Judge Rita Miller (Ret.)
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Don't make your first witness your first mistake

CALLING A DEFENSE WITNESS AS YOUR FIRST WITNESS IS A POPULAR IDEA – AND A BAD ONE

There's a school of thought that teaches plaintiffs' lawyers to call a defense witness as the first witness at trial because it makes the jury focus immediately on the bad acts of the defendant rather than anything the plaintiff did. Some folks take it further and call several defense witnesses first.

As a judge who has seen this done scores of times, I can tell you it often doesn't work. I can tell you this with confidence because I have been the trier of fact on many of these occasions. Here's the deal.

The rule of "primacy"

You are all familiar with the rule of "Primacy." David Ball defines it as follows: "'Primacy' is the tendency to continue to believe that which one first believes. Belief has momentum: It continues until something stops or reverses it. So in trial, whatever jurors first come to believe, they tend to continue believing. Once they believe something, it colors everything that follows." (D. Ball, *David Ball on Damages: The Essential Update, A Plaintiff's Attorney's Guide For Personal Injury And Wrongful Death Cases* (NITA, Second Ed. 2005) p. 56.)

Ball continues: "Primacy does not mean that we best remember or most notice or are most affected by what we hear first. This is how primacy is usually taught and it is dead wrong. In any oral presentation longer than a paragraph, placing something first subordinates it, makes it less noticeable, less memorable, and less effective. Primacy has nothing to do with what is said at the start. It means that someone has started to believe something." (*Id.*, p. 56, n. 1.)

A lot of smart people believe that success in a case depends on what the jurors come to believe during voir dire and opening statements. I wholeheartedly agree, largely because of "primacy." But don't be deluded – defense attorneys have figured this out as well.

So, let's assume that both sides try like crazy during voir dire and opening statements to win the battle to get the jurors to believe their side first.

Then plaintiff gets to call the first witness. This is a huge advantage because of primacy. Both sides have had a relatively equal chance to win the battle for primacy during voir dire because their questions to the jurors have been more or less concurrent. The sides have had similarly contemporaneous opportunities to try to establish primacy in opening statements. But only one side gets to call the first witness. Assuming that you have battled only to an ignominious tie in voir dire and opening statements, the first witness is your big chance to get the jurors to believe your side first.

I have seen this opportunity squandered time after time by plaintiffs' lawyers who have been taught to call a defense witness as the first witness in their case.

The following line of reasoning may be the genesis of the idea that you should call a defense witness as your first witness. David Ball teaches that, in opening statement, after initially focusing on the harm suffered by the plaintiff, the lawyer should focus next on what the defendant did that caused harm and should avoid any focus on the plaintiff's own acts. (*Id.* p. 124.)

Subordinate your client

Ball says, with respect to opening statement: "Subordinate your client. Leave your client out of the story of what the defendant did. It is hard for some plaintiff's attorneys to accept that the story of what the defendant did must exclude the plaintiff as much as possible. It seems a counter-intuitive reversal of all they have ever learned. But it is essential. This is because jurors believe they are here to decide who did something wrong. To make their all-important first decisions about who did wrong, they will over-use the early information you give them. When your client is doing things in that information, the jury will infer that some of those things could have caused what happened to her. They will turn her most innocuous actions (a cup of coffee before driving to work) into negligence. When that becomes one of their first beliefs, you will find it hard and often impossible to dislodge it later. Don't give them anything to start them on that path." (*Id.* p. 125.)

This is a splendid approach. But someone made the leap from using this approach in opening statement to using it in deciding whom to call as the first witness. At first blush, this seems a logical extension of Ball's advice on opening statement: by calling a defense witness first, you might be able to direct the focus onto what the defendant did and avoid focusing on the plaintiff's own actions.

