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***Children and Family Law Division***

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**APPELLATE BULLETIN**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Administrative Attorneys

Fr: Andrew Cohen, Director of Appellate Panel, CPCS/CAFL Division

Jaime Prince, Staff Attorney, CAFL

Re: Administrative Matters

Recent Rule 1:28 Decisions

Writing Tips – Adverbs; Primacy & Recency

Practice Tips – Brief Formatting; Link to New Decisions

Date: December 8, 2015

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**Administrative Matters**

Farewell to Mimi

As some of you know, Mimi Wong will be leaving CAFL after nine years (seven in the Boston CAFL trial office). She’s heading to DCF, where she will be handling Unaccompanied Refugee Minors cases in the Suffolk County Probate and Family Court. We wish her the best of luck, and we’re glad she’s not going too far away.

In the meantime, Jaime will be handling appellate assignments. She can be reached at jprince@publiccounsel.net.

New Website

Please check out the revamped CPCS website at [www.publiccounsel.net](http://www.publiccounsel.net). The really, really good stuff is on the CAFL appellate panel page (if I may say so), at <http://www.publiccounsel.net/cafl/private-counsel-appellate-panel/>. Under “Current Appellate Panel Members,” click on “Appellate Practice Tools and Resources.” Among other things, you’ll find:

* links to the Rules of Appellate Procedure (and other rules), the Appeals Court, the SJC, the Juvenile Court, and relevant statutes
* dozens of model motions, oppositions, affidavits, and letters
* dozens of model briefs, FAR applications and oppositions, and properly-formatted templates for briefs (covers, tables, addenda, etc.)
* appellate bulletins from 2008 to 2014
* summaries of recent decisions and a link to the Reporter of Decisions so you can search (for free) for published and unpublished cases; and
* legal research memos on a variety of trial, appellate, and child welfare topics.

Please explore our site and save it in your bookmarks/favorites; there’s a ton of material there.

Issue/Resource Bank

The first stage of our Issue/Resource Bank is done. Our “Due Process” files – which we have scanned and can send to you as PDF attachments – include portions of briefs, research memos, Massachusetts and out-of-state cases, law review articles, and many other materials. Our materials include all aspects of procedural due process, including the right to counsel, the right to notice, the right to participate, judicial bias, structural error, and many other topics under the umbrella of “Due Process.” Just ask; if we have it, we’ll send it to you. Here is a link to the Due Process Issue Bank table of contents:

[www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/issueresource-bank/](http://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/issueresource-bank/)

Moot Courts

If you have an upcoming oral argument and want to be moot-courted, call us. Under some circumstances we can come out to your office or use CAFL staff space in Worcester. Remember, if you moot-court with someone from our administrative office, you will receive 2 CLE credits for the current fiscal year.

**Recent Rule 1:28 Decisions**

This bulletin catches us up through December 31, 2014. (Yes, I know; almost a year behind. Mea culpa.) If we left out one of your Rule 1:28 decisions and it has a useful tidbit in it, please let us know.

Remember, if you cite to a Rule 1:28 decision in your brief or motion, you must:

(a) attach a copy of the decision as an addendum; and

(b) cite the page of the Appeals Court reporter that lists the decision and a notation that the decision was issued pursuant to Rule 1:28.  In your brief or motion, you do not need to cite the docket number, month or day. **For example: Care and Protection of Priscilla, 79 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28).** Please note that we’re using the docket numbers and dates of issuance below just to make it easier for you to find the decisions online.

Please note that the Massachusetts Courts website has changed. Rule 1:28 decisions are now available on the web at: <https://www.lexisnexis.com/clients/macourts/>. (Check off that you agree to the terms of usage, and click on “Begin Searching Opinions,” then select “Search by Party Name” (on the left border), then select “Appeals Court Unpublished Decisions.” To find child welfare Rule 1:28 decisions, type in the first “party” box “adoption or care or custody or guardianship.” Unfortunately, the free LEXIS search engine limits you to the most recent 25 cases. To find a specific case, enter the case name.

