Sequencing and Chronology in Trial Presentations

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A trial is, among other things, the law’s process by which information is communicated by advocates to factfinders. Successful advocates make sound decisions, not just about what facts to convey, but also about how those facts are conveyed, including the optimal sequencing of those facts. Intuitively, and conventionally, the most sensible formula for presenting information is to do so in a chronological order, revealing facts in the historical sequence in which they actually occurred.

There is much to commend this traditional wisdom. Human beings are predisposed to understand events as stories. We are receptive to narratives that follow a linear progression. Moreover, it is the essence of a story that it proceeds chronologically, or at least substantially so.

In addition to making events comprehensible, chronology also impacts inferences and conclusion. Most obviously, our deductions about causal relationships are influenced by chronologies, as an event can only be perceived as a cause of another event if the former event precedes the latter one. For that reason, as well as general edification, trial lawyers often present juries with timelines, at least verbally and often visually.

Notwithstanding the manifest appeal of a chronological presentation, a number of commentators caution that a strict chronological approach is not always the best choice. A strictly chronological approach could separate in time facts which, although individually of limited significance, would be compelling when considered in combination. Furthermore, a chronological formula might disclose facts the significance of which depends upon later-occurring events. Finally, it has been suggested that a chronological approach invariably buries material facts among trivial chronological details.

Of course, no one suggests that facts be presented in a completely random sequence; at some point, presenting at least some events in chronological order is essential and unavoidable. Furthermore, to the extent that the lawyer opts for an alternative structure, it must have an ease of comprehension and a persuasive logic at least comparable to a chronological presentation. For example, one could organize facts by topic or by contention, regardless of their chronology. Another alternative framework is convergence, whereby two or more parallel chronologies (usually involving separate persons) are traced, leading up to a single encounter or result. A third option is to begin later in the story, and then flash back to earlier events. This approach may be particularly useful when the later incident, presented first, will color the interpretation of the earlier-occurring events.

One principle that might influence choices about sequencing is the rule of primacy and recency, the notion that an audience will be particularly captivated by the first and last items addressed. Consistent with this principle, irrespective of chronology, one could start with the most important facts or arguments, end with the most compelling information or sandwich compelling points before and after more mundane details. Along these lines, and with the objective of immediately capturing the attention of the jurors, a useful strategy is start with a
dramatic point, regardless of chronology, and only then present a timeline that places that powerful item in a chronological sequence.  

So what is a trial lawyer to do? Commentators agree that a chronological sequence is the best presentation except, of course, when an alternative structure would be better. Not much guidance is available, however, for identifying when to opt for a chronological presentation and when to opt for a substitute organizing scheme. With the hope of addressing this elusive issue, I offer the following observations.

First, while all trial presentations involve advocacy, some advocacy is affirmative and some is negative. By affirmative advocacy, I mean building a factual scenario which, when combined with governing legal principles, should result in a favorable verdict. By negative advocacy, I mean tearing down the opponent’s factual scenario.

Second, counsel for the parties with the burden of proof (plaintiffs in civil cases and the prosecution in criminal cases) must engage in affirmative advocacy. In other words, prosecutors and plaintiffs’ counsel must have a factual version of the events which they must persuade the jury to accept. Prosecutors and plaintiffs’ counsel might engage in negative advocacy, but only to the extent that the defense engages in affirmative advocacy by offering an alternative version of the events.

Third, counsel for the defense (in both civil and criminal cases), having no burden to prove anything, will almost invariably engage in negative advocacy, and will also engage in affirmative advocacy only to the extent that they offer an alternative factual account. For example, in a homicide prosecution in which the only real issue is the identity of the killer, counsel for the defendant will surely engage in negative advocacy to the extent that she attempts to persuade the jurors that there is reasonable doubt about the prosecution’s evidence identifying the defendant as the killer. She might also engage in affirmative advocacy by offering an alibi defense.

Fourth, the essence of affirmative advocacy is story-telling, i.e., providing the jurors with a narrative or narratives which establish the factual account advanced by that party. Without a doubt, the best method for advancing an historical version of the events is to proceed chronologically. Thus, when counsel is engaging in affirmative advocacy, he should offer a chronological presentation. As will be explained later, any problems with a chronological presentation under these circumstances can be solved by minor adjustments and should not require abandoning chronological order as the guiding principle of the presentation.

Fifth, negative advocacy is not storytelling. In fact, it is telling the jury that there is no story. Consequently, there is no compelling reason to proceed chronologically, and one should do so only as a default system, i.e., only when no better organizing principle suggests itself.

