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The Primacy and Recency Effects:

The Secret Weapons of Opening Statements

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THE PRIMACY AND RECENCY EFFECTS are arguably the most misinterpreted psychological constructs in litigation. Most trial attorneys simply understand them as "jurors most remember the first and last things you say to them." However, it is not that simple. By definition, true primacy and recency effects only occur when memory accuracy varies as a function of an *item's position within a list of words in a controlled research setting.* Hence, it is impossible to replicate these memory effects in the courtroom because the information presented to jurors is incredibly different than a word list in a laboratory. Information from the real world, in natural settings, is perceived by the brain and encoded into memory very differently than it is in a laboratory setting.

However, that is not to say that variations of the primacy and recency effects are non-existent in the courtroom. In fact, more sophisticated versions of the primacy and recency effects exist at trial, mainly during opening statement presentation. These effects go far beyond basic memory enhancement, and actually have a significant impact on juror information processing and decision-making. Specifically, the primacy effect plays a very powerful role early in an opening statement presentation, whereas the recency effect plays an important role at the conclusion of the opening statement. It is important for trial attorneys to understand what primacy and recency effects really are and how they can be used as potent weapons in their opening statement.

The Primacy Effect

At trial, jurors perceive information presented early in an opening statement as *more valuable and meaningful* than information presented in the middle or at the end. This not only enhances jurors' memory encoding related to that information, but it also (positively or negatively) affects processing of subsequent information presented to jurors during the opening. Therefore, rather than a true primacy effect (i.e., basic memory enhancement), it is better labeled a "primacy-saliency" effect. For example, people form a more positive impression of someone described as, "intelligent, industrious, impulsive, critical, and stubborn," than when they are given the same characteristics in reverse order because the first two adjectives are automatically valued more by the brain than the middle and later ones. The main distinction between a strict primacy effect vs. a primacy-saliency effect is value vs. recall. If a juror recalls information due to a primacy effect, but doesn't value it, there is little benefit to the trial team. Bottom line: value leads to better recall, but recall doesn't necessarily lead to better value. This is why careful, strategic ordering of information in opening statement is so critical to jury persuasion.

During the "opening" of an opening statement (i.e., the first three minutes), jurors form a working hypothesis that affects how they interpret the rest of the information presented to them. Therefore, attorneys can inadvertently stack the deck against themselves by beginning their opening statement with the wrong information, which will essentially

taint the jury's perceptions from that point forward. Information presented early in an opening statement acts as a cognitive "lens" of sorts that all subsequent information flows through. This cognitive lens can drastically impact how jurors perceive information as the presentation progresses, so one must choose this lens very carefully in order to persuade jurors during opening statement.

For optimal persuasion, a trial attorney needs to begin his opening statement by installing the most effective cognitive "lens," meaning:

- Skip the introduction and ice-breaking small talk with the jury
- Use a passionate, not vengeful, tone
- Reset the playing field immediately by fighting fire with fire
- Start with three to four key "daggers" that attack rather than defend
- Illuminate the apex of the defense story first, rather than working up to it

It is essential to hammer home key themes (i.e., "daggers") related to plaintiff culpability and/or alternative causation immediately, as this is the time when the jurors' brains are most malleable. The defense story should only proceed after the "lens" has been placed, which should significantly influence jurors' perceptions and working hypotheses of the case. This powerful starting strategy was adopted from the cinema big screen and is referred to as the "flash forward" start. Many movies don't begin at the "start" of the story, but rather begin at some other point in the story that no one expects. This creates immediate curiosity, suspense, and intrigue within the audience. World-renowned director Martin Scorcese has used this technique on many occasions to create Oscar Award-winning movies, such as *GOODFELLAS* (1990), *CASINO* (1998), and *GANGS OF NEW YORK* (2002). These movies don't start with "once upon a time..." Instead, they start with a brutal murder of a rival gangster, a murder attempt by car explosion, and a violent territorial war on the original streets of lower Manhattan in 1846. The result: the audience is primed and on the edge of their seats, as the director has installed a "lens" that the audience will view the rest of the movie through. The same must happen in the courtroom, as jurors should be oozing curiosity and intrigue during the defense opening statement. The best way to accomplish this effect is to flash-forward to culpability and/or alternative causation immediately, and THEN start the defense story afterwards.

However, many defense attorneys are inclined to start their opening statement by introducing themselves, the legal team, and their client, followed by reminding jurors how important their civic duty is to the judicial system and how much they appreciate the jurors' time. Then, many succumb to the temptation to a) tell the defense story in chronological order or, even worse, b) come out of the gate defending against each of the plaintiff's allegations. Both methodologies are weak and ineffective, and they certainly won't create any intrigue or curiosity. Instead, it represents a monumental missed opportunity as jurors will value that first three minutes of information more than any other part of the opening. Remember, jurors don't care about the identities of the attorneys or defendant. They only care about one thing: assigning blame. Therefore, immediately giving

jurors something else to blame (besides your client) is imperative to derailing the plaintiff's case.

