

Pam DeMartino:

Welcome to the Widener Wordsmith, a podcast series designed to enhance and supplement legal methods here at Widener University Commonwealth Law School. I am Pam DeMartino an adjunct professor of legal methods and the host of this series. Joining me throughout this year will be attorneys from both academia and legal practice who will provide listeners with advice and insight into the challenging process of legal writing.

Pam DeMartino:

Hello listeners. And thank you for spending part of your day with me, I extend a special welcome to the 1LS who were asked to listen to this episode as they develop their arguments and their briefs. The topic of today's podcast is the counterargument and I have two questions that I will seek to have answered. One is why? The why of a counterargument, why is it needed for a complete and successful brief? And the other is the how, how to go about developing an effective one. To help me answer these questions is Professor David Raeker-Jordan, who joins me now in the studio. Welcome professor.

David Raeker-Jordan:

Thank you, Pam.

Pam DeMartino:

Professor Raeker-Jordan, is an associate professor of legal methods here at Widener Commonwealth Law. He teaches, I would say, for the most part in the day program, but is also involved in certain classes in the evening division as well.

David Raeker-Jordan:

I teach wherever the Dean tells me to teach.

Pam DeMartino:

Which could be across lines.

David Raeker-Jordan:

Could be day, could be the night, could be late afternoon.

Pam DeMartino:

Okay. Currently, my guess is that many of my night students may not be as familiar with you as the day students. So what I'm hoping to do, before we launch into this discussion of the counterpart or the counter-argument and the why and the how, is to give students just a flavor of who you are and what your role is here at the law school. And with that, let's start with your title. I know that from speaking with students that at the very beginning of the year, you invite them to refer to you by something other than your compound last name.

David Raeker-Jordan:

Well, yes, since my wife also teaches here and I think most of the students probably have my wife for some procedure. A lot of students refer to me as DRJ or Professor DRJ, and they'll refer to my wife and

Professor SRJ. Students will call me DRJ to my face, they don't usually call my wife SRJ to her face. She's a little more formal.

Pam DeMartino:

She gets the full title.

David Raeker-Jordan:

She gets the full title. Alternatively, they could refer to my wife as Lady Raker-Jordan, and they could refer to me as Lord Raker-Jordan either one would work. Yes.

Pam DeMartino:

Either one would work. And there you are. So now everyone knows if they hear these various titles, you are one and the same person.

David Raeker-Jordan:

Yes.

Pam DeMartino:

So when you were in law school, a couple of years ago, sitting there thinking about your future, at that time did you envision yourself growing up and becoming a law school professor, teaching legal writing?

David Raeker-Jordan:

No. I never had that thought. The first time I ever had any thought about teaching was the law school that I went to. Third year, students were paired up with professors to teach legal writing to first year students. So although we have academic support students here, I, as a third year student was primarily responsible for teaching the first years.

Pam DeMartino:

Oh, almost like an externship, on the job.

David Raeker-Jordan:

Or more like educational malpractice as I look back on it.

Pam DeMartino:

Oh, well, depending on how you view it, yes.

David Raeker-Jordan:

But I really enjoyed that experience. And then we moved to Harrisburg, my wife was working here at the law school and they had an opportunity for, they needed somebody to teach legal writing and I thought, oh, maybe I can do that. And so I did, came in as an adjunct and they slowly turned me into a full-time professor.

Pam DeMartino:

And you've been here ever since.

David Raeker-Jordan:

Been here ever since. That was probably the early 2000s.

Pam DeMartino:

Okay. So you started out then principally in the legal methods program?

David Raeker-Jordan:

Yes.

Pam DeMartino:

But since then, I've seen your name on a number of different courses.

David Raeker-Jordan:

Yes. So I've taught several different flavors of academic support. I've taught the ILA class for first year students, I've taught the ALA course for second year students. I've taught contract drafting, legal methods three course, taught that several times. And I also years ago I would teach the fundamentals of the bar course, which we now have outsourced to BARBRI, I think. I think BARBRI is now taking care-

Pam DeMartino:

Coming in and offering that.

