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Withstanding Scrutiny: Teaching Students to Address Counterarguments Effectively

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I. Introduction

41. Law-school assignments, which simulate real-world practice, routinely ask students to predict and explain the likely outcomes of legal disputes and to convince decision-makers to reach specific outcomes. Analysis of the facts and legal authority that bear on these disputes often leads to the possibility of different outcomes — particularly where a law professor creates the fact patterns and determines the jurisdiction. Unsurprisingly, students struggle with analyzing and communicating competing arguments. Common pitfalls include the following:

1. failing to identify counterarguments,
2. mistakenly treating an adversary's conclusions as a counterarguments,
3. failing to refute counterarguments,
4. misplacing the refutation of counterarguments,
5. misusing rhetorical tools to defeat counterarguments, or
6. misleadingly confronting hypothetical claims.

42. Below, we detail these pitfalls and propose methods for teaching students to avoid them.

II. Failing to Identify Counterarguments

43. Before deciding to address a counterargument, students must identify the competing arguments at play and, in the objective-writing context, must choose one side as the main argument. To begin, students should broadly evaluate the facts and applicable law to determine the viable arguments which support the possible outcomes.[2] For various reasons, however, students may fail to identify such arguments. Examples include inadequately gathering or poorly comprehending the facts; engaging in faulty legal research or analysis; or being predisposed to their assigned client, as many students believe that to be their role.[3] Regardless of the cause, the failure to identify counterarguments will render the main argument unconvincing, threaten the writer's credibility, and potentially create ethical concerns.

2 JAY FEINMAN, LAW 101, 345 (4th ed. 2014).

3 See Sarah E. Ricks, *Teaching 1Ls to Think Like Lawyers by Assigning Memo Problems with No Clear Conclusions*, 14 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 10, 12 (2005).

44. Of course, students may choose to implicitly address some counterarguments as part of the main argument;[4] whether to do so is a strategic decision. Indeed, in arguing that the facts support one conclusion, students may choose to affirmatively address facts that could viably support the contrary conclusion. For example, in an assault case, a defendant's intent to seriously injure the complainant might be shown by the defendant's choice to strike the complainant multiple times, but such an intent might be undermined by the defendant's choice not to use a nearby weapon. In an effort to gain credibility or be cogent, a party arguing for either conclusion as to the defendant's intent might choose to address both of these facts as part of the main argument rather than set off the unfavorable fact as a distinct counterargument. But it might also be that, in a particular case, a distinct counterargument does exist —- for example, a procedural concern might block review of the merits, a precedent case might superficially undermine the main argument, a policy argument might be in play, or complex reasoning might be required.[5]

45. After identifying the viable arguments, students who are writing an objective document must then balance these arguments and choose the more compelling of the two. This, too, will probably be a challenge as sound legal analysis is required,[6] and, even in cases that are not truly close, students (particularly first-year students) may lack the skills or confidence necessary to choose easily. In some instances, the professor will have eased this burden by advising students that their performance on assignments is evaluated mostly on the skill with which the student presents the arguments rather than the accuracy of the student's prediction.

46. To minimize the chance that students will fail to identify counterarguments, professors should urge students to evaluate the full scope of facts underlying a legal dispute. To provide structure, professors can ask students to list the facts that undermine the student's position (perhaps in addition to listing the facts that support the position) and then ask students to formulate the best arguments for each position. Professors should also urge students to analyze and research thoroughly; indeed, an expansive review of case law may alert the student to previously unconsidered lines of arguments as to what the law is or should be (e.g., policy issues). And, in the objective-writing context, professors should emphasize the value of truly neutral analysis — i.e., a holistic assessment of the facts and law that accurately predicts the likelihood of success and thus allows for sound decision-making on behalf of the client. Finally, professors should discuss the

4 HELEN S. SHAPO, MARILYN R. WALTER, & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 129 (7th ed. 2018).

5 HELEN S. SHAPO, MARILYN R. WALTER, & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 129 (7th ed. 2018).

6 See CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES 168 (3d ed. 2018).

value of developing a reputation as a thorough, and thus credible, advocate as well as the ethical rules that require acknowledging controlling and adverse precedent.

