PLAYING WITH FIRE: THE SCIENCE OF CONFRONTING ADVERSE MATERIAL IN LEGAL ADVOCACY

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I. INTRODUCTION

Although much of the attention on persuasion in law has focused on how to frame supporting arguments, persuasion is not only about how to present favorable information. Confronting and defusing negative information is a critical aspect of the art of persuasion. But disclosure of negative information raises substantial and thorny questions about advocacy and persuasion because it is, by definition, not helpful to the client's position. Lawyers have depicted the dilemma of what to do with negative information in vividly unpleasant terms, likening disclosure to a "self-inflicted wound" and describing the decision to disclose as "agonizing" and "painful."[1]

Given these descriptions, it is not surprising that there is considerable controversy among both appellate practitioners and trial lawyers regarding when and how to address information that potentially undermines the position they are advocating.[2] Although the rules of professional responsibility require some disclosure of negative information, the rules leave much discretion to lawyers, and

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1. Angela Gilmore, *Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority*, 43 CLEV. ST. L. REV. 303, 303 (1995); Kay Nord Hunt & Eric J. Magnuson, *Ethical Issues on Appeal*, 19 WM. MITCHELL L. REV. 659, 672 (1993); Risa B. Lischkoff, *Recent Decisions on Citing Authorities to Courts: Model Rule 3.3(a)(3) of the Model Rules of Professional Conduct*, 19 J. LEGAL PROF. 315, 315 (1995).

2. *See* James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 DISCOURSE PROCESSES 1, 7-13 (1994). *Compare* C. Geoffrey Hazard Jr., *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821 (1982), *with* Richard Silverman, *Is New Jersey's Heightened Duty of Candor Too Much of a Good Thing?*, 19 GEO. J. LEGAL ETHICS 951 (2006).

so the decision is, in most instances, a strategic one.[3] The vehemence of the disagreement among lawyers about the appropriate strategy, as well as the pain of the dilemma, is a testament to the high stakes of the question. If the advocate makes a strategic decision to disclose negative information and that decision turns out to be a mistake, the advocate has not only weakened her own case, but has taken affirmative steps that will strengthen the other side's case.

The disagreement about when to confront negative information goes to the heart of what it means to be an advocate in the adversarial system and reveals a fundamental disagreement among lawyers about persuasive strategy and zealous advocacy. Those who resist disclosing negative information start from the premise that such disclosure in a persuasive context is inconsistent with the duty of zealous advocacy.[4] Advocates in this camp feel that preemptive disclosure of negative information is rarely strategically advisable.[5] Beyond those situations where it is ethically mandated, the decision to disclose should be approached with great caution. Advocates on the other side argue that disclosure of negative information is in the client's interests and therefore entirely consistent with zealous advocacy, both because confrontation of negative information makes the positive arguments deeper and stronger and because candid confrontation enhances the advocate's credibility.[6]

This Article seeks to shed light on this controversy by looking carefully at the social science research on persuasion, particularly the social science that addresses the handling of negative information in persuasive messages. The Article does not take sides in the ethical debate over whether a lawyer's duty of candor should trump the duty of zealous advocacy or vice versa, a question that has sometimes characterized the debate on this issue.[7] Rather, the focus

3. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007). The rules require disclosure of negative authority and negative facts under certain circumstances; *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (1980).

4. *See, e.g.*, Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 837-38 (1982); Silverman, *supra* note 2, at 951, 959; *see also* ROBERT H. KLONOFF & PAUL L. COLBY, WINNING JURY TRIALS: TRIAL TACTICS AND SPONSORSHIP STRATEGY (2d ed. 2002).

5. *See* Freedman, *supra* note 4, at 838.

6. *See generally* Quentin Brogdon, *Inoculating Against Bad Facts: Brilliant Trial Strategy or Misguided Dogma?*, 63 TEX. B.J. 443, 447 (2000); Hazard, *supra* note 2, at 831-32; L. Timothy Perrin, *Pricking Boils, Preserving Error: On the Horns of a Dilemma After* Ohler v. United States, 34 U.C. DAVIS L. REV. 615, 616-17 (2001); Kathryn A. Sampson, Disclosing and Confronting Adverse Authority, http://comp.uark.edu/~ksampson/adverse_authority.htm.

7. *See, e.g.*, Christopher W. Deering, *Candor Toward the Tribunal: Should an Attorney Sacrifice Truth and Integrity for the Sake of the Client?*, 31 SUFFOLK U. L. REV. 59, 63-64 (1997).

of this Article is on persuasion. Thus, the Article seeks to use the science to determine what treatment of adverse information is most beneficial to the client's position. A careful study of the science reveals that, overall, it is advantageous for the advocate to volunteer negative information and rebut it early, and that a direct and in-depth confrontation of negative information is generally more effective than an indirect and cursory treatment.

A close look at the finer points of the data, however, reveals that the question of disclosure is a complicated one. Therefore, legal advocates should learn about the research findings and the theories underlying the research in making the decision about whether to volunteer adverse information. For example, the general rule favoring disclosure applies where the advocate has a competent and effective refutation for the information; when such a refutation is not available or is weak, the advocate may be better off not disclosing. Moreover, the data also reveal that there are somewhat surprising reasons for the persuasive advantage of preemptive disclosure that go beyond the conventional wisdom of boosting credibility. Advocates who fully understand the reasons underlying the persuasive value of disclosure will be better guided in their decision making about when to disclose. Moreover, teachers of advocacy will be better able to guide their students. Advocates who arm themselves with deeper knowledge of how people react to the disclosure of negative information will be in a better position to make decisions for their clients, and will have a better feel for the winning strategy.

II. THE CONTROVERSIES OVER DISCLOSURE OF NEGATIVE INFORMATION

The threshold question in advocacy regarding the treatment of negative information is whether to disclose at all. That question can be difficult, particularly when opposing counsel has not raised or cited the information.[8] Embedded in this threshold question are the related, and perhaps more practical, questions of *when* and *how* to disclose adverse information. For example, should an advocate wait for opposing counsel to raise it, or raise it preemptively (which of course risks raising information that might never have seen the light of day)? Having decided to disclose, should an advocate directly confront it or allude to it in a more indirect or oblique fashion?

8. Practically speaking, this question is relatively narrow. Most lawyers will not raise adverse information that they are not ethically required to disclose when opposing counsel either has not, or is not likely to, cite or disclose the information. Similarly, it is rare that lawyers would make the strategic decision to ignore adverse information raised by the other side.

This part of the Article explores the vigorous debate among lawyers over the disclosure of negative information, in particular to uncover the divergent philosophies that lawyers have about the most persuasive approach toward negative information. The Article traces this debate from the various controversies over the ethical duty to disclose adverse authority in the context of appellate practice to the controversy over preemptive disclosure of negative facts in the trial context. In both the appellate and trial contexts, the same rationales appear repeatedly as justifications for disclosing—or not—unfavorable information. It is the validity of these rationales that the social science research can shed light on.

A. Rationales Against Disclosure

Lawyers who advocate disclosing adverse information only in very narrow circumstances support their position by pointing to the duty of zealous advocacy.[9] In the view of these lawyers, disclosure of negative information is harmful to the client's position and should generally be avoided. For these lawyers, the adversary system and the lawyer-client relationship depend on the lawyer's role as champion for the client, not as a research assistant for the judge or, even worse, for opponents.[10] Because the adversary system depends on the two sides presenting their positions as strongly as possible, the system is best served by making the most positive argument possible and raising negative information only in narrow circumstances.

The clash over disclosure is illustrated by the various impassioned debates over the duty of candor. For example, advocates espousing this rationale raised a storm of opposition in response to the Kutak Commission's proposed revisions of the *Model Code of Professional Responsibility* in the late 1970s.[11] Among other things, the Kutak Commission had recommended substantially broadening

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9. *See, e.g.*, Hazard, *supra* note 2, at 827; Theodore I. Koskoff, *Proposed New Code of Professional Responsibility: 1984 is Now!*, 54 CONN. B.J. 260, 262 (1980) (describing as totalitarian the requirement that advocates reveal detrimental information to the court and opposing counsel); Silverman, *supra* note 2, at 952.

10. Ralph Gregory Elliot, *The Proposed Model Rules of Professional Conduct: Invention Not Mothered by Necessity?*, 54 CONN. B.J. 265, 280 (1980); Koskoff, *supra* note 9, at 261-62. *See generally* Freedman, *supra* note 4, at 838 (arguing that writing a brief harmful to the client is inconsistent with the fidelity and zealousness that a lawyer owes a client); Joanne Pitulla, *Playing Ostrich: Courts are Getting Tough with Lawyers who Forget to Cite Adverse Authority*, 79 A.B.A. J. 97, 97 (1993) (noting that many attorneys argue against having to do research and supply arguments for the other side); Robert B. Tunstall, *A Plea for Re-Interpretation of a Canon*, 35 A.B.A. J. 5, 6 (1949) (stating that a lawyer "is an advocate, not an umpire").

11. *Forward: Symposium on Proposed New A.B.A. Code*, 54 CONN. B.J. 259 (1980).

the duty of candor to require advocates to disclose to the tribunal a wider array of negative information.[12]

For example, one Kutak Commission recommendation would have expanded the requirements for disclosure of adverse authority in a brief.[13] At the time, the rule regarding adverse authority was the same as it is now: a lawyer is prohibited from *knowingly* failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel," a rule that leaves unregulated a vast amount of potentially adverse authority and gives advocates substantial leeway for strategic decisions about negative information.[14] The Kutak Commission recommendation required disclosure of any authority that would "probably have a substantial effect on the determination of a material issue."[15] This rule would have worked a substantial change in the disclosure requirements.[16]

Lawyers who opposed this change argued that the broadening of the duty of candor inappropriately changed the lawyer's role from "champion and agent of the client" to "disinterested servant" of the public.[17] They argued that broadening the disclosure rules was inconsistent with the role of the lawyer in the American adversary

12. Deering, *supra* note 7, at 83. In this regard, the Kutak Commission controversy itself was, in some respects, history repeating itself. In the 1930s, the American Bar Association Committee on Professional Ethics and Grievances had also attempted to impose upon the bar a broad duty to disclose adverse law, an imposition that engendered similar controversy. *Id.* (citing Freeman, *supra* note 4).

13. MODEL RULES OF PROF'L CONDUCT R. 3.1(c) (Discussion Draft 1980).

14. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-106(B)(1) (1980); Freedman, *supra* note 4, at 835-36. For example, among other things the rule requires disclosure of authority only if it is from the "controlling" jurisdiction, which arguably leaves out authority from anywhere outside the jurisdiction. Moreover, the rule only requires disclosure of "directly adverse" authority and leaves to the lawyer's judgment what authority should be considered "directly adverse." *Id.*

15. Hazard, *supra* note 2, at 826 (citing MODEL RULES OF PROF'L CONDUCT R. 3.1(c) (Discussion Draft 1980)).

16. *Id.* at 826-27 (citing MODEL RULES OF PROF'L CONDUCT R. 3.1(c) (Discussion Draft 1980)). For example, it would have changed the leeway that lawyers had for failing to disclose authority that could be very persuasive but falls outside the "controlling jurisdiction." *Id.* at 829 (citing MODEL RULES OF PROF'L CONDUCT R. 3.1(c) (Discussion Draft 1980)). It would also have broadened the authority required to be disclosed from "directly adverse" to authority with a probable "substantial effect" on the issues. *Id.* (citing MODEL RULES OF PROF'L CONDUCT R. 3.1(c) (Discussion Draft 1980)). Moreover, while the current rule arguably did not cover a case that could be distinguished or otherwise rebutted, the proposed rule would have required disclosure of such cases. MODEL RULES OF PROF'L CONDUCT R. 3.1(c) (Discussion Draft 1980); Freedman, *supra* note 4, at 835-36.

17. Elliot, *supra* note 10, at 267.

system and the notion of zealous advocacy.[18] They characterized the broadening of the disclosure rules as "destructive to the adversary system and the lawyer-client relationship . . . regressive, and dangerous."[19] Noting that the rule would be contrary to the prevailing wisdom among most litigators, these lawyers also argued that the rule would be routinely defied.[20] At the core of the debate was the belief that disclosure of negative information harms the client and is therefore at odds with the duty of zealous advocacy.

Another example of this view of advocacy is the sponsorship theory of jury trials.[21] Proponents of sponsorship theory argue that a client is irreparably harmed when his lawyer, as opposed to the opponent, introduces a bad fact.[22] The theory is that jurors will *punish* a lawyer who discloses—or sponsors—information that harms his position because people assume that lawyers are putting forth the best case possible.[23] For this reason, a lawyer should almost never preemptively disclose negative information.[24] This theory presumes that people view advocates as fundamentally biased, like "hired gun[s]."[25] Therefore, any negative information offered by the side it hurts will carry a heavy presumption of relevance and materiality.[26] In other words, if an advocate discloses negative information, people will assume that it is important to her side. Moreover, advocates presumably will present the best case possible; so if an advocate introduces negative evidence, it will be assumed that his absolute best case included this negative information *and* that it presents the evidence in the best possible light.[27]

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18. *See* Koskoff, *supra* note 9, at 261; *see also* Silverman, *supra* note 2, at 951. *See generally* Deering, *supra* note 7, at 69.

19. Koskoff, *supra* note 9, at 260 (critiquing Kutak Commission); *see also* Deering, *supra* note 7, at 69 n.65 (citing Tunstall, *supra* note 10, at 6).

20. *See* Elliot, *supra* note 10, at 280-81; *see also* Freedman, *supra* note 4, at 837 (noting that a survey of the District of Columbia Bar in 1972 revealed that ninety-three percent of lawyers "would *not* disclose adverse authority that was not cited by opposing counsel") (emphasis added); Tunstall, *supra* note 10, at 5 (arguing that the 1935 ABA ruling was undoubtedly "habitually violated").

21. *See* KLONOFF & COLBY, *supra* note 4, § 1.02.

22. *See id.* § 2.02(1). Sponsorship theory advises attorneys against a default position of disclosure of bad facts. *See id.* Although Klonoff and Colby limit their theory to jury trials, the rationales they offer mirror those used by appellate lawyers to argue against disclosure of adverse authority.

23. *See id.*

24. *See id.* § 1.02.

25. *See id.* § 2.02(1).

26. *See id.* § 2.02(1). Proponents of sponsorship theory also note that the same psychology leads people to devalue as "self-serving" any good information disclosed by the side it helps. *See id.* § 2.03(1).

27. *Id.* § 2.02(2)(a)-(f).