Sixth, although the question of whether one is engaged in affirmative advocacy or negative advocacy is contextual, some general conclusions may be drawn concerning the components of the trial. Direct examinations generally constitute affirmative advocacy, and thus should generally be conducted in a chronological manner. Cross-examinations usually involve
negative advocacy, and therefore the cross-examiner should not be wedded to the chronology of the events. Opening statements from plaintiffs’ counsel and prosecutors invariably constitute affirmative advocacy and should use chronological order as the fundamental structure. No such generalizations can be stated about opening statements from the defense. Finally, closing arguments require special considerations. Each of these will be addressed in turn.

I. Direct Examinations

When we speak of direct examinations, we have to consider both the macro and micro scenarios. At the macro level, there is the sum total of all of one’s direct examinations, i.e., one’s entire case-in-chief. Ordering one’s witnesses is very much a tactical decision. For all the reasons that a chronological presentation makes sense, witnesses should be called in an order such that their testimony corresponds to events as they occurred chronologically. Of course, witnesses are not teammates in a relay race. They rarely have testimony to offer that lines up in a perfectly linear fashion, with each witness picking up the narrative at the point at which the preceding witness concluded. Nevertheless, a general chronological order will make the most sense to the jurors. Only to the extent that one can do so without distorting the overall chronology of the case should one strive to have strong witnesses called first and last in the sequence.

With regard to a particular direct examination, with the allowance that each witness’s testimony must be individually assessed, it makes a great deal of sense to present directs chronologically. Most often, on direct examination, counsel is building her own case, engaging in affirmative advocacy, and a chronological narrative is accordingly the best choice. A chronological direct is easiest for the jurors to understand, most comfortable for the witness to follow and simplest for the attorney to prepare and execute.

The perceived problems with a chronological direct can be avoided or remedied without abandoning the chronological formula. First, to avoid diluting material facts in a sea of extraneous details, consider eliminating the extraneous details altogether. Second, in order to streamline the storytelling component of the direct, consider clearing out background and foundational issues in advance of the narrative. For example, if the core of a witness’s direct testimony is to recount overheard conversations among other persons, establishing the witness’s knowledge of these other persons, his relationship with them, and his ability to recognize their voices – all prior to inquiring about the conversations – will enable the essence of the story to proceed without interruptions or flashbacks.

Third, to maintain the jurors’ interest and comprehension, divide the direct into a sequence of linear episodes or chapters. In order to maintain a chronological framework, consider, when appropriate, using introductory signals to announce each new chapter, as for example: “All right, Mr. Smith, let’s move forward to the next week, the week of May 18. Did you encounter Ms. Jones again during that week?”

Fourth, any drawbacks from separating items of circumstantial evidence in time can be easily remedied by looping back to the earlier evidence when one arrives, in the chronology, at the later evidence. For example, having previously established that, on Monday, the witness
had seen the defendant wearing a light blue jacket with brown, horizontal stripes, at a later point in the direct, discussing the events of the following Thursday, the examination might proceed as follows:

Q. Could you see the intruder’s face?
A. No.
Q. Why not?
A. He was running away from me.
Q. What could you see?
A. I could see he was wearing a light blue jacket with brown, horizontal stripes?
Q. Had you ever seen such a jacket before that night?
A. Yes.
Q. When?
A. As I testified earlier, I had seen the defendant wearing such a jacket the previous Monday.

Such a device enables the direct examiner to accomplish all of the advantages of a chronological presentation without compromising inferential connections between temporally distant testimonies.

Even when a witness’s testimony does not consist exclusively, or even primarily, of a factual narrative, it still makes good sense to present portions of the direct in a chronological format. For example, with an expert witness, who likely possesses no personal knowledge of any relevant, historical facts, the core of her testimony will likely consist of one or more expert opinions buttressed by the bases for such opinions. Both the Rules of Evidence and common sense make a strictly chronological presentation unworkable in most such instances. Nevertheless, the portions of such a direct that truly constitute historical narratives will benefit from a chronological framework. Thus, in a case in which the expert’s qualifications include both her education and post-graduate employment history, it would be most advantageous to cover the former before the latter, and to proceed chronologically within each category.

II. Cross-Examinations

Except in the relatively unusual circumstance in which the cross-examiner is able to elicit facts affirmatively establishing the cross-examiner’s version of the relevant events, it is very likely that the cross-examination will consist entirely of negative advocacy. What the cross-examiner reasonably hopes to accomplish with most questions is to destroy or diminish the
significance or weight to be given to the damaging narrative elicited during the direct examination. To the extent that the opponent’s witness testifies about several topics on direct, it is not necessary that the cross-examiner touch upon all, or even most, of those topics. The cross should cover subjects about which the witness is vulnerable, and the cross-examiner should then sit down (unless, of course, one is practicing in a court in which the cross-examination is conducted while seated).

