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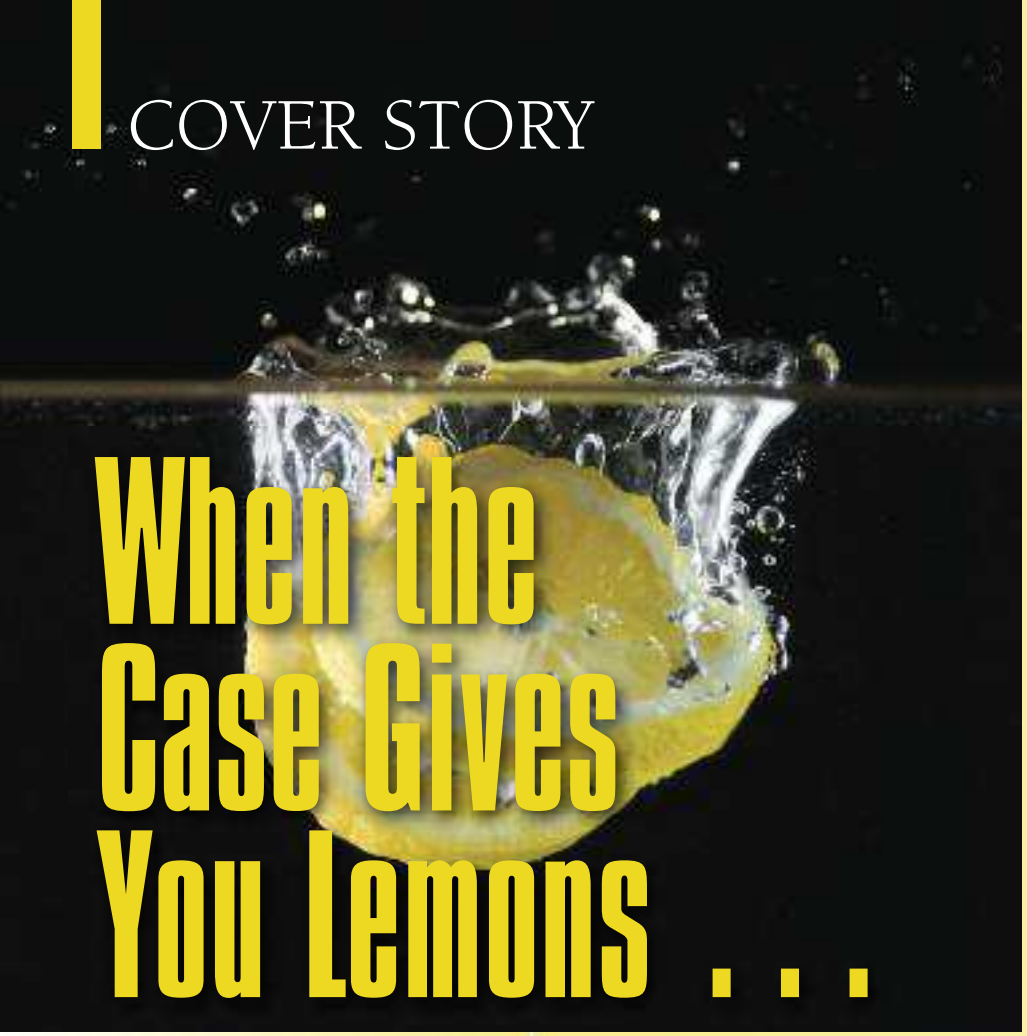

When the Case Gives You Lemons . . .

Using Negative Authority in Persuasive Legal Writing

By Michael J. Higdon

For legal advocates, dealing with adverse case law can often be an extremely vexing experience. By "adverse," I mean cases that, to some extent or another, cast doubt on the ultimate argument the lawyer is hoping to advance. When these "bad" cases come along — and they frequently do — the lawyer must ask herself two difficult questions: 1) should she include the negative authority and 2) if so, how and to what extent.

The answer to the first question is in most instances going to be an emphatic "yes," partly because of the lawyer's ethical duty, but more germane to the point of this article, because negative case law can actually improve advocacy. Now, it may sound somewhat fanciful to suggest that including adverse authorities in a brief can ultimately make a legal argument more persuasive. The fact is, however, that proper incorporation of such authority can elevate both the perceived credibility of the legal writer and as the overall strength of the

writer's position. Such a conclusion is supported not only by studies involving legal writing, but also by basic tenets of cognitive psychology.