For example, a plaintiff's lawyer following sponsorship theory may not elicit the fact that a plaintiff claiming employment discrimination was fired from her prior job, even if he has reason to believe that the other side will use that information on cross-examination.[28] Raising the information will imbue it with special relevance, and the jury is likely to disregard the plaintiff's explanation for the termination as self-serving.[29] Instead, foregoing any mention of the prior termination on direct allows the advocate to argue credibly in summation that the termination is irrelevant to the case and the jury should ignore it.[30]

In sum, lawyers who are against a default position of volunteering negative information argue that it will harm the client's case and is therefore inconsistent with zealous advocacy. Because of the lawyer's role as advocate, disclosure of negative information will imbue that information with special weight and relevance. Therefore, the lawyer should not disclose negative information unless the lawyer is ethically required to or it is otherwise unavoidable.

B. Rationales for Disclosure

The advocates on the other side have a diametrically opposite view of zealous advocacy. In their view, acknowledgment and rebuttal of adverse information is a critical component of persuasion and the best method of advocacy for the client.[31] Disclosure of adverse information helps advance the client's cause not only by strengthening the substance of the case, but also by enhancing the credibility of the lawyer.[32]

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28. *See id.*

29. *See id.* § 4.04(2).

30. *See id.*

31. *See* MARGARET Z. JOHNS, PROFESSIONAL WRITING FOR LAWYERS 209 (1998); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 334 (5th ed. 2005); MICHAEL R. SMITH, ADVANCED LEGAL WRITING 152 (2002); Brogdon, *supra* note 6, at 444 (citing various commentators who advise preemptive disclosure as a way to persuade the jury to accept the advocate's position); Hazard, *supra* note 2, at 830-31; *see also* Perrin, *supra* note 6, at 622 (noting that many of the metaphors for negative disclosure, such as "drawing the sting" or "pricking the boil," liken the disclosure to a surgical procedure that is painful but essential for "long term health"). Some commentators do mention the integrity of the trial process and its credibility as reasons to disclose all relevant facts, but this is often a secondary consideration. *See* Floyd Abrams, *Trial Tactics*, 101 YALE L.J. 1159, 1175-76 (1992) (book review).

32. It should be noted here that most judges encourage lawyers to preemptively and openly disclose weaknesses. *See* RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 13.5 (Rev. 1st ed. 1996) ("An appellant should never deliberately save for the reply its response to an argument."); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 78 (2d ed. 2006) (quoting Judge Fred I. Parker); NEUMANN, *supra* note 31, at 331 (quoting Judges Roger Miner and Clyde H. Hamilton). While judges are certainly a good source of what is

In the appellate realm, advocates espousing this view maintain that the strongest arguments are those that offer both positive supporting points and refutation of opposing views.[33] Confrontation of adverse authority makes a brief stronger, even if that authority is unknown to the court or opposing counsel, because "[t]he weight of an argumentative position can be properly gauged only by reference to what can be set against it."[34] Moreover, confronting adverse authority gives the advocate the opportunity to present the authority in the most favorable light or otherwise refute it.[35] A similar rationale supports disclosure of negative facts in the trial context: by volunteering a bad fact early in trial, the advocate has the opportunity to frame or shape the fact and present it in the best possible light, whereas nondisclosure defers to opposing counsel the opportunity to characterize the fact.[36]

In this way, disclosure of negative information removes the sting of negativity and divests opposing counsel of the opportunity to expose and capitalize on it.[37] Trial lawyers in particular rely for support on the communications theory of inoculation to argue that preemptive disclosure is scientifically proven to be a better persuasive strategy.[38] The theory of inoculation posits that advocates can make the recipient of a persuasive message resistant to opposing arguments, much like a vaccination makes a patient resistant to disease.[39]

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persuasive in legal writing, they are not the definitive source. Judges may have other reasons, beyond persuasion and good advocacy, why they want all the arguments and authorities to be made in the most comprehensive way possible in the opening brief. Judge Aldisert alludes to this when he says, "Reply briefs are not the favorite children of appellate judges." ALDISERT, *supra*, § 13.5.

33. *See* BEAZLEY, *supra* note 32, at 78-80; NEUMANN, *supra* note 31, at 334-35; Deering, *supra* note 7, at 87 & n.182 (arguing that disclosure allows attorneys to place favorable spin on adverse authority); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 516-22 (2003) (describing the failure to address opposing arguments as "myopic vision" because it often results from an advocate's failure to see the weaknesses of her own arguments).

34. Hazard, *supra* note 2, at 828.

35. NEUMANN, *supra* note 31, at 334-35; HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 431 (Rev. 4th ed. 2003); Hunt & Magnuson, *supra* note 1, at 673; Douglas R. Richmond, *Appellate Ethics: Truth, Criticism and Consequences*, 23 REV. LITIG. 301, 324-25 (2004).

36. Brogdon, *supra* note 6, at 444; Perrin, *supra* note 6, at 616-17.

37. *See, e.g.*, THOMAS MAUET, TRIAL TECHNIQUES 70-71 (7th ed. 2007); Abrams, *supra* note 31, at 1164-65; Brogdon, *supra* note 6, at 444-45; Perrin, *supra* note 6, at 616-17.

38. *See, e.g.*, Brogdon, *supra* note 6, at 444.

39. RICHARD M. PERLOFF, THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY 125 (2d ed. 2003); *see also supra* Part III.B.

Advocates who favor this approach label a strategy of presenting only positive arguments as superficial, myopic, and, ultimately, unconvincing.[40] They also argue that the best strategy is to take the least controversial path to victory, the "middle ground"—meaning the path that best reconciles supporting and opposing information.[41] This strategy seeks to present a brief that essentially writes the opinion for the judge, who will want a way to deal with opposing information in the opinion.[42] As one commentator noted:

> The chance of prevailing is greatest if the decision point involves the greatest concession with respect to the client's position that is consistent with victory for the client. That is, where the question is seriously debatable, the strongest position for the client is one that borders on concession to the opposing party. Any more extravagant position on behalf of the client may seem stronger because it is less equivocal. However, it is actually weaker because it asks the court to reject the competing value in greater degree than is minimally necessary to decide the case in the client's favor.[43]

Although this commentator was referring to adverse authority in a persuasive brief, the same rationale supports a trial strategy that includes and acknowledges negative facts.

Credibility is a major factor in support of broader disclosure of negative information. Under this rationale, an attorney who has impressed the court with his trustworthiness and intelligence is more likely to prevail because he has cultivated the court's respect and goodwill.[44] Preemptive disclosure will enhance the lawyer's credibility with the trier of fact, and a concession confessed by the side hurt by it will be forgiven, whereas the trier will not forgive the lawyer (or his client) if it perceives that the lawyer attempted to "hide" the bad fact.[45] Indeed, failure to disclose negative information might enhance the importance of the information, because the audience will assume that a competent lawyer would refute the information if refutation were possible.[46] Similarly, credibility arguments also encompass lawyer reputation, noting that judges will

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40. Robbins, *supra* note 33, at 516-22; *see also* Hazard, *supra* note 2, at 828-32. Professor Hazard charged that those in the practicing bar who ignore adverse information do so out of ignorance, fear, laziness, and even cowardice. *Id.* at 827-29.

41. *See* Robbins, *supra* note 33, at 516.

42. *See* Stratman, *supra* note 2, at 10.

43. Hazard, *supra* note 2, at 830-31 (emphasis omitted).

44. NEUMANN, *supra* note 31, at 334; SMITH, *supra* note 31, at 152; Deering, *supra* note 7, at 87; Hunt & Magnuson, *supra* note 1, at 673; *see also* JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 251 (3d ed. 2007).

45. GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME 131 (1995).

46. *See* Richmond, *supra* note 35, at 324-25.

view all the arguments of an attorney who has a reputation for hiding relevant information with greater skepticism.[47]

In sum, there is a division among lawyers about the appropriate treatment of negative information.[48] Both sides are adamant that their approach is the best path toward victory for the client; but the two sides represent two diametrically opposed ideas about what treatment of negative information best serves the client.

C. How and When to Disclose Negative Information

Once the decision has been made to disclose the negative information, the advocate still faces a strategic question regarding *how* to disclose the information. In both the appellate and trial contexts, this question engenders controversy similar to the decision to disclose at all, and the opposing sides divide along comparable lines.

Many advocates, even some who support preemptive disclosure, favor a minimalist approach to negative information. One commentator refers to this brief-writing approach as "adversarial" because it embodies the duty of the lawyer as a combatant who should push the client's position as zealously as possible and concede nothing.[49] Mirroring the concerns of sponsorship theory, these advocates wish to minimize the "air time" given to the negative information because of the worry that space devoted to adverse points will inflate their importance or unduly highlight them.[50] In the appellate context, advocates following this approach are likely to confront adverse authority indirectly.[51] This may be done by allusion,

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47. Sampson, *supra* note 6, at 3 ("[A] judge who has once been burned by dishonest advocacy will not likely be burned in the future.").

48. While some trial lawyers concede that preemptive disclosure is not always the best strategy, the prevailing wisdom is that preemptive disclosure should be the default position. *See* MAUET, *supra* note 37, at 71 ("Credibility is best maintained by always being candid, which includes honestly disclosing weaknesses . . . ."); Brogdon, *supra* note 6, at 447; Kipling D. Williams et al., *The Effects of Stealing Thunder in Criminal and Civil Trials*, 17 LAW & HUM. BEHAV. 597, 597 (1993) (noting that, without exception, lawyers stated that there were *no* circumstances under which bad facts should be withheld). Appellate lawyers are more divided, though the practicing bar—as opposed to scholarly commentators or teachers of persuasion—seems to lean in favor of nondisclosure. *See supra* Part II.A.

49. Stratman, *supra* note 2, at 8-9.

50. *Id.* at 8-9; MICHAEL R. FONTHAM, MICHAEL VITIELLO & DAVID W. MILLER, PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS 39-40 (2d ed. 2007); JOHNS, *supra* note 31, at 209; SHAPO ET AL., *supra* note 35, at 425.

51. Sampson, *supra* note 7, at 6; Stratman, *supra* note 2, at 9-10. *See generally* Laura Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372 (1996). Professor Little rejects as largely ineffective the more direct refutational strategy of "negation" and explores the efficacy of the subtler refutational treatments of recharacterization. *Id.*

such as a quick "but see" citation, or by subtly shifting the frame of the argument so that the authority or argument appears not to directly conflict with the advocate's goal.[52] Overall, the space devoted to negative information will be minimal, and the negative information will structurally appear sandwiched between positive arguments.[53] Similarly, for negative facts in both the trial and appellate contexts, advocates following this approach will bury negative facts in the middle of an otherwise positive narrative, whether the narrative is the statement of facts or direct examination.[54]

In the appellate context, many advocates see direct refutation of opposing viewpoints as akin to playing on the "home team's turf"—per se disadvantageous—so the advocate will seek any avenue to avoid direct refutation. If he must confront opposing arguments directly, he will do so wholly and without qualification or concession. The tone of advocacy is unabashedly polemical; there is no attempt to present the brief as anything other than a one-sided document designed to push the client's position.[55] Advocates following this approach will almost never make explicit concessions in the brief, even if the concession is small and unlikely to affect the outcome, on the theory that concessions demonstrate to a judge that the advocate is less than fully committed to the thesis or otherwise in a weak position.[56] Similarly, negative information will never be raised neutrally, without refutation, based on the theory that the advocate does not want to make an opponent's arguments for her.[57]

On the other side are advocates who favor disclosure of negative information specifically because it presents a more balanced picture of the case. This approach is marked by arguments that do not shy away from concession and confront adverse information openly.[58] In the brief-writing context, one commentator refers to this as the "scholarly" style because it tends to be more educational than combative.[59] A brief written in this style is more likely to confront and explain adverse authority and arguments directly and in-depth,

52. *See* Little, *supra* note 51, at 372-74; Sampson, *supra* note 6, at 5-9.

53. *See* Stratman, *supra* note 2, at 9-10.

54. LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 209-11 (2003) (deemphasizing bad facts in brief writing); MAUET, *supra* note 37, at 114 (suggesting advocates bury weaknesses in the middle of direct examination narrative).

55. *See* Stratman, *supra* note 2, at 8.

56. *Id.* at 9-10.

57. *See id.* at 10.

58. *Id.* at 9-10.

59. *Id.* at 8-10.

making reasonable concessions that acknowledge the positive adverse points and then rebutting them.[60]

This approach takes a more educational role in brief writing, and so will explain an adverse authority or argument in the course of refuting it, on the theory that the risk of greater exposure to the adverse point is outweighed by the ability to make a full and explicit rebuttal.[61] The goal in this approach is reasonableness, and the advocate fashions herself and her communication as designed to aid in the reader's full understanding of the issues, arguments, and authority in the case.[62] Advocates who use this style will make concessions on points that do not directly subvert their ultimate goal, on the theory that this enhances their credibility and gives the impression that their position is not an extreme, but, rather, a middle ground that will be more palatable to the judges.[63] These advocates are willing to argue both on and off their opponent's turf—but, overall, they worry less about whose turf they are on.[64] They will concern themselves more with whether the judge understands both the negative information and its refutation than whether the judge will sense weakness or qualification.[65]

III. THE SOCIAL SCIENCE RESEARCH ON NEGATIVE INFORMATION

There is a substantial body of social science research on the treatment of negative information, and this research can start lawyers on the path to resolving the wide divergence of opinion regarding the treatment of negative information.[66] The bulk of this research focuses on political issues and advertising, as opposed to law. Nevertheless, the research lends itself to some generalizations beyond those contexts, and so provides valuable clues about how to handle negative information in the legal context.

In the nonlegal context, there are two significant bodies of social science research implicated in the question of how to deal with negative information in a persuasive message. One, the research into one-sided versus two-sided messages, tests both the persuasive value of the message as well as whether the message made the recipient

60. *Id.*

61. *Id.*

62. *Id.* at 8-10.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See generally* William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, 1 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 191 (1964).

resistant to attacks from opponents.[67] The other body of research, inoculation theory, focuses on making message recipients resistant to attacks on a persuasive message.[68] Inoculation does not make an argument more persuasive, but rather seeks to make sure that the audience does not accept an opponent's arguments.[69] This aspect of persuasion—convincing an audience to resist arguments that contravene an opposing position—is a bit different from developing and communicating a set of positive justifications for one's own position.[70]

There is also a small but growing subset of social science research devoted to the handling of negative information in legal advocacy. The research in this area can help supplement the nonlegal research and facilitate its application to legal contexts. The legal research, however, is in its infancy and also has some significant gaps and flaws that require reference to nonlegal studies. The two areas, legal and nonlegal, are best examined together for the most comprehensive picture. Taken together, the research supports the general proposition that, in many situations, there is a strategic advantage to preemptively raising negative information.