1. Adoption of Ray, 86 Mass. App. Ct. 1104, No. 13-P-1868 (July 17, 2014). Following a trial, the Juvenile Court found the father unfit and terminated his parental rights. The father argued that the judge’s side-bar comments about settlement deprived him of a fair trial. The Appeals Court disagreed. The comments in question occurred after eight days of a nine-day trial. At that time, only the potential admission of a police report and limited rebuttal testimony by father remained. The panel noted that, unlike Adoption of Tia, 73 Mass. App. Ct. 115 (2008), where the judge had erred by assessing the strength of the evidence well before the evidence had closed, the challenged comments here came at the end of the trial after the judge had access to all of the evidence and occurred within a conversation where counsel for both parents indicated that their clients were considering open adoption agreements. Though the panel thought it would have been “more prudent to discuss settlement options after the questions regarding father’s potential rebuttal testimony and the certified police report were resolved,” the panel was satisfied that the comments did not compromise the fairness, or the appearance of fairness, of the trial.
2. Guardianship of Jorge De La Cruz, 86 Mass. App. Ct. 1106, No. 14-P-505 (July 31, 2014). This case is worth mentioning because it reinforces the importance of the trial judge making independent findings of fact and providing a basis for those findings. The child submitted proposed findings in an effort to obtain Special Immigrant Juvenile Status. The trial judge adopted some, but not all, of the juvenile’s proposed findings. (The un-adopted findings would have helped the child obtain the desired immigration status.) The judge did not explain why she refused to adopt the remaining findings, which the panel noted were fully supported by the record. Because the judge received no testimony and made her findings based entirely on documentary evidence, the panel did not accord her findings any special deference. Instead, because of the particular circumstances presented, the panel issued its own findings and rulings and remanded the matter with an order to enter those findings and rulings forthwith.

This is a great case for attorneys seeking Special Immigrant Juvenile Status for their clients. For the rest of us, it’s a reminder that trial court findings based solely on documentary evidence are not entitled to deference.

1. Adoption of Ukari, 86 Mass. App. Ct. 1111, No. 13-P-0967 (September 12, 2014).  Once again, the Appeals Court remanded a case based solely on the need for a specific schedule of post-termination and post-adoption sibling visitation. The trial judge found that sibling visits served the best interests of the children, but left visits to the discretion of the adoptive families. The panel noted that the child-appellant “is correct that the timing and frequency of such visits should not have been left to the discretion of the department or the adoptive parents[,]” because the statute requires the judge to order the schedule and conditions of visitation.

Why are trial judges continuing to fail to make sibling visitation orders? The statute and the case law are both crystal clear. If you represent a child at the trial level and the judge has not issued sibling visitation orders as part of a termination decree, bring this case (and the published sibling visitation cases, including Galvin, Zander, and Rico) and G.L. c. 119, § 26B(b) to the judge’s attention and insist that the judge make specific orders. If you represent the child on appeal, consider bringing this issue to the trial court’s attention in a post-trial motion. A remand on this issue by an Appeals Court panel is almost a foregone conclusion. It shouldn’t take a full appeal to get there. (Of course, if sibling visits do *not* serve all of the children’s best interests, that’s another story.)

1. Adoption of Vince, 86 Mass. App. Ct. 1113, No. 14-P-005 (September 30, 2014). This case is the *fourth* time (!) the Appeals Court has considered whether a particular trial judge’s questioning of witnesses was inappropriate and prejudicial. This case and its predecessors – Adoption of Norbert, 83 Mass. App. Ct. 542 (2013); Adoption of Ezra, 84 Mass. App. Ct. 1102 (2013) (Mass. App. Ct. Rule 1:28); Adoption of Nurit, 71 Mass. App. Ct. 1104 (2008) (Mass. App. Ct. Rule 1:28); and Adoption of Terrill, 70 Mass. App. Ct. 1115 (2007) (Mass. App. Ct. Rule 1:28) – suggest that judicial questioning, even excessive or inappropriate questioning, does not constitute structural error unless the trial judge was biased. Absent a showing of bias – which would not require a showing of harm – an appellant must show that the judge’s questioning prejudiced the appellant.