An opening statement doesn't talk back

But calling an unfriendly witness is different from an opening statement. An opening statement doesn't talk back. With an unfriendly witness, you unleash factors you may not be able to control. A good defense witness can grab primacy away from you by being a sympathetic and believable witness. She can bury your helpful facts in a morass of explanations, denials and minutiae. She will do her best to do what Ball warns against – telling the jury exactly what plaintiff did wrong and why plaintiff was the negligent party. She may have nasty things to say about plaintiff. She doesn't have to be asked about these – she can blurt them out, regardless of your questions. She can raise issues that you will have to spend your time explaining away when you call your witnesses, depriving you of the ability to put on your case as simply and cleanly as you would have if this defense witness had come after your witnesses.

Even if you get away cleanly by just asking questions from her deposition that are impeaching and highly damaging, her lawyer will get the chance to ask her questions after you have finished that can dismantle some of what you tried to do.

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776 examination

The judge is likely to compound your misery by ruling that, when defense counsel examines the witness, she may exceed the scope of the 776 examination and put on her entire case. Try to find out in advance if the defense will seek to put in its entire case immediately after your 776 examination. Also, try to find out if the judge will allow it. Before calling the witness, you might advise the judge that you are going to conduct a very limited examination and that you will object if the defense attorney goes beyond the scope of your 776 questioning. This might convince the judge to limit the defense examination or at least warn you that counsel will be allowed to go beyond the scope.

Fortunately, some defense attorneys want to follow your 776 examination with only a limited direct, reserving their right to recall the witness in their case in chief. If you're lucky, the witness has not been prepared to go beyond your 776 examination at this early stage and the defense attorney will not want to go there. But beware the witness and lawyer who were warned by your witness list that you would call her 776 and who are prepared. Thus, her case comes in before yours. If this happens, you have given the defense the opportunity to call the first witness and to gain an advantage in the battle for primacy.

Why the defense witness is a bad idea

Interestingly, David Ball appears to agree with me that you should not call a defense witness first. This is evident from his description of the ideal first witness. He says: (1) "She should be able to tell some significant part (not necessarily the largest part) of the overall story: either what the defendant did or the results of what the defendant did." She should not talk about what the plaintiff did. (2) "Your first witness should be able to speak at least a little to the harm that was done – such as seeing how hard the car hit your client." (3) "Your first witness should have no stake in the outcome." (4) Your first witness should be cross-proof. Your opponent's cross-examination of your first witness is the first-time jurors see your case tested in the crucible of truth, cross-examination. Jurors have heard you make your claims and now for the first time see your credibility tested. They are primed to create their first belief about your credibility. . . . If your witness holds up under cross, the jurors' initial belief will be that you are credible. If the cross-examination shows holes in your claims, the jurors' initial belief will be that you are not altogether credible." (*Id.* p. 173.)

If you call a defense witness first, you will fail to achieve what Ball suggests for the first witness: (1) He will not tell "a significant part … of the overall story" from your perspective; (2) He will not describe the harm that was done to your client; (3) He will not be a neutral witness without a stake in the outcome who endorses the legitimacy of your client's claim; (4) He will not be "cross-proof": he will be the opposite of cross-proof in that he will contradict your client's version of events. Importantly, he will not establish your credibility; he will do his best to shatter it.

You want to be able to control the witness

In case after case, I have seen the plaintiff's lawyer call the principal defendant first. The plaintiff's lawyer tries to control the witness by asking questions exactly as asked at the deposition. But the witness blunts the force of the questions by explaining that his answer did not really mean what it seemed to, that he did not understand the question the way you did, that he has changed his answer because he has refreshed his recollection recently, or that new information has emerged that has changed the answer. His impeached responses often do not have the devastating effect you hoped for.

And the defense witness inevitably volunteers information that is not called for by the question and that is the bedrock of defendant's case. In the process, he bad-mouths the plaintiff and his whole family. By the time you have eked out a tepid response, the jury does not recall exactly what the original question or answer was and is intrigued and distracted by the salacious information the witness has volunteered.