A. Message Sidedness

Message sidedness refers to whether a persuasive message contains only positive (or bolstering) information, or whether it acknowledges or addresses contrary information.[71] Research into message sidedness tests audience reaction to one-sided versus two-sided messages.[72] One-sided messages simply offer only positive or bolstering information—only support of the advocated position without any acknowledgement of the existence of opposing arguments.[73] In an advertisement for a cold medicine, for example, a one-sided message would describe the brand as powerful, safe, and

67. *See, e.g.*, Michael Etgar & Stephen A. Goodwin, *One-Sided Versus Two-sided Comparative Message Appeals for New Brand Introductions*, 8 J. CONSUMER RES. 460, 460 (1982).

68. *See generally* Brogdon, *supra* note 6, at 444-45.

69. *See* Stratman, *supra* note 2, at 10.

70. *See* McGuire, *supra* note 66, at 192.

71. JAMES B. STIFF & PAUL A. MONGEAU, PERSUASIVE COMMUNICATION 140 (2d ed. 2003).

72. DANIEL J. O'KEEFE, PERSUASION: THEORIES AND RESEARCH 161 (1990); Erin Alison Szabo & Michael Pfau, *Nuances in Inoculation: Theory and Applications*, *in* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 234, 234 (James P. Dillard & Michael Pfau eds., 2002).

73. STIFF & MONGEAU, *supra* note 71, at 140.

effective, with no negative side effects.[74] The advertisement would not mention of any flaws of the medicine.

Two-sided messages offer support for the advocated position as well as an acknowledgement of opposing views.[75] But two-sided messages come in a variety of forms and are sometimes difficult to classify. Researchers have attempted to classify two-sided messages into two categories: refutational and nonrefutational.[76] Two-sided nonrefutational messages offer only an acknowledgement of opposing views, with no direct refutation of those views.[77] The nonrefutational messages may follow negative information with positive information, but they do not directly refute or address the negative information.[78] For example, one study involved messages that supported and criticized the existence of fraternities.[79] That study created the two-sided message by simply combining the (one-sided) profraternity message and the (one-sided) antifraternity message, so that the audience received a balanced view of both sides.[80]

Two-sided refutational messages offer not only an acknowledgement of opposing views, but also a refutation of opposing arguments.[81] The message may "involve attacking the plausibility of opposing claims, criticizing the reasoning underlying opposing arguments, [or] offering evidence . . . to undermine opposing claims," but the core characteristic is that it contains some kind of direct refutation.[82] These messages attempt to "remove" the negative information either by denying the truth of the opposing claims or by arguing that the negative information is irrelevant.[83] Examples of refutational two-sided messages are: "[s]ome people say this economic policy will increase unemployment, but that isn't so because" (direct negation) or "[i]t's true that my client was convicted

74. *See* Etgar & Goodwin, *supra* note 67, at 462; *see also* Daniel J. O'Keefe, *The Persuasive Effects of Message Sidedness Variations: A Cautionary Note Concerning Allen's (1991) Meta-Analysis*, 57 W.J. COMM. 87, 89 (1993).

75. STIFF & MONGEAU, *supra* note 71, at 140.

76. *See id.* at 141.

77. *Id.* at 141; Mike Allen, *Meta-Analysis Comparing the Persuasiveness of One-sided and Two-sided Messages*, 55 W.J. SPEECH COMM. 390, 392 (1991).

78. *See* STIFF & MONGEAU, *supra* note 71, at 141.

79. Ralph L. Rosnow, *One-Sided Versus Two-Sided Communication Under Indirect Awareness of Persuasive Intent*, 32 PUB. OPINION Q. 95, 96 (1968).

80. *Id.*

81. STIFF & MONGEAU, *supra* note 71, at 140-41 (giving example of negative political advertising as a two-sided message); Allen, *supra* note 77, at 392; *see also* O'KEEFE, *supra* note 72, at 161; Szabo & Pfau, *supra* note 72, at 234.

82. Daniel J. O'Keefe, *How to Handle Opposing Arguments in Persuasive Messages: A Meta-Analytic Review of the Effects of One-Sided and Two-Sided Messages*, 22 COMM. Y.B. 209, 211 (1999).

83. *Id.* at 215.

of robberies in the past, but past convictions are not evidence of guilt in the current case" (arguing irrelevance).[84]

1. Two-Sided Refutational Messages Are the Most Effective

As a general matter, the results of the research are quite consistent. Two-sided refutational messages are more effective because they cause sustained attitude change that is less vulnerable to opposing arguments.[85] In other words, when message recipients are exposed to two-sided refutational arguments, they are more likely to be persuaded by the message and less likely to change their minds when confronted with an opposing viewpoint. On the other hand, two-sided nonrefutational messages are the least persuasive, significantly less effective than one-sided messages that ignored opposing viewpoints entirely.[86] In other words, the data suggest that if a persuader is not going to refute the arguments, it is better to ignore them entirely.[87]

However, the line between refutational and nonrefutational messages is not always clear. For example, researchers have disagreed over the classification of the advertisement: "VIT toothpaste: you may not like its color, but you'll certainly love its nice fresh taste."[88] Similarly, researchers have also disagreed about the classification of this advertisement: "Although calorie content per . . . serving[] is higher than the other premium beers tested, and while Crick Premium's price is also premium, the net result remains superior drinking pleasure."[89] At first glance, these messages appear to be nonrefutational in that they do not offer a direct rebuttal of the negative information.[90] However, some researchers have a somewhat broader view of refutation, finding that messages with even subtle rebuttal can be refutational.[91] Although not directly addressing the negative information—the color of the toothpaste, the calorie content,

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84. *Id.*

85. *See* O'KEEFE, *supra* note 72, at 161; PERLOFF, *supra* note 39, at 178; Allen, *supra* note 77, at 396; Szabo & Pfau, *supra* note 72, at 234. Although there is some variation in the degree of effectiveness, two-sided messages are consistently more effective notwithstanding audience education level, familiarity with the issue, or initial attitude toward the topic. *See also* STIFF & MONGEAU, *supra* note 71, at 142. Dr. O'Keefe concludes that "persuaders are well advised to employ two-sided messages rather generally." O'KEEFE, *supra* note 72, at 162.

86. STIFF & MONGEAU, *supra* note 71, at 141-42.

87. *Id.*

88. O'Keefe, *supra* note 75, at 89. O'Keefe disagreed with Allen's classification of the toothpaste advertisements as refutational. Allen, *supra* note 77, at 398.

89. Etgar & Goodwin, *supra* note 67, at 462; *see also* O'Keefe, *supra* note 75, at 89.

90. O'Keefe, *supra* note 82, at 211.

91. Allen, *supra* note 77, at 393, 396.

or the price of the beer—there is arguably some rebuttal contained in these messages.[92] Specifically, both messages seek to overcome the negative information by referencing a countervailing positive attribute. Both messages also could be read to contain a subtle argument about relevance: you may not like the color, but does that really matter more than the taste of toothpaste? Or, isn't overall drinking pleasure worth more calories and a higher price? The Crick beer advertisement could even be interpreted as reframing a negative as a positive, emphasizing the "premium" price of the beer to appeal to status-conscious beer drinkers.

Messages like these muddy the waters of the two-sided message research a bit. As a general matter, directly refutational two-sided messages have a stronger effect than indirectly refutational two-sided messages, but some indirectly refutational two-sided messages outperform one-sided messages.[93] The VIT toothpaste advertisement, for example, that acknowledged the ugly color but argued that the taste was great, outperformed the one-sided advertisement in that study, bringing it closer in persuasive effect to a two-sided refutational argument.[94] Similarly, the Crick Beer advertisement that acknowledged the "premium" price but argued that Crick nevertheless provided overall "superior drinking pleasure" also outperformed the one-sided advertisement.[95] This suggests that less direct refutation has some persuasive power. However, the studies show inconsistent results for similar indirectly refutational two-sided messages.[96]

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92. Another example is Bill Clinton's acknowledgement during the 1992 Presidential campaign that he had not worked a perfect transformation of Arkansas as governor. PERLOFF, *supra* note 39, at 113. Instead, in his speech accepting his party's presidential nomination, Clinton acknowledged that there was no "Arkansas miracle," and then went on to extol his achievements as governor. *Id.* This acknowledged the potential for criticism, while noting that much good was done in Arkansas nonetheless. A direct refutation would have been an argument that what Clinton did in Arkansas *was* a miraculous transformation; nevertheless, there is *some* refutation inherent in Clinton's defense of his achievements as governor.

93. *See supra* note 67-84.

94. *See* Allen, *supra* note 77, at 397; O'Keefe, *supra* note 74, at 91.

95. Etgar & Goodwin, *supra* note 67, at 462-63.

96. In yet another toothpaste advertisement, for the fictional Shield toothpaste, a one-sided advertisement outperformed this two-sided advertisement: "[A]lthough Shield [toothpaste] was found to be only about average in tests of whitening ability, its fluorigard formula was preferred in taste tests." George E. Belch, *An Examination of Comparative and Noncomparative Television Commercials: The Effects of Claim Variation and Repetition on Cognitive Response and Message Acceptance*, 18 J. MARKETING RES. 333, 348 (1981). The Shield toothpaste advertisement seems to contain the same kind of subtle refutation as the VIT and Crick advertisements. However, the Shield toothpaste advertisement was run as a television advertisement, whereas the VIT toothpaste and Crick Beer advertisements were print

In terms of the structure of a two-sided persuasive message, it is clear that beginning with refutation decreases persuasive value. Not surprisingly, the studies show that two-sided messages are less effective if all of the refutational material is presented first.[97] The best persuasive results occurred when the refutational arguments were interwoven with the supporting arguments.[98] However, the news about whether to lead with an entirely supportive statement is a bit surprising (and less clear). Some studies report that leading with supporting information in a two-sided message and leaving all refutational information for the end is most effective.[99] In an even later meta-analysis[100] of a series of studies, however, neither type of two-sided message—refutational or nonrefutational—enjoyed a persuasive advantage over one-sided messages when the two sided messages discussed all positive information first.[101]

2. Why Are Two-Sided Messages So Effective?

The advantages of two-sided messages can be explained in a number of ways. Like lawyers, social scientists theorize that the credibility of the message source is at the heart of the power of two-sided messages, but there are other important reasons as well.[102]

The boost that two-sided messages offer to the credibility of the message source stems from the audience's expectations. Most people expect issues to have two sides and expect persuaders to address both sides.[103] This theory is borne out in the studies, which find overall that both refutational and nonrefutational two-sided messages lead the audience to perceive the message source as more credible and knowledgeable than one-sided messages.[104]

Credibility also explains the advantage of refutational two-sided messages over nonrefutational. The theory is that if the persuader

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advertisements. *See id.* Researchers have posited that written persuasive messages may be more effective because they allow the recipients greater opportunity to process the message and dwell on the credibility of the message source. *Id.* at 346. Both Allen and O'Keefe characterize the Shield toothpaste advertisement as nonrefutational. *See* Allen, *supra* note 77, at 397; O'Keefe, *supra* note 74, at 91.

97. O'KEEFE, *supra* note 72, at 162; O'Keefe, *supra* note 82, at 226.

98. O'KEEFE, *supra* note 72, at 162; O'Keefe, *supra* note 82, at 226.

99. O'KEEFE, *supra* note 72, at 162.

100. Meta-analysis uses data from multiple studies to derive a more complete picture of overall findings. Mark A. Hamilton & John E. Hunter, *A Framework for Understanding: Meta-Analyses of the Persuasion Literature, in* PERSUASION: ADVANCES THROUGH META-ANALYSIS 1, 2-3 (Mike Allen & Raymond W. Preiss eds., 1998).

101. O'Keefe, *supra* note 82, at 226.

102. SMITH, *supra* note 31, at 101-02 (citing Michael Frost, *Ethos, Pathos and Legal Audience*, 99 DICK. L. REV. 85 (1994)); STIFF & MONGEAU, *supra* note 71, at 140-41.

103. *See* STIFF & MONGEAU, *supra* note 71, at 139-41.

104. O'Keefe, *supra* note 82, at 226.

raises, but does not rebut, opposing arguments, message recipients tend to discount the persuader's credibility and expertise.[105] In other words, message recipients confronted with an unrebutted opposing view will assume that the persuader, while perhaps more knowledgeable than someone who seems to know only the supporting view, does not have the requisite expertise to adequately address the opposing view. The audience may view the speaker who raises opposing views without rebuttal as less knowledgeable, less fair, and less honest than one who has addressed opposing viewpoints.[106]

This aspect of credibility—the expectation that a true expert would be able to rebut opposing views—appears to be most important for political and social messages. For political and social messages, such as antismoking campaigns, messages about political candidates, and messages about the political status of countries like Tibet, directly refutational two-sided messages significantly enhanced the credibility of the message source.[107] On the other hand, in those contexts nonrefutational (or indirectly refutational) two-sided messages did not enhance credibility.[108] Thus, in the political or social arena the ability to rebut opposing views is essential to credibility.

Interestingly, the opposite is true in commercial advertising. In advertising, credibility is enhanced by merely raising opposing views; to enjoy the credibility boost of a two-sided message, there is no need to rebut the opposing views. In the studies involving commercial advertisements, when a message source is perceived by the audience as trying to sell something, nonrefutational two-sided messages resulted in greater perceived credibility than one-sided messages.[109] But, *refutational* two-sided messages did *not* result in greater perceived credibility than one-sided messages.[110] A possible reason for this is that when the message source is perceived as having "an axe to grind," the rebuttal of the two-sided message is viewed skeptically because it comes from a biased source seeking to sell something to the audience, as opposed to an objective rebuttal by a scholar.[111]

Another widely embraced theory supporting the superiority of two-sided messages focuses on the depth of thought stimulated by

105. STIFF & MONGEAU, *supra* note 71, at 141.

106. Allen, *supra* note 77, at 392. The negative evaluation of a speaker's credibility is referred to as the "discounting hypothesis" because the audience discounts the speaker's message based on a negative credibility assessment. *Id.*

107. *See generally* O'Keefe, *supra* note 82.

108. *Id.* at 226.

109. *Id.* at 226-27.

110. *Id.* at 226.