David Raeker-Jordan:

They're taking care of that for us in an online course.

Pam DeMartino:

But let's go back to that. And in teaching a bar preparatory course like that, I'm going to assume that you were able to see a direct correlation between the work that we do in legal methods, one and two and students' performance on the bar exam.

David Raeker-Jordan:

Yes. I mean, a big focus of any kind of writing is thinking about who is your reader and what does your reader need? And so a big part of at least, essay writing in Pennsylvania is knowing what the bar examiners are looking for and how you need to tee that up so it's easy for them to find the points so that you can pass the bar exam the first time.

Pam DeMartino:

There's a goal.

David Raeker-Jordan:

Yes. That is the goal.

Pam DeMartino:

That is the goal. So now I think then we can turn to my two really big questions that you're going to give us some insight to today. And that is the why and the how of the counterargument, the specific component of the brief writing that our students are working on right now. And so in turning first to the question of why, let me suggest this, it almost seems counterintuitive to present your opponents side in your argument and your time, giving them any type, kind of recognition or it's almost like an admission that there's another side of the story and inviting either the court or another party to consider that. So why is it that it's really essential that we include a counter argument in our briefs?

David Raeker-Jordan:

Well, let me start by saying, I would agree with you that you don't want to make your opponent's argument for them. On the other hand, we do need to anticipate what authority the other side is going to use to make their argument. And so the way I teach counter-arguments is, we're going to undercut the authority that our opponents are going to use without articulating their argument clearly.

Pam DeMartino:

There is a difference. All right. So hold that thought to the how, how we're going to actually do that. Let's consider the why then in terms of the different approaches, then. Why we would need to address a particular point that differs from ours. And by that, what I'm referring to are three examples that you present in a handout, that we're going to refer to as the counter-argument handout in the course of this podcast. And I'll let listeners know that you will be able to access a copy of this handout if you have not been given a copy in the course of your legal methods class, it will be uploaded as a link on the podcast description for this particular episode. And in that handout, you identify three reasons in essence, of why you might counter another person's position. So I'm going to start with the first example, and that would be you disagree on the rule to apply, in the midst of the conflict, there is a disagreement on just what role is even in play here. Can you give an example of what that might look like?

David Raeker-Jordan:

Okay. So that's what I would refer to as a rule battle. So a rule battle, the classic example of a rule battle is, a jurisdiction takes up an issue, it's an issue of first impression. They've never decided this issue before so they have to find some law to decide it. Well, if you look to other jurisdictions, maybe jurisdiction A, has one law, jurisdiction B has a different law. We have two different laws. One favors the moving party, one favors the responding party. They're going to argue about what law the court should apply. That's a classic kind of rule battle.

Pam DeMartino:

That's a rule battle. Another one then, we disagree on the interpretation of the role.

David Raeker-Jordan:

So interpretation of the rule is sometimes looks like a different rule, but I'll talk about in the context of contract drafting. So in contract drafting, a lot of times we'll use, we'll have a list of things, and we'll say, you can't do these things including other things. And so the word including, everybody agrees that the word including is in the statute, or it's in the contract or it's in whatever rule we're looking at. But in some contexts, of course, we'll read including as a restrictive word, meaning including this and nothing else. So including A, B and C, and the courts will find that, well, it has to be A, B or C. Other times courts will read, including as non-restrictive, in other words, meaning including, but not limited to. So in contract drafting, we're always very careful to be clear in terms of exactly what we mean, because if you

just say the word, including, there's some courts that will read that to say, oh, well, you're restricted to only what you mentioned-

Pam DeMartino:

A very narrow interpretation.

David Raeker-Jordan:

A very narrow interpretation, whereas others would give it a more expansive and say, well, no, including means including, but not limited to. So it's the same. It could be the same rule, it could be the same phrase, could be the same contract clause, but it could be interpreted differently by different courts.

Pam DeMartino:

And without any case examples or precedent to guide us on.

