, "No, I did not see him clearly." He instead answered indirectly and with less information than required, thereby forcing A to figure out for himself how the seemingly less than adequate information given fits in with the question asked.

In linguistic terms, B is raising an *implicature*. Through implicature, a speaker may say something, or, in other words, communicate a message, without actually saying it. A comes to understand B's response through *bridging*, a process which allows him to relate B's response to the original question. The bridge in this example would go something like this:

A: I asked B if he saw the thief clearly and he told me that it was dark. I know that when it is dark, it is difficult to see. Therefore, I can assume that B meant that because it was dark, he was unable to see the thief. Thus the answer to my question is, in fact, no.

Through bridging, a hearer is able to construct a direct answer from a response in which the necessary information is not explicitly stated, but implied. Thus, although the speaker violates the Maxim of Quantity by giving less than enough information, the hearer draws an inference or implicature, which makes the utterance conform to the maxim, and is thus able to understand the speaker's point.

Another type of violation occurs when the speaker gives his hearer more information than necessary, as seen in the following example.

A: Did you see the thief clearly?

B: Yes. I looked directly into his eyes and saw a smoldering fire of hatred.

In this example, B's "yes" response answers A's question directly. B's response also gives more information than the question demands.

A close look at B's response reveals that it is comprised of two distinct parts. The first part alone, a direct answer, is sufficient to answer the question. The second part of the response is an implicature like those discussed in the previous section. Note that in the absence of the "yes," the response "I looked directly into his eyes and saw a smoldering fire of hatred" would be sufficient to allow A, through

bridging, to infer that B did see the thief clearly. The bridge would go something like this:

A: B said he looked directly into the thief's eyes and saw a smoldering fire of hatred. In order to look directly into someone's eyes, you must be very close to him. Being so close to someone, you would certainly see him clearly. Therefore, the answer to my question is yes.

Thus, even though the speaker's contribution contains more information than required, his message is still communicated effectively.

In sum, a speaker may convey his message directly (by giving exactly enough information) or indirectly (by giving more or less information than necessary). For a lawyer seeking to effectively use understatement and overstatement, two questions arise. First, how does the manner in which a litigator chooses to communicate his message affect the way in which the jury interprets the message? Second, how can a litigator manipulate the Maxim of Quantity to achieve the most effective closing argument possible?

B. A Theory of Understatement and Overstatement

As just discussed, the speaker's contribution may take one of three forms with respect to the Maxim of Quantity. In the first case, the contribution adheres strictly to the maxim by providing the hearer with exactly as much information as required. This will be referred to as an instance of "directness."

The defense claims that Bill Evans killed Eugene Watts in self-defense. The evidence has proven that this was not the case. Bill Evans shot Eugene Watts, who was unarmed at the time, two times in the chest. This use of deadly force by Evans was well beyond that which was necessary to defend himself and, as such, is clearly not justifiable as an instance of self-defense.

In this argument, the speaker gives just enough information to make his point clearly. The final sentence relates the relevant evidence (Evans used more force than necessary to defend himself) and states the speaker's desired conclusion (Evans' action was not justifiable as self-defense). By stating the desired conclusion explicitly and by avoiding the use of implicature, the argument based on directness results in the most efficient exchange of information.

In the second case, the speaker's contribution violates the Maxim of Quantity by providing less information than necessary, exemplifying "understatement."

The defense claims that Bill Evans killed Eugene Watts in self-defense. Is this what the evidence has proven? Eugene Watts

was shot twice in the chest, even though he was unarmed. Tell me, why would a man who claims to have acted only in self-defense need to use deadly force on an unarmed man in order to adequately defend himself?

In the argument based on understatement, instead of stating his conclusion explicitly, the speaker relies upon the use of implicature to communicate the message. The final sentence ("Why would a man") leads toward a desired conclusion, but ultimately leaves this conclusion up to the hearer to make.

The effect of understatement is very different from that of directness. In directness, the speaker makes the conclusion. The hearer is not required to process as much—he need only listen to understand. In understatement, however, the hearer is forced to take a more active role in the exchange because he must arrive at the speaker's desired conclusion on his own — the speaker does not spell it out for him. In sum, understatement, by giving the hearer less than enough information, impacts the hearer not by providing him with all necessary information in the most expedient manner possible, but by creating a situation in which he must process the given information and "discover" the speaker's desired conclusion on his own.