111. Allen, *supra* note 77, at 392 (explaining the "discounting hypothesis").

two-sided messages. People are more motivated to think about the content of messages when the message is more stimulating and the source of the message is perceived as more credible.[112] A two-sided message appears well-informed and balanced.[113] This leads people to think more favorably about the ultimate message and makes them more likely to change their minds to agree with the message.[114]

Finally, one of the primary theories explaining the effectiveness of two-sided messages is called inoculation.[115] Inoculation posits that two-sided messages work because they make the message recipient able to resist and reject attacks on the message.[116] Inoculation theory is discussed at length in subpart B.

B. Inoculation Theory

Proponents of preemptive disclosure of negative information in the trial context frequently rely on the social science theory of inoculation to support their view that the default position should be to offer bad evidence on direct examination, before the opponent has the opportunity to dramatize it.[117] But the history of inoculation and the studies upon which the theory is based call for a nuanced approach to negative information. Consistent with data regarding two-sided messages, inoculation studies show that raising and refuting adverse information works better than a wholly positive message to insulate message recipients from later attacks on the message.[118] However, the comparison between inoculation and post-hoc refutation is a bit less conclusive. Inoculation is superior in some respects to post-hoc refutation, but only in certain circumstances.

1. How Inoculation Works

The theory of inoculation is based on the idea that advocates can make the recipient of a persuasive message "resistant" to opposing arguments, much like a vaccination makes a patient resistant to disease.[119] In an inoculation message, the message recipient is

112. Mike Allen, *Comparing the Persuasive Effectiveness of One and Two-Sided Message*, *in* PERSUASION: ADVANCES THROUGH META-ANALYSIS 87, 87-88 (Mike Allen & Raymond W. Preiss eds., 1998).

113. *Id.*

114. STIFF & MONGEAU, *supra* note 71, at 142.

115. *See generally* Brogdon, *supra* note 6; Michael J. Saks, *Flying Blind in the Courtroom: Trying Cases Without Knowing What Works or Why*, 101 YALE L.J. 1177, 1187-88 (1992).

116. *Id.*

117. Brogdon, *supra* note 6, at 447 (citing trial consultant Donald Vinson); Saks, *supra* note 115, at 1187-88 (citing inoculation studies).

118. *See* Saks, *supra* note 115, at 1187-90.

119. PERLOFF, *supra* note 39, at 125.

exposed to a weakened version of arguments against the persuasive message, coupled with appropriate refutation of those opposing arguments.[120] The theory is that introducing a "small dose" of a message contrary to the persuader's position makes the message recipient immune to attacks from the opposing side.[121] Inoculation works because the introduction of a small dose of the opposing argument induces the message recipient to generate arguments that refute the opposing argument, the intellectual equivalent of producing antibodies.[122] Once the message recipient generates refutational arguments, she will be less likely to accept the opposing argument when it is presented to her by the opposing side because she will already have a cache of ammunition with which to resist the opposing argument.[123]

Inoculation does not focus on the persuasive value of the message; rather, the focus of inoculation is in making the recipient resistant to attack.[124] In other words, unlike most persuasive message strategies, inoculation strategy is not designed to change one's beliefs, but to stop a recipient from changing a belief based on a competing message.[125] The reason for this becomes clear when the history of inoculation research is examined. The research evolved in the aftermath of the Korean War, when many American prisoners in North Korean camps seemed to have trouble defending basic American democratic values and resisting Communist indoctrination.[126] The success of North Korean indoctrination raised questions about how and why soldiers who embraced and fought for American cultural values could be persuaded to reject them merely by enemy proselytizing.[127] Early inoculation theory suggested that it was the very strength and unquestionable nature of the values that lay at the root of the problem.[128] The indoctrination was successful because until their imprisonment, the American prisoners had never

120. *Id.*

121. *Id.*; O'KEEFE, *supra* note 72, at 179; Szabo & Pfau, *supra* note 72, at 234.

122. PERLOFF, *supra* note 39, at 125.

123. *Id.* ("Counterarguing the oppositional message in one's own mind should lead to strengthening of initial attitude and increased resistance to persuasion.").

124. *See generally* Michael Pfau, Steve Van Bockern & Jong Geun Kang, *Use of Inoculation to Promote Resistance to Smoking Initiation Among Adolescents*, 59 COMM. MONOGRAPHS 213 (1992).

125. *Id.* at 214, 218; Michael Pfau & Michael Burgoon, *Inoculation in Political Campaign Communication*, 15 HUMAN COMM. RES. 91, 92 (1988) (stating that inoculation is a "resistance strategy" designed to "strengthen existing attitudes against change"); *see also* Wei-Kuo Lin, *Inoculation to Resist Attacks*, 15 ASIAN J. COMM. 85, 86 (2005).

126. Szabo & Pfau, *supra* note 72, at 234.

127. *Id.*

128. *Id.*

had to defend these values against attack.[129] Much like a baby raised in an aseptic environment, they had not built up an "immunity" to counter-arguments and were more vulnerable to them.[130] Therefore, the early research into inoculation theory sought to strengthen message recipients' existing attitude against change; in other words, it targeted message recipients who believed in something and tried to insulate those beliefs from attack.[131]

Because of this history, the early inoculation research focused on how to make widely held beliefs—i.e., cultural truisms—more resistant to attack.[132] In early studies, researchers tested what kind of "pretreatments," if any, would make subjects more immune to attacks on the truisms.[133] Pretreatments refer to the information subjects are exposed to prior to being exposed to attacks on the truism. In one experiment, subjects were divided so that one group read only arguments supporting the truism, a second group was exposed to an attack on the truism and read a refutation of that attack, a third group was exposed to an attack on the truism and was asked to write a refutation of that attack, and a fourth group received no information.[134] All groups were then subjected to a subsequent attack on the truism.

When confronted with the subsequent attack on the truism, those who had been exposed to an attack and then a written refutation demonstrated the highest resistance to later attacks and were most likely to cling to belief in the truism.[135] Those who read the already-prepared refutational statement were more resistant to the later attacks than those who had written their own refutations, but those who wrote the refutations were more resistant than those who had read only the supporting statements or those who received no information.[136] In fact, the research demonstrated that the group

129. *Id.*; O'KEEFE, *supra* note 72, at 180.

130. O'KEEFE, *supra* note 72, at 179; Szabo & Pfau, *supra* note 72, at 234.

131. *See* Pfau & Burgoon, *supra* note 125, at 92.

132. O'KEEFE, *supra* note 72, at 180; PERLOFF, *supra* note 39, at 125; McGuire, *supra* note 66, at 201. Cultural truisms are defined as "beliefs that are so widely shared within the person's social milieu that he would not have heard them attacked, and indeed, would doubt that an attack were possible." O'KEEFE, *supra* note 72, at 180.

133. McGuire, *supra* note 66, at 200-01; Pfau & Burgoon, *supra* note 125, at 92.

134. McGuire, *supra* note 66, at 203-05. Early research focused on cultural truisms, such as "people should brush [their] teeth after every meal" and "penicillin ha[s] been, almost without exception, of great benefit to mankind." *Id.* at 201; O'KEEFE, *supra* note 72, at 180; PERLOFF, *supra* note 39, at 125; STIFF & MONGEAU, *supra* note 71, at 288; Szabo & Pfau, *supra* note 72, at 235.

135. PERLOFF, *supra* note 39, at 125; O'KEEFE, *supra* note 72, at 180.

136. STIFF & MONGEAU, *supra* note 71, at 288; McGuire, *supra* note 66, at 206-07. The lesser inoculation effect exhibited by those who had to write their own refutations suggests that leaving arguments or conclusions implicit, an "enthymeme" in classical

reading only the supporting arguments exhibited about the same level of resistance to attack on the truism as those who received no information at all—in other words, a support-only argument was roughly as effective as no argument at all.[137]

In the context of cultural truisms, the inoculation effect is quite strong; researchers describe it as "robust."[138] The effect is so strong that an inoculation message can create generalized resistance to a wide variety of attacks on the belief—even attacks different from the ones refuted by the original inoculation message.[139] For example, in a later experiment, researchers studied whether the inoculation effect would occur if the subjects were exposed to subsequent attacks different from the attacks refuted in the original message. In this experiment, all subjects read a message containing attacks on the truism and refutation of the attacks.[140] All were then exposed to subsequent attacks on the truism. However, one set of subjects was exposed to subsequent attacks that were the same as the attacks refuted in the original message ("refutational-same" message).[141] The other group was exposed to different subsequent attacks ("refutational-different" message).[142] The study demonstrated that inoculation messages seem to confer resistance to a wide variety of attack messages, not just to the attack messages that were the subject of the original message.[143] Those who received inoculation messages were not only more resistant to the particular attack to which they had been exposed, but exhibited overall resistance to a variety of novel attacks on the truism.[144]

Later research expanded inoculation beyond cultural truisms. The results of these experiments demonstrated that there is an inoculation effect with more controversial topics, but the effect is weaker.[145] For example, inoculation has been tested a number of times in the context of political advertising, where attack messages

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rhetoric, is a risky persuasive strategy. *See* STIFF & MONGEAU, *supra* note 71, at 142-43, 288.

137. McGuire, *supra* note 66, at 206-07.

138. Szabo & Pfau, *supra* note 72, at 240-41.

139. O'KEEFE, *supra* note 72, at 181; Szabo & Pfau, *supra* note 72, at 235-36 (noting that inoculation "spreads a 'broad blanket of protection against specific counterarguments'") (quoting Michael Pfau, *The Inoculation Model of Resistance to Influence*, *in* 13 PROGRESS IN COMMUNICATION SCIENCES: ADVANCES IN PERSUASION 137-38 (George A. Barnett & Frankin J. Boster eds., 1997)).

140. McGuire, *supra* note 66, at 208.

141. *Id.* at 202, 208-09.

142. *Id.*

143. *Id.* at 209.

144. *Id.* at 205; O'KEEFE, *supra* note 72, at 181; Szabo & Pfau, *supra* note 72, at 235-36.

145. STIFF & MONGEAU, *supra* note 71, at 289.

are relatively common.[146] In one study, which tested inoculation in the 1986 political campaign between Republican James Abdnor and Democrat Tom Daschle, researchers estimated that South Dakota residents had been exposed to more than three hundred political advertisements on behalf of the two candidates.[147] In this setting, the beliefs of the voters had already been the targets of a variety of persuasive messages, both negative and positive, about both candidates, a setting hardly analogous to an "aseptic" environment.

Even in this context, the inoculation effect was significant, with inoculated message recipients showing resistance to the message in the attack advertisements.[148] Voters exposed to the inoculation message were less supportive of an opponent's attack advertisements and less likely to change their attitudes in favor of the candidate employing the attack advertisements.[149] The inoculation effect occurred regardless of whether the inoculation message addressed the issue raised in the attack advertisement or attempted to inoculate on a wholly different issue.[150] The resistance to the attack advertisements for those recipients who received a refutational-same message did not differ significantly from those who received a refutational-different message.[151] And those recipients who received an inoculation message, whether the same or novel, showed more resistance to attack advertisements than the recipients who received no inoculation at all.[152]

In the study, however, researchers determined that the inoculation effect "decays over time."[153] Researchers tested time intervals of one, two, and three weeks, and determined that inoculation is stronger at one week than either two or three, and stronger at two than at three weeks.[154] This suggests that the inoculation effect "wears off" at some point, and is not as strong as the time lapse between the inoculation message and the attack

146. *See, e.g.*, Pfau & Burgoon, *supra* note 125, at 91; Michael Pfau, Henry C. Kenski, Michael Nitz & John Sorenson, *Efficacy of Inoculation Strategies in Promoting Resistance to Political Attack Messages: Application to Direct Mail*, 57 COMM. MONOGRAPHS 25 (1990).

147. Pfau & Burgoon, *supra* note 125, at 95 (citing John J. Fialka, *Intense Mudslinging in South Dakota Senate Race Provokes Many to Favor Restricting Political Ads*, WALL ST. J., Nov. 13, 1986).

148. *Id.* at 101.

149. Szabo & Pfau, *supra* note 72, at 244-45 (citing Pfau & Burgoon, *supra* note 125).

150. *Id.*; *see also* Pfau & Burgoon, *supra* note 125, at 93, 100-01.

151. Pfau & Burgoon, *supra* note 125, at 101.

152. *Id.* at 101

153. *Id.* at 101-02.

154. *Id.* at 101-03.

increases.[155] Interestingly, though, there was no significant difference in the time effect between same and novel inoculation messages.[156] On the other hand, another study, which involved adolescent subjects, showed that the inoculation response continued over a period of more than eight months.[157] The study did not say, however, whether the response was weakened over time; only that the effect continued.[158]

Not surprisingly, inoculation messages seemed to work best overall with those recipients who already had strong beliefs. For example, in the political advertising context, the inoculation effect was strongest with those message recipients who identified strongly with a political party, and less effective among those who identified weakly with a party, who did not identify at all, or who claimed identification with one party but were supporting the candidate of the other party ("crossovers").[159] Interestingly, refutational-same messages seemed most effective with strong party identifiers, whereas inoculation novel messages worked with both strong identifiers and crossovers.[160]

In addition to creating a shield around a message recipient, inoculation also has another positive persuasive effect. In the commercial advertising context, inoculation messages have been shown to suppress a message recipient's usual counter-argument reaction to a purely supporting message.[161] Message recipients are often skeptical of a one-sided persuasive message and will react to wholly positive advocacy by generating counter-arguments to the positive message. This is particularly true if the message recipient is somehow forewarned that a persuasive message or argument is coming her way, such as: "You will soon hear a message advocating that quitting smoking will improve your health."[162] This type of forewarning tends to lead most people to generate arguments against the message. Inoculation appears to stop this process, which means it also has some strengthening effect on the original persuasive message.

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155. *See id.* at 102.

156. *Id.*

157. Pfau, Van Bockern & Geun Kang, *supra* note 124, at 227.

158. *See id.*

159. Pfau & Burgoon, *supra* note 125, at 103-05, 107.

160. *Id.* at 104.

161. Szabo & Pfau, *supra* note 72, at 244.

162. PERLOFF, *supra* note 39, at 123. When people are told that they will soon be exposed to a persuasive message, particularly if it is a message with which they are likely to disagree, they tend to generate counter-arguments in opposition to the persuasive message. Forewarning in this way makes a subsequent persuasive message much less likely to succeed. *Id.* at 123.

