Legal Writing: Playing Offense Against Your Adversaries' Arguments

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Big Picture

- Focus = dealing with adverse arguments
- Adverse argument defined:
  Arguments that may case doubt upon my position in the case. Many times, these arguments stem from cases that your opponent may rely on.
- In particular:
  - *First*, should I address the adverse argument?
  - *Second*, if so, how best to address adverse argument?

Do I address the adverse argument?

- Playing defense says: only address if I must
  - So address if ethical duty to do so because "directly adverse"
  - Otherwise, take the wait-and-see approach (and only addresses if and when other side does)
- Playing offense says: anticipate and address other side's arguments by inoculation

Downsides of Playing Defense

- Credibility:
  - Court may find and consider the authority anyway, even other side doesn't
  - Inference → Poor researcher? Misleading?
- Missed opportunity to persuade...in other words, to *inoculate*

What is inoculation in context of legal writing?

"The theory of inoculation is based on the idea that advocates can make the recipient of a persuasive message [the judge!] '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 positions makes the message recipient immune to attacks [e.g. a large dose of other side's arguments] from the opposing side."

-Kathryn M. Stanchi, "Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy," 60 Rutgers L. Rev. 381, 399-400 (2008)

Upsides of Playing Offense

- Opportunity to persuade:
  Inoculates judge to "resist" other side's arguments when they make them
- Credibility :
  Competent and forthright

How do I address the adverse argument?

- Playing defense says: summarize other side's argument and then knock it down
- Playing offense says: integrate response to adverse argument into your affirmative argument

Example: Playing Defense

- The Knock-It-Down Approach

Defendant may assert that under *Smith*, plaintiff cannot recover because she did not actually witness the entire accident. *Smith*, however, is not applicable because in that case, unlike the present case, the plaintiff did not witness any aspect of the accident. Here, the plaintiff did witness some of the accident and thus is not barred from recovery.

Downsides of Knock-it-Down Approach (Playing Defense)

- May draw too much attention to opponent's argument and, gasp, do a better job than opponent of making that argument
- Sounds defensive (like trying to run from the "bad" case)
- At best, sounds like it "holds the line" rather than advances down the field

Example: Playing Offense

- The Assertive/Integrated Approach

Under *Smith*, the plaintiff can recover as long as she perceived some part of the accident; *Smith* simply bars recovery by a plaintiff who witnesses no part of the accident. Here, the accident was ongoing in nature, and the plaintiff without doubt witnessed the end stage of the accident.

Advantages of Assertive/Integrated Approach (Playing Offense)

- Move the ball (argument)
- Present cohesive framework to the court
- Buries opponent's argument and minimizes it

Advanced Offense: Beyond Style

- Now that you've decided to play offense (e.g., integrated/assertive approach/style), consider the substance of how to integrate your response to the opponent's argument
- Rules of thumb:
  - *Generalize to analogize but get specific to distinguish*
  - *Location matters but is context dependent*

Advanced Offense: Beyond Style
Get Specific to Distinguish

- Consider cats and dogs

How similar?	How different?

- Find similarities by focusing on more general categories and find differences by focusing on specific attributes

Advanced Offense: Beyond Style
Get Specific to Distinguish

- What's the lesson?

  If you want to argue that two things are alike, use a fairly general level of abstraction.

  But if you want to argue two things are different (such as, that negative authority is not applicable), *get more specific.*

- So in distinguishing negative authority, focus on the *specific aspects* of that case, framing such that the precedent seems inapplicable to your own facts. This means reading the precedent narrowly.

Example of "Getting Specific" to Distinguish Your "Opponent's Case"

- Issue: Alabama law criminalizes sale of "sex toys"
  - Opponent will argue SCOTUS decision in *Lawrence* broadly applies because recognizes fundamental right to sexual privacy in one's home and thus that under *Lawrence* Alabama law is unconstitutional
  - You (the AG of Alabama) obviously want to distinguish "opponent's case" (*Lawrence*) as not to sweeping and thus inapplicable.
- How to distinguish? Get specific and frame the precedent narrowly to draw attention to differences between precedent and current case.

  Example:*

  > "*Lawrence* held unconstitutional a state law that criminalized homosexual acts that occurred in the privacy of one's home. It did not, however, set forth a new fundamental right to all forms of sexual intimacy, let alone set forth a fundamental right to purchase certain products simply because they are sexual in nature. Given Lawrence's limited holding, it has little to no application in the present which involves the *public sale* of sexual products, not the *use* of such products in the intimacy of one's *home*."

* adapted from 11th Circuit's majority opinion that refused to strike down Alabama law banning sale of sex toys

Example of "Getting Specific" to Distinguish Your "Opponent's Case" (continued)

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Advanced Offense: Beyond Style

Location Matters but Context Dependent

- Where to put your affirmative "response" to the opponent's argument
- Context-dependent:
  - How integral is that argument to the core of your affirmative argument? Put early if integral
  - How strong is your response? If not strong, generally don't put early

Wrap-Up/Questions