Often in understatement another type of information is simultaneously communicated, perhaps inadvertently. In processing understatement, the hearer in actuality seems to go through two separate steps. First, he constructs a direct answer to the question. Second, after having understood the main point of the statement, he proceeds to determine why the speaker chose to communicate his message through the less efficient path of understatement. Returning to the above example, the speaker's intended conclusion (Evans wasn't acting in self-defense) is, as already seen, constructed through bridging. This, however, is not the only important information conveyed in the argument. In asking himself why the speaker did not state his conclusion directly, the hearer infers that there is some reason why the speaker chose to be indirect. Here, the speaker seems to imply that Mr. Evans was less than honest in his testimony. Thus, the hearer may infer two important pieces of information from this argument: (a) Mr. Evans was not acting in self-defense, and (b) Mr. Evans lied when claiming self-defense. As will be seen in the results of the experiment detailed in Part III, *infra*, this second piece of information has significant implications for lawyers using understatement to construct closing arguments.

In the third case, the speaker's contribution violates the Maxim of Quantity by giving more information than necessary, exemplifying "overstatement."

The defense claims that Bill Evans killed Eugene Watts in self-defense. We know, however, from the evidence presented

today, that Evans was not acting in self-defense when he killed Eugene Watts. Would a man really need to shoot an unarmed man twice in the chest to defend himself adequately?

In this argument based on overstatement, the speaker makes his conclusion explicitly ("We know . . . that he was not acting in self-defense") and also utilizes implicature ("Would a man really need to shoot an unarmed man") to communicate his message. Thus, overstatement is a combination of directness and implicatures like those raised in understatement. By offering the hearer both direct and indirect means of recognizing the intended message, the speaker is able to emphasize that message to the hearer. His point is made directly, yet the hearer is also given the opportunity to participate more actively in the talk exchange and to arrive at the message on his own.

The relationship between directness, understatement, and overstatement is summarized in Table 1.

Table 1

Understatement	Directness	Overstatement
-explicit	+ explicit	+ explicit
+ implicature	-implicature	+ implicature

In sum, understatement, overstatement, and directness are all strategies which allow a speaker to communicate a message to a hearer. Directness makes the conclusion explicitly for the hearer and avoids implicature, understatement utilizes implicature to lead the hearer to the desired conclusion which is never stated explicitly, and overstatement relies upon both an explicit statement of its conclusion and implicature to communicate its message.

III. APPLICATION—AN EXPERIMENT IN THE USE OF UNDERSTATEMENT, OVERSTATEMENT, AND DIRECTNESS IN CLOSING ARGUMENTS

Any one of the strategies of understatement, overstatement, or directness could be used in constructing a closing argument.¹⁵ As discussed previously, some trial manuals support using overstatement, while others suggest that understatement is the more forceful strategy. None of the manuals, however, offer any evidence showing which strategy is more forceful. The following experiment was conducted in order to explore this issue.

15. In the interest of completeness, directness is explored along with understatement and overstatement although this strategy is, as is brought out in the results of the experiment, of little value as a tool of persuasion in the courtroom. A comparison of directness with understatement and overstatement does, however, help to illuminate the strong and weak points of each strategy.

A. Purpose

The purpose of this experiment was to test the effectiveness of the strategies of understatement, overstatement, and directness in terms of accuracy (ability to relate the facts clearly and accurately) and persuasiveness (ability to convince/persuade). The experiment was designed to elicit general patterns and observations only, and thus does not purport to settle definitively in any numerical sense the issues of accuracy and persuasiveness. Finally, the experiment is concerned only with the effects each of these strategies has on a jury in a closing argument and, as such, does not address the myriad of other variables such as voice quality or appearance of the lawyer, which may affect the way a jury reacts to a closing argument.

B. Method

Forty-nine Louisiana State University undergraduates, in three separate groups, were read three short arguments. The arguments, made by the defense counsel in a hypothetical criminal case, were based upon the same set of facts and varied only according to the strategy (directness, understatement, or overstatement) used to communicate the speaker's message. The order in which the arguments were read was varied with each of the three groups, so that no two groups heard the same argument first or last. This was to ensure that no bias resulted from the order of appearance of the arguments.

The students first were read a statement of the facts of the case. Each argument was then read one time, and the students were asked to write a one sentence statement of the main point of the argument. After this had been done for each argument, the three arguments were read one after the other. After all had been read, the students were asked to rank the three in terms of:

- a. accuracy (how clearly and accurately were the facts related).
- b. persuasiveness (which argument made the most convincing case).

