

CAFL Appellate Practice Tip

April 17, 2019

Primacy and Recency

Facts sections should tell engaging stories. Purely chronological stories are boring. Don't start 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 an important part of your story. 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 client's unique 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. 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 use counseling, a crowning achievement after years of heroin use. 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 your client's many relapses and the petty crimes she perpetrated while battling her demons. That placement de-emphasizes the negative information. Why start your story with all of your client's problems that led to removal of the child? Is *that* what you want the judges to remember?

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>