

THE “DILUTION” EFFECT AND SHARPER ADVOCACY –  
ANOTHER “LESS IS MORE” TOOL FOR PERSUASION

What wins the day in arguing a motion *in limine*? A single argument or a decision tree approach of “Your Honor, we prevail because of Rule A, but Rule D also applies and so might F?” One answer may come from studying the dilution effect and an experiment on drug safety [side effects] information.

On the way there, we need to start with the conventional wisdom in appellate practice. Just as too many cooks may spoil the broth, raising too many claims for appellate review may spoil the one or two valid ones. In the world of appellate advocacy, this has become not merely lore or collective wisdom but a guiding principle embraced as a standard for attorney effectiveness. As one court proclaimed, “the number of claims raised in an appeal is usually in inverse proportion to their merit and that a large number of claims raises the presumption that all are invalid.” Commonwealth v. Ellis, 534 Pa. 176, 183 (1993)

The source? R. Aldisert, “The Appellate Bar: Professional Competence and Professional Responsibility -- A View From the Jaundiced Eye of One Appellate Judge,” 11 Cap.U.L.Rev. 445, 458 (1982). Judge Aldisert’s assertion is not necessarily scientific, and the data he drew from are his own cases – as he puts it in the article, “[w]ith a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial court it is rare that a brief demonstrates that the trial court committed more than one or two reversible errors.” *Id.* And the Aldisert ‘rule’ is ignored by capital case defense appellate lawyers who, with life on the line and no certainty as to what issue(s) will ‘grab’ the court and whether an accumulation of small errors might generate discomfort with the verdict, raise a cornucopia of claims,

But whether Judge Aldisert is correct about how many issues to raise *to an overburdened appellate court charged with reading voluminous records*, the separate question is how many *reasons* to argue for an individual claim. This came to the fore in a recent article on effective motions practice. Here is what was posited:

When deciding what to include in a motion, it is important to consider the dilution effect. The dilution effect is a judgment bias. When a judge is presented with information that is helpful to a particular issue (e.g., the law concerning probable cause to arrest), a risk exists that the court will underutilize such information when information not important to such an analysis is also presented (e.g., the law concerning car stops). The brain does not distinguish the relevant from the nonrelevant information when considering each independent argument. Instead, having irrelevant information dilutes the power of persuasion. People's minds do not add 75 (the value of argument A) to 25 (the value of argument B) to reach a total of 100. People average these out, resulting in a value of 50. Thus, the weaker argument may dilute the stronger argument. Less can indeed be more. Advocates should be careful in advancing multiple arguments to persuade the court or risk their better argument being diluted by the weaker one.

Stephen Epstein: CREATIVE MOTION PRACTICE: WHO, WHAT, WHERE, WHEN, AND WHY, 48 Champion 20, 22 (2024)(footnotes omitted).

Is there a dilution effect and how does it work? The “averaging” phenomenon discussed in CREATIVE MOTION PRACTICE is real. See, e.g., “Dilution Effect: Focus On Quality, Not Quantity (December 1, 2021) <https://www.assurance-barreau.com/en/articles-maitres-droits/articles/dilution-effect-focus-on-quality-not-quantity/> (last visited July 28, 2024).

Referenced is a study by Sivanathan and Kakkar where thousands of people were given information about a drug’s side effects. Half of the group was told only the severe side effects; the other half was told of both the severe and moderate side effects of the drug. The outcome, as explained in the article abstract, was stark:

Specifically, when commercials list severe side effects along with those that are most frequent (which include both serious and minor side effects), as required by the Food and Drug Administration, it dilutes consumers’ judgements of the overall severity of the side effects, compared with when only the serious side effects are listed.

Sivanathan and Kakkar, The unintended consequences of argument dilution in direct-to-consumer drug advertisements,  
<https://www.nature.com/articles/s41562-017-0223-1> (last visited July 28, 2024).

In a subsequent Ted Talk, Professor Sivanathan directed the research toward general persuasion theory:

what this body of research tells us is that in the world of communicating for the purposes of influence, quality trumps quantity. By increasing the number of arguments, you do not strengthen your case, but rather you actively weaken it. Put another way, you cannot increase the quality of an argument by simply increasing the quantity of your argument. The next time you want to speak up in a meeting, speak in favor of a government legislation that you're deeply passionate about, or simply want to help a friend see the world through a different lens, it is important to note that the delivery of your message is every bit as important as its content.

Stick to your strong arguments, because your arguments don't add up in the minds of the receiver, they average out.

Sivanathan, The Counterintuitive Way To Be More Persuasive  
[https://www.ted.com/talks/niro\\_sivanathan\\_the\\_counterintuitive\\_way\\_to\\_be\\_more\\_persuasive/transcript?subtitle=en](https://www.ted.com/talks/niro_sivanathan_the_counterintuitive_way_to_be_more_persuasive/transcript?subtitle=en) (last visited July 28, 2024).

Does this mean that we never offer two grounds in support of an argument? No, especially if both are compelling and unanswerable (“Your Honor, that police report is not a business record, and its use here would violate my client’s 6<sup>th</sup> Amendment right of confrontation.”). And of course, there is often the need for a fallback, usually a Rule 403 reach for a compromise or ‘toning down’ of the proof to be argued on rebuttal. And there is some support for layering arguments, the approach known as “sequential request strategies.” *See, e.g.* Stanchi, THE SCIENCE OF PERSUASION: AN INITIAL EXPLORATION, 2006 Mich.St.L.Rev. 411 (2006).

But maybe, just maybe, being the smartest person in the room with the most arguments actually makes you “average” by dilution. And that wins neither hearts nor minds.