In Vince, the panel agreed that it was error for the judge to ask questions that were adversarial in nature. But the panel held that the error was not structural, citing Adoption of Seth, 29 Mass. App. Ct. 343, 351 (1990) (affirming termination decree, because judge’s “extraordinary” questioning was not prompted by bias but rather his impatience with counsel’s inability to properly pose questions). The panel went on to determine that the error was not prejudicial to the appellant; the evidence supporting the termination decree was overwhelming.

Perhaps more interesting, the panel in Vince applied the “substantial risk of miscarriage of justice” standard to address the issue of improper judicial questioning, because it was not raised below. This is the criminal standard for most unpreserved errors. *See* Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). Other than a footnote in Adoption of Yannis, 78 Mass. App. Ct. 1111 n. 4 (2010) (Mass. App. Ct. Rule 1:28 ) (because panel addressed jurisdictional problem, trial counsel’s failure to raise it below was not ineffective because there was no substantial miscarriage of justice), no child welfare case has applied it. The closest our published cases have come is an “exceptional circumstances” standard. *See* Adoption of Mary, 414 Mass. 705, 712 (1993) (declining to reach merits of arguments on post-adoption visitation and ineffective assistance of counsel because “there has been no showing made of exceptional circumstances”); Care & Protection of Stephen, 401 Mass. 144, 150 (1987) (holding that absent exceptional circumstances, claims of ineffective assistance of counsel will not be reviewed for the first time on appeal). Are the two standards really different? Perhaps not. But Vince (and, perhaps, the Yannis footnote) opens the door for us to cite to the vast criminal jurisprudence on unpreserved error. (Did the Vince panel use the “substantial risk of miscarriage of justice” standard on purpose or by accident? This is the beauty – and horror – of Rule 1:28 decisions. The world may never know. So feel free to cite Vince freely on this issue.)

1. Adoption of Yasha, 86 Mass. App. Ct. 1117, No. 14-P-213 (October 27, 2014). This case is worth noting only because of one odd sentence: “The father was not consistently living with the children and has been incinerated for a large portion of the children's lives.” This sentence – which would be very funny were the rights at stake less fundamental – suggests that the Appeals Court, as well as the Reporter of Decisions, should pay a bit more attention to the Rule 1:28 decisions than they currently do.
2. Adoption of Zach, 86 Mass. App Ct. 1118, No. 13-P-1664 (November 7, 2014). This case is particularly sad because it suggests that “legal orphan” status can be good for a child even in the absence of any identifiable harm from contact with a birth parent. In Zach, the mother and daughter (age 11) conceded the mother’s unfitness but argued that termination was inappropriate because the daughter had no adoption prospects and would likely be left a legal orphan. No evidence suggested that contact with the mother harmed the daughter; indeed, the judge ordered post-adoption contact. According to the panel,

While we fully acknowledge that becoming a legal orphan is an undesirable outcome for any child, permanence and stability may be “eased” by the termination of parental rights, even where the child will become a legal orphan. [*Adoption of Nancy*, 443 Mass. at 517](https://advance.lexis.com/document/?pdmfid=1000516&crid=6fb7a852-ace1-45bd-b48d-cda03b77e890&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5DJ0-K6B1-F15C-B0BV-00000-00&pddocid=urn%3AcontentItem%3A5DJ0-K6B1-F15C-B0BV-00000-00&pdcontentcomponentid=345916&pdshepid=urn%3AcontentItem%3A5DG8-R001-J9X5-R0J4-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=0d16185b-908f-4adb-a9aa-43015836e2d4). *See* [*Adoption of Paula*, 420 Mass. 716, 722 n.7 (1995)](https://advance.lexis.com/document/?pdmfid=1000516&crid=6fb7a852-ace1-45bd-b48d-cda03b77e890&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5DJ0-K6B1-F15C-B0BV-00000-00&pddocid=urn%3AcontentItem%3A5DJ0-K6B1-F15C-B0BV-00000-00&pdcontentcomponentid=345916&pdshepid=urn%3AcontentItem%3A5DG8-R001-J9X5-R0J4-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=0d16185b-908f-4adb-a9aa-43015836e2d4) (“A fully developed adoption plan, while preferable, is not an essential element of proof in a petition brought by the department under [G. L. c. 210, § 3](https://advance.lexis.com/document/?pdmfid=1000516&crid=6fb7a852-ace1-45bd-b48d-cda03b77e890&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5DJ0-K6B1-F15C-B0BV-00000-00&pddocid=urn%3AcontentItem%3A5DJ0-K6B1-F15C-B0BV-00000-00&pdcontentcomponentid=345916&pdshepid=urn%3AcontentItem%3A5DG8-R001-J9X5-R0J4-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=0d16185b-908f-4adb-a9aa-43015836e2d4)”). Here, a continuing legal tie to the mother, whose fitness could not reasonably be foreseen, would be at odds with the goal of stability for the daughter.