Consider the following "opening" of an opening statement in an employment case:

Ladies and gentleman of the jury, my name is Mr. Smith from Smith and Associates Law, a firm located right here in Small Town, USA. It is my pleasure to represent ABC Company in this law suit. ABC Company has been operating here in Small Town for the last 95 years, and it is an ethical company with high standards and values. Speaking of values, my father taught me many values growing up, and one of them was to be patient before making important decisions. He always told me to take my time, and weigh all the factors before making key life choices, as quick, hasty decisions would lead to misjudgments and carelessness. In this case, I ask you to do the same: be patient. Let all the evidence come out, and listen to both sides of this story. In fact, the judge will tell you the same thing before you enter the deliberation room. It is important for you to know that ABC Company is a company that believes in diversity. We are a company that believes in fairness. We employ people from many different ethnic and cultural backgrounds, and all different age groups. The claim that our management repeatedly punished and eventually fired Mr. Jones because of his race is absurd and just plain not true. The claim that we singled him out is untrue. We intend to show you the many reasons why Mr. Jones had to be punished and then fired, and we believe you will understand that ABC Company did the right thing in this case.

The key weaponry in this opening comes at the middle and the end, which is far too late to have an optimal impact on jurors' decision making. The top strategic mistake in any opening statement is to immediately go on the defensive and address the plaintiff's allegations. After plaintiff's counsel has bludgeoned the defendant in his opening statement, there is a great temptation to stand up, address and deny each allegation one-by-one. This strategy is also known as the *"hey, we didn't do anything wrong and we are a good company"* approach. Addressing each claim immediately is a potentially deadly mistake because it highlights and can even validate the plaintiff's claims. By merely reacting to the plaintiff's story, the defense plays right into the plaintiff's hands. It is foolish to play "follow the leader" with the plaintiff, when the defense has a wonderful opportunity to come out of their corner swinging, rather than dancing and dodging. Remember, plaintiff's counsel wants to put all of the (negative) attention on the defendant and its actions. By systematically denying each claim and stating how the defendant is a good company, the defense can inadvertently reinforce the plaintiff's claims and place the spotlight of blame on itself, rather than the plaintiff. This effect is called the "Availability Bias," meaning jurors tend to blame the party that is most "available" (i.e., in the spotlight).

Therefore, manipulating the "Availability Bias" is essential to a persuasive opening statement for the defense. The way to win in the deliberation room is to arm jurors with weapons, which can only be done by the defense attacking early. Rather than reacting and responding to the plaintiff's story, the defense needs to arm jurors with the "real" story and immediately put the plaintiff or alternative

causation on trial. This strategy accomplishes three critical jury-level goals: a) it arouses jurors' attention, b) it halts the plaintiff's momentum, and c) it makes the trial about the plaintiff or an alternative cause, not the defendant.

Now, consider this "opening" of an opening for the same case:

On June 1, 2010, Mr. Jones' failed to perform his work responsibilities in a safe manner, resulting in a pipe leak that damaged $15,000 of product, and even worse, put his coworkers in danger. Mr. Jones let down the company, his team, and most importantly, himself. This case is not about race, period. This case is about responsibility. About team work. About safety. About accountability. About fairness. Mr. Jones did not take his work responsibilities seriously. You will hear that he was disciplined three times for sleeping on the job, while his co-workers picked up his slack. You will hear that he was disciplined twice for not following safety protocols and procedures, putting himself and his co-workers in unnecessary danger. After several of these instances, did ABC Company fire Mr. Jones? No. We kept him. We provided him with more training. We gave him more supervision. We were fair. We wanted him to grow and develop, but Mr. Jones simply refused. He chose not to grow. He chose not to develop. Instead he continued to sleep on the job and continued to cut corners with safety procedures. These, and only these, are the reasons why Mr. Jones was fired. His race is irrelevant. Today, Mr. Jones is here playing the blame game: blaming everyone else but himself. He refuses to take responsibility for his actions and inactions that resulted in dangerous work environments and substantial loss of product.

This strategy accomplishes several things:

- It immediately illuminates the apex of the defense story (i.e., flash forward)
- It quickly highlights plaintiff culpability issues
- It is proactive, not reactive
- It creates intrigue and curiosity
- It establishes a pro-defense lens for jurors to see the rest of the story through

Does the primacy-saliency effect exist anywhere else during a trial? Yes, the effect is also present during witness testimony, particularly direct examination of key witnesses. Similar to an opening statement, the initial testimony from the witness will be more valuable to jurors than testimony towards the end of the examination. This is why attorneys should not necessarily start their direct examination by covering the witness's education and work history, as that information would be better placed in the middle or end of the testimony. Rather, the most effective way to question a witness during direct examination is to start with questions that go right to the heart of the case, as jurors will value that information more than subsequent information. For example, in a medical malpractice case, defense attorneys usually ask the following question at the end of the direct examination: "Doctor, did you in any way deviate from the standard of care when you were treating Mr. Smith?" Of course, the physician delivers a firm, confident "no" to the jury. However, this is not the best strategic approach, as this question is THE pivotal question in the case. This question should be the very first question out of the gate, with a few follow up questions allowing the witness to explain

why the care provided to Mr. Smith was reasonable and within the standard of care. That is what the jury wants and needs immediately, rather than later in the examination. Jurors don't care where the physician went to medical school or where he did his residency. Jurors don't care if the physician is board certified and has privileges at four city hospitals. Jurors first and foremost concern is about the defendant's conduct and decision making, and asking those key questions immediately in direct examination takes full advantage of the primacy-saliency effect. Because direct testimony comes well after opening statements, the Availability Bias is not a concern, as jurors have already processed each side's story and are seeing the rest of the case through a cognitive lens.