As to the subjects covered on cross, there is no very good reason to proceed chronologically. The cross-examiner should group questions by topic, but few, if any, of the considerations that dictate a chronological sequence on direct apply to the order of those topics. Considerations of primacy and recency (particularly recency) suggest starting and ending (particularly ending) with strong subjects. Moreover, as a witness is likely to become less cooperative once antagonized, it would be reasonable to postpone more provocative topics until after predictably helpful testimony is obtained.

III. Opening Statements

As mentioned earlier, the wisdom of a chronological approach in an opening depends upon two factors. First, plaintiffs’ counsel and prosecutors will almost invariably be engaging in affirmative advocacy, in which case the general admonition to employ a chronological format should be followed. Particularly in the opening statement, a chronological presentation is easiest to deliver and simplest to comprehend.

Second, for the defense the choice between affirmative and negative advocacy is much more contextual. Often, the defense will present a conflicting version of events through its own witnesses and evidence, in which case a chronological approach is warranted. However, particularly in criminal cases, in which the defendant has a right not to testify and in which the burden upon the prosecution is so high, it is not unusual for the defense to offer no evidence in its case-in-chief and ultimately to argue that the prosecution’s case fails to prove guilt beyond a reasonable doubt. Such a strategy occurs less often, but still occasionally, in civil cases. In such situations, the defense is engaged entirely in negative advocacy. Under these circumstances, it is nonsensical to admonish counsel to deliver a preview of his case in chronological order. What case? The defense has no story to tell. Defense counsel is less of a storyteller and more of a book reviewer. In his opening, he does not tell the jurors what the true story is; he only tells the jurors why the prosecution’s or plaintiff’s story is a false one. In such a case, the opening statement is more argument than narrative, and consequently grouping facts so as to raise doubts about the other side’s case will be far more potent than a chronological presentation of otherwise nonlinear facts.

Of course, argument is not permitted in opening statements, but persuasion is mandated. There is nothing impermissible about listing facts that will be revealed during the other side’s case (including during cross-examination) and what facts will not be revealed in the other side’s case (for example, that there will be no evidence that any fingerprints left by the defendant were discovered at the crime scene). The most persuasive preview of such a defense is not to scatter these facts in a makeshift chronology, but rather to list them in a manner that makes them quantitatively and qualitatively convincing. Consequently, when the circumstances dictate the
use of negative advocacy at trial, a superior opening statement ought to be presented, not chronologically, but rather topically or thematically.

Even when the forecast is for affirmative advocacy (as it should be for the plaintiff or prosecution and as it might be for the defense), a completely neutral chronological presentation is hardly optimal. The purpose of the opening statement is to influence the jurors’ reception of the evidence, as well as the connections and inferences to be drawn from, or even imposed upon, the facts. However, because argument is not permitted, the facts must be positioned and sequenced so as to provoke the jurors to draw the desired conclusions without any overt direction to do so. Does that mean that the chronological approach should be abandoned? Absolutely not. The advantages of a chronological opening are too numerous and too important to forego. Instead, consider various strategies for adjusting a chronological direct examination.

First, less important facts, even when there will be evidence of such, can be omitted from the opening to avoid diluting the facts deserving the most attention. Second, the chronological body of the opening statement can be preceded by an attention-grabbing theme or by highlighting the most critical facts. Third, when facts that should be connected in the minds of the jurors are separated by chronology of the events, resurrect the earlier facts when the time comes to preview the later facts.

IV. Closing Arguments

Some commentators suggest that the closing argument ought to be presented in a chronological format. Others argue that summation should most certainly not be a chronological recounting of the evidence. Consistent with the principles advanced in this article, a chronological approach should be used in closing argument in only so much of the closing as could fairly be described as storytelling. However, simply recounting the evidence presented at trial in one’s summation is tedious and not optimally persuasive. It might be necessary, for example, in a very long or complicated case in which jurors’ memories might need refreshing. However, most, if not all, of the closing argument should be just that: argument.

No matter how many elements make up a claim, charge or defense, it is likely that the trial centers on only one or a few of these. It is simply a waste of the finite attention span of jurors to waste time on any but the real issues in the case. For example, in a burglary case in which the defense is misidentification, it is probably useless and potentially annoying for the prosecutor to spend any significant time explaining how the evidence has proved that the intruder entered with criminal intent.