David Raeker-Jordan:

Yes, if you have no case examples, it's going to be very difficult to argue one way or the other, case examples would be the best, but I've even seen cases where, and sometimes you'll have different States interpret it differently, it's the same language, but it's interpreted differently in different States.

Pam DeMartino:

So we would go for persuasive authority in that case.

David Raeker-Jordan:

Yes.

Pam DeMartino:

All right. So those are two of the examples that you identify in the handout. It is the third example then that I've purposely left last because that is what our focus is going to be today. And that is where we are disagreeing with the application of the case examples to a rule that we agree on. Would that be a fair description of that type of?

David Raeker-Jordan:

Yeah. The rule is clear. We have a series of case examples, some favor one party and some favor the other party.

Pam DeMartino:

And with a counter-argument then in that, under that scenario where, and I'm anticipating an argument where we lay out the rule and we're laying out our examples, but we know that ultimately we're going to be disagreeing on the application of those case examples, where in that structure will the counter-argument fall?

David Raeker-Jordan:

So there's actually two different places where the counter-argument could fall. If you have a series of cases, and if you're able to both analogize the cases and distinguish them in a fairly straightforward way,

you may be able to encompass all the cases. If you can use all the cases to support your argument, then I would say in most situations, you don't really need a separately denominated counterargument, because you've already dealt with all the cases and you're done. A trickier situation occurs where there's a split in the cases where there's a number of cases that clearly worked for you and you can analogize to. The other cases, don't really support you very well and in fact, they probably support the other side better. And so now we're in a situation where we're going to have a more formalized counterargument. And I think that's where we're going right now.

Pam DeMartino:

That's where we're going right now. And primarily because our assignment anticipates that for the brief writing for our students right now. So keeping in mind, and I agree with you wholeheartedly, there's more than one way of going about this, and perhaps we should put that caveat out there, the counterargument can look and feel differently and be placed in different places within a brief, there's no definitive rule. I think the definitive rule is it should go where it makes the most logical sense and where it will present itself most persuasively. All right. Well, I think then we should all understand why, the why then, of why do we have a counter? What is it that could possibly be rising to the top as really the dispute where it might fall within the brief and why we would need to have it there to begin with. So let's talk about the how. How do we go about effectively presenting a counterargument? And again, I'm going to refer to your handout where you suggest a structure for a counter beginning with a new paragraph.

David Raeker-Jordan:

The assumption would be that you're first going to make your argument, and you're going to make your argument without reference to any of the authority that the other side is going to use. You're going to focus only on the authority that supports your argument, the facts that support your argument, the case examples that support your argument, you're going to lay your argument out completely one problem. I find a lot of students do is they have this ping pong game in their argument where they start off to make an argument and then they immediately think, oh, what's the other side going to say? And they try to respond to that and then they come back and they say something in response. Focus just on what you're going to argue and that'll take you through your conclusion, the rule, the case examples and your application.

David Raeker-Jordan:

Once you've done that, now you're ready to start the counterargument. And as you said, so my first suggestion would be to start a new paragraph. It's a signal to the reader that we're moving to a different topic. And this topic is going to be the counter-argument. You then could either restate your argument, or you could make a statement about why the authority that the other side's going to use, or that you think they're going to use isn't going to be applicable. So you can say something like, although such and such a case appears superficially similar to our case, this court should not use it for the following reasons, but the key is going to be, we're going to undercut the authority. We're not going to go after their particular argument one, because at least for the assignment we're doing here, we don't know what the other side is going to argue.

Pam DeMartino:

Well, I was going to ask about that. When you're the appellant, you don't have the benefit of the appellee's brief.

David Raeker-Jordan:

If you're the appellant, or if you're the moving party, you don't know what the other side's going to argue. The best you can do is anticipate what their authority is going to be. If you're in a situation where the other side's already filed their argument and you know exactly what their argument is, then you can attack their argument head-on. But again, you would only do that after you made your argument.

Pam DeMartino:

Even on the responding side, it's still critical that you launch your side first. Okay. So you make an interesting point where you're carefully laying out the counter argument as not an attack on what the other side's position might be. It is more of a challenge to the authority that they might be drawing on to support that position. Is that a fair characterization?