Notably, however, research shows only "modest" support for the superiority of inoculation strategy over post-hoc refutation.[163] In another political advertising study focused on the Bush/Dukakis presidential campaign of 1988, researchers used inoculation messages, inoculation-plus-reinforcement messages, and post-hoc refutation to counter attacks on a candidate's position and character.[164] The inoculation-plus-reinforcement messages consisted of an initial inoculation message followed later by additional reinforcing inoculation messages, all of which preceded the attacking message.[165]

The researchers tested the efficacy of the inoculation messages based on two variables: the attitudes of message recipients regarding the *candidate* in the attack advertisement and their attitudes regarding the *position* advocated in the attack advertisement.[166] To do this, the researchers used two types of attacking messages, one attacking the candidate's position on an issue and the other attacking the candidate on character.[167] The Bush attack messages criticized "Dukakis for being weak on crime [issue] and for deception involving his record as Governor of Massachusetts [character]."[168] The Dukakis attack messages criticized "Bush for his support of agricultural policies that . . . hurt rural America [issue] and for insensitivity to" average working people (character).[169]

The study showed that inoculation was clearly superior to post-hoc refutation with respect to strong political party identifiers, or people who already had strongly formed beliefs.[170] Among weak party identifiers, however, inoculation alone was actually inferior to inoculation-plus-reinforcement and post-hoc refutation in deflecting issue attack messages.[171] On the other hand, inoculation and inoculation-plus-reinforcement were superior in deflecting the character attack messages.[172] So, overall, inoculation had "some advantage" over post-hoc refutation with respect to the message recipients' attitude toward the character of the candidates in the

163. Pfau et al., *supra* note 146, at 38.

164. *Id.* at 31.

165. *Id.* at 32-33. This was meant to test whether inoculation plus reinforcement would stop the 'wearing off' of the inoculation effect noted in the earlier study. It did not. *Id.* at 38.

166. *See id.* at 33.

167. *Id.* at 31.

168. *Id.*

169. *Id.*

170. *Id.* at 39. *See generally* STIFF & MONGEAU, *supra* note 71, at 291; Szabo & Pfau, *supra* note 72, at 245.

171. Pfau et al., *supra* note 146, at 39.

172. *Id.*

attack advertisements;[173] it had no advantage over post-hoc refutation with respect to the message recipients' attitude toward the position advocated in the attack.[174] Unfortunately, researchers offer no theory as to why there should be this difference in inoculation effect between issue and character.

2. Why Does Inoculation Work?

The key to inoculation is the warning of the impending attack, or "threat," combined with the refutation of the attack.[175] Refutation alone is not sufficient to produce the inoculation response.[176] The two components work in tandem—for the inoculation response to occur, challenges must be explicitly raised and then answered.[177]

The key to the inoculation response is "threat."[178] This reveals that the inoculation process is primarily emotional, and only secondarily cognitive.[179] The threat creates the motivation: the raising of a weak counter-argument to the position advocated produces an implied challenge or threat to the position.[180] This threat stimulates the recipient to generate arguments that refute the counter-arguments; the recipient becomes motivated to counter the threat.[181] In other words, when people read a set of supporting arguments, they experience a "threat" or "dissonance" when presented with an opposing viewpoint.[182] This threat motivates them to develop or seek out refutational arguments; people want to resolve dissonance and will gravitate toward a path that allows them to alleviate the threat to the position advocated.[183] For example, in a study testing whether inoculation would have any effect on student response to peer pressure to begin smoking, the threat of the inoculation message was a warning that "as a result of significant

173. *Id.* at 38.

174. *Id.*

175. *Id.* at 28.

176. *Id.*

177. *See* Lin, *supra* note 125, at 86.

178. Pfau, Van Bockern & Geun Kang, *supra* note 124, at 215.

179. Szabo & Pfau, *supra* note 72, at 235-37.

180. *Id.* at 235.

181. O'KEEFE, *supra* note 72, at 182; PERLOFF, *supra* note 39, at 125 (arguing that "inoculation works by introducing a threat to a person's belief system and then providing a way for individuals to cope with the threat"); Lin, *supra* note 125, at 86 (noting that threat is a "motivational trigger" inducing the message recipient to bolster his or her belief); Szabo & Pfau, *supra* note 72, at 235.

182. *See* STIFF & MONGEAU, *supra* note 71, at 289.

183. *See id.*

peer pressure . . . many of them would become uncertain about smoking, and some would change their minds and try smoking."[184]

The importance of the feeling of a threat to a position can explain why the inoculation effect is stronger in situations involving cultural truisms. Because the threat is felt so much more intensely when the message recipient agrees with the advocated position, the message recipient will feel greater motivation to resolve the dissonance created by the opposing position.[185] The importance of a threat also explains why inoculation regarding one potential weakness provides a wide umbrella of protection against novel attacks on other weaknesses.[186]

The refutation portion of the inoculation message serves a more cognitive, as opposed to emotional, purpose. The refutation gives the message recipient an example of how to resist the attack. Often, the refutation explicitly reiterates the attacks. For example, in the smoking study, the refutation began by raising specific attacks on the belief that smoking is bad.[187] Students were told that they might, in the future, hear that smoking is "cool" and that a person can try smoking without becoming a regular smoker.[188] These explicit attacks were then directly negated.[189]

Cognitively, the refutational argument gives the message recipient the *capability* (as opposed to motivation) to refute the counter-argument; it gives the message recipient a partial "script" for refutation of counter-arguments.[190] The preemptive quality of inoculation also gives the persuader the opportunity to reframe the attack arguments before the opposition has an opportunity to present them.[191]

Largely because the inoculation effect is consistently generalized beyond the "script" provided, researchers have focused on motivation as the critical component.[192] In fact, there is some research that suggests that a warning of possible counter-attack alone, or a message recipient's generalized awareness that an argument is vulnerable, can be enough to stimulate the recipient to create refutational arguments.[193] Threat alone, however, risks a weaker

184. Pfau, Van Bockern & Geun Kang, *supra* note 124, at 219.

185. *See* STIFF & MONGEAU, *supra* note 71, at 289.

186. *See* Pfau et al., *supra* note 146, at 29.

187. Pfau, Van Bockern & Geun Kang, *supra* note 124, at 219.

188. *See id.*

189. *See id.*

190. *See* Szabo & Pfau, *supra* note 72, at 235.

191. PERLOFF, *supra* note 39, at 126.

192. O'KEEFE, *supra* note 72, at 182; Szabo & Pfau, *supra* note 72, at 235-36 (noting threat is the "most integral" of the two components of inoculation).

193. *See* O'KEEFE, *supra* note 72, at 182.

inoculation response, and depends greatly on the level of a message recipient's involvement in the issue. Involvement is a complex phenomenon in social science, but, to oversimplify, it refers to the level of personal relevance a message has for the message recipient.[194] A message recipient who is deeply involved in the issue of the message is likely to have a stronger inoculation response—that is, she will exhibit greater resistance to attacks on the message.[195] However, research suggests that there is an "optimal level" of recipient involvement in an issue required for the inoculation effect to occur.[196] For example, if the message recipient is either too involved or not involved enough, inoculation may have a negligible impact because the recipient's motivation will be unaffected by the two-sided argument.[197]

In sum, the inoculation effect occurs when an advocate preemptively raises a negative issue within a persuasive message. Inoculation puts a "shield" over the message recipient, making her resistant to attacks on the persuasive message. Consistent with the two-sided message research, inoculation creates the strongest shield when accompanied by refutation of the negative information. While the inoculation shield is strongest with message recipients who already agree with the persuasive message, it is nevertheless present even with message recipients who are undecided. Overall, when an advocate for a controversial position makes even a weak refutational argument in addition to supporting arguments, the audience is more resistant to multiple counter-arguments by the other side.[198]

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194. Kathryn M. Stanchi, *The Science of Persuasion,* 2006 MICH. ST. L. REV. 411, 434; *see* STIFF & MONGEAU, *supra* note 71, at 181-83. For example, college students confronted with the possibility of tuition hikes at their school feel high involvement; they feel less involvement when confronted with the possibility of tuition hikes at a distant or obscure university. *See id.* at 183.

195. *See* Lin, *supra* note 125, at 97.

196. *See* Szabo & Pfau, *supra* note 72, at 237.

197. *See id.* at 237, 239. Up to a point, higher involvement will increase the inoculation effect because a person who has deeper involvement in an issue is more likely to "acknowledge the vulnerability of one's attitudes and act to bolster them." Lin, *supra* note 125, at 90. A person with deeper involvement is also more likely to expend the energy necessary to bolster the belief. *Id.*

198. *See* O'KEEFE, *supra* note 72, at 180-81; Szabo & Pfau, *supra* note 72, at 236; *see also* PERLOFF, *supra* note 39, at 125 (arguing "inoculation spreads a broad blanket of protection both against specific counterarguments raised in refutational pre-emption *and against those counterarguments not raised*") (citation omitted) (emphasis added); Pfau et al., *supra* note 146, at 29 (noting "inoculation promotes resistance to *both same and different* counterarguments").

IV. MESSAGE SIDEDNESS AND INOCULATION IN THE LEGAL CONTEXT

Within the social science discipline of persuasion, there has also been growing interest in scientifically studying persuasion in law. There are several studies that focus on the use of negative information in the legal context. Most of the studies in this nascent area of the discipline are in the trial context, but there is one study in the persuasive writing context. The small number and limited nature of the studies means it is difficult to draw definitive conclusions from them, but nevertheless they can help legal advocates supplement and refine their application of the persuasion science to law.

A. Brief Writing

The inoculation response has been tested and explored in the law context by Professor James Stratman.[199] Professor Stratman sought to compare the rhetorical effectiveness of what he refers to as the "adversarial" approach with the "scholarly" approach to dealing with adverse arguments and authority in legal briefs.[200]

Professor Stratman tested the two approaches using "think-aloud" protocols.[201] He asked attorneys writing a brief in an appellate case to record their thought processes, and then asked the court clerks to record their thought processes while reading the briefs.[202] He then analyzed the briefs and the protocols to determine whether the attorneys used the adversarial or scholarly approach, and how the judicial clerks reacted to the different approaches.[203]

The case concerned whether the Pennsylvania Department of Environmental Resources (DER), a state agency, can require that a company against whom it has assessed a fine must put the fine money in escrow before the company is permitted to appeal.[204] In the case, the DER had fined a company referred to as "Magic Mining," and Magic Mining had challenged DER's right to require an escrow deposit of the fines.[205] Magic Mining had lost on this issue before the commonwealth court and appealed to the Pennsylvania Supreme

199. *See* Stratman, *supra* note 2.

200. *Id.* at 7-13.

201. *Id.* at 18-23.

202. *Id.*

203. *Id.* None of the judges approached by Stratman could participate in the study for a variety of reasons. *Id.* at 21. As a result, Stratman used court clerks as his "judicial" readers. *Id.*

204. *Id.* at 25-26.

205. *Id.*

Court.[206] Magic Mining argued that the deposit requirement violated its rights under the United States and Pennsylvania Constitutions.[207]

Professor Stratman observed that both DER and Magic Mining employed mostly adversarial or one-sided argumentation in their briefs.[208] The attorneys almost never qualified their arguments of supporting case law.[209] One attorney, an experienced trial advocate, seemed unable to consider or accept the legitimacy of any opposing views, and this hampered his ability to construct convincing refutations.[210] He appeared to believe that the lower court was unfairly predisposed against his client and felt that he must overwhelm the supreme court with arguments undermining the decision below.[211]

The think-aloud protocols of the clerks (the brief readers) demonstrated that the one-sided argumentation favored by the attorneys was not effective.[212] The clerks were largely skeptical of the one-sided arguments and not persuaded by the briefs.[213] The think-aloud protocols showed that the clerks interpreted the one-sided arguments as unfair to the other side and as less valuable for their failure to account for other views.[214] The clerks eventually rejected as irrelevant or inapplicable roughly seventy percent of the supporting cases cited in the briefs.[215]

Professor Stratman's article analyzes in depth only a portion of the appellant's brief dealing with adverse arguments and information.[216] Notably, the adverse authority dealt with in this portion of the brief is the commonwealth court opinion, the lower court from which the appeal was taken.[217] In Professor Stratman's view, this portion of the appellant's brief demonstrates one-sided argumentation because the arguments make no concession regarding the reasonableness of the opinion below, opting instead to attack it at every juncture.[218] Of course, the job of the appellant is to point out error in the decision below, but Professor Stratman's argument is that the appellant does so in a manner that suggests that the court

206. *Id.* at 26.
207. *Id.*
208. *Id.* at 43.
209. *Id.* at 44.
210. *See id.* at 46-47.
211. *See id.*
212. *Id.* at 42-44.
213. *Id.* at 43-44.
214. *See id.* at 44.
215. *Id.*
216. *Id.* at 27.
217. *Id.* at 27-31.
218. *Id.* at 27-30.

below got everything wrong.[219] In one section, for example, the appellant focuses on two cases relied on by the commonwealth court involving the constitutional right to a jury trial.[220] He argues that the cases are inapposite because they involve the constitutional jury trial right and not the constitutional right to appeal.[221] These discussions contain no language conceding that the jury trial cases might be (even superficially) analogous to a case about the right to appeal.[222]

The appellant also attributes to the lower court certain assumptions and contentions that it is not clear the court made, and then vehemently attacks these assumptions.[223] In this part of the brief, the tone toward the lower court borders on disrespectful and even a bit sarcastic.[224] This approach to negative information is not well-received by the clerks, who react to the appellant's arguments with skepticism.[225] In fact, Professor Stratman notes that the one-sided approach resulted in a boomerang effect and led the clerks to a conclusion *opposite* the one advocated.[226]

Professor Stratman's study has much useful information for the persuasive legal writer, particularly what it suggests about the efficacy of a two-sided inoculation approach in the persuasive legal writing context and the persuasive advantage of a more educational, concessionary approach.[227] It also offers some much needed caution against the advocate's trap—the inability to see the merit of the opposing side's arguments—that is so easy to fall into.[228] Indeed, this is what Professor Stratman focuses on in his conclusion: the possible origins of the one-sided approach to brief writing, for which he offers a number of interesting explanations.[229]

There are some caveats to using Professor Stratman's study to draw definitive conclusions about how best to handle negative information in a brief. It is one study about one case, so it is rather limited in scope. Moreover, any conclusions drawn about the overall negative impact of the one-sided argumentation techniques must be evaluated in light of the fact that, at least in part, the "adverse" authority that was the target of the one-sided technique analyzed

219. *See id.*
220. *Id.* at 28-30.
221. *Id.* at 28-29.
222. *Id.* at 29.
223. *Id.* at 30.
224. *Id.* at 30-31, 35-36.
225. *Id.*at 38-39, 41.
226. *Id.* at 42. Stratman believes that the clerks' "backlash" reaction to appellant's argument stems from appellant's failure to make concessions to the lower court. *Id.*
227. *Id.* at 42-46.
228. *Id.*
229. *Id.* at 47.

was the lower court opinion, a body of authority to which judges and clerks will give far greater deference than, for example, an opponent's brief.[230] It would be reasonable to conclude that judges and clerks might view a one-sided attack on an adversary's argument differently from an attack on a judicial opinion.[231] Readers might expect and find persuasive a very adversarial attack on arguments made by opposing counsel.