Once the real issues have been identified, the task is to explain how the evidence has or has not proven the contested point or points. So, in the burglary example, the majority of the summation should be spent explaining how the evidence has proven that the defendant is the burglar, or, from the other side of the aisle, how the evidence has proven no such thing. Chronology has little to do with this exercise. Instead, the attorney’s cause is better served by proceeding to each real issue, and then listing and explaining each of the reasons the evidence demands the desired conclusion.
Once one identifies the arguments to be advanced (for example, continuing with the burglary example, suppose that the prosecutor intends to identify for the jury five reasons why the evidence has proven that the defendant is the burglar), the question remains how one should sequence those arguments. The choice here is not insignificant. One author suggests that the best argument be advanced first. General considerations about primacy and recency make as much sense here as anywhere else. However, the chronology of the factual events which support the various argument is at best a criterion for sequencing that should be followed only in the absence of any significant tactical reason for sequencing the arguments otherwise.

**Conclusion**

 Sequencing presentations in trial presentations is an important aspect of the tactical choices made by trial lawyers. Proceeding chronologically makes abundant sense when one is engaged in storytelling, which is likely to be the case when one is engaged in affirmative advocacy. Affirmative advocacy occurs nearly always during direct examinations, often during opening statements and only rarely during cross-examinations and closing arguments. When a chronological presentation is appropriate, any disadvantages of that approach can be eliminated or mitigated by one or more simple strategies, and therefore the basic chronological formula should not be abandoned.

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1 Steven Lubet, **Modern Trial Advocacy, Analysis and Practice** 18 (2004).
3 Paul Bergman, **Trial Advocacy in a Nutshell** 15-16 (1989).
7 *Id.* at 27.
8 *Id.* at 18.
11 Lubet, *supra* note 1, at 433.
12 *Id.* at 432-33.
13 *Id.* at 433; Dominic J. Gianna, **Opening Statements 2D, Winning in the Beginning by Winning the Beginning** § 2:12 (2004).
14 Thomas A. Mauet, **Trial Techniques** 46, 75 (1996).
15 Lubet, *supra* note 1, at 59; Gross & Webber, *supra* note 56, at 196.
18 Gross & Webber, *supra* note 5, at 196.
19 Lubet, *supra* note 1, at 17; Tanford, *supra* note 9, at 247.
Lubet, supra note 1, at 18.
Gilden, supra note 4, at 4.
Marten, supra note 9, at 4.
Bergman, supra note 3, at 239.
See, id.; Bergman, supra note 3, at 239.
Purver, et al., supra note 9, at 402.
Tanford, supra note 28, § 6.04[3] at 223; Gilden, supra note 4, at 83; Mauet, supra note 14, at 75; Tanford, supra note 9, at 247.
Id.
Tanford, supra note 9, at 249.
Gianna, supra note 13, § 2:12 at 2-12; Tanford, supra note 28, § 6:04[3] at 223; Gilden, supra note 4, at 83.
Lubet, supra note 1, at 63; Moore, supra note 10, at 660.
Robert E. Keeton, TRIAL TACTICS AND METHODS 139 (1980).
Moore, supra note 10, at 685.
Bergman, supra note 3, at 112; Crawford & Morris, supra note 9, at 225; Gianna, supra note 13, § 8:1 at 8-2; Tanford, supra note 28, § 4.05 at 167; Mauet, supra note 14, at 46; Purver, et al., supra note 9, § 13:6 at 292, § 13:15 at 303; Moore, supra note 10, at 615, 671; Louis N. Massery, II, PSYCHOLOGY AND PERSUASION IN ADVOCACY 182-83 (1978). A chronological presentation in an opening statement means presenting facts in the order in which they occurred, not in the order in which they will be revealed by the evidence during the trial. Lubet, supra note 1, at 430-31; Tanford, supra note 28, § 4.05 at 173.
Lubet, supra note 1, at 59.
Singer, supra note 2, § 14:34 at 11; Gross & Webber, supra note 5, at 59, 196; Tanford, supra note 28, § 4.05 at 161; Mauet, supra note 14, at 46; Purver, et al., supra note 9, § 13:15 at 303; Moore, supra note 10, at 615, 671; Massery, supra note 37, at 183.
Bergman, supra note 3, at 108-10; Gianna, supra note 13, § 4:3 at 4-6.
Bergman, supra note 3, at 110.
Lubet, supra note 1, at 495-96; Moore, supra note 10, at 709.
Bergman, supra note 3, at 414-15.
Lubet, supra note 1, at 495.
Bergman, supra note 3, at 413.
Id.