



# Does Order Really Matter?

By Jessica Hoffman, J.D., M.A.

If you have put together an opening statement, drafted a script for a focus group or arranged witnesses for trial, you have likely struggled with the order in which to configure everything or wondered how much order really mattered. Order does matter, and for a few reasons.

## 1. Primacy, Recency and Persistence.

Most people have learned about primacy and recency in psychology 101. The general principle is that people remember things that are presented either first or last better than things presented in the middle. This has consequence for the order of witnesses. The most powerful witnesses should be your first and last witnesses and everyone else should go in between. This may not always work you must present witnesses in chronological order to make the most sense, but where there is room for play, order witnesses accordingly.

Persistence, for our purposes, means that what someone first comes to believe they tend to continue to believe. Jurors come to trial with preconceived notions, beliefs and attitudes. You will not change those within the course of a trial. However, you will shape the story that jurors create with those background values. The story that the jurors first come to believe is the one they will tend to continue to believe. As a plaintiff's attorney, you have an opportunity to speak to jurors first and begin to shape a story that is in your favor. If you craft your story well and take into account individual jurors' values and beliefs, then the jurors will be less likely to buy into defense arguments throughout trial. Anything they will remember anything they hear that is consistent with the story they have started to believe, and their subconscious either will alter anything inconsistent to become more story-consistent or will forget it. Your job is to make your story strong enough that jurors believe it first, thereby viewing the rest of trial through a plaintiff-colored lens.

## 2. Tort reform.

The order in which you present your opening evidence makes a much bigger difference today than it did years ago. With tort reform attitudes running rampant, you face jurors who do not trust you, your client, or anything that either of you say. The short time you have with them in jury selection is not enough to build good rapport. Therefore, the structure of your opening does matter. Gone are the days when you can begin advocating for anything early on. Your opening needs to start with purely rules and a statement of facts. Any adverbs will do you more harm than good. Toward the end of opening, you can begin to advocate. By that time, if you have done your job correctly, jurors will have some level of trust in you and they will be willing to listen to your arguments.

Further, you cannot mention your client in creating your story. If you focus on your client in explaining what happened, jurors will automatically blame him or her – and for things you never would have dreamt. In an automobile accident where the defendant ran a red light, jurors will wonder if your client was on the phone, drunk, on drugs, or distracted. In a medical malpractice case, jurors will wonder why your client chose that doctor, why he or she did not get a second opinion or whether he or she was doing anything to cause the injury. Jurors think your client is suing simply to get rich quick and is heading for deep pockets, so any story that revolves around your client is close to doomed. Instead, talk first about the defendant. Frame the story around what the defendant did and the safety steps he or she chose to skip. Toward the end of opening, when you become adversarial, you can bring your client into the story to explain harms and losses, but not before that point.

Order also has a place in running focus groups and mock trials. If order makes a difference at trial, then it only makes sense to run various focus groups to test which

orders create the strongest story. Find out which witnesses jurors gravitate toward and put them first or last. Change the order of your story and of the presentation of evidence and test (always with a control group) jurors' reactions. Find out how jurors respond to your client. You may need to put him or her in the middle of the case if they are turning off jurors and put strong experts or lay witnesses at the beginning and end. Remember, what jurors first come to believe they will tend to continue to believe. Use every strategy you can, including order, to make your story the one they come to believe first.

Jessica Hoffman is a mediation and trial strategist, as well as a board certified attorney. She is the owner of Hoffman Brylo Consulting, LLC. She was trained by nationally renown trial consultant David Ball, Ph.D. for three years. She specializes in running focus groups and mock trials as well as doing case analyses to help attorneys leverage their cases for mediation or trial. She also edits opening statements and closing arguments and aids in witness preparation and jury selection. You can reach her at [trialstrategist@gmail.com](mailto:trialstrategist@gmail.com) or 303-653-2233.

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