David Raeker-Jordan:

Yes.

Pam DeMartino:

All right. So how do we do that?

David Raeker-Jordan:

The first thing is you have to think about, and as you're drafting, you're doing this already, so you're reading cases, you're deciding which cases support you, what are the best cases, the strongest cases that support your position. You should also be thinking, what are the strongest cases to support my opponent's position? So we're not going to deal with every single case, every single authority that supports our opponents position, we're going to deal with the strongest ones, which is usually the one that students don't want to deal with because they're the toughest, but that's the most persuasive. You can deal with their strongest argument that's going to give the court a lot of confidence that you've taken care of all the problems, you've looked at this problem in a holistic way, you're not trying to hide bad news.

Pam DeMartino:

Going back to our earlier lessons on persuasive writing, as I had presented it, it's oftentimes an issue of your credibility with the court. And so, as you say, bringing in what might be the most damaging authority and squarely addressing it, I think would increase your credibility with the court.

David Raeker-Jordan:

Yes, absolutely.

Pam DeMartino:

Okay. So we're going to select, be selective here, on the authority that we want to address and that we want to talk about. Let me give you an example of what I consider to be a typical example in the student writing that I've seen, when they're attempting to do this. They will open up their paragraph with a sentence and pretending in a scenario, we'll say it's a criminal case and I'm representing the defendant. So I could open up my paragraph with, the other party argues that, or the State argues that blah, blah, blah, blah. But this is why that argument fails. So in one sentence, I'm going to just summarize their entire brief on that point and immediately turn around and try to counter it, try to come back on it. And

I'm wondering what your thoughts are on how much, is that really enough airtime to let the court really understand or appreciate the distinction and the argument that you're trying to make?

David Raeker-Jordan:

Well, no. So one, it's not enough airtime. Second point is, I think the first thing I noticed was that you were trying to attack their arguments. So the other party argues this, so you're actually going to articulate their argument. And if you're the moving party who's filing first, you may be giving them ideas about what they could argue that they haven't thought of before. So there's no point in that. Again, I think it's better and as I often tell students, the other side cannot make an argument unless they have authority to back that up. Because I have a lot of students who, like in the statement of facts, will put all kinds of facts and they think might be bad for them, which they should, they should put legally significant facts and even those facts hurt them. And I'll say, "Why did you put this fact in?" "Well, it helps the other side." I'll say, "Well, how are they going to use that? What law are they going to use with that fact?" Well, they don't have any law well, then they can't use that.

David Raeker-Jordan:

So again, think about what authority are they going to use. So instead of saying, the other side is going to argue, blah, blah, blah, say something about the case itself. So this case, so this other case stands for this limited proposition or courts have held in this particular case, under certain circumstances, they might do something.

Pam DeMartino:

So we completely remove the other party from the equation. And instead we're focusing the lens only on the authority, the authority itself.

David Raeker-Jordan:

On the authority. So if there's a case example, they're going to use, we're going to explain why that case example should not be used by the court in our situation, because either our facts are different, the underlying rationale in that case, doesn't work here, the policy concerns in that case are not valid policy concerns in our situation. Something else, something other than what the other party might try to argue, because on the one hand, we probably don't know what they're going to argue. And even if we do know what they argue, if you'd know what they're going to argue, you could attack their argument directly, or you could just undercut their authority. I think of it as a table is not going to stand, unless it has three legs. If you attack one of the legs, if you attack the authority, the table's going to fall.

Pam DeMartino:

And so then you've already set them up at a great disadvantage before they even put their argument, their brief together, they have to overcome now what it is that you have pointed out to the court as a potentially major weakness in their analysis. Interesting, then how does that relate to the section in your handout here, where you make a distinction between the assertive version and a defensive version in the writing of the counter-argument?