No doubt there are cases where a child is better off without any parent than with a dangerous or destabilizing parent. But in this case, there was no evidence that contact with the mother destabilized this child – if such evidence existed, the trial court wouldn’t have ordered regular post-adoption contact – or that termination would actually “ease” permanency for the child (other than easing the child toward permanent legal orphan status).

But befuddlement over the language in Zach only gets us so far. What does Zach teach us about legal orphan cases? It teaches us that more must be done at the trial level to show the court that termination will not serve *that particular child’s* best interests. Parents’ or child’s counsel should retain a mental health expert (using ICCA funds) who will testify that (a) the child does not want to be adopted; (b) the child will not be stabilized by terminating parental rights; (c) the child will suffer harm if her loss of a parent isn’t mediated by the gain of a new permanent, loving caretaker, which is unlikely or impossible in this case; and (d) care by a foster parent, program, or facility will harm the child long-term if she is legally deprived of the only loving caretaker she will ever have. The child’s therapist can also testify to this. Better yet, use the child’s therapist *and* an expert. CAFL Administration has some materials on the bleak outcomes for legal orphans. *Please* use it to educate your trial judge and the Appeals Court.

1. Adoption of Yancy, 86 Mass. App. Ct. 1118, No. 14-P-472 (November 3, 2014). This case is interesting only because of DCF’s flip-flop of position on appeal. At trial, DCF argued that the parental rights of both mother and father should be terminated. The trial court disagreed and gave the father custody. On appeal, DCF changed position and supported the judge’s decision.

DCF does not like it when children change positions on appeal. Why? Because, when this happens, it usually means that the children no longer support DCF’s position. DCF has even filed the occasional motion to strike a child’s brief on this basis. But here it’s DCF that flip-flopped. If you represent a child who has changed position on appeal and DCF moves to strike your brief, Yancy would be a good case to cite.

1. Adoption of Addison, 86 Mass. App. Ct. 1119, No. 14-P-197 (November 12, 2014). One of the evidentiary holdings in this case is even more perplexing than the typographical error in Yasha. Here, the mother argued that the trial judge erred in admitting hearsay statements in § 51B reports and in admitting stale DCF court reports that concerned mother’s child in a prior proceeding. The panel held that all of the statements were admissible. As for the hearsay in § 51Bs, the panel cited Care and Protection of Benjamin for the proposition that traditional rules of hearsay are not followed in these cases. But Benjamin stands for the *opposite* proposition: the rules of evidence must be followed. Indeed, the footnote in Benjamin explains that the only exceptions to the hearsay exclusionary rule are statutory, citing §§ 21 (court investigator reports and DCF “status letters”) and 29 (service plans). Section 51B reports are, of course, neither of those things. The panel seems to have been confused, because it then cites Care and Protection of Bruce for the proposition that hearsay in the § 51B reports is admissible. But Bruce does not speak to § 51B reports; it addresses DCF’s “status letters” under § 21.

To be fair, the issue of the admissibility of hearsay in § 51B reports is, at best, unclear. Adoption of George suggests that hearsay is admissible in § 51Bs, but it doesn’t say so explicitly, and cases in other fields clearly state that hearsay is inadmissible in official records. Still, the Appeals Court did nobody any favors in Addison by confusing the rules governing very different types of reports.

