



Confronting Bad Facts

No Room for Elephants

By Linda Morkan

Twice in recent weeks I have reviewed submissions from opposing counsel and, when done, put the brief down wondering about the elephant. You know the elephant—the one in the corner? The gray elephant in the corner buffing her nails?

I can see the elephant; I am sure that the court will be able to see the elephant. Does my opponent fail to see the elephant?

No, surely that's not it. He sees it as clearly as I do. But he does not want to talk about the elephant. After all, the elephant is big and unwieldy and rather hard to squirm past. No doubt, it appears easier to ignore the elephant than try to explain its presence.

I am talking about failure to confront bad facts or adverse case law when you write your briefs—that's the "elephant" in the room. Although it may be tempting to write as if there are no troublesome facts or cases that run contrary to the points that you will make, first, let's talk about why ignoring the soft underbelly of your case is a weak and ineffective briefing strategy; and then let's review a few tactics that you might employ to address opposing counsel's attempts to take advantage of it.

First, there is dignity and power in being the attorney to bring the negative aspects of your case to the attention of the court. Acknowledging the existence of bad facts or adverse precedent will not only enhance your credibility with the court, but it may also allow you to maintain control over the presentation of issues.

As an advocate, it is your duty to persuade the court to accept your way of thinking and there is no better way to start than if the court looks at you from the onset as a trustworthy source of information. Particularly when you argue before an unfamiliar court and have limited opportunity to establish credibility, your willingness to acknowledge and discuss the weakest parts of your case reveals not only candor and fairness—it also demonstrates your mastery of the facts and the law, creating the perception that you are an expert, afraid of nothing.

In addition to enhancing the court's view of your expertise and credibility, raising adverse issues will allow you to maintain some semblance of control over the case. Although some practitioners may tell you that it is better not to predict your opponent's arguments,

instances in which bad facts or contrary law will arise are unavoidable. If unavoidable, why try to avoid them? Instead, be the attorney to drag them into the light. Then you can control the context in which they are raised and the angle from which the court will first view them. Maintaining control also allows you, as the advocate, to diffuse (and de-fuse) your opponent's arguments. You will have planted in the court's mind a kernel of disbelief before the opposing attorney has even had a chance to explain his or her position. You may be able to successfully resolve the issues raised by the thorny fact or law so that when your opponent files his or her brief, the court skims right past that argument because you have already addressed it. Even if you are not that lucky, at least you will have already influenced the court's perception of the issue and have (hopefully) severely hampered the mileage your opponent expected to derive from your misfortune.

There are many techniques for effectively raising and resolving the weak parts of your case. Three such tools you should routinely consider are the three D's: dismiss, distinguish, and deflect.

The first and easiest way to counteract a bad fact or case law is to *dismiss* it entirely. If factual, argue that the fact, although bad, is irrelevant, and explain why. Show how the bad, irrelevant fact results in a sensational impact and cite a case that holds that the court is ruled by law, not emotion.

If case law is dogging you, argue that the particular case is not binding on the court or, if it is, that it should be overruled because the law was misunderstood or misapplied when first considered. While you may also argue that the case is distinguishable, do not be afraid to craft a cogent argument for overruling the precedent even if the court does not agree that it is distinguishable. Argue it in the alternative, but do not renounce it entirely because the court is highly unlikely to overrule a case when it has not been asked to do so.

The second way to counteract a bad fact or case law is to *distinguish* the fact or precedent from the situation before the court. You must urge the court not to apply precedent blindly, but to instead carefully examine whether the earlier holding arose from a scenario sufficiently similar to the one presently before the court thus rendering application of the former rule logical and just. You can distinguish a case either on its facts or on

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the applicable law; either will do. The goal is to show that the two cases are not parallel. Judges routinely say that each case is ultimately decided on its facts, and this is the ideal time to remind them of their maxim. Often just one critical fact will set a case apart.

Finally, to counteract a bad fact or case law you can *deflect* the court's attention from your prediction about your opponent's argument by discounting its substance. Again, while acknowledging that the bad fact or case certainly casts your arguments in a negative light, point out the

fallacies and weaknesses inherent in those negative arguments. Try to cast the counterargument as a red herring (an irrelevant or minor issue) or as a straw man (an oversimplified or extreme distortion of your argument). Attempt to persuade the court to disregard the adverse facts or case law by deflecting away from them while drawing attention to the red herring or straw man.

Another powerful deflection tool is to point out the gaps or errors in your prediction about your opponent's reasoning. If he or she has engaged in circular reasoning or employed *non sequiturs* (inferences that don't follow from the premises),

highlight the flaws for the court and urge it to discount the defective arguments on that basis.

Any of these techniques should help you to take on the difficult task of owning up to the ugliest part of your case. It may seem easier to wait and to hope that your opponent will fail to raise the negatives, but take it from me: elephants will not be ignored. My advice, then, is to resist the urge to pretend that the elephant is not in the corner buffing her nails; instead, be the attorney to point her out. And then set to work chasing her out of the room. 