Finally, despite Professor Stratman's statement that "[i]dentifying whether a specific case in a brief is given a one- or two-sided analysis is a fairly easy judgment to make," the difference can be difficult to pin down.[232] Professor Stratman cites three criteria for his judgment that the appellant's refutation of adverse material is one-sided: (1) the argument makes no concession that the adverse authority relied upon might have some applicability; (2) the argument insinuates points, rather than closely analyzing material from the court below; and (3) the argument avoids any concession that the lower court decision might be correct in some respects.[233]

However, the excerpt provided also has some aspects of a two-sided message, in the sense that it directly raises and addresses the contrary authority and provides a direct and somewhat lengthy refutation of its inapplicability.[234] For example, the advocate directly refers to and cites the two jury-trial cases relied upon by the commonwealth court, explaining what they hold and how the court below relied upon them.[235] He then takes several paragraphs to explain why, in his view, the cases are distinguishable.[236]

The problem is that although the appellant distinguishes the two jury-trial cases relied upon by the court below by arguing that they involve the right to jury trial and not the right to appeal, the lawyer never explains "why this difference is legally sufficient"—or why it should change the outcome in the case before the court.[237] The failure to explain the relevance of a distinguishing fact is widely recognized as a mistake in persuasive legal writing—one professor calls it "myopic vision"—and legal writing texts routinely caution law

230. *See id.* at 42.

231. *See id.* at 29. Professor Stratman acknowledged the deference problems, but, nevertheless, he uses the example of the critique of the lower court opinion to generalize about the effectiveness of the one-sided approach. *Id.* at 42.

232. *Id.* at 43.

233. *See id.* at 27-31.

234. *See supra* notes 75-84 and accompanying text (O'Keefe's definition of refutational two-sided message).

235. Stratman, *supra* note 2, at 28-29.

236. *Id.*

237. *See id.* at 29.

students against it.[238] Thus, the characterization of this strategy as a legitimate strategic choice is not quite fair. Moreover, it isn't entirely one-sided. Because the appellant's treatment of the jury-trial cases in the Magic Mining litigation raises negative information without effective refutation,[239] the appellant's approach may be more analogous to a two-sided nonrefutational argument—which social science shows to be largely unpersuasive—than a one-sided argument.[240] It may be that the arguments fail not because they are one-sided, but because they do not offer an effective refutation.

In the same vein, what Professor Stratman characterizes as the lawyer's one sidedness in imputing certain conclusions to the lower court[241] can also be seen as a mistake—"myopia" is a good word here, too—that most lawyers and scholars of advocacy would counsel against. For example, the lawyer mischaracterizes the lower court as having stated that constitutionally permitted appeals should not be allowed to "frustrate" the DER's enforcement of the environmental laws because the environmental laws serve the public interest.[242] This characterization of the lower court's reasoning takes a piece of quoted material out of context, and thus does not present a fair description of what the lower court said.[243]

Moreover, the characterization is also disrespectful in that it implies that the lower court views the constitutional right to appeal as "frustrating" to law enforcement and the public interest, as though the lower court finds the constitutional right to appeal to be something of an annoying technicality that thwarts the public interest.[244] That readers reacted unfavorably to this as well as other similar characterizations is not surprising, and most brief-writers and texts would recommend against such a strategy.[245] Again, it is important here that the adverse authority attacked is that of the lower court, which advocates almost universally perceive as warranting more respect and deference than the opposing side. So it may not be correct to attribute the failure of the brief to persuade to a particular, conscious "adversarial" strategy, as much as it should be attributed to lawyer error.

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238. Robbins, *supra* note 33, at 516-18; *see also* FONTHAM, VITIELLO, & MILLER, *supra* note 50, at 142-43; LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK 496 (4th ed. 2006).

239. Stratman, *supra* note 2, at 28-29.

240. *See supra* notes 107-08 and accompanying text.

241. Stratman, *supra* note 2, at 30-31.

242. *Id.* at 30.

243. *Id.*

244. *Id.*

245. *See* BEAZLEY, *supra* note 32, at 181-82; DERNBACH ET AL., *supra* note 44, at 259; SMITH, *supra* note 31, at 116-17.

The blurring of the "adversarial" approach with what many appellate advocates would recognize as strategic mistakes recommends caution in generalizing too widely from Professor Stratman's interesting study about how to treat negative information. However, the study does make an important point about the "myopia" that can result from becoming too deeply embedded with the client's position and how that can lead to ineffective brief strategy.[246]

B. Trial Context

Preemptive disclosure of negative information has also been tested several times in the trial context. In virtually all the studies, preemptive disclosure of negative information was judged to be strategically advantageous.[247] Again, these studies offer valuable information to the advocate regarding the strategic decision of whether to disclose negative information. However, a close look at the studies cautions against generalizing too broadly from them.

In one study, subjects heard two videotaped opening statements of a mock civil trial involving an automobile accident.[248] This study purported to compare sponsorship theory with inoculation.[249] In the hypothetical case, a young man is driving "home from a party when his vehicle overturns and he is killed."[250] His family sues the automaker, contending that the car had a propensity to overturn.[251] The key negative fact at the center of the study was that the driver had been drinking before the accident, a fact that hurt the plaintiff's case.[252] Group A (the sponsorship group) heard a plaintiff statement that did not mention anything about the driver's drinking and heard a defense statement that made full use of the fact that the driver had been drinking.[253] Group B (the inoculation group) heard the same defense statement, but prior to that heard a plaintiff statement that directly addressed and refuted the negative information.[254] In it, the plaintiff's attorney warned the jurors that the defense would argue that the plaintiff's drinking caused the accident, but noted that

246. Stratman, *supra* note 2, at 46-49.

247. *See, e.g.*, Williams et al., *supra* note 44, at 608; Douglas S. Rice & Ellen L. Leggett, *Empirical Study Results Contradict Sponsorship Theory*, INSIDE LITIGATION, Aug. 1993, at 22.

248. Rice & Leggett, *supra* note 247, at 21.

249. *Id.*

250. *Id.* at 20.

251. *Id.*

252. *Id.*

253. *Id.* at 21.

254. *Id.* at 21.

plaintiff was not known as a drinker and that plaintiff's blood alcohol level was not above the legal limit.[255]

The inoculation group, who heard plaintiff's preemptive rebuttal of the negative fact, was more likely than the sponsorship group to discount the defense's arguments about the driver's drinking.[256] The inoculation group also had a more positive impression than the sponsorship group of the plaintiff's attorney, who they "viewed as more honest, organized, persuasive, poised and effective."[257] Interestingly, the inoculation group also had a more negative impression of the defense attorney, rating him "as less honest, organized, clear, persuasive and effective, and as more nervous."[258] When interviewed, the jurors in the sponsorship group said that it would have made a difference to them had the plaintiff's attorney confronted her client's drinking.[259]

In a similar but more in-depth study, participants were exposed to an entire trial from beginning to end.[260] The trial involved an assault and battery, and the key piece of negative information was that the defendant had prior convictions for the same crime.[261] The researchers referred to the negative information as "thunder" if the negative information was volunteered and the researchers called it "stolen thunder" in cases where the opposing side raised the information.[262] In Group One's trial, there was no mention of the prior convictions ("no thunder").[263] Group Two heard the identical trial, except that at the end of the defendant's testimony the prosecutor elicited the negative information ("thunder").[264] Group Three heard the same trial as Group Two, except that the defense attorney elicited the negative information and refuted it as irrelevant to the issue of guilt ("stolen thunder").[265] Perhaps more importantly, in Group Three the judge's instructions to the jury reiterated the irrelevance of the prior convictions to the issue of guilt.[266]

The "thunder" group was more likely to believe in the defendant's guilt than both the "no thunder" or the "stolen thunder"

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 22.
260. Williams et al., *supra* note 48, at 601.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*

groups.[267] But the "stolen thunder" group was *more* likely to believe in guilt than the "no thunder" group.[268] The data certainly suggest that "stealing thunder" is a risky strategy and that "no thunder" is in many respects the preferred outcome. Therefore, the decision to preemptively raise negative information should depend on whether the information is likely to come out.[269] Similarly, the "no thunder" group rated the defendant's credibility more highly than those in the "thunder" group, but the "stolen thunder" group was only marginally more impressed with the defendant's credibility than the "thunder" group.[270] That the boost to credibility by "stealing thunder" is only marginal suggests that this strategy should be employed cautiously and with a full realization of the downsides.[271]

While these studies offer some interesting information about refutation, it is problematic to draw conclusions from them regarding the effectiveness of preemptive disclosure as compared with post-hoc refutation. These studies test preemptive disclosure against a situation where the attorney who has been confronted with negative information does not effectively argue against it at any time.[272] What these studies compare is a lawyer who preemptively discloses negative information with a lawyer who makes no response when an opponent uses negative information.[273] Thus, all the studies really demonstrate is that preemptive disclosure is better than being attacked and offering no rebuttal,[274] which is not the most relevant question. Few lawyers would let an attack go wholly unanswered. The question is whether to preempt the attack or wait for it and argue against it after it is made.

Moreover, in the assault and battery study, the judge's instructions to the jury reinforce the rebuttal made by the advocate who is "stealing thunder."[275] This casts doubt on whether the strength of the response is due to the attorney's behavior or the judge's instructions. The strength of the "stolen thunder" response must be discounted because of the substantial boost given to the "stolen thunder" strategy by the judge's instructions to the jury.

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267. *Id.* at 601-02.

268. *Id.* at 601.

269. *See id.* at 602-03.

270. *Id.* at 602.

271. *See id.*

272. *See* Robert H. Klonoff & Paul L. Colby, *Responding to a May 2000 Legal Article: The Flawed Empirical Testing of Sponsorship Strategy*, 63 TEX. B.J. 754, 755 (2000).

273. *See id.*

274. *See id.*

275. Williams et al., *supra* note 48, at 601.

In one study, however, preemptive refutation was tested against post-hoc refutation in the context of a civil trial.[276] In that study, the case involved a shipyard worker who was exposed to asbestos and died of lung cancer.[277] The negative information was that the plaintiff's expert, who relied on medical records to testify that the asbestos caused the plaintiff's cancer, had testified in a prior trial "that using medical records to determine causation was not scientifically valid."[278]

In the "no thunder" group, the jury heard only about the expert's credentials.[279] In the "thunder" group, the defense brought up the negative information, but the expert refuted the information by saying that, "as an expert . . . he could testify for both sides of such a controversial issue."[280] In the "stolen thunder" group, the expert himself brought up the prior trial, and stated, as he did in the "thunder" trial, that as an expert he could testify for both sides.[281]

In this study, both the "stolen thunder" and "no thunder" groups were more likely to return a verdict for the plaintiff than the "thunder" group, with a fairly significant difference between the "stolen thunder" and "thunder" groups.[282] However, even with the "thunder" version, forty-three percent of the jurors found for plaintiff, as compared with sixty-five percent of the "stolen thunder" jurors and fifty-eight percent of the "no thunder" jurors.[283] Moreover, the difference between "thunder" and "no thunder" was not significant, which might suggest that the raising of the negative information by the defense did not have a substantial impact on the verdict.[284] Moreover, "thunder" (or lack thereof) did not make any significant difference to the juror's assessment of whether asbestos caused the plaintiff's cancer.[285] In terms of witness credibility, the "no thunder" and "stolen thunder" groups did not differ significantly on credibility ratings, and both groups rated the expert's credibility higher than the "thunder" group.[286]

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276. *Id.* at 604.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* This is a fairly unpersuasive refutation, one that most competent litigators probably would avoid. Nevertheless, the same refutation was used in both the "thunder" and "no thunder" scenarios, so it is difficult to argue that the weakness of the refutation had an impact on the results.

281. *Id.*

282. *Id.* at 605.

283. *Id.*

284. *Id.*

285. *Id.* at 606.

286. *Id.*

C. Why Does "Stealing Thunder" Work?

Although the success of the "stealing thunder" strategy can be attributed in part to the inoculation effect and to credibility boosts, researchers have looked beyond these reasons to determine why "stealing thunder" works so consistently. Researchers have noted that mock (and real) jurors are not necessarily always sympathetic to the message being attacked, and therefore are not necessarily highly motivated to counter-argue in response to an attack—two conditions that are present in the strongest inoculation studies (on cultural truisms).[287] The absence of these conditions led researchers to believe that inoculation and credibility are not the whole story in the legal realm, and led them to speculate that an additional psychological phenomenon might be at work.

One explanation that researchers offer is "framing," a concept that is familiar to most legal advocates.[288] The theory is that because "stealing thunder" permits the advocate to "frame" the negative information in the best possible light, jurors mentally process and accept the more positive spin before they are exposed to the attack.[289] Although framing is widely accepted in law as necessary to neutralize negative information, one study found that the success of "stealing thunder" did not depend on it.[290]

In that study, jurors read the fairly complex trial transcript of a car accident case in which a head-on collision killed the driver of one vehicle, although the other driver escaped with only minor injuries.[291] The driver who survived was then charged with vehicular homicide.[292] The prosecution argued that the defendant veered into the other lane and was speeding.[293] The defendant's theory of the case was that the victim died because it took too long for emergency personnel to arrive and transport the victim to the hospital.[294] The key piece of negative information was that the defendant had been drinking at a party prior to the accident.[295]

In the "no thunder" version, jurors heard nothing about defendant's drinking except that the blood alcohol test on defendant

287. Lara Dolnik et al., *Stealing Thunder as a Courtroom Tactic Revisited: Processes and Boundaries*, 27 LAW & HUM. BEHAV. 267, 267-68 (2003).

288. *Id.* at 269.

289. *Id.*

290. *Id.* at 274.

291. *Id.* at 271.

292. *Id.* It should be noted that the researchers in this study are Australian, so the laws and procedures used are those of Australia. *Id.* at 267.

293. *Id.* at 271.