The panel was on surer ground as to the mother’s second argument, the admissibility of the (actual) § 21 DCF status letters. The mother objected to the letters on one basis at trial, but switched to a different argument – that the letters addressed a different child in a prior proceeding – on appeal. The court rejected her argument:

On appeal, the mother posits that the letters in question do not comport with the requirements established by Adoption of Bruce, as they refer to Robert, a different child from a different case. However, “[a] party may not raise an issue before the trial court on one ground, and then present that issue to an appellate court on a different ground.” [Adoption of Astrid, 45 Mass. App. Ct. 538, 542, 700 N.E.2d 275 (1998)](https://advance.lexis.com/document/?pdmfid=1000516&crid=3acdfaac-a0dc-4c12-8216-18ab9a3ec35c&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5DJV-F4T1-F15C-B0CK-00000-00&pddocid=urn%3AcontentItem%3A5DJV-F4T1-F15C-B0CK-00000-00&pdcontentcomponentid=345916&pdshepid=urn%3AcontentItem%3A5DG8-TKN1-DXC7-J0D2-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=cbcd3d05-aa66-4a16-aad8-eb79fc0b6543). *See* [Adoption of Flora, 60 Mass. App. Ct. 334, 340 n.10, 801 N.E.2d 806 (2004)](https://advance.lexis.com/document/?pdmfid=1000516&crid=3acdfaac-a0dc-4c12-8216-18ab9a3ec35c&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A5DJV-F4T1-F15C-B0CK-00000-00&pddocid=urn%3AcontentItem%3A5DJV-F4T1-F15C-B0CK-00000-00&pdcontentcomponentid=345916&pdshepid=urn%3AcontentItem%3A5DG8-TKN1-DXC7-J0D2-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=cbcd3d05-aa66-4a16-aad8-eb79fc0b6543). Therefore, the mother failed to properly preserve for appeal the evidentiary issue regarding the unsworn letters, and we need not consider it here.

It’s unusual to see the Appeals Court nitpick to this extent. But the law is clear; even if an issue is preserved on one ground below, the Appeals Court may refuse to address it if counsel raises a different ground on appeal.

1. Care and Protection of Bancroft, 86 Mass. App. Ct. 1120, No. 13-P-1963 (November 14, 2014). The mother and her younger child, Bancroft, appealed the judge’s unfitness determination. (The mother also appealed the termination of her parental rights as to her older child.) The trial judge relied heavily on the mother’s past abusive relationships. At trial, the mother testified that her current boyfriend was not abusive. There was no evidence to the contrary. But the judge discredited her testimony and found that she “did not have sufficient information” to determine whether the current boyfriend was abusive. The mother argued that this constituted improper burden shifting, but the panel disagreed, stating, “[t]he judge was entitled to discredit mother’s uncontroverted testimony and determine that the record lacked credible evidence on this issue.”

Judges, of course, cannot find facts based purely on discrediting witnesses. *See* Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 224 (1992) (“disbelieving evidence does not establish the contrary proposition”); Kunkel v. Alger, 10 Mass. App. Ct. 76, 86 (1980) (“It is settled that mere disbelief of testimony does not constitute evidence to the contrary.”). Accordingly, a judge can’t make a finding: “Father testified that he never used drugs, but I don’t find him credible, so he did use drugs.” (A judge *can* do this if there is other evidence that the father used drugs.) But Bancroft is a bit different. The judge here didn’t find that the boyfriend was abusive as a result of discrediting the mother’s testimony that he wasn’t. Rather, the judge found that there was *no* evidence about whether the boyfriend was abusive, because the only evidence on point came from the mother and she didn’t believe the mother. That is permissible. Judges don’t have to believe witnesses just because there is no evidence to the contrary.