The purpose then of this article is two-fold: first, to point out why an attorney, for both ethical and persuasive reasons, should include contrary case law, and second, to discuss concrete ways in which attorneys can incorporate such authorities for maximum benefit in legal advocacy.

To Include or Not to Include …

As a preliminary matter, this article would be remiss if it failed to point out the ethical rules concerning a lawyer's duty to include negative authority. Specifically, the Rule of Professional Conduct 3.3 states that "a lawyer shall not knowingly … fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[1] So what exactly does this language mean? Well, according to some, the answer is "not much."

Indeed, Rule 3.3 fails to clarify what is meant by "directly adverse." This omission raises many questions as to what exactly an attorney must disclose. As one legal writing scholar has described: "The language could arguably be interpreted to require an attorney to disclose even clearly distinguishable adverse authority that nonetheless offered importance guidance to the court through analogy, dictum or general reasoning. In contrast, a narrow interpretation may require an attorney to disclose only authority that is squarely on point."[2] Because the rule, however, further modifies "directly adverse" with the language "known to the lawyer," the rule allows an attorney to make a subjective determination of whether any given authority falls within the ambit of the rule. Given then that almost any case can be distinguished on some basis, some have criticized Rule 3.3 as being "so narrow as to be wholly ineffectual."[3]

Even in the absence of an ethical duty to do so, however, there are still good reasons that a lawyer might decide nonetheless to disclose negative authority. First off, either your opponent or the judge is likely to find the same negative authority and, once that happens, the fact that you failed to include the case can be quite damaging. At best, such an omission will lead the court to think that you are a poor researcher. At worst, the court will conclude that you were trying to hide something. Furthermore, including such an authority can have quite a positive impact on an attorney's reputation. Just as a political message becomes more credible the more highly regarded the politician is, so too does an attorney's argument gain strength based on the perceived character of the attorney who is making the argument. Disclosing adverse authority is, then, one way attorneys can increase a court's perception of their character. As one judge has pointed out, "nothing is more impressive than the advocate who comes into court" and presents not only positive cases, but also those that are not so positive.[4] In fact, one court has gone so far as to praise an attorney for informing the court of a potentially harmful case: "Normally we do not compliment counsel for being ethical; however, compliance with [Rule 3.3], in our experience, has been the exception rather than the rule."[5]

The Persuasive Impact of Including Adverse Authority

Beyond helping the lawyer's reputation, Illinois Judge Mark Drummond also notes the positive persuasive impact that the disclosure of negative authorities can have on the lawyer's argument. As Judge Drummond explains, "It appears that you are less concerned about [the negative authority] when you admit its existence — and it is even more devastating for the other side when you cite cases that are against you that they have not found."[6] Indeed, bringing up negative authority in advance of your opponent can be quite damaging to your opponent's argument in that doing so "permits taking the wind

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out of an opponent's sails."[7] In the field of cognitive psychology, the theory that describes this phenomenon is known as inoculation theory.

Indeed, where an author can predict resistance to a particular message, such resistance can be preempted through inoculation. In essence, "Inoculation theory asserts that people can resist attitude change if they are trained to consciously generate responses to anticipated persuasive messages targeting a particular attitude or value."[8] As Professor Kathryn Stanchi explains:

> The theory of inoculation is based on the idea that advocates can make the recipient of a persuasive message "resistant" to opposing arguments, much like a vaccination makes a patient resistant to disease. In an inoculation message, the message recipient is exposed to a weakened version of arguments against the persuasive message coupled with appropriate refutation of those opposing arguments. The theory is that introducing a "small dose" of message contrary to the persuader's position makes the message recipient immune to attacks from the opposing side.[9]

For instance, consider one of the events that led to the development of this theory. Specifically, during the Korean War, American prisoners were persuaded to cooperate with the enemy, not through physical intimidation, but through indoctrination. This was so because the Americans had never before really questioned their patriotism and American values. As such, the prisoners lacked immunity to counterarguments and were thus more susceptible to influence.[10]

Thus, employing Inoculation Theory in legal advocacy, whereby an advocate raises and refutes a contrary argument in advance of his opponent, can make it that much harder for the opponent to rely on that argument. In essence, the reader has already been "inoculated" to resist this argument. Furthermore, by making this preemptive strike, your opponent is now forced into a defensive posture should he subsequently decide to try and press the argument you have attempted to refute. As noted below, defensive arguments are inherently weaker than affirmative, offensive arguments.