294. *Id.*

295. *Id.* at 272.

was inconclusive because the machinery had broken.[296] In the "thunder" version, the prosecution elicited from the defendant on cross-examination that he had been drinking.[297] In the "stolen thunder framing" version, the defendant admits on direct examination that he had been drinking, but testifies that he believed himself able to drive.[298] In the "stolen thunder-no framing" version, the defendant simply admits to drinking, but offers no explanation.[299]

The results on framing are a bit surprising. As expected, the "thunder" version resulted in the highest ratings of the defendant's guilt and the "no thunder" version the lowest ratings of guilt.[300] But, although the "stolen thunder framing" version led to fewer findings of guilt than the "thunder" version, that difference was not statistically significant.[301] The "stolen thunder-no framing" version, however, *did* lead to significantly fewer guilty findings than the "thunder" version, and also led to fewer guilty findings than the "stolen thunder framing" version.[302] However, only the "stolen thunder framing" version improved the defendant's credibility.[303]

Researchers conclude from this that framing is not essential for the "stealing thunder" effect.[304] This is somewhat analogous to the conclusion that inoculation can work without a script for refutation—it can work with threat alone. However, it seems to contradict the many studies outside the legal context that find nonrefutational two-sided messages to be unpersuasive.[305] Nevertheless, the study authors qualified the results of their research and stopped short of concluding that framing is not important. The authors of the study acknowledged that the framing technique employed in the study was not particularly effective, and that the defendant's personal belief about his ability to drive after drinking might have been viewed by jurors as self-serving and less than credible.[306] As a result, they concluded that a more effective framing of the negative information might have led to different results.[307] The study also led researchers

296. *Id.* at 271-72.

297. *Id.* at 272.

298. *Id.*

299. *Id.*

300. *Id.* at 273.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 274.

305. Because in the "stolen thunder-no framing" scenario, the defendant admitted drinking (negative fact) but offered no explanation (no refutation), that scenario is analogous to a two-sided nonrefutational message. *See supra* Part III.A.

306. Dolnik et al., *supra* note 287, at 275.

307. *Id.*

to conclude that the success of "stealing thunder" was not necessarily a result of credibility enhancement because of the differences in the effects of framing on credibility and guilt findings.[308]

Having learned that the "stealing thunder" effect was not solely a function of credibility, researchers sought to find what might cause the success of this litigation strategy by testing two other hypotheses: the "change of meaning" hypothesis and the "old news is no news" hypothesis.[309]

The "change of meaning" hypothesis suggests that preemptively disclosing negative information actually motivated message recipients to change the meaning of the information to be less damaging to the side offering it.[310] In other words, as suggested in sponsorship theory, jurors expect lawyers to offer information that is positive for their side, and so jurors experience some "dissonance" when lawyers offer negative information.[311] However, contrary to sponsorship theory—which posits that this dissonance leads jurors to inflate the relevance of negative information—social scientists theorize that jurors will resolve the dissonance by reinterpreting the information to be more positive to the side that is offering it.[312]

The "old news is no news" hypothesis posits that if negative information is preemptively disclosed, then its later use by opposing counsel is perceived by the jury as "old news" and therefore will carry less weight.[313] This is the concept for which "stealing thunder" is the core metaphor: once the jury has heard the "thunder," hearing it again will have less impact.

To study this, researchers replicated the scenario in which the head-on collision of a car accident killed one driver.[314] The conditions included the three basic conditions of "thunder," "no thunder," "stolen thunder-no framing," plus two additional conditions.[315] These conditions were identical to the "stolen thunder-no framing," except that the prosecution's response was altered.[316] In "stolen thunder-no repeat," the defendant admits to drinking, offers no explanation, and the prosecution does not make any use of the evidence.[317] In the "stolen thunder-tactic revealed" version, the defendant offers the same information, but the prosecution accuses the defendant on

308. *Id.*
309. *Id.* at 275-76.
310. *Id.* at 269.
311. *See id.*
312. *Id.* at 269-70.
313. *Id.* at 269.
314. *Id.* at 276-77.
315. *Id.* at 277.
316. *Id.*
317. *Id.*

cross-examination of trying to manipulate the jury by being the first to divulge damaging information.[318] These two conditions were designed to test the "old news is no news" hypothesis and whether there is an effective counter-attack to the "stealing thunder" strategy.[319]

In order to test the "change of meaning" hypothesis, researchers recorded jurors' perceptions of the weight and seriousness of the negative evidence.[320] Jurors were asked to rate how strong the negative evidence was and how damaging they felt it was to the defendant's case.[321] To assess the change of meaning hypothesis, only the "stolen thunder-no framing," "thunder," and "no thunder" scenarios were compared.[322]

The results demonstrated that the "old news" hypothesis did not account for the "stealing thunder" effect.[323] There was no significant difference in guilty findings for the scenarios in which the prosecution repeats the information after defendant preemptively revealed it and where the prosecution does not repeat it.[324] In other words, the "stolen thunder-no framing" results were not significantly different from the "stolen thunder-no repeat" results. Both effectively reduced the percentage of guilty findings.[325] The results also showed that revealing the strategy of "stealing thunder-tactic revealed" to jurors was an effective way to combat the strategy.[326] The "stealing thunder-tactic revealed" results were not significantly different from the "thunder" results.[327]

The results showed support for the "change of meaning" hypothesis as a reason for the success of "stealing thunder."[328] Jurors hearing the "stolen thunder" scenario were more likely to consider negative evidence to be weaker and less damaging than those hearing the "thunder" scenario.[329] Researchers tested this across a wide variety of scenarios, including evidence of the defendant's drinking, forensic evidence that the defendant had veered across the

318. *Id.*
319. *Id.* at 276.
320. *Id.* at 277.
321. *Id.*
322. *Id.* at 279.
323. *Id.* at 283.
324. *Id.* at 279.
325. *Id.*
326. *Id.*
327. *Id.* at at 279, 283 (noting that "warning the jurors that they had been manipulated by a tactic motivated participants to correct for the effects of stealing thunder").
328. *Id.* at 283.
329. *Id.*

road, and evidence that the defendant was speeding.[330] However, the researchers warned that the study did not show *when* the jurors' perceptions changed—before the verdict or after the verdict—to justify it.[331]

These studies offer legal advocates additional information to enhance their understanding of the nonlegal science. Consistent with the inoculation research, which demonstrated that the counter-argument script was not essential, the legal studies show that framing is not essential to the "stealing thunder" effect. Moreover, "stealing thunder" works not only by boosting credibility, but also by leading jurors to change the meaning and weight of the evidence. Finally, the "stealing thunder" effect can be lessened or neutralized by exposing the tactic.[332]

In addition to attempting to pinpoint the reasons for the "stealing thunder" effect, researchers have also sought to discover the optimal conditions for "stealing thunder." The research shows that "stealing thunder" was most effective under conditions where the jury was less likely to think and process the trial information deeply and carefully—what researchers call conditions of low elaboration.[333] In one experiment, mock jurors listened to a criminal trial in which the "thunder" consisted of evidence of the defendant's prior record.[334] The conditions under which the mock jurors heard the trial were manipulated so that some jurors heard the evidence under conditions shown to lead to low elaboration, and others heard the evidence under conditions conducive to high elaboration.[335] For example, the low elaboration group heard a recording "that was lower volume, faster paced, and contained more complex" language.[336] They were also given a "distracting" task to do while listening to the trial—researchers told them to record their impression of the audio quality of the recording in addition to listening to the evidence.[337] The low elaboration group participants were also told that they were merely

330. *Id.* at 277. Researchers tested different negative information variables, not just the defendant's possible drunkenness.

331. *Id.* at 284.

332. *Id.* at 286.

333. The study used the elaboration likelihood model, which posits that there are two routes to decision making: a central route that is characterized by active attention to and scrutiny of the issues and merits and a peripheral route that is characterized by quicker, more superficial judgments. Mark V. A. Howard et al., *How Processing Resources Shape the Influence of Stealing Thunder on Mock-Juror Verdicts,* 13 PSYCHIATRY, PSYCHOL. & L. 60, 61-62 (2006); *see also* Stanchi, *supra* note 194, at 435-41 (discussing elaboration likelihood model in greater detail).

334. Howard et al., *supra* note 333, at 63.

335. *Id.*

336. *Id.*

337. *Id.*

doing a pilot test to calibrate the materials and measures, whereas the high elaboration group participants were told that they should give their full attention to the merits of the case because their answers were important to the researchers.[338]

The experiment demonstrated that "stealing thunder" worked to reduce the number of guilty verdicts only under conditions of low elaboration; for jurors who processed the information more carefully and deeply, "stealing thunder" did not work as well in that it did not lead to fewer guilty verdicts.[339] This led researchers to conclude that "stealing thunder" would be most effective when jurors are likely to process with lower elaboration, such as when the evidence is particularly complex or the issues challenging.[340] At the same time, "stealing thunder" will be less effective when message recipients are likely to think carefully and thoughtfully about the merits.[341]

Researchers believe that these results are likely caused by either overcorrection or reactance.[342] Overcorrection refers to the propensity of people to correct for what they perceive as bias in their decision making.[343] Those who are thinking carefully about the evidence in a case might perceive "stolen thunder" evidence as a potential red herring that is distracting them from an accurate, merits-based decision. As a result, they will correct for the bias they think is caused by the red herring.[344] Generally, when people try to correct for perceived bias, they tend to overcorrect.[345] Reactance refers to the response people have when they perceive that a message source is trying to manipulate them.[346] When people perceive that they are being manipulated, they experience a threat to their decision-making autonomy and often react with negative backlash against the perceived manipulator.[347] In the "stealing thunder" scenario, those scrutinizing the evidence with care and thought might view "stealing thunder" as a manipulative tactic and react by rejecting the message.[348] Reactance also explains why revealing the tactic of "stealing thunder" might neutralize the effect.[349]

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338. *Id.*

339. *Id.* at 64 tbl. 1. Indeed, those jurors in the high elaboration group were more likely to find the defendant guilty when "thunder" was stolen.

340. *Id.* at 64.

341. *Id.*

342. *Id.* at 65.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* This is sometimes called the "boomerang effect."

348. *Id.* (citing Dolnik et al., *supra* note 287).

349. *Id.*

Overall, the studies of "thunder" in the legal context provide another layer of knowledge for the legal practitioner looking for a solution to the dilemma of what to do with negative information. However, the number of studies and the limited focus of the studies makes it difficult to draw from them a clear answer to this question.

V. IMPLICATIONS OF THE SOCIAL SCIENCE DATA FOR PERSUASION IN LAW

The big picture of the social science data suggests that, overall, it is advantageous to preemptively disclose and refute adverse information. However, there are a number of factors that qualify that big picture.

A. The General Rule: Be Open About Negative Information

The data demonstrate that two-sided refutational messages consistently, and across a wide spectrum of variables, were more effective, in that they resulted in more sustained attitude-change that was less vulnerable to opposing arguments.[350] This data is especially relevant for opening statements and briefs by appellants or movants because it demonstrates that the power of a message is stronger if it confronts and refutes its weaknesses. The data on inoculation support this by showing that, in particular, an inoculation message can make the audience resistant to a broad array of attacks on the message. It does not merely deflect the particular attack anticipated and rebutted, but also provides some protection against any number of novel, unanticipated attacks. Finally, Professor Stratman's study[351] and the "stealing thunder" studies are also consistent in showing the advantages of volunteering negative information.[352]

In terms of message style, the studies show a distinct advantage for a message that directly and frankly deals with negative information. Inoculation, for example, depends on the audience perceiving a "threat" to the message, and a threat can only be perceived if the message clearly announces the imminence of the attack.[353] Similarly, the trial studies suggest that it is the preemptive disclosure of negative information that is critical to the "stealing thunder" effect, not the "framing" of the information.

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350. PERLOFF, *supra* note 39, at 178; Allen, *supra* note 77, at 396; O'KEEFE, *supra* note 72, at 161; Szabo & Pfau, *supra* note 72, at 234; *see also* STIFF & MONGEAU, *supra* note 71, at 142. Dr. O'Keefe concludes that "persuaders are well advised to employ two-sided messages rather generally." O'KEEFE, *supra* note 72, at 162.

351. *See* Stratman, *supra* note 2.

352. *See generally* Howard et al., *supra* note 333.

353. STIFF & MONGEAU, *supra* note 71, at 289; Pfau et al., *supra* note 146, at 39.

This all suggests that the better approach in advocacy is one that does not shy away from describing, with some depth, the negative information and authority that it then refutes, which lends support to the "scholarly" approach to brief-writing described by Professor Stratman and the conventional trial wisdom on volunteering weaknesses. The importance of threat also suggests that giving the reader forewarning of an attack before the rebuttal, such as "Plaintiff may argue that the *Smith* case controls" or "You may hear that the plaintiff had been drinking on the night of the accident," will strengthen the inoculation response. Forewarning in this manner is more common in trial strategy than in appellate brief strategy, where advocates are concerned about giving voice to the other side's arguments.[354] The need for forewarning is not explicitly tested in the law experiments, but overall those experiments lend support for open, frank confrontation.

The data not only counsel in favor of greater openness about negative information, but also augment the conventional wisdom about why volunteering negative information works. Inoculation, for example, boosts credibility and gives the advocate the opportunity to reframe negative information.[355] Fact-finders expect that knowledgeable experts will be aware of and address both sides of an argument. This aspect of credibility—demonstrating honesty and intelligence—has long been recognized by persuasive legal writers.[356]

However, volunteering weakness in a case does more than boost credibility. It starts a mental and emotional process in the audience that allows the audience to resist both similar and novel arguments from the other side. Because inoculation works by stimulating the message recipient to develop her own arguments against attacks on the message, inoculating against negative information can potentially help the advocate with arguments she has anticipated *and* arguments that she has not.[357] Inoculation also can stop the audience from engaging in a counter-argument process that can be a common backlash to an unduly positive one-sided argument.[358] While this aspect of the inoculation effect has not been tested in the legal arena, the strength of the nonlegal studies highlights a relevant area for future research.

Moreover, not only does volunteering negative information provide a shield against attacks, it also causes the audience to alter

354. *See, e.g.*, BEAZLEY, *supra* note 32, at 79 ("You need not highlight your opponent's arguments" by reiterating them.).

355. STIFF & MORGEAU, *supra* note 72, at 290-92.

356. SMITH, *supra* note 31, at 101-02.

357. *See supra* notes 132-37 and accompanying text.