The facts and arguments were read as follows.

Case facts

The accused, George Hampton, is charged with the rape of Beth Sylvester on 3 October 1985. The prosecution claims that the victim, Ms. Sylvester, saw his face clearly and was later able to pick him out of a police line-up. The defense claims that Hampton was across town when the alleged rape occurred.

Argument 1—Directness

The prosecution contends that Beth Sylvester saw her rapist clearly, clearly enough to identify him two weeks later in a

police line-up. The evidence presented has proven otherwise. Ms. Sylvester herself testified that on October 3rd, the night of the alleged rape, it was unusually dark due to the absence of a large moon. In addition, there were no lights on in her apartment and the curtains on her bedroom windows were completely closed, blocking out any outside light which may have existed. Finally, Ms. Sylvester testified that the entire incident, from the rapist's entrance into her bedroom, through the ensuing scuffle, to his hurried exit through the front door, lasted approximately ten minutes. From all of this evidence we can see that Ms. Sylvester could not possibly have gotten a clear view of her attacker. The lack of sufficient light and the small amount of time with her attacker make a clear view of him impossible.

Argument 1 (directness) presents the evidence and the speaker's desired conclusion in the most straightforward manner possible. The problem is set up in the first sentence ("The prosecution contends that"), and the explicit conclusion is stated in the following sentence ("The evidence has proven otherwise."). The facts of the case are then related, followed by a concise statement relating the evidence to the speaker's desired conclusion ("From all of this evidence we can see that Ms. Sylvester could not possibly have gotten a clear view of her attacker.'). This argument leaves no doubt as to the point that the speaker intends to make.

Argument 2—Understatement

The prosecution would have you believe that Ms. Sylvester saw her attacker, saw him clearly enough to point him out in a police line-up two weeks later. But is this what the evidence we've heard today has proven? Let's take a look. October 3rd was a dark, moonless night—Ms. Sylvester herself testified to this fact. She also told us that her apartment was completely dark and that her curtains were closed. Yet, in spite of all this, she saw her attacker clearly, the prosecution tells us. He entered the darkened room, struggled briefly with her, raped her and left—all in the span of ten minutes. There is the evidence—a woman surprised in her dark bedroom, frightened for her life, manages in a short period of time to see her attacker clearly. I think, members of the jury, that all of you know as well as I what the evidence really shows.

Argument 2 (understatement) never directly addresses the problem set up in the opening sentence ("The prosecution would have you believe"). Instead, the speaker responds with another question ("Is

this what the evidence . . . has proven?") and a seemingly contradictory statement ("A woman surprised . . . frightened . . . manages . . . to see her attacker clearly."). In this way, the conclusion is left for the jury to discover for themselves. The speaker does not give them his desired conclusion; rather, he depends on their ability to analyze the various pieces of evidence, realize the contradictory nature of his statements, and arrive at this conclusion on their own.

Argument 3—Overstatement

The prosecution wants you to believe that the victim, Ms. Sylvester, saw her attacker clearly, clearly enough, in fact, to identify him in a police line-up two full weeks later. However, the evidence presented by Ms. Sylvester herself has proven exactly the opposite—that she could not have possibly seen him clearly. First, Ms. Sylvester testified that it was an exceptionally black night. She also told us that no lights were on in her apartment and that her curtains were closed. Yet in spite of a total absence of light, the prosecution assures us that Ms. Sylvester saw her assailant clearly. In addition, Ms. Sylvester estimates that the entire time span of the incident—from the entrance of her attacker, through the ensuing struggle, to his hasty departure—was no longer than ten minutes. So the prosecution wants us to believe that in a very brief period of time and in total darkness, Ms. Sylvester still managed to get a perfectly clear view of her attacker. I think that we can all see that she could not and, in fact, did not get a good view of her attacker.

Argument 3 (overstatement) communicates the speaker's desired conclusion both explicitly ("The evidence . . . has proven . . . that she could not have possibly seen him clearly") and through implicature, as seen in the seemingly contradictory statement "in a very brief period of time and in total darkness, she still managed to get a perfectly clear view." As such, the conclusion is made both for and by the hearer.

C. Results

The percentage of times each strategy was chosen as first, second, or third choice is recorded in the table below. All figures have been rounded to the nearest whole number.