Writing Techniques for Including Negative Cases

The better course of action for an advocate, then, is to affirmatively point out negative case law and, at the same time, point out why that case is inapposite to the case currently before the court. But how exactly does an attorney do that? Well, there are two steps. First the lawyer must find a way to distinguish the case and, second, he must frame the case in such a way that the case is included as affirmative support for the attorney's position and not merely as a defensive strike born out of fear of an expected attack. This section details exactly how an attorney can successfully navigate each of those two steps.

Distinguishing a Case

Learning how to distinguish a case is as simple as comparing cats and dogs. In fact, when I first introduce law students to the process of distinguishing cases, I ask them to first envision a cat and dog and then tell me how the two are alike and how they are different. When it comes to similarities, typical responses include: "both are mammals," "both have four legs," and "both are kept as pets." In terms of differences, students provide answers like: "cats have retractable claws," "dogs come in a wider array of sizes than cats," and, my personal favorite, "cats bury their poop." Having made this list of similarities and differences, I then ask the students to compare the two lists. When they do so, they begin to see that they found similarities by focusing on more general categorizations (e.g., "both cats and dogs inhabit the planet earth"), while they identified differences by looking at more specific attributes of cats and dogs (e.g., "cats have 38 chromosomes, while dogs have 78"). The lesson in all this: if you want to argue that two things are alike, use a fairly general level of abstraction; to argue they are different, get more specific.

We see this principle employed all the time in the law. For example, there are numerous judicial opinions where the majority and the dissent disagree simply because one is reading a precedent case broadly while the other is focusing on a more specific reading of the case. For instance, the Eleventh Circuit, in *Williams v. Attorney Gen. of Ala.* upheld Alabama's criminal statute that bans the sale of "sex toys."[11] Those who challenged the statute did so by relying on the Supreme Court's decision in *Lawrence v. Texas*,[12] which ruled unconstitutional a Texas law that criminalized homosexual sodomy. Nonetheless, the Eleventh Circuit in *Williams* rejected this argument, noting that "although Lawrence clearly established the unconstitutionality of criminal prohibitions on consensual adult sodomy, 'it is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right' … to all forms of sexual intimacy."[13] The dissent, in contrast, argued that "[i]n validating the sodomy statute at issue in *Lawrence*, the Court reaffirmed this [substantive due process] right to sexual privacy."[14] As this example from *Williams* points out, the dissent, which was trying to include the present case within the framework of *Lawrence*, did so by framing *Lawrence* generally (i.e., establishing a right to sexual privacy). The majority, on the other hand, framed *Lawrence* in a much more specific way (i.e., consensual adult sodomy), to distinguish that case from the one it was then ruling on.

The lesson, then, for attorneys trying to distinguish an unfavorable case is to focus on the specific aspects of the case, framing it so specifically that it appears to exclude cases such as the one they are currently advocating. Likewise, when hoping to ultimately argue that a client's case is sufficiently similar to a favorable case as to require the same

outcome, they should frame the case in general enough terms so as to encompass the facts of their client's case.

Taking the Offensive

Once an attorney seizes upon a way to distinguish an unfavorable case, the only question remaining is how best to go about drafting the discussion of that case. Indeed, given the fact that courts rely on past cases when deciding a new dispute, the way in which an attorney frames those cases can be crucial. Many attorneys unfortunately choose to take a very defensive tact when wording the case in question. Typical examples will often include constructions that begin with such language as "Although my opponent may attempt to rely on Case X, this case is not applicable because …" or, more directly, "Case X has no bearing on my case because X." The problem with constructions such as these is two-fold. First, it puts the attorney in a very defensive posture, giving the impression that she is afraid of this "bad" case. Second, it draws too much attention to your opponent's argument. By essentially repeating the anticipated argument of your opponent, you are reminding the court of that very argument, regardless of whether you eventually explain why that argument is inapposite. What the attorney should do is take an offensive approach, presenting the negative case in a way that, instead of simply rehashing what opposing counsel is likely to argue, affirmatively advances your own argument.