III. Treating a Responsive Position as a Counterargument

47. A related pitfall arises when students state a "counter-conclusion" in lieu of identifying a counterargument for an issue. Typically, a counter-conclusion begins with language that explicitly signals a counterargument: e.g., "Defendant will argue." The counter-conclusion goes on, however, merely to assert that the adversary will dispute the issue and fails to identify any grounds for the adversary's position.

48. Consider, for example, an objective-writing assignment regarding liability under a state dog-bite statute. Assume that, to recover damages against a dog owner for the dog's attack, the injured party must prove, among other elements, that she did not provoke the dog. Within a memorandum predicting that the plaintiff can likely recover damages, a problematic counter-conclusion and response for the provocation issue might appear as follows: "Defendant will argue that Plaintiff provoked the dog. Plaintiff did not do so, however, because [analysis supporting predicted outcome]." Although the plaintiff should in some manner address a potential claim of provocation, such a counter-conclusion has not done the work of identifying a potential legal or factual weakness in the plaintiff's case and, accordingly, does not enable the reader to assess the strength of the prediction or achieve the goal of boosting the writer's credibility. Likewise, the response to the "counter" has not reconciled any seemingly adverse law or facts.

49. In the persuasive context, because an advocate need not (and, following a "more elegant approach,"[7] should not) explicitly identify what the adversary may argue before affirmatively rebutting that argument, the "counter-conclusion" pitfall does not directly apply. That said, because law-school students representing a defendant, non-movant, or appellee in a hypothetical case often do not have the real-world advantage of previewing their adversary's argument before responding, the risk of missing or ignoring key legal or factual weaknesses still exists on either side of the case.

50. Students may fall into the "counter-conclusion" trap for the same reasons they fail to identify counterarguments more generally, as discussed above, but the "Defendant will argue" language disguises the problem. That language falsely signals that

7 NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 94 (2013). But cf. Stacy Rogers Sharp, *Crafting Responses to Counterarguments: Learning from the Swing-Vote Cases*, 10 LEGAL COMM.& RHETORIC 201, 213–15(2013).

the student has met the task of identifying a counterargument. To help students avoid this trap, professors should set aside class time to illustrate the difference between a counter-conclusion and a counterargument and should show examples of each. Professors should also encourage students to test whether they have identified a potential counterargument by checking whether they have indicated why a party disputes an issue, in the objective context, or by checking whether they have addressed adverse law and facts that the adversary will likely rely upon in the case of a persuasive document.

IV. Failing to Refute Identified Counterarguments

51. Yet another pitfall arises when students explicitly identify potential counterarguments but leave them unrebutted. In the objective context, failing to rebut identified counterarguments usually means that the student has not effectively predicted a likely result (or, at least, has undermined the reader's confidence in any asserted prediction). In the persuasive context, failing to rebut key points that the adversary has raised means that the student has not shored up the client's case.[8]

52. Returning to the dog-bite problem, an identified but unrefuted counterargument might appear tacked on to an objective analysis as follows:

> Here, the dog's repeated bites and the resulting lacerations show that the dog's attack was vicious and disproportionate to Plaintiff's act of lightly spraying the dog in the face with water. Thus, the court may conclude that Plaintiff did not provoke the dog. Defendant, though, can argue that Plaintiff provoked the dog because, unlike the injured party in *Messa v. Sullivan*, Plaintiff did more than merely walk into the dog's line of sight.

53. In the above example, the writer applies facts to the law in support of the plaintiff's position but then offers an equivocal, mid-analysis conclusion and fails to explain why the defendant's argument does not alter that conclusion. Such an analysis would leave a reader uncertain about the likely outcome and would not help the reader strategize about next steps for the client.