Table 2

Accuracy			
% times			
chosen as:	understatement	overstatement	directness
first choice	18%	14%	67%
second choice	29%	53%	18%
third choice	53%	33%	14%
Persuasiveness			
% times			
chosen as:	understatement	overstatement	directness
first choice	43%	43%	14%
second choice	24%	26%	49%
third choice	33%	33%	34%

D. Discussion

1. Accuracy

Directness was perceived as by far the most accurate strategy, chosen first sixty-seven percent of the time. Several students commented on the clarity of the argument, others on the greater amount of detail present with respect to the two other arguments. Because the desired message was stated explicitly and because no implicature was raised to obscure the message, the students had no trouble understanding the facts and quickly recognizing the desired conclusion. Thus, directness was perceived as the most accurate strategy because the students were given exactly as much information as needed to understand the message.

Understatement was perceived as the least accurate strategy, chosen third fifty-three percent of the time. Some students claimed that this argument "didn't try to state a point" and was "inconclusive" and "unclear." Many students also did not recognize the intended message (Ms. Sylvester couldn't have gotten a clear view of her attacker) and instead became confused, believing the main point of the argument to be that Ms. Sylvester had lied or contradicted her own testimony. As was discussed previously, an implicature usually gives the hearer two distinct pieces of information, one relating to the underlying direct message and the other to the reason why the message was communicated indirectly. In this particular example, some of the students seemed to focus on this second piece of information, reasoning perhaps that because Ms. Sylvester's own testimony was used to make the point that she couldn't see her attacker, something must be wrong with her testimony. Thus many students had the impression that the most important point was that Ms. Sylvester was "lying," "discrediting," and "contradicting herself," or trying to "falsely accuse" someone. These very strong impressions, though never explicitly stated, are nevertheless important by-products of the implicature. Thus, by allowing the hearer to make

the final conclusion, understatement may result in a conclusion not intended by the speaker.

This has important implications for the trial lawyer. First, no matter how persuasive the argument, if it does not make the intended point, then it is of little value. Second, if the implicature communicates more than the desired message, will the hearer have to agree with both pieces of information in order to accept the lawyer's view of the case? In other words, if the juror in this case agrees with the intended message that Ms. Sylvester could not have seen her attacker, but disagrees with the insinuation that she is lying, will he be persuaded by the lawyer's argument? Because this second piece of information may significantly affect the jury's response to an argument, a lawyer must take into account the interaction of implicature and the mood of the jury when constructing a closing argument based on implicature.

Overstatement fell between understatement and directness in terms of accuracy. Because the conclusion was stated explicitly, many students seemed to find this argument clearer than one based on understatement. However, because overstatement, like understatement, makes use of implicature, some students were led to believe that the main point of the argument was Ms. Sylvester's "untruthful testimony." Thus, although the confusion resulting from the use of implicature was to some degree mitigated by the presence of directness (as reflected in the greater perceived accuracy of overstatement vis-a-vis understatement), it was not eliminated altogether.

In sum, directness is perceived as the most accurate strategy, with overstatement second and understatement least accurate of all.

2. *Persuasiveness*

In terms of persuasiveness, it would seem that overstatement would emerge as the most effective strategy because of the interaction of implicature and directness. This experiment suggests, however, that no appreciable difference exists between overstatement and understatement. The values representing the percentage of times each of the strategies was chosen first, second, and third are almost identical. Students commented on understatement, stating that it is "more leading or persuading; [it] defines conditions and time, then lets the jury draw the conclusion." Some mentioned that this argument was "short on facts, long on emotion" and one student went further, describing the argument as "too personal. It makes assumptions . . . [and is] cocky." Thus, while some students found the open-ended conclusion persuasive insofar as it allowed for more active participation on the part of the jurors, others felt that the argument was being used to play on emotions rather than to emphasize facts.

Although overstatement was chosen third just as often as understatement, fewer negative comments were directed toward this strategy. The results indicate that students who ranked overstatement as most persuasive reacted positively to the combination of directness and im-

plicature. On the other hand, thirty-three percent of the time students ranked overstatement last in persuasiveness, due in part perhaps to the negative impact of the implicature present and in part to over-emphasis of the intended message.

Directness was the least effective strategy, probably due to the fact that the students were given just enough information to understand the intended message, but nothing more to persuade them one way or the other. This strategy was chosen second a relatively large percentage of the time, which most likely is a result of the fact that some students responded positively to the completely open-ended nature of understatement while others reacted very negatively. As such, directness seemed to present an acceptable alternative.