Should an attorney use the same structure for closing argument? The primacy-saliency effect doesn't surface during closings, as a closing argument is a regurgitation of previously presented information that the jurors' brains have already processed. Decades of jury decision-making research has illustrated that the vast majority of jurors have made their decision on liability prior to closing argument. Additionally, this same research shows a high correlation between which party jurors favor after opening statements and who they favor entering deliberations. Therefore, attorneys should take a "less is more" approach to closing argument, making sure to highlight the key defense evidence clearly and succinctly.

The Recency Effect

The recency effect is far less powerful, as it is a simple enhancement of short-term memory due to the recent exposure to the information. In other words, it is easy to remember information that is presented an hour ago compared to information from a week ago. While recent (i.e., later) information from an opening statement will be remembered well, it will not be as persuasive as information presented early due to the primacy-saliency effect. Therefore, defense attorneys should avoid placing new information towards the end of their opening, as it will be inherently perceived as less valuable by jurors. This is a critical issue, as some of the most important defense information is often located later in the timeline of events. That is precisely why the defense story should not be presented chronologically, as the second half of the story will never be valued as much as the first half. To optimally persuade a jury, one must understand how the juror brain works and in turn order the information in the most strategic way to ensure value.

How can trial attorneys use the recency effect to their advantage in opening statement? Use the "closing" of the opening (i.e., the last three minutes) to repeat and reemphasize the "opening" of the opening, focusing on those key points that highlight plaintiff culpability and/or alternative causation, as well as the apex of the defense story. Strategically using the beginning and end of the opening to focus on these key points will enhance persuasion and increase the odds of a defense verdict. For

example, a more effective "closing" to the opening statement from the employment case is:

Ladies and gentlemen, Mr. Jones was fired because he repeatedly put himself and his coworkers in danger. He was fired because his behavior resulted in valuable product being damaged. He was fired for repeatedly sleeping on the job. He was fired because he refused to take responsibility for his actions. Was Mr. Jones' race part of ABC company's decision to fire him: absolutely not, 100% NO.

The Middle of the Opening Statement

So is the middle of the opening statement useless? No, jurors don't necessarily ignore the middle of an opening; they simply don't remember or value it as much as the start of the opening. Jurors don't value the information in the middle as much as information at the beginning due to the primacy-saliency effect described above. They don't remember as much because as the opening statement progresses, their short term memory becomes saturated and their attention/concentration levels gradually decrease with each minute. Even if the judge allows jurors to take notes, the action of writing tends to distract jurors from what is being presented. In other words, they may write down point X, but they may also totally miss point Y because they were writing instead of listening.

While nothing will improve the value of information more than the primacy-saliency effect, there are tools that defense attorneys can use to improve juror memory recall from information presented in the middle of the opening statement. Specifically, variables such as visual cues, emotion, and repetition can all positively impact a juror's ability to remember information regardless of "where" the information is located or presented. For example:

- Visual Cues: Showing a timeline of events via a board or projected onto a screen can improve jurors' recall of that information as the information input stimulus has doubled (visual + auditory vs. only auditory).
- Emotion: Emotions can create vivid memories. For example, when an attorney expresses emotion (e.g., compassion for plaintiff's injuries, passion and zeal for the defense's themes), it improves juror recall of that information as emotional information is encoded into memory more efficiently by the brain vs. logical information.
- Repetition: Repetition is an effective tool in improving juror recall of information. For example, if a defense attorney repeats that the plaintiff was noncompliant to his medication regimen several times during his presentation of the timeline of events, jurors will tend to remember that information better as repetition improves memory encoding.

Conclusion

The science of psychology can assist defense attorneys design opening statements that will have maximal impact on jurors' perceptions of a case. By properly utilizing the primacy-saliency

effect, defense attorneys can force jurors to assess the legitimacy of the plaintiff's case immediately rather than allowing them to critique the defense's conduct right away. Additionally, using the recency effect to repeat the defense's key themes at the end of opening statement ensures jurors will have a keen understanding of the defense's stance. Regardless of the judge's instructions, jurors enter the courtroom expecting to assign blame. The cognitive process of assigning blame starts very early in the trial, and is completed well before closing arguments. By understanding how jurors' brains function and strategically ordering information in opening statement and direct examination, defense attorneys can significantly increase the odds of a defense verdict.

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