David Raeker-Jordan:

The assertive version starts off with a clear statement of how the case at your opponent is going to use is different, is not similar to our facts. What law students want to do, even though they start with the

case their opponent is going to use is they immediately start to talk about how their opponents case might seem to be similar to our facts, but it's different in this way. So they end up digging themselves a hole-

Pam DeMartino:

Almost give a concession there.

David Raeker-Jordan:

They almost concede. Well, yeah, it is similar to our facts, but now let me explain why it's different. The assertive version starts off and says, the case they're trying to use is not like our case, either factually or because of rationale or because of some policy concerns. So you never go down the track of either stating what your opponent's arguing or stating how your opponent is going to try to use that case. You're immediately going to inform the court why that case is different and irrelevant in the resolution of our dispute.

Pam DeMartino:

It simply doesn't apply?

David Raeker-Jordan:

Yes.

Pam DeMartino:

It simply doesn't apply the facts here.

David Raeker-Jordan:

And the faster you can do that, the more credibility you're going to have with the court, if it takes you a long time to explain why the case is different then it seems like you're protesting too much.

Pam DeMartino:

Well, and on that point then, I will suggest that students take a look at the handout because you give a very nice, you give very nice examples of each of those versions at play. So you can see what does an assertive version look like as opposed to the defensive version on the same set of facts and with the same case.

David Raeker-Jordan:

Okay. I stole that from somebody else, but I think you're right, I think it does work well. And I think it's really helpful to have concrete examples. And there's some nice concrete examples in the handout.

Pam DeMartino:

All right. I'm wondering what your feelings are about the questioning of the motives of your opponent. What he or she might be thinking, or if it's an institution, let me give you an example. Again, let's keep it in terms of a criminal matter and I'm representing the defendant. So what about a statement where I say the State's reasoning for advancing this argument can only be that it wants to make an example of my client.

David Raeker-Jordan:

Well, if I don't want you to directly articulate your opponent's argument, I'm pretty sure I also don't want you to speculate as to why they're making that argument. It's totally unnecessary, it's irrelevant and it really falls into that kind of emotional appeal that although we use in ordinary arguments, a lot of times we really do not want to use in legal argument. We want to stick to the law and the facts. A little bit of emotional fact can be okay, but trying to paint the other side as the bad guys, when it's not based on what the law says is a very dangerous road to go down.

Pam DeMartino:

And I agree. I was hoping you would give me that point. All right, let's stick with that. This idea of how you address your opponent and how you portray them to the court. There's an educator by the name of Joseph Harris, who has published a book widely used in public education, where he presents a discussion on the counter argument, that is to be included within an argument. He calls it countering and he takes off on this whole idea of how do you counter another person's or another party's position. And he makes the point that, in assessing a situation, we can disagree but remain civil in that disagreement. I can address our disagreement and still be, I can be assertive, I can be an advocate, I can be even somewhat aggressive, but still retain a level of civility and respect for my opponent.

Pam DeMartino:

I'd like to talk about that point, particularly in the realm of legal writing, where so often the media at least, portrays being an advocate, as being someone who's going to be mean and vindictive and disrespectful. And I don't believe that's what we're encouraging students to do here in this particular part of their brief.

David Raeker-Jordan:

No. And I think if you focus on the authority, the authority that you're going to use, the authority that your opponent's going to use, and that's where you keep the focus, then you'll be much better able to maintain a civil discourse. If you're not, I mean, instead of attacking what their argument is, look at what their authority is. And if you can convince the court that their authority should not be used in this case, their authority does not say what they might want you to think it says, it means what I'm telling you. Then they have no argument and you did not have to do anything to attack them personally.

Pam DeMartino:

And I think that's the word, troubles me is attacking, that we seem to think that's what we have to do to be successful.

David Raeker-Jordan:

Yeah. You do not have to attack someone to be an advocate. You're being an advocate for your client. And to the extent that you can explain all the relevant case law, that's what an advocate needs to do. If you've not left any case law that the court believes favors the other side, then you're going to win.

Pam DeMartino:

Our students will finish up their brief writing beginning to end and turn the brief in. And at that point, if not before, will start to fret about their oral argument, because that will be the final endeavor. In what way though, are they preparing for that oral argument as they draft the brief right now?

