Primacy, Recency, and the Opening Statement

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In persuasive communication, the order of the information being presented has a significant impact on how a juror will receive that information. We tend to best remember information that we are presented with first, and then second best the information we are presented with last. This is the concept of primacy-recency.

The primacy effect holds that information presented first will have a greater persuasive power than that produced later. Thus, the information that an audience is first presented with is the most meaningful. Likewise, in persuasive communication, information conveyed last is also highly persuasive. This is the recency effect. It is the information in the middle that is lost or muddled. The first items presented are within a person's working memory capacity and therefore stored in semantic memory. As information is received, it is sorted or lost in order to allow for the additional processing of the final bits of information.

The primacy effect is why opening statements are one of the most critical moments in a trial.

Look at the words below for 10 seconds and then cover them up and try to fill in the blanks in the order in which the words appeared.

Apple 1.________________
Wreath 2.________________
Octopus 3.________________
Ranch 4.________________
Letter 5.________________
Egg 6.________________
Paper 7.________________
Chair 8.________________
Toy 9.________________
Purple 10._______________

Most likely, you remember the first several and last couple of words on the list. The words in the middle were likely the toughest to recall. In addition to affecting one's ability recall information, primacy also influences the persuasive power that information is given.

Consider the following example:

Karen is envious, stubborn, critical, impulsive, industrious, and intelligent.

Karen is intelligent, industrious, impulsive, critical, stubborn, and envious.

The sentences paint very different pictures of Karen despite containing the same information. The second description of Karen seems much more favorable than the first. This is an example of the primacy effect in action. The further down the adjective is in the list the more reduced is its primary effect. In order to be successful at trial you must use the primacy effect to your advantage.

I. Using Primacy to Persuade

Nearly every trial publication discusses how themes and storytelling make trial lawyers more persuasive. Consider the importance of theme and storytelling in the context of the opening statement. If your theme is well defined and your story is well crafted, it will give the jurors a framework by which to interpret all of the testimony and documentary evidence presented throughout the trial. If you use the first minutes of your opening to
layout your case and present your theme in a concise manner, it will be the thing that the jurors remember most. They can use this framework to give the middle parts of the trial—testimony and documentary evidence context.

Do not waste the first minutes of your opening reintroducing yourself to the jurors. Use voir dire as your initial opportunity to let the jury get comfortable with you. Also, do not explain to the jury the significance of their role, how much you like your client, or how an opening is supposed to work. Instead, take advantage of primacy and get the most important aspect of your case in front of the jury. If you are the defendant, distill down why the plaintiff cannot prevail and broadcast this to the jury.

II. Use Themes

Themes are important not only to develop a well-crafted narrative, they give you the opportunity to take advantage of both the primacy and recency effects. Present jurors with a concise theme throughout the trial in order to provide a persuasive context for the interpretation of the evidence.

III. Chunking

Chunking means that information is packaged together into meaningful groups. The chuck is a collection of very basic information that is repeated throughout the trial. Presenting the chunks of information early allows that information to be given a primacy effect. The information chunk should then be reiterated again at closing to take advantage of the recency effect.

IV. Sensory Variation

Jurors are more stimulated and pay more attention to new or novel stimulation. Since attention levels decline after information is initially presented, reengage the jurors by presenting evidence in a variety of formats, i.e. through graphics and other demonstrative evidence. Take advantage of their renewed attention by presenting critical information when a new graphic or demonstrative aid is introduced as this is the time they will be paying the most attention.

V. Combatting the Plaintiff’s Primacy Advantage

The plaintiff will have the persuasive effect of primacy as he puts his case on first. During your opening anticipate key aspects of the plaintiff’s case and offer the jury information by which to interpret it. Give the jury information early on that rebuts the plaintiff’s case so that they can consider it as they are processing the plaintiff’s case.

VI. Conclusion

Primacy means as defense counsel you must introduce the elements that kill the plaintiff’s case immediately. Reiterate this point throughout the trial in various ways. Finally, present it again to the jury in closing.

Endnote

1 In 1946, Solomon Asch asked some people about a person described as envious, stubborn, critical, impulsive, industrious and intelligent. He then asked other people about a person described as intelligent, industrious, impulsive, critical, stubborn and envious. The second group rated the person more highly than the first group. He also found that the second and third items on the list had reduced primacy effects.