54. Likewise, raising negative information without "effective refutation" in brief writing is "analogous to a two-sided non-refutational argument," which is "largely unpersuasive."[9] Although "few lawyers" would intentionally leave an adversary's attack

8 See NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 75, 95 (2013).

9 Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 398, 413 (2008).

"wholly unanswered,"[10] lawyers and students may still fall into the "advocate's trap"[11] of wrongly undervaluing the merits of the opposing side's arguments or ineffectively refuting those arguments.

55. In the objective context, students may fail to refute identified counterarguments because the students feel torn between competing arguments and either do not know how to weigh them or do not understand that identifying counterarguments is only the first step toward addressing them. To help students avoid this pitfall, professors should equip students with techniques for evaluating and effectively refuting counterarguments.[12] Substantive tools to refute counterarguments include noting omissions or misstatements of fact or law, exposing logical flaws in the counterargument (e.g., non-sequiturs), showing the counterargument's lack of support from or inconsistency with precedent, or demonstrating unfair consequences of adopting the counterargument.[13] Professors should advise students that, with any approach, students should frame responses to counterarguments respectfully.[14] Further, professors should warn students against using equivocal language like "may" to predict what a court will likely conclude. Finally, professors should show students examples of fact applications that leave counterarguments unrebutted and discuss why such applications do not serve the purposes of objective or persuasive writing.

V. Ineffectively Refuting Plausible Counterarguments

Failing to Explain Fully the Legal Insignificance of Unfavorable Facts

56. An effective response to a counterargument based on seemingly unfavorable facts should not only note the facts that are unfavorable to the predicted or argued position, but also fully explain the legal insignificance of those facts. Students sometimes fail to do the latter — for example, they merely mention unfavorable facts or merely juxtapose them with favorable facts — because they believe that readers will independently

10 Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 398, 416 (2008).

11 Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 411, 414 (2008).

12 See, e.g., CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES 168 (3d ed. 2018).

13 See NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 79 (2013).

14 See NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 95 (2013).

discount the unfavorable facts or that extended discussion of those facts would only damage the position advanced. (Juxtaposition of an unfavorable fact with a favorable fact can be a valuable rhetorical tool when used as part of a rebuttal; however, unless the insignificance of the unfavorable fact is patent, juxtaposing facts, without explaining the insignificance of the unfavorable one, is unlikely to be impactful.) Whatever the reason, such a deficiency (or omission) renders an analysis incomplete and thus unconvincing. For example, in the assault-case example discussed above, a writer who is arguing that the defendant intended to seriously injure the complainant should not only note the defendant's choice to forego the use of a nearby weapon but also explain why such an intent existed despite that choice (perhaps because the defendant believed that reaching for the weapon would allow the complainant to escape or that using a weapon would result in even-greater culpability). Indeed, a failure to explain the legal insignificance of the unfavorable facts would ask the reader to do too much work and underuse the opportunity to advance a particular interpretation of the facts.

57. To minimize the risk that students fall into this pitfall, professors should advise students of the dangers of assuming that a reader will "fill in the blanks" and understand, independent of an explanation, the legal insignificance of unfavorable facts. Related, professors should ensure that any word or page limits for an assignment allow for thorough treatment of the facts.

Failing to Explain the Legal Significance of Distinguishable Facts of Precedent

58. Another pitfall related to ineffectively refuting counterarguments arises when students do not explain the legal significance of distinguishable facts of precedent. Of course, advocates may distinguish adverse authority on non-factual grounds.[15] But, even when students precisely contrast the client's facts with facts from precedent, the students will not have neutralized the adverse authority without explaining why the distinction matters.

