



Don Jackson makes the call as to whether to lead off with the other side's witness.

When the first witness is an adverse one

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By John Schneider

Leading off a case with an adverse witness is a risky proposition, but the payoff can be great, as Don Jackson knows. The tactic helped him and his colleagues win a \$699 million verdict in a breach-of-contract case arising from a construction dispute, *Gulsby Engineering v. Gulf Liquids New River Project LLC*, VerdictSearch Texas, volume 6, issue 40, dated Oct. 16, 2006. (*Gulsby* is also featured in VerdictSearch's Top 100 Verdicts of 2006.)

Jackson says that the advantage to calling an adverse witness first is that plaintiff's counsel gets a chance to get critical admissions without having to wait for the defense's cross. He acknowledges that a jury might believe the things that the witness

says to help his or her case, but he points out that the jury could just as easily believe anything that the witness says to hurt his or her case. And if this is among the first testimony that the jury hears, it can have a great impact, Jackson says.

But many factors should be weighed before taking such a step, Jackson warns. He says that there were several circumstances that made it worthwhile to call one of the principals of the defendant property owner as the first witness in the *Gulsby* case. He carefully evaluated the witness's performance in his deposition and found that, "although [the witness] was a smart guy, he was not very quick on his feet."

Another important factor is whether there is a "bad fact," some evidence that can reflect very poorly on the witness, Jackson says. In *Gulsby*, the adverse witness had "borrowed \$100,000 from the plaintiff, used it for personal expenses, and not paid it back," Jackson says. "I asked him if he ever intends to pay that money back to the plaintiff, who's sitting right there, and he finally admitted that he did not."

A third and probably most important element is getting preadmission of all of the documents that you plan to use during examination. As Jackson puts it, "You want to have your gun loaded. You don't want to have to wonder, 'Can I get the documents in through the witness?'"

Jackson notes that calling adverse witnesses can also be useful in non-commercial cases. "If you've got an open intersection collision, evaluate the defendant during his deposition, and at trial maybe you can prove liability through him right up front."

Tactics in Practice

"But don't overplay your hand," Jackson advises. "Jurors tend to give witnesses the benefit of the doubt and aren't predisposed to side with lawyers."

On one occasion, opposing counsel called Jackson's client as an adverse witness, and it blew up in their faces. In the highly publicized trial for the disposition of the estate of J. Howard Marshall II, widower of the late Anna Nicole Smith, Jackson represented Pierce Marshall, one of the sons. (*In re the Estate of J. Howard Marshall II*, published in VerdictSearch Texas' predecessor publication, Texas Blue Sheet, Southeast edition, 2000.) Plaintiffs' counsel led with Marshall.

"The plaintiffs' lawyers assumed that the jury would dislike him as much as the lawyers did, and they kept him on the stand for five or six days. Then we put in all the evidence through him that we were ever going to. We also made him seem warmer, and [it] set the tone for our victory," Jackson recalls. The defendants, including Jackson's client, were awarded more than \$28 million.

The Brief on Don Jackson

Education: J.D., Baylor University Law School, graduated cum laude.

What he does to relax: Jackson says that he loves his work, but that he also takes a family vacation at every opportunity. Skiing in Colorado is a favorite way to spend time with his wife, Michelle, who is a painter, and their three daughters.