OUTSIDE PERSPECTIVES

The Perils Of Calling Your Opponent As A Witness In Your Case

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YEARS AGO, I WATCHED A PLAINTIFF'S attorney fail miserably in his attempts to tell his client's story to a jury through his very first witness – one of the named defendants. At a recess, a friend said to me: "This just proves that you are a fool if you try to put on your case in chief through an adverse witness." As self-evident as my friend's advice might seem, it is often ignored.

Except under unique circumstances, examining an adverse witness on direct during your case in chief for any extended period of time is usually a mistake. To begin with, using an adverse witness as your spokesperson is simply not a compelling way to offer your evidence at trial. Moreover, your case in chief is more than simply the time to offer evidence establishing your claim or defense. It is your only opportunity to introduce your witnesses to the judge or jury and to convince the trier of fact that your people are likeable and credible. Putting an adverse party on the stand during your case is similar to inviting your biggest competitor to participate in the private sales meeting you have scheduled with a potential customer. Every minute that the adverse witness is on the stand, the trier of fact is focused on your opponent and ignoring your witnesses.

In my experience, it is also easier and less dangerous to cross examine an adverse witness during your opponent's case than to examine that witness on direct during your case. In most jurisdictions, you will have the right to ask leading questions of an adverse witness during direct examination and to impeach that witness if necessary. Nonetheless, you will likely not enjoy as much control over the adverse witness during direct examination as you would during cross examination. Unlike cross examination, the adverse witness testifying on direct did not voluntarily take the stand and, more importantly, did not have the opportunity prior to examination by the opposing counsel to fully tell his or her story. Many judges under these circumstances will allow an adverse witness greater freedom to deviate from the standard "yes or no" answers of cross examination and to explain their answers. This results in a direct examination that is often lengthier, choppier, less predictable, and ultimately less compelling than a tight, clean cross examination of the same witness in your opponent's case. The time to examine an unpredictable and hostile witness is during cross examination and not on direct during your case in chief.

To make matters worse, juries in particular might sympathize more with an adverse witness being examined on direct in your case than with that same witness during cross examination in your opponent's case. They might also be more critical of the examining attorney. Based on their own experience or what they have seen in movies, juries often come to expect witnesses to tell their story on direct in response to friendly open-ended questions before getting cross-examined with leading questions by an opponent. The adverse witness examined on direct during your case will be treated differently than most witnesses at trial; he or she will almost immediately be confronted with leading questions from an attorney who has no intention of allowing the witness much freedom in responding. Indeed, that witness will probably be treated differently than the witnesses that the very same attorney examined immediately before and after the adverse witness is on the stand. This might seem odd to a jury and cause the jurors to conclude that this particular witness is being treated unfairly or that the attorney is attempting to withhold evidence from the jury.

Finally, attempting to accomplish during direct examination in your case what you could accomplish

during cross examination in your opponent's case increases the length of your case, while reducing the length of your opponent's case. Triers of fact – particularly juries – do keep track of how much of their valuable time each party is using during trial, and you never want to unnecessarily lengthen your case.

There are, of course, legitimate reasons to consider putting on the testimony of an adverse witness in your case in chief, but the benefits should be weighed against the inherent risk and the alternatives carefully considered. The most compelling justification for calling an adverse witness is when a necessary element of your case can only be established through that witness's testimony. Similarly, it might be most effective to offer a key admission from an adverse party corroborating your witness's story immediately following your witness's testimony during your case in chief. Under these circumstances, you should consider whether offering a snippet of the adverse witness's deposition testimony or other form of documented admission will accomplish the desired result. If you have taken an effective deposition and if the adverse party's testimony does in fact establish a key element of your case or corroborates your witness's testimony, the deposition testimony should suffice. By offering the deposition testimony, you prevent the witness from backing away from or explaining his or her prior testimony during your case, while reserving live testimony of the witness for cross examination in your opponent's case.

Attorneys sometimes justify calling an adverse witness in their case in chief, because they are impressed that the adverse witness generally supports their client's position and are concerned that their opponent will not call the witness at trial. Standing alone, this is rarely a sufficient basis for calling an adverse witness for direct testimony. Litigants should apply the same rationale they would apply to any witness they are considering calling in their case. The fact that a witness is more helpful than harmful does not justify putting the witness on the stand. Your case in chief should be smooth, clean, and completely presented in your favor. If you had an employee who generally had very helpful things to say, but was harmful on certain issues, you probably would not call that employee as a witness. The fact that the potential witness is adverse does not make that witness any more attractive; indeed, it makes the witness more dangerous.

I also know attorneys who have called an adverse witness in their case in hopes of surprising the witness or making the witness uncomfortable. In my view, this is an example of arrogance obscuring sound litigation strategy, usually to the client's detriment. The reality of the courtroom does not mirror the drama of television. Once they have been disclosed on your pre-trial witness list, witnesses are not often surprised or unprepared to testify. And, rarely do adverse witnesses actually crumble on the stand and fully admit their transgressions. In any event, if the witness is truly a candidate for self-destruction on the stand, you can accomplish that task more effectively on cross examination.

In sum, if your counsel is considering calling an adverse witness in your case in chief, insist upon receiving answers to some basic questions. First, determine why it is necessary to offer testimony from the adverse witness in your case and, if it is truly necessary, why the witness's deposition testimony is not sufficient. Second, ask your attorney to explain how he or she intends to examine the witness so as to ensure that the adverse examination is effective. As a general rule, the direct examination of an adverse witness should be brief and narrowly focused on the factual points that can or must be established.

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