59. Consider, for example, an objective-writing assignment regarding a motion for a protective order[16] to bar public disclosure of police body-camera footage in an excessive-force case. To establish good cause for such an order, a movant must show that private harm from disclosure outweighs public interest in that disclosure. The following sentence illustrates an ineffective distinction for the public-interest side of the balance:

15 See, e.g., NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 95 (2013).

16 Fed. R. Civ. P. 26(c).

> Unlike the deposition footage in *Hobley*, which showed police officers repeatedly invoking the privilege against self-incrimination, the body-camera footage here shows police officers arresting a suspect and injuring her in the process.

60. Without more, the reader is left wondering what this distinction proves. The following revision, although an improvement, would not fully cure the inadequacy:

> Public interest in disclosure is greater here than in *Hobley* because body-camera footage of police officers arresting a suspect and injuring her in the process is different from deposition footage of officers repeatedly invoking the privilege against self-incrimination.

61. Although the writer has now tied the factual difference to the legal point, there remains a disconnect: how does the factual difference support the legal point? Does an elevated public interest in the body-camera footage stem from the public's right to know about external police practices that affect public health and safety? Does the public have a greater interest in the body-camera footage because it, unlike the deposition footage, would reveal new substantive information about the underlying case? The writer has left the reader to connect the dots rather than led the reader to the predicted outcome or, in the persuasive-writing context, a favorable outcome for the client.

62. Many legal-writing textbooks already instruct students to explain the legal relevance of fact comparisons and distinctions.[17] And students are typically able to identify legally significant factual differences once students learn how to compare like components of cases instead of, for example, comparing facts to an entire case. But students tend to fall into the trap of ineffectively distinguishing adverse authority because their minds fill in the logical gaps that are not communicated in writing. To help students avoid this pitfall, professors should advise students to revisit case comparisons with "fresh eyes" after taking some time away from the writing. Students should then ask themselves whether they have not only identified a legally significant factual difference but also explained why the difference supports their prediction or argument. As with the other pitfalls, professors should also show students examples of effective versus ineffective distinctions and discuss the merits and shortcomings of the examples. Moreover, as noted, professors should ensure that any word or page limits allow students to be thorough.

Inadequately Explaining Precedent

63. Students will not be able to distinguish arguably adverse authority effectively if they have not earlier explained the relevant facts and reasoning of the adverse authority.

17 CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES 159 (3d ed. 2018); see also BRADLEY J. CHARLES, APPLYING LAW 62 (2011).

Even when analyzing a purely legal issue, students cannot effectively distinguish a line of cases without first explaining the court's reasoning in those cases. Thus, this next pitfall arises when students inadequately explain precedent and, thereby, inadequately set up their ability to articulate case distinctions.

64. Returning to the protective-order motion, an inadequate case explanation for the private-harm side of the balance might appear as follows:

> The court in *Flaherty* held that the mere fact that a mayor might experience some discomfort or "modest embarrassment" from disclosure of a video did not establish sufficient harm.[18]

65. Without knowing more about the content of the video, the reader will not understand why the potential embarrassment was only "modest" in the mayor's case or why the police body-camera footage is materially different (assuming that the writer goes on to distinguish the video and resulting harm in *Flaherty*). Any case distinction based on this explanation would either ring hollow or require discussing facts of the case that were not included in the original explanation of precedent.[19]

66. Students may fall into this trap because they become so familiar with the precedent cases that they forget to think about the intended audience: a supervisor, law clerk, or judge who has not necessarily read those same cases and who should not have to read the cases to understand the point made. Additionally, students may be attempting to minimize the airtime afforded to adverse authority. Finally, students often struggle to grasp the difference between stating legal rules and explaining precedent; indeed, the above example of an inadequate case explanation would easily convert to a legal rule if the writer omitted the preface, changed "a mayor" to a "public official," and used present tense.