To do that, I encourage attorneys to begin with the following formula. For a negative case, let "A" represent the result that the court reached in that case (i.e., the result you do not want the court to reach in your case). Furthermore, let "X" represent the specific attributes of that case that you intend to focus on so as to ultimately distinguish your case from the precedent case (using the method described *infra*). Having defined X and A, you can now begin to craft your discussion of the negative case. To do so, start off with the following sentence: "Only in the limited circumstance of X has the Court ruled A. For example, in [name of negative case] …" As you can see, in following this basic construction, you will affirmatively make the point that, yes, the court has reached a result other than the one you are advocating, thus fulfilling any ethical duty you may have and also building your reputation with the court as being a credible, forthright attorney. At the same time, by introducing the case using such limiting language, you also communicate that such contrary results are limited to cases involving very different circumstances. Thus, you begin to foreshadow to the court how and why this case is inapplicable, a conclusion that is only bolstered when you ultimately point out

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that your client's case is missing the all-important "X" factor.

On the flip side, suppose you are drafting a case description of a favorable case. In that case, let "B" represent the result that was reached in the positive case (i.e., the result you want the current court to reach) and let "Y" represent what that case has in common with your client's case. With those two variables in place, you can then draft a case description that essentially says, "Whenever Y, the court has ruled B." In so doing, when you later reveal that your client's case also includes "Y," your argument that the court should reach a result in your case similar to the one it reached in the precedent case is much more compelling.

Of course, none of this discussion is to suggest that legal writing should be formulaic or even that this exact wording should always be used; these constructions are instead offered as ways to start thinking about and framing the precedent cases so as ultimately to support stronger arguments on the basis of those cases and the present case.

Conclusion

In sum, the presence of adverse case law should not be taken as cause for alarm, but should be seen as an opportunity for advocacy. Indeed, instead of simply ignoring such cases, embrace them. To ignore a negative case (in addition to possibly violating the rules of professional conduct) is to bestow upon your opponent the privilege of being the first to bring the case to the court's attention — and you can be sure that your opponent will not be bringing up that case in a way that is favorable to you. Instead, affirmatively work the "bad" case into your own argument. In so doing, you achieve two benefits: 1) you insure that the first time the court hears of this case, it also hears how the case is inapposite to your position; and 2) at the same time, you "inoculate" the court, making it that much harder for your opponent to argue a contrary position. In other words, as the old Mexican proverb advises, "He who strikes first, strikes twice."

MICHAEL J. HIGDON is an associate professor at the University of Tennessee College of Law. He teaches and writes in the areas of family law, trusts and estates, and legal writing. He serves as member of the national Board of Directors for the Legal Writing Institute. Higdon received his law degree in 2001 from the University of Nevada, graduating first in his class and receiving the James E. Rogers Award for Outstanding Academic Achievement. While in law school, he served as editor-in-chief of the *Nevada Law Journal*. He went on to clerk for Judge Procter Hug Jr. on the U.S. Court of the Appeals for the Ninth Circuit.

Notes

1. Tenn. Sup. Ct. R. 8, RPC 3.3 (2009).
2. Beverly J. Blair, "Ethical Considerations in Advocacy," 4 *J. Legal Writing* 109, 118 (1998).
3. Monroe H. Freedman, "Arguing the Law in an Adversary System," 16 *Ga. L. Rev.* 833, 835 (1982).
4. Mark A. Drummond, "What Judges Want," 31 *Litigation* 3 (Summer 2005).
5. *See, Lassiter Constr. Co. v. American States Ins. Co.*, 669 So.2d 768, 770 n.3 (Dist. Ct. App. 1997).
6. *Drummond*, supra note 4 at 4.
7. Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* 29-18 (2001).
8. Blair T. Johnson, Gregory R. Maio & Aaron Smith-McLallen, "Communication and Attitude Change: Causes, Processes, and Effects, in The Handbook of Attitudes 650" (Dolores Albarracin, Blair T. Johnson & Mark P. Zanna, eds., 2005).
9. Kathryn M. Stanchi, "Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy," 60 *Rutgers L. Rev.* 381, 399-400 (2008).
10. *Id.* at 400-01.
11. 378 F.3d 1232 (11th Cir. 2004).
12. 539 U.S. 558 (2003).
13. *Supra* note 11, at 1136.
14. *Id.* at 1253.