OUT OF ORDER… THE UNPREDICTED STORY ORDER

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Ready, Aim, __?__

Lights, Camera, __?__

1,2,__?__

A,B,__?__

We can finish the third, predictable number, word or letter to each of these. We tend to be so ordered that if our Uncle Leo were to ask us about the case we have coming up for trial, we would tell the story in the same order every time. But the trial story doesn't have to be structured that way. We usually initiate the narrative starting on the day our client was injured and finish after his last doctor's visit. A jury, like Uncle Leo, may listen carefully to only the first part of the story. After a short time of perhaps five minutes,

however, jurors may tune out, lost in their own reveries. Even though *we* know the story so well when told in the predictable order, the jury isn't necessarily listening all the way through.

Assess Potential Jury Biases at the Start

Lawyers have limited input into the order of the trial. Jury selection comes first. As plaintiff's attorney we have the first opportunity to have a conversation with prospective jurors. During jury selection, the traditional approach is to convey the story of the case, just as we told Uncle Leo. But to "inoculate" the jury to the weaknesses in the case, the out of order technique can be employed to expose the flaws right up front. Jurors will find you more credible, because you were forthright in bringing up these negative features first. It also defuses the defendant's strategy of exploding the bomb of these damaging issues during the evidence portion of the case.

In the medical negligence case, your client, the plaintiff, missed several appointments with the defendant, and continued to smoke even though instructed to quit. In the auto case, the impact was light and the defendant's photos show little damage. The plaintiff didn't complain of injury at the scene. After exposing this information, ask open-ended questions to determine how each prospective juror feels about these weaknesses. Deselect those whose biases may close their minds to mitigating facts. People tend to fill in their own facts based on their own murky personal experience. And be cognizant of the predictable prejudices and resentments most jurors harbor. When the plaintiff's lawyer first stands up to speak to the prospective pool of jurors, these same folks have already been forced to come downtown to an unfamiliar part of the city and to park in the lot that costs as much as their monthly telephone bill. They have heard the drone of the deputy county clerk about the great civic duty they are about to undertake; they have had to make arrangements

for the kids, work and spouses to take the day off; and, finally, they probably resent the lawyers who have forced them into this predicament. In particular, they dislike plaintiffs' lawyers and plaintiffs who they think are just trying make money on the system, while their own insurance premiums keep going up.

As we proceed to convince them that they have an important task, that they are capable of reaching the correct decision, and that justice will be served, they are thinking about how soon they can leave. Further, most are protective of personal information, even if it is the name of their spouses. Learning the person's occupation is especially revealing. From that we can determine how long the individual has been at the same job, the level of occupational satisfaction and confidence, and the degree of responsibility in supervising, hiring, and firing others. Determining reading and television habits will convey jurors' liberal or conservative areas of curiosity.

Throughout jury selection, maintaining focus on the seriousness of the case is paramount. Jurors should gather immediately from your style that this is no frivolous case. Your client has been seriously injured and is the only player who has suffered and paid for his injuries. Once these prospective jurors are convinced that they could potentially be the judges of this genuine grievance, they should begin to relax into their new roles as judges of the facts.

Out of Order Direct Examination

Generally, when *we* call to the stand our client's primary treating physician, the first question is about the doctor's background. "Where did you go to medical school?" is the standard first order of questioning for this witness. The out of order alternative would be to confront immediately the heart of the issue: "When did you first meet your patient, Lucy?"

"What did you treat her for?" "Doctor, do you have an opinion to a reasonable degree of medical and surgical certainty…" The jury will be listening to the first part of this doctor's testimony. Make sure the doctor is comfortable teaching the jurors, in an interesting way, about the medicine that applies. This may best be conveyed utilizing visual aids. An expert witness, who can hold the jury's attention while teaching them key concepts, must establish these points immediately, while he maintains the jury's attention. It matters little that the physician was Phi Beta Kappa at Pennsyltucky University. The jurors often tend to stop listening after awhile, just like Uncle Leo. So with the key issue of proximate cause in balance on this rear end crash case, why not mix up the order! Talking to the doctor about your client also shows the jury that the doctor also cares a lot about what happens to the plaintiff. After the doctor has summarized all of his treatments, then explore future medical care, disability and pain that the plaintiff will experience for the rest of his life. Subsequently, you can explicate the doctor's medical school, internship, fellowship, residency, hospital affiliations, relevant publications and honors. The jury has already been entranced by the doctor's knowledge and easy style in speaking about her patient. Ideally, these twelve strangers would want this physician to be their doctor. The first topic, treatment of the plaintiff, is the most important, and most likely is given the greatest attention by the jurors.

The same approach is effective for all experts. Get to the heart of the testimony quickly, leaving the qualifications for last.

Out of Order Cross-Examination

An out of order approach may also apply to the cross examination of the defendant or key defense expert. Many times these professional witnesses are expecting a certain line of questions. They may be unprepared to discuss the heart of the case immediately and may be thrown off guard. In fact, for any adverse witness, rather than to risk losing the jury's interest by getting bogged down in mundane details, get to the key facts first. For example, the defendant in the rear ender who denies liability should be questioned right up front by leading him through his testimony to where he crashes into the rear end of the car ahead admitting that he "just couldn't stop in time; my brakes locked".

Ultimately this technique is effective because it is felt that the first words out are most likely to be heard and remembered. But maybe just as important is the old adage that "less is more" in today's jury trial. In order to maximize your effectiveness, present the most important facts first, within the limited attention span of the jury. Efficiency and conciseness will be much appreciated by those who sit in judgment of your performance.

To know whether or not your trial scheme works, test it with focus groups. Focus groups usually uncover the unknown holes as well as the strengths in your cases. Try out the out of order scenario several times, with different emphasis and order. Listen to the focus group deliberations. Then reset the order to match the focus group's responses.