67. To help students avoid this pitfall for persuasive writing, professors should advise students to highlight legally relevant distinguishing facts in the explanation of an adverse case so that the reader, even before getting to the fact application, can anticipate why the case does not control the parties' facts.[20] And for objective writing, professors should instruct students to provide enough factual context in the explanation of precedent to support case comparisons in the application without requiring the reader to review the precedent case independently. For example, to enable a reader to understand any similarity or difference between the police body-camera footage and the video in *Flaherty*, the explanation of precedent would have to specify that the video

18 *Flaherty v. Seroussi,* 209 F.R.D. 295, 299 (N.D.N.Y. 2001).

19 See CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES 154 (3d ed. 2018).

20 See JOAN M. ROCKLIN, ROBERT B. ROCKLIN, CHRISTINE COUGHLIN & SANDY PATRICK, AN ADVOCATE PERSUADES 174–75 (2016).

was the mayor's deposition testimony explaining why he declined to reappoint his rival's paramour. Students can test whether they have explained precedent or largely restated a legal rule by checking whether the explanation incorporates concrete facts specific to a single case. Again, professors should ensure that any word or page limits allow students to address precedent thoroughly in both the law and fact-application sections.

Unduly Emphasizing Counterarguments

68. Another common mistake is to overemphasize counterarguments. Such errors can take the form of poor placement of counterarguments or ineffective use of rhetorical tools. For example, a student might begin the legal discussion with a counterargument rather than a main argument or, in a persuasive- writing context, frame a counterargument neutrally so as to imply that it has merit. Students may fall into this trap because they lack experience in organizing a legal document strategically or in effectively advancing a particular position.

69. An important threshold issue, particularly in the persuasive-writing context, is whether to address a counterargument in the initial document or instead to do so in reply and only if an adversary has made the argument. An upfront attempt to inoculate an argument from later attack may not only soften the impact of the attack,[21] but also demonstrate candor, and thus enhance an advocate's credibility. Such an attempt, however, risks overemphasizing an argument that is ultimately not pressed vigorously or even alerting an adversary to an argument that would otherwise go unnoticed.[22] Nevertheless, viable counterarguments should be addressed to some extent.

70. An oft-recommended method for organizing a legal discussion is to address affirmative points first by leading with the strongest argument[23] and to address counterarguments at the end of the legal discussion[24] or in the middle thereof;[25] rarely, if ever, would a counterargument be addressed before the main argument.[26] Addressing the

21 Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 399, 405 (2008).

22 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 16 (2008).

23 MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 98, 224 (3d ed. 2010); RICHARD K. NEUMANN JR., LEGAL REASONING AND LEGAL WRITING 254 (8th ed. 2017).

24 HELEN S. SHAPO, MARILYN R. WALTER, & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 121 (7th ed. 2018); see CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES 162 (3d ed. 2018); WILLIAM H. PUTMAN, LEGAL ANALYSIS AND WRITING 362 (3d ed. 2009).

25 ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 15 (2008).

26 See CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES 174 (3d ed. 2018).

main argument first focuses the reader on the reasoning advanced as the most sound or, in the persuasive context, the reasoning proposed to be embraced and establishes the counterargument as an aside or mere nuisance undeserving of much concern. Relegating a counterargument to a footnote may also minimize its airtime and effectively signal its insignificance.[27] A different approach — one that prominently places the counterargument — may well demonstrate the writer's worry that the counterargument is indeed strong.

71. Generally, professors should encourage students to afford counterarguments the least amount of attention[28] consistent with fully refuting them.[29] Depending on the complexity and strength of the counterargument, a single assertion in the fact-application section of the legal discussion — invoking language from the explanation of the law — may suffice to show why an adversary's contention is inaccurate or inapt. Additionally, students should be cautious not to bolster a counterargument by articulating or framing it more clearly or developing it more fully than the adversary has.[30] Related, unless they are responding to counterarguments that an adversary has already raised, students should address only those counterarguments that might be reasonably convincing — rarely more than one or two per issue (e.g., factor or element).