To summarize, the results of this experiment indicate no real difference between understatement and overstatement with respect to power of persuasiveness. Overstatement was perceived as more accurate than understatement, as many students listening to the argument based on understatement became confused as to the speaker's main point and ultimately did not receive the speaker's intended message. Directness, although by far the most accurate strategy, fell short in its ability to persuade. These observations, especially those relative to the possible difficulties arising out of the use of implicature in both understatement and overstatement, suggest that a lawyer should exercise care in deciding when and how to use understatement and overstatement in his closing arguments.

IV. ADVICE FOR THE TRIAL LAWYER

As developed in the experiment above, understatement can be a powerful persuasive tool, but one which is not altogether without problems. The fact that this strategy is sometimes problematic does not mean, however, that it should be removed altogether from the trial lawyer's arsenal. A lawyer who understands the operation of understatement can choose the circumstances in which this strategy will be most effective and take action to mitigate any undesirable side effects when using it.

As discussed, one problem accompanying the use of understatement is that many hearers do not ultimately arrive at the speaker's intended message. There are two possible solutions to this problem. First, the use of understatement seems better suited to cases in which the message to be conveyed is not overly complex. Obviously, the easier the information is to process, the more likely it is the jurors will be able to analyze the information and arrive at the intended message on their own. Conversely, as complexity of the subject matter increases, the likelihood that jurors will miss a piece of significant information, fail to make a logical connection, and ultimately miss the intended message also increases.

Second, a lawyer using understatement must take care to give his jurors as much guidance as possible, without directly stating his conclusion. He must try to make the leap in reasoning from the facts to the unstated conclusion as short as possible allowing jurors less room to diverge from the lawyer's chosen path. One method of providing such guidance is the use of contradictory statements or leading questions like those used in the above examples.¹⁶ These statements make the connection between the facts and the point of law in dispute for the jurors, but still allow them to "discover" the conclusion on their own.

A second problem arising from the use of understatement is the fact that unintended and often undesirable information is sometimes communicated along with the intended message. From this problem follow two possible solutions. First, understatement would seem to be particularly effective in cases where the second piece of information communicated through implicature actually strengthens the lawyer's case instead of detracting from his main point. For example, in a situation where the jury is particularly unsympathetic to the plight of the victim or other witness, conveying the impression that the victim or witness is lying would seem to help the opposing lawyer's case. A jury would be more likely to agree with that lawyer when the opposing witness is shown to be not only inaccurate, but also a liar.

Second, when the second piece of information would damage his case, the lawyer could state explicitly that it is not his intention to convey such an impression. In other words, he could use an express disclaimer to negate a conclusion based on the second piece of information. For example, in the experiment above in which the lawyer was defending an accused in a rape case, conveying the impression that the victim was lying could serve only to create resentment in the jury. In such a case, the lawyer could have made a statement such as "I know poor Ms. Sylvester probably honestly believes that this was the man that raped her, and under the circumstances we really can't blame her for being a little confused." The lawyer thus cuts off the negative implication and leaves the jury to process only his intended message.

Because overstatement is characterized by the use of directness, it is generally more accurate than understatement. As such, when the

16. E.g., "Would a man really need to shoot an unarmed man twice in the chest to defend himself adequately?"; "So the prosecution wants us to believe that in a very brief period of time, and in total darkness, Ms. Sylvester still managed to get a perfectly clear view of her attacker."

Although the above statements were taken from examples of overstatement given in this paper, they could just as easily form part of an argument based on understatement. This is because the statements are both examples of the process of implicature which is common to both understatement and overstatement. The only difference between the two strategies is that in overstatement, the argument would in addition contain a direct response to the statements.

subject matter to be communicated is fairly complex, an argument based on overstatement would seem to be the lawyer's safest bet. Likewise, when the lawyer is worried about jurors drawing conclusions based on information he never intended to communicate, an argument based on overstatement would be more likely to keep the jurors on track. Because they will be presented explicitly with a statement of the lawyer's primary message, they will spend less time guessing at what he is trying to say. However, as overstatement does rely in part on the use of implicature to convey its message, the problems which plague understatement will be present here as well. The mitigating strategies discussed relative to understatement apply with equal force in the context of overstatement.

In sum, both understatement and overstatement are useful strategies for trial lawyers, though they are not without problems. By choosing carefully the context in which a strategy is used and taking action to mitigate possible harmful side effects, a lawyer can use both strategies successfully in his trial practice.

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