1. Adoption of Bella, 86 Mass. App. Ct. 1121, No. 13-P-1739 (November 21, 2014). In Bella, the trial judge relied, among other things, on hearsay statements in a § 51B report to support her conclusion that the mother was unfit. In one finding, quoted directly from a § 51B report, the hearsay declarant is identified as “staff from MGH and Spaulding Rehabilitation”; no one is named. As in Addison, above, the panel relies on Care and Protection of Bruce for the proposition that hearsay in § 51Bs is admissible. But, as noted above, Bruce does not support that proposition. Worse, in this context, the hearsay should not have been permitted even in a court investigator report. Hundreds of staff work at MGH and Spaulding. It is difficult to understand how this satisfies the requirement – a requirement that only applies to court investigator reports, not § 51B reports – that the hearsay declarant be identified or identifiable. Nevertheless, the panel found this sufficient.
2. Custody of Catherine, 86 Mass. App. Ct. 1124, No. 14-P-61 (December 11, 2014). After trial, the judge gave permanent custody of two children to the mother, found the father unfit, but did not terminate his rights. Three months later, after the father was arrested and charged with parental kidnapping, DCF moved for reconsideration under Mass. R. Civ. P. 60(b)(2) based on newly discovered evidence. The trial court scheduled a hearing for three months after that (for a total of six months after the initial custody order), and terminated the father’s rights.

The father argued that DCF was required to wait six months after the initial custody order and petition for review and redetermination under G.L. c. 119, § 26(c). The panel disagreed, stating, “we do not read the six-month repose period for care and protection proceedings to apply to termination proceedings.” It is unclear what this statement actually means. Does it mean that other statutory provisions in chapter 119 don’t apply to termination proceedings? We are left to guess.

The panel went on to state that “although the text of the rule does not refer to motions for reconsideration or to reopen the evidence, the department’s motions, in substance, were properly considered under rule 60(b)(2).” That is, no matter what a post-trial motion is titled, it is really a Rule 60(b) motion and should be construed as such. This makes sense; it is almost impossible for any of the parties to file timely post-trial motions under Rules 52 or 59. Only the one-year deadline in 60(b) is practicable.

In a footnote, the panel noted that, even if it were error for the trial court to reopen the evidence (or grant relief from judgment), the error was harmless, because the hearing took place six months after the initial custody order. That would have satisfied G.L. c. 119, § 26(b).

**Writing Tips**

1. **Adverbs – Yech!**

Here is a great writing tip from Debra Cassens Weiss, posted on October 8, 2014 on the ABA Journal website.

# Using adverbs recklessly can hurt your appeal and vex the courts

By [Debra Cassens Weiss](http://www.abajournal.com/authors/4/)

Adverbs can be a boon and a bane to lawyers who argue over the meaning of words such as “knowingly,” “intentionally” and “recklessly” and sprinkle them throughout their briefs.

Indeed, the number of disputes over how to interpret adverbs in criminal statutes has surged since the 1980s, the [Wall Street Journal](http://online.wsj.com/articles/why-adverbs-maligned-by-many-flourish-in-the-american-legal-system-1412735402) (sub. req.) reports, citing research by Brooklyn Law School professor Lawrence Solan. But losing an argument over statutory construction isn’t the only downside to adverbs.

A 2008 study found that lawyers who use intensifier adverbs in their briefs such as “very,” “obviously,” “clearly,” “absolutely” and “really” are more likely to lose an appeal than lawyers who avoid the words, the story says. There is one exception, though–the adverbs are likely to help the lawyer if the judge likes to use the words, too.

Justice Anthony M. Kennedy has said he doesn’t like to use adverbs in his writing. But Justice Antonin Scalia apparently has no such compunction. He uses phrases such as “blatantly misdescribes,” “most tragically” and “judicially brainstormed,” leading one legal linguist to complain about his “caustic exploitation” of adverbs.

As we know, little is “clear,” “obvious,” or “absolute” in our cases. It makes sense to purge the adverbial forms of these words from our briefs.

1. **Primacy and Recency**

Facts sections should tell engaging stories. Purely chronological stories are boring. Like a novel, your story can start in the middle or even at the climax. So long as you are faithful to the record and follow the rules for factual citation, you can create drama however you wish. Don’t kill the drama by starting your story the same way the trial judge likely started his or her findings of fact – with the birth of the child, or even the birth of the parents – unless that “birth” is itself a dramatic moment. And never tell your story witness-by-witness. That is dry and repetitive, and it forces the appellate judges to create their own story from the evidentiary puzzle pieces.

