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Weak Arguments Are Pellets for the Shotgun Approach

Fight the temptation to include them 'just in case'

By Kenneth F. Oettle

Some writers will make almost any argument they can think of because they are afraid to lose with cards still in their hand. They fear — not totally without reason — being second-guessed by clients, partners or peers.

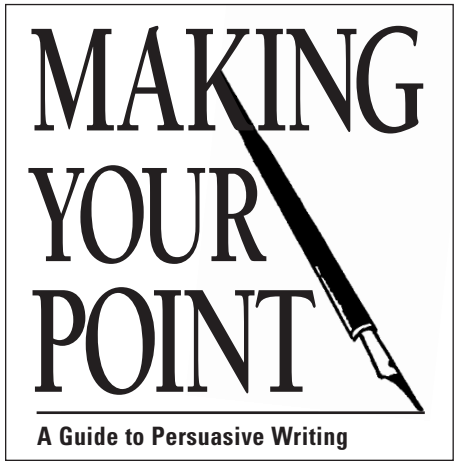
Judges sometimes fan this fear with rulings "from out of left field," in other words, on uncertain grounds, to reach what they believe is the right result. Attorneys then justify making weak arguments (once burned, twice shy) on the theory that you never know what will appeal to the court.

You never do know, but you can make a good guess. Weak arguments almost always hurt your case and rarely help it.

Gamblers will continue to gamble even as their stakes dwindle as long as they receive intermittent, unpredictable payoffs. This is how slot machines work. Random payoffs keep the patrons pulling.

So it is with weak arguments. We have all won something with a weak argument, so we keep using them. We seem to think that persuading a judge is a matter of pushing buttons until we find the right one.

The right argument is, in a sense, a button — if you press it, you persuade. But weak arguments are buttons, too, and unlike the "Close Door" buttons on elevators, they are connected to something. At a minimum, weak arguments hurt your credibility and cast doubt on your belief in your case; they irritate the court because they lengthen the brief; and they may even insult the court's intelligence.



Some lawyers view weak arguments as a negotiation tactic. They expect the court to reject their lesser points, but they figure the shock troops will help "soften the court up." Or they think their strong points will appear stronger by comparison. I have also heard the rationale that judges like to be able to reject something from both sides so the court does not appear partial.

These strategies assume that (1) the court is more likely to be moved by the best argument if it can cast other arguments aside, and (2) the advocate's role is "transparent" to the court, that is, the advocate's credibility is irrelevant.

Not having judged except in moot court, I polled sitting and former judges, state and federal. The consensus was, without dissent, that weak arguments don't work. They don't help the court feel comfortable ruling for one side or the other; they don't make stronger arguments look good by comparison; and they don't soften the court up.

To the contrary, they irritate the court because they waste time, and they may insult the court by suggesting the court is too stupid to see through them. Most of all, they cast doubt on the advocate's judgment for having used them, and thus they cast doubt on the advocate's whole case.

A judge can't help being affected by weak arguments, just as an employer can't help being affected by an employee's weak performance. The weakness of the argument reflects poorly on the advocate.

One judge analogized to the expression, "False in one, false in all." That is, if you lie about one thing, you'll lie about anything. Similarly, if one of your arguments is weak, then the rest of your arguments may be weak as well.

Not only do weak arguments suggest you lack judgment, but they suggest you lack confidence in your strong arguments to carry the day — that you are grasping at straws. Weak arguments mark you as a shotgun advocate and all your points as pellets.

Weak arguments also make easy targets.

For example, courts can develop momentum in their opinions by soundly rejecting a series of feeble contentions. By the time a reader gets to the point in the opinion where the strong arguments face off, the reader is primed to accept

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that your best argument is just as weak as the rest. Weak arguments thus add length and strength to the court's litany of rejection.

On occasion, courts refute only your weak arguments and ignore your strongest. The court may write, "Plaintiff argues X and Y, which are wrong because ... ," and the court will be correct. Then the court will stop. "What about Z?" you ask. "That was my best argument."

Figuratively, the court shrugs. To your embarrassment, the newspapers report that you argued X and Y, as if you said nothing about Z. This should come as no surprise — X and Y make better targets and therefore better news. If this happens at the appellate level, all you have left is the possibility of discretionary review by the state's highest court, with the other side arguing, not unreasonably, that substantial justice has been done.

In sum, you don't get to make weak arguments for free.

The time you spend on weak arguments would be better spent on strengthening your best point. When you lose a case — and you usually know when you are going to lose — even your core argument seems to lack an irresistible bite.

Maybe your case is inherently weak, but maybe you just haven't thought your best point through, or you haven't brought your best facts to bear. Maybe you cut the research short and lack good dicta, or you haven't found a good theme. You are spread too thin, and you didn't put enough time into your best argument to craft a winner.

The very sense that you may lose the case seduces you into making arguments you know are inadequate in a desperate attempt to find something that works and to cover yourself so that when you lose, nobody can say you missed an issue.

To serve your client and yourself, consider sharing your briefing strategy with the client. By explaining why you plan to omit arguments — including ones the client may like — you may reduce the likelihood that if you lose, you aren't held more responsible than you should be.

Puzzler

How would you tighten and sharpen the following sentence?

> There was no case within the annotations to the statute which addressed the issue.

The construction "there is" or "there was" is rarely needed because it adds nothing. It is easily deleted, usually taking a third word with it (in this case, "which"). "Within" is ponderous and can be replaced by "in." I would drop the phrase "to the statute" for readers who are lawyers or judges because they would find the concept of "statute" implicit in the reference to annotations.

> The revised version:
> No case in the annotations addressed the issue. ■