



Order out of chaos

The strategy and skills behind witness order and scheduling at trial



Cooper

BY MILES B. COOPER

The defense was putting on its case. The lawyer, a trial veteran, was *good* but not *great* with time estimates. Adding to the pressure: a trial judge who made it clear that there must be a ready witness waiting to take the stand – no delays – or there would be dire consequences.

An example? The judge's statement on the first trial day. At 4:55 p.m. (we ended at 5:00), I ran short of witnesses. In that one day, we had trial call, were assigned out, conducted motions in limine, selected a jury, did openings, and put on four witnesses – a fast clip in today's trial courts (and no, this was not an expedited jury trial). The judge's response? "Mr. Cooper, what have I done at any point that might make you think ending early would be okay? Your client is here – call her." Gulp. Call her I did.

Later in the trial, a crippling hourly burn rate of witnesses sat in the hall – a heavenly host of defense experts. The defense neuropsychologist, neurologist, orthopedist, and general contractor. Sitting. Waiting to be called. A rough calculation: \$3,100 per hour.

We're taught about the importance of witness order. But when the rubber meets the road, practicality sometimes supersedes precision. That balance is our subject this month.

Primacy and recency

There are maxims regarding juror information retention. Primacy – what happens first – is one. Recency – what happened most recently – is another. Primacy is an important plaintiff's lawyer's tool. We get to go first.

Thus, we fret about which witness goes first. A frequent approach is to call the defendant or defendant's designated agent under Evidence Code section 776. This can be a good move. One potential benefit: a solid cross can yield the elusive but valuable piss-off factor, the case polarizer. The short version: a likable plaintiff helps a verdict. A hateable defendant supercharges it.

Bend like a reed

But after the first witness (and sometimes before), it gets harder. No battle plan survives the first shot. The same is true in trial order when your witness list includes busy surgeons, reluctant police officers, and cameos you are cajoling to attend. You can fixate on your witness order and stress – we are control freaks

after all – or you can acknowledge the evidence, to a certain extent, will come in on its own schedule.

It will all work out

As the evidence comes in, the witnesses slot into position like blocks in a Tetris game. With focus, it falls into place. There are panic moments, though. Good time estimates help (and it hurts if your opposing counsel cannot nail theirs). In the end, everything works out.

Aces up the sleeve

It works out for a reason. The reason is a combination of fear, preparation, organization, and a few aces up your sleeve. The aces? Deposition transcript reads or video, the plaintiff's testimony, and the defendant's testimony, also known as readily available fill.

The deposition read or video playback is an important pre-trial step. Frequently there are witnesses who one cannot call live. Reaching agreements with opposing counsel about what excerpts to use early on is a key tool in schedule management. Once that's done, you've got material that can be used at any point.

Don't overlook the importance of the testimony though. If the playback is a key witness – say the out-of-state surgeon – playing it after lunch (in the food coma timeslot) may not be the best idea.

You can also use your client as fill. Many judges and opposing counsel will allow the plaintiff to take the stand to fill empty slots and not require the client to complete testimony in one sitting. This also requires consideration. If your client is not the best witness, getting the client on and off the stand in one sitting is best.

Play nice

You will have problems. So will your opposing counsel. That's where professionalism helps. If you've played hardball, you may not get much cushion from your opponent. Prepare accordingly.

Most courts require 24-hour notice to opposing counsel of your witness lineup. But if you know sooner than that, share it. Opposing counsel has to be up late at night finalizing exams just like you. You'll want the same courtesy when the defense case – which always comes in faster – plays out.

The defense can also run into witness problems. If they ask you to accommodate an out-of-order witness in your case-in-chief, accommodate it unless it is completely unreasonable.



Unreasonable here means the first witness in the case or the defense expert prior to your expert.

Billed out

The outcome of four experts in the hall? Some couldn't come back the next day. The defense ultimately did not call all of the experts. This was the right decision – the ones they pared down would not have done well on cross. But a decision that would have been far less expensive with better planning.

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