



Beware the Weak Argument

The Rule of Thirteen

By Kirby Griffis

Felix Frankfurter is reputed to have said, “A bad *argument* is like the *clock striking thirteen*. It puts in doubt the others.” Imagine yourself listening to a clock tolling the hours: one, two, three...ten, eleven, twelve. Ah, it's twelve o'clock. Then, with one more “bong” the clock dispels all of your confidence in it, and in the correct time. And so it is with weak arguments. Their very presence in a brief undermines confidence in everything else that you have said.

Lawyers are often terrified to cut an argument because “you never know what a court will hang its hat on,” or because “we might want that for appeal,” or, very strangely, because “you should give them something to reject.”

But including a weak argument that ultimately will not persuade a court can do harm. A court's time and attention is not a free and inexhaustible resource, and neither is your credibility. Both are in scant supply and are, for practical purposes, nonrenewable.

If a court must wade through multiple arguments, one or more of which an opponent could question, the value of the good arguments will be diminished in two different ways. First, dilution will diminish them: a court's attention will be divided and wasted by the attempt to pay attention to too much material. This is closely allied to the sin of using every page allotted to you even when you can make a cogent argument in fewer pages. Judges hate this imposition on their time perhaps more than anything else that lawyers do.

The second way that weak arguments undermine strong arguments is that the very existence of the weak argument poisons the strong by association. A bad argument tells a court that either you are unable to tell the difference between a strong argument and a weak one, or you *can* tell the difference but think that the court can't. Neither option is flattering. A weak argument tells a court that you can't be trusted to discriminate between the important and the unimportant and you lack confidence in your other arguments.

As for the contention that you never know what may appeal to a court, *it is your job* to figure it out. In part,

that means knowing your judge or judges. For example, if a judge is a fierce stickler for procedural rules who will enforce them even when it means disposing of a claim that seems meritorious, then a rule-based defense is more likely to work. If your judge always gives parties that violate a rule another chance, then you probably shouldn't bother to make an argument for strict enforcement.

Briefing only strong arguments means knowing your own case well enough to know which arguments should appear strong and which should appear weak to any intelligent and rational fact finder, based on their logic, emotional appeal, and grounding in the facts of the case and the applicable law. Just shoving in every argument that occurs to you suggests that you have done neither.

It can be very difficult for a lawyer who is deeply invested in a case to abandon a long-cherished argument. That's why a reading by an intelligent but uninvolved third party can be so valuable. In fact, that sort of review is probably more valuable than a moot session in which you practice your oral argument. By the time you get up to argue, your panel may have already decided the case—or at least formed strong views about it—from the briefing alone. Find out which arguments don't persuade, and cut them ruthlessly. If you end up with a brief consisting of two arguments, make them, and can wrap up 20 pages under the limit, so much the better. Your brief will stand out from the rest as a display of remarkable confidence, control, and respect for a court.

I don't know when Justice Frankfurter compared a bad argument to a clock striking 13, if he did, but if he did, it may have happened after George Orwell published *1984* in 1949, and he may have consciously echoed the first sentence of that novel about the wickedness of false arguments: “It was a bright cold day in April, and the clocks were striking thirteen.” Orwell was a savage critic of fuzzy writing whether or not it was used as a tool of totalitarian thought control, and in addition to *1984*, he wrote a very fine essay called “Politics and the English Language.” You should read it. It is fewer than 10 pages long and readily available online. In it, Orwell offered six rules for good writing, including this one: “If it is possible to cut a word out, always cut it out.” As for superfluous words, that is true for paragraphs, pages, and sections, and much more so for weak arguments that poison and drag down a whole brief.



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