David Raeker-Jordan:

It's not unusual in oral argument for the court to ask you, your opponent has argued that such and such a case is relevant and should be used to decide this case. Why should we not use that case? So the same approach you're using in writing, where you're thinking about authorities, the other side it's going to use, it's very likely that the court is going to be thinking of the same thing that if the other side is relying on a particular precedent, what's your argument that the court should not use that precedent?

Pam DeMartino:

And so even if a case does not make its way into the actual drafting of the counter-argument in your brief, the time spent in looking at other cases that are available and thinking about your opponent's side, as you're drafting will all work towards your benefit in the course of the argument.

David Raeker-Jordan:

Absolutely. And the way we do oral argument is you will exchange briefs with your opponents before oral arguments, so you will know what cases they are relying on. So even if in your brief, you didn't anticipate they're going to use a particular case, when it comes time for oral argument, you will know what authorities they're relying on so you can be prepared to answer any question about why that authority should or should not be used.

Pam DeMartino:

Well, professor, do you have any overall advice for our 1LS then as they work towards completion of their appellate brief and ultimately to the oral argument this semester?

David Raeker-Jordan:

I would say draft early and revise heavily. I see, I just got finished doing conferences with students on their trial memos. And what I saw was a lot of pretty good first drafts. I didn't see a lot of heavy revision. And I think part of it was, they didn't have a lot of time to work on it, but for the appellate brief, I tell my students draft a particular section or subsection, and then move on to something else. Don't try to revise until it's gone cold for three, maybe four, at least three or four days. Because if you can come back to it when it's cold, it's much more, much easier to be able to see where the problems are. But when you try to write it in the morning and revise it in the afternoon, you can't do it. All you're thinking about is what you thought it said when you wrote it. You're thinking about the thoughts in your head. You're not reading it the way a brand new reader's going to read it. So draft early, revise often.

Pam DeMartino:

And to your point, we know that this appellate brief is going to have a lot of moving parts to it. And so the idea that you can handle all of these parts in a day, all at once, you're going to sit down and draft. I mean, that has been my experiences. I was reading through the JOs from last semester and particular sections were so well done and then other sections wobbled. And when I went back and talked to students, I shared with them that my perception was too much was left to perhaps at the end, or became compressed where it became clear, where you spend time writing and rewriting and redrafting, and then too much came together at the end because you came to realize there are a lot of moving parts that have to be.

David Raeker-Jordan:

Yeah. I mean, these assignments take much longer than you think they're going to take, it's best to get started early, break it up in little pieces. It is daunting, the whole project is daunting, but if you break it up in small pieces and do a little bit every day, you can get it done and it can be a really high quality product that you'll be proud to give to employers as a writing sample.

Pam DeMartino:

And take it even beyond that. I mean, this advice will also prove to be beneficial in practice. I mean, to the degree that your schedules will allow you to really work on your writing when students are actually in practice, it doesn't get easier.

David Raeker-Jordan:

No, it doesn't get easier. In fact, you end up with less time. So if you talk with second or third year students, they'll say, oh my gosh, I thought we had so little time for the appellate brief, but now that I'm working at a firm, I realized what a luxury we had as first years, so-

Pam DeMartino:

Weeks and weeks.

David Raeker-Jordan:

Weeks and weeks. So take the time now to develop the kind of habits that are going to do you right as an attorney, get started early.

Pam DeMartino:

Well, thank you professor for joining me today. I certainly have appreciated your time and your advice and your insight. I feel confident that our 1LS also will appreciate the time that they've spent listening to this podcast. I thank my 1LS for tuning in. And I believe that you all have some important ideas to consider now when drafting this part of your briefs. I wish you luck in writing this semester and I look forward to you joining me for the next episode of the Widener Wordsmith Podcast series.

Pam DeMartino:

This podcast series was made possible by a generous grant award from The Association of Legal Writing Directors and the collaborative and creative support of the legal method's faculty at Widener University Commonwealth Law School.

Outro:

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