72. Other rhetorical tools for de-emphasizing counterarguments are legion. For the most part, these tools mirror those used broadly for persuasive writing, and, given many students' lack of experience with persuasive techniques, professors should alert students to them. For example, skepticism about a counterargument can be created by the choice of words used to discuss facts (e.g., the difference between a "home" and a "rental apartment") or to frame a counterargument (e.g., labeling it as a "claim" or an "attempt to argue"). Juxtaposing favorable facts or precedents with unfavorable ones can likewise minimize the sting of the latter. To the extent possible, arguably adverse authority should be addressed collectively rather than individually (e.g., "The cases cited by the plaintiff are inapt given that, there, the plaintiffs did not contribute in any way to the accidents.").[31]

73. Related, in the persuasive-writing context, professors should advise students not to formally set up a counterargument (e.g., "My adversary has argued [or will likely argue] that the evidence of the defendant's guilt is overwhelming."). Framing the counterargument in that way may highlight or "advertise" the adverse position and "makes

27 See ROSS GUBERMAN, POINT MADE 184 (2d ed. 2014).

28 NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 94 (2013).

29 Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 383 (2008).

30 ROSS GUBERMAN, POINT MADE 21 (2d ed. 2014).

31 ROSS GUBERMAN, POINT MADE 149–52 (2d ed. 2014).

your argument sound defensive." Therefore, professors should teach students that, if possible, they should address counterarguments affirmatively (e.g., "The evidence of the defendant's guilt is far from overwhelming.").[32]

VI. Attacking a Straw Man

74. Finally, students may avoid the above pitfalls but still fall into another trap: attacking a straw man. That is, students may preemptively refute an argument that the adversary would never raise, even having thought of it.

75. Consider, for example, a persuasive-writing assignment regarding a defendant's alleged "fair use" of an author-illustrator's cartoon-character drawings under the federal Copyright Act of 1976. The defendant, a non-profit organization, used children's renditions of the drawings in a free recipe book to solicit donations for the organization and to encourage children to eat healthy foods. A straw-man attack on behalf of the plaintiff might appear as follows:

> The "purpose" factor weighs against fair use as Defendant's recipe book is not scholarly and does not make a novel contribution to the field of nutrition.

76. Certainly, the Copyright Act identifies "scholarship" as an example of an activity that may qualify as fair use. But the defendant in the above example did not and would not contend that its use was scholarly. Rather, the plaintiff's argument for the "purpose" factor should have focused on why the defendant's purpose in using the characters was not distinct from the plaintiff's original purpose and why the defendant's use amounted to commercial advertising. By distorting the adversary's argument, the writer has not insulated her client's case from attack. Likewise, in the objective context, attacking a straw man may mean that the writer has not evaluated valid counterarguments.

77. Refuting a counterargument that the adversary would never raise is tempting precisely because it is so easy to knock down, and doing so may lure a novice into believing that she has thoroughly analyzed competing contentions. Students may also fall into this trap because they notice, in the problem case, the absence of certain facts that were material to adverse holdings in past cases. Students then mistakenly assume that the absence dictates a favorable result for the client. To help students avoid this pitfall, professors should educate students about the straw-man fallacy, direct students to focus on arguments that the adversary has raised, and remind students to use the facts at issue in

32 NOAH A. MESSING, THE ART OF ADVOCACY: BRIEFS, MOTIONS, AND WRITING STRATEGIES OF AMERICA'S BEST LAWYERS 94 (2013).

the problem case to anticipate likely counterarguments. If no viable counterargument exists, students should not create one.[33]

VII. Conclusion

78. Identifying and effectively refuting counterarguments is difficult even for seasoned lawyers, and students struggle with these tasks even more so. By understanding the types and sources of common pitfalls surrounding counterarguments, however, professors can develop a teaching plan to minimize the risk that students will succumb to those pitfalls.

33 HELEN S. SHAPO, MARILYN R. WALTER, & ELIZABETH H. FAJANS, WRITING AND ANALYSIS IN THE LAW 127 (7th ed. 2018).