In putting together *your* story, remember the principles of primacy and recency: readers tend to remember the first and last things they read and forget what’s buried in the middle. So start and end your story with something memorable. Put the bad parts – and there are always bad parts; after all, your appellant-client has lost at trial – in the middle. For example, your story might begin with your client’s successful completion of substance abuse counseling, a crowning achievement after years of drug abuse. Your client goes through a graduation ceremony and gets a certificate. The head of the program writes her a glowing evaluation about her progress and prospects for the future. Your story might end with a discussion of all the other services your client completed before trial. In the middle of the story, you might address the many relapses and petty crimes your client perpetrated while battling her demons. That placement de-emphasizes the negative information. Why start your story with all of your client’s problems?

The principles of primacy and recency apply as well on the micro level. That is, we remember the first and last things we read in a paragraph. We tend to forget what’s in the middle. While you have to disclose and address bad facts, you can “bury” the bad stuff in the middle of a paragraph where it’s harder to see and easier to forget.

The link below contains an interesting analysis of the primacy/recency effect in the context of teaching a lesson (which is, in many ways, what we are doing in a brief):

<https://www.lancsngfl.ac.uk/secondary/math/download/file/How%20the%20Brain%20Learns%20by%20David%20Sousa.pdf>

**Practice Tips**

# Brief Formatting, Length, Etc.

# Here is another great article from Debra Cassens Weiss. This one is from the September 18, 2014 ABA Journal newsletter:

# Judge scolds BP for squeezing extra lines into brief

# By Debra Cassens Weiss

BP is on notice that a federal judge will be closely scrutinizing its briefs for excess words in litigation over the Gulf oil spill.

In an [order](http://www.laed.uscourts.gov/OilSpill/Orders/9152014Order%28OPATestMotToStrike%29.pdf) (PDF) on Monday, U.S. District Judge Carl Barbier said BP evidently abused a 35-page limit by slightly squeezing the spacing between the lines. The limit was already 10 pages longer than usual, and it called for a double-spaced brief.

As a result of the manipulation, Barbier said, BP exceeded the already enlarged page limit by about six pages. [Slate](http://www.slate.com/blogs/the_slatest/2014/09/16/bp_changes_line_spacing_in_court_filing_to_beat_page_limit.html) and [NPR](http://www.npr.org/blogs/thetwo-way/2014/09/16/349006089/bp-lawyers-use-old-school-trick-judge-not-amused?sc=17&f=1001) have stories.

“The court should not have to waste its time policing such simple rules—particularly in a case as massive and complex as this,” Barbier wrote. “Counsel are expected to follow the court’s orders both in letter and in spirit. The court should not have to resort to imposing character limits, etc., to ensure compliance. Counsel’s tactic would not be appropriate for a college term paper. It certainly is not appropriate here.

“Any future briefs using similar tactics will be struck.”

BP is represented by several law firms, and Barbier did not identify the firm at fault. He does, however, reference the Pacer number on the offending brief, which was submitted under the electronic signature of Kirkland & Ellis lawyer J. Andrew Langan. A Kirkland & Ellis spokesperson did not immediately respond to a request for comment. Langan said he would refer the ABA Journal’s request for comment to the appropriate person.

What’s the take-away from this? First, cheating on your brief formatting doesn’t pay, even if you’re a partner at Kirkland & Ellis. Second, even though the Appeals Court Clerk’s Office has *generally* softened its enforcement of certain formatting rules, it has not forgotten the rules. We still hear about CAFL appellate briefs getting rejected by the Clerk’s Office, which is embarrassing for the appellate counsel. Even if your non-conforming brief is accepted, clerks and judges do notice problems with fonts, font sizes, margins, and other issues. Read Rules 16 and 20 carefully. Don’t let formatting problems lead to the wrong kind of attention from the appellate judges.

# New Appellate Decisions – Keeping up to Date

# Each day, the mass.gov website posts new published appellate decisions and lists of unpublished decisions. Go to:

# <http://www.mass.gov/courts/court-info/sjc/about/reporter-of-decisions/new-opinions.html>

# We recommend copying this URL into your browser and saving it as a bookmark. Thanks to Henry Porter for this tip.