The examination is blathering along in a tedious, annoying way and the jurors are wondering why the case is so boring and complicated compared to the crisp, dramatic narrative of the plaintiff's opening statement. The story that is coming out is not what plaintiff's counsel told them in opening. Right out of the gate, the plaintiff's lawyer is not living up to his promises and is losing his most important asset: his credibility.

Sometimes a lawyer thinks it is useful to impeach the witness's credibility by reading deposition testimony that contradicts the witness's trial testimony, even though the contradictions are not particularly important. This often backfires by suggesting to the jurors that the plaintiff's lawyer is a nit-picker who doesn't have anything better to offer and must resort to bullying the witness instead of extracting probative evidence.

I have seen more than one case where plaintiff's counsel calls every defense witness before he calls the plaintiff or plaintiff's witnesses. I cannot think of a reason for this other than the misguided notion that, if one defense witness is good to start with, more must be better.

Your plaintiff should come later

On the other hand, I am not suggesting that the plaintiff herself be called first. Experienced plaintiffs' lawyers (and David Ball) teach that you should not put the plaintiff on the stand first. You should build up to the plaintiff's testimony and use witnesses without a stake in the outcome to establish as many facts as possible, relieving the plaintiff of the need to do so.

The desire: (1) to avoid focus on what the plaintiff did; and (2) not to dampen the impact of the plaintiff's testimony by putting the plaintiff on the stand first, may motivate some attorneys to call

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defense witnesses first. But consider calling any and of plaintiff's friendly witnesses before plaintiff as opposed to calling a defense witness. There must be some friend or family member who can testify to how badly the incident has hurt plaintiff emotionally or physically or someone who can testify that they saw the irresponsible things that defendant did.

Conclusion

In summary, if you call the defense witness(es) first, you risk losing your ability to put on your case cleanly at the outset, fulfilling the promises you made to the jury in opening statement and undercutting the promises defense made in its opening statement. With a better first witness, you build your credibility and undercut defense counsel's. You get the jury believing your version of events. You don't necessarily cause an unwelcome focus on what your client did wrong. You avoid letting the other side get the jury to believe its side first. You avoid getting tangled up with an unfriendly witness who takes your case on undesirable, mind-numbing detours and distracts from what you seek to establish. You avoid opening the door to facts you would rather confront after you make certain points.

My final point is that some lawyers can pull it off. These are the highly experienced, highly effective folks you admire. They carefully consider which, if any, defense witness they will call and surgically cut to the one, two or three areas of questioning the witness cannot credibly refute.

If you are not yet in this august company, think long and hard about the following before you call a defense witness first:

1) Is the defense witness personable or sympathetic?
2) Do you have dynamite answers given in a deposition with which to confront this witness?
3) Can the witness wiggle out of those answers?
4) Is the witness crafty enough to muddy the waters?
5) Can the witness say damaging things about plaintiff that you should not have to defuse until later in the case?
6) Are you going to have to spend time explaining away points the other side made with the witness when you should be putting on a clean case in chief and explaining these things only on rebuttal?
7) Will the judge allow the defense to exceed the scope of your 776 examination?
8) Will the opposing attorney be able to get in great stuff (early in the case) when he or she questions the witness after your initial examination?
9) Do you have a good plaintiff's witness who can testify first about the extent of the harm to the plaintiff or the extent of defendant's bad acts?
10) If you have to call a defense witness first, can you call someone other than the principal defendant?
11) Are you experienced enough to pull it off?

Judge Miller is a mediator, arbitrator and discovery referee at ADR Services, *handling personal injury, employment, products and premises liability, malpractice, business disputes and all types of civil litigation. She was named Trial Judge of the Year by CAALA in 2011. She graduated first in her class from Loyola Law School, summa cum laude. As an attorney she represented both plaintiffs and defendants in civil litigation. Judge Miller sat in Mosk Courthouse for 14 years. She can be reached through Christie@ADRServices.com.*

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