358. *See supra* Part III.B.

its interpretation of the negative evidence to be less damaging. Message recipients do not expect advocates to offer unfavorable information, so when advocates do offer it the message recipients resolve their confusion by making the evidence more favorable.[359] Sponsorship theory is partly right when it notes that jurors do not expect advocates to offer negative information.[360] But the science demonstrates that jurors do not hold the offer of negative information against advocates as supposed by sponsorship theory, but rather reinterpret it in the advocate's favor.[361]

Thus, the science shows that a direct and frank treatment of negative information can have benefits beyond what even its proponents in law would argue and that it is particularly important in law, where the audience is trained to be skeptical and engage in the counter-argument process. While we might associate skepticism more with judges than with jurors, it is certainly arguable that jurors have become more skeptical of attorneys as the cultural perception of attorneys as "hired guns" has become more prevalent.[362] Indeed, even sponsorship theory depends on the belief of its authors that jurors view trial attorneys with great skepticism, even to the extent of discounting any positive information the attorney offers in support of his client's position.[363] In contrast to sponsorship theory, however, the science demonstrates that volunteering weakness is the more effective way to deal with that skepticism.

In terms of structure, the data also confirm the conventional wisdom on how to insert negative information once the decision has been made to disclose it. Weaving negative information into the positive message is the most effective organization. This lends considerable support to the technique of burying negative information within positive information, or juxtaposing negative information with positive to neutralize it.[364] There is some support for leading with positive and following with negative information, but, not surprisingly, no support for leading with negative and following with positive.[365]

In sum, volunteering unfavorable information can work as a sword (to boost credibility, to transform from negative to positive)

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359. *See id.*

360. *See* KLONOFF & COLBY, *supra* note 4, § 2.02(1).

361. *See supra* Part III.B.

362. KLONOFF & COLBY, *supra* note 4, § 2.02(1).

363. *See id.* § 2.02(2)(b).

364. BEAZLEY, *supra* note 32, at 186 (deemphasize contrary authority by placing it in the middle of a point-heading section); *id.* at 148-49 (juxtapose bad fact with good one to neutralize it); MAUET, *supra* note 37, at 114 (bury bad fact in middle of direct examination and make it part of the story).

365. *See supra* note 364.

and a shield (to resist attack). A powerful tool, indeed. Beyond the big picture, however, are details that provide a deeper understanding of negative information and its effect on the audience. There are a number of caveats to the general rule of volunteering weakness, and the advocate should be aware of these so that she can make informed and nuanced decisions about when the general rule may not be the most effective course of action.

B. Caveat One: Volunteer Weakness Only if Attack is Certain

Virtually all of the studies presume that the opposing argument will be made by the opponent. The studies therefore tell us only that volunteering negative information is better than a one-sided, wholly positive message *if* an attack is made.[366] Only one study in the legal arena tested "stealing thunder" when no use was made by the opponent of the negative information.[367] While that study showed that "stealing thunder" had a beneficial effect regardless of whether an attack was made, further study is probably warranted before generalizing from that experiment.[368]

Several other studies within the legal arena have shown the opposite—that if the attack never comes, volunteering negative information is actually harmful, even if it is directly rebutted. These studies show that the strongest position for the side vulnerable to negative information is not when that information is volunteered and rebutted ("stolen thunder"), but when there is no disclosure of the negative information by either side ("no thunder").[369]

While it is likely rare that a legal opponent makes no attack, a legal opponent might not, for many reasons, disclose a truly damaging piece of negative information. Often, even with the liberal discovery rules, opponents may not absorb the information or realize its damaging nature. So, even taking into account the "blanket" effect of inoculation, advocates are well advised to be wary about disclosing damaging information unless they are certain an opponent will raise it. After all, the inoculation studies show only that the rebuttal of any relevant negative information provides resistance to a variety of novel attacks; the studies do not suggest that the rebuttal must be of the *worst* information.[370] If disclosure of very damaging information does come, the advocate can always refute it at that time. Because the findings on the efficacy of preemptive versus post-hoc refutation are unclear, the decision to rebut damaging information when the

366. *See supra* notes 155-56 and accompanying text.

367. Howard et al., *supra* note 333.

368. *See id.*

369. Williams et al., *supra* note 48, at 601, 604.

370. *See supra* notes 132-37 and accompanying text.

other side discloses it—as sponsorship theory would advocate—is a supportable and legitimate strategic choice in many instances.

C. *Caveat Two: Sometimes Post-Hoc Refutation May Be Better than Preemptive Refutation*

Unfortunately, most of the studies in the trial context tell us only the unsurprising fact that when a particular attack is certain, it is better to refute it preemptively than to ignore it.[371] This is not the most relevant information for the legal advocate. Only in the direst circumstances will legal advocates let an attack pass with no response. The key question is whether to raise the negative information preemptively, before your opponent, or make a post-hoc refutation after the attack comes.

However, there is limited research comparing the effectiveness of preemptive refutation with post hoc refutation. The only trial study to do so demonstrated that preemptive refutation ("stealing thunder") was more effective.[372] Here again, however, preemptive refutation was *less* effective than the "no thunder" position—where the negative information was never raised—which reaffirms that advocates should be quite certain the attack is coming before volunteering the information. Moreover, the certitude of this one study in the trial arena is undermined somewhat by inoculation studies conducted outside the legal context. These studies suggest a more complicated picture of preemptive and post-hoc refutation and indicate a need for more testing in the legal arena.

The studies outside the legal realm find that preemptive and post-hoc refutation work with differing degrees of effectiveness for character and issue attacks. In studies where character was the subject of the attack message, preemptive inoculation was more effective than post-hoc refutation regardless of audience belief. This is consistent with the trial study in which preemptive disclosure helped the expert whose credibility was attacked by his prior inconsistent testimony.[373] However, in studies where the issues or merits of the message were the subject of the attack, inoculation was more effective than post-hoc refutation only with people who already had a strong position, but was actually *less* effective than post-hoc refutation with people who had weaker beliefs.[374]

The data suggest that a lawyer's feel for the position of the audience is an important variable when deciding whether to depart from the general advice of volunteering negative information. If the

371. *See supra* notes 329-32 and accompanying text.

372. Williams et al., *supra* note 48, at 603-07.

373. See *id.*

374. *See id.* at 605-06.

audience seems strongly favorable or hostile, inoculation is the best strategy.[375] On the other hand, if the audience seems neutral or more weakly affiliated, post-hoc refutation may be better if the anticipated attack is on the merits, but inoculation is better if the anticipated attack is on character.[376]

The varying power of inoculation depending on the beliefs of the audience, as well as inoculation's roots in cultural truisms, suggests that, if possible, lawyers arguing before judges should carefully research the judges for clues about the attitudes of the judges on the issues raised by the case. This can include examination of the judge's prior opinions or scholarship, any public statements on a particular issue, or the judge's employment prior to his elevation to the bench. If discernable, the leanings of the bench on a particular issue can make a difference in the decision to inoculate or not.

In the jury trial context, identifying the attitudes of the jury is a bit trickier. The attorney can rely on her recollections from voir dire if she wishes to inoculate in her opening statement, or on her instinct about the way the case is proceeding if inoculation will occur during examination of a witness. Again, inoculation is more effective in most situations, so if the advocate is unsure, inoculation should be the default. But if the advocate has a sense of the audience and is divided about the advisability of disclosure, the data suggest that there are times to deviate from the default response.

D. Caveat Three: Volunteer Weakness Only If You Can Directly Rebut It

Moreover, the message sidedness studies suggest that, overall, adverse information should only be addressed if a refutation of the adverse information is possible.[377] These studies are complicated by some confusion over the concept of refutation. When the science refers to refutation, it usually means a very direct negation of the adverse point, such as a direct attack on the merits or on relevance.[378] This would be the equivalent of arguing that a negative fact is simply not true or is not relevant to the issue, or arguing that an adverse authority is inapplicable or not actually adverse. For instance, "You may hear that the plaintiff was drinking, but his drinking is irrelevant to this dispute," or "While the *Jones* case has some facts in common with the current case, it is distinguishable on the key relevant facts." It is with these types of negation that the persuasive advantages of two-sided messages are clearest.

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375. *See id.*

376. *See id.*

377. *See supra* Part III.A.

378. *See id.*

In fact, the research clearly prescribes a strategy of preemptive refutation *only if* the unfavorable information can be directly negated. The research shows that two-sided refutational messages are superior in terms of persuasive effect to one-sided, but that one-sided are superior to two-sided nonrefutational messages.[379] This is consistent with the inoculation studies as well.[380] (Again, not entirely surprising—if the information cannot be directly refuted, it is best not to volunteer it.) The social science is borne out by the trial studies, which tend to find that the "no thunder" (weakness is never raised by either party) scenarios had better outcomes than the "stolen thunder" (volunteering weakness) scenarios.[381] So, if the advocate either has no good answer to the negative information *or* has reason to believe that opposing counsel may not raise the information, then the best strategy may be to withhold the information and risk having to make a post-hoc refutation. This aspect of the message sidedness research, particularly combined with the inoculation studies on post-hoc refutation, gives a small boost to the advocates who counsel against volunteering information, such as the proponents of sponsorship theory.

But, the research is less clear about the effectiveness of the kind of less direct refutations that are the "meat and potatoes" of most legal advocates. While it certainly happens, lawyers cannot count on always being able to directly negate a bad fact or directly refute an adverse authority. Much of the lawyer's arsenal for dealing with bad facts and law involves subtler methods. For example, lawyers who cannot directly negate a bad authority may reframe the question to render the authority less relevant[382] or may read the authority broadly or narrowly to support their view.[383] Lawyers seeking to deal with bad relevant facts may juxtapose them to more positive facts in order to blunt their force.[384]

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379. *See supra* notes 93-95 and accompanying text.

380. The one study in the legal context that found framing to be unnecessary to the "stolen thunder" effect conflicts with this, but the authors of that study acknowledged that their "framing" strategy might have been ineffective. Dolnik et al., *supra* note 287, at 275.

381. *See supra* notes 248-71 and accompanying text.

382. For excellent examples of some of these techniques of argumentation, see generally Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 376 (1996) (suggesting that where facts are not helpful, advocates should change "the characterization" of the argument).

383. *See, e.g., id.* at 383-85 (describing the expanding or contracting universe); SHAPO ET AL., *supra* note 35, at 226-27.

384. As an example, in a breach of contract case involving a former employee's violation of a noncompete clause, the former employee might note, "Although Acme competes directly with Carrolton in the three prohibited counties, the competition extends only to three product lines." *See* EDWARDS, *supra* note 54, at 194; *see also*

The research on subtler methods of refutation is both contradictory and limited. Sometimes, messages like "Crick Beer, the price is premium but the *net result* remains superior drinking pleasure" are better than purely positive messages—and sometimes they are not.[385] This finding suggests that less direct refutational strategies, particularly those that seek to "overwhelm" negative information with positive, are riskier than direct refutation, but can sometimes work. This leaves the advocate with a difficult choice when, for example, the advocate cannot directly refute a negative fact, but can argue that the negative fact is outweighed by positive facts. Thus, a strategy along the lines of "It may be true that my client was drinking, but he was not driving recklessly and did not violate any traffic laws" is left uncertain by the science. Moreover, there is a substantial gap in the science regarding the subtler techniques of refutation and reframing that are frequently employed by lawyers.[386]

When the available refutation is indirect, it may be better to simply argue the good facts and take the chance that the negative fact might not be raised (and even if it is, post-hoc refutation is still available). Similarly, in a brief, attempting to outweigh a negative authority with other positive authority may or may not be a winning strategy when compared with simply pushing a positive version of the case. It is interesting to note that the indirect refutational strategies worked in written persuasive messages but not in the televised advertisements. This might suggest that subtler refutation will work in a written brief, but perhaps not in a trial where, as on television, the message is conveyed verbally.

E. Caveat Four: The Credibility Advantage May Depend on a Variety of Factors

Although not the only reason, credibility of the message source is certainly an important factor in deciding whether to volunteer weakness. Interestingly, however, the credibility boost associated with two-sided refutational messages is limited to messages about social or political issues. In the advertising context, the credibility advantage was greater with two-sided *nonrefutational* messages. In the advertising context, therefore, it seems that there are times when the message source may enjoy a credibility boost from being less aggressively refutational.

SHAPO ET AL., *supra* note 35, at 378 ("Although Paley's memory is poor, he is an excellent lawyer.").

385. Etgar & Goodwin, *supra* note 67, at 462 (emphasis added).

386. *See* Little, *supra* note 383, at 373; *see also* J. Thomas Sullivan, *Ethical And Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. MIAMI L. REV. 341 (2005).

How this translates to the legal realm depends on the perception of lawyers. Are we more like commercial advertisers, trying to sell our client's position like an advertiser sells a product?[387] Or are we more like social or political commentators who have strong opinions, but are not materially invested in changing audience position? If the proponents of sponsorship theory are believed, most see lawyers as "hired guns" who, like advertisers, have a strong bias that counsels viewing their statements with great skepticism.

However, if this aspect of sponsorship theory is accepted, the science contradicts the main tenet of the theory that the default position should be to withhold information. Rather, if lawyers are "hired guns," then the research indicates that a more balanced, scholarly approach that eschews strong refutation would raise credibility more effectively. On the other hand, if lawyers are perceived more as informed experts with strong opinions, direct and aggressive refutation might be the strategy more likely to raise credibility.

The data suggest a number of interesting points to the legal advocate. Sometimes, an advocate's credibility will be enhanced if she appears more balanced and less adversarial. If an advocate feels that she has lost credibility with her audience, she might consider changing course toward a less aggressively argumentative style, whether in briefing or in trial.

F. Caveat Five: Volunteering Weakness is Less Effective Where There is a Time Lapse and Where High Elaboration is Likely

Finally, both the weakening of the inoculation effect over time and the ineffectiveness of "stealing thunder" for high elaboration audiences casts a layer of doubt over the efficacy of volunteering negative information in many legal contexts, including persuasive writing. The inoculation response's decay certainly suggests that preemptive disclosure may be most effective for trials of relatively short duration and that inoculation may not be particularly useful in persuasive brief-writing. On the other hand, particularly in the trial context, if the attack is likely to come on cross-examination, shortly after the direct examination of the witness, the decay of inoculation is less of a factor.

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387. The analogy between lawyers and salespeople has been made in a number of contexts. *See, e.g.*, KLONOFF & COLBY, *supra* note 4, § 2.02(2)(b) (using example of vacuum cleaner sales to illustrate point about legal persuasion); NEUMANN, *supra* note 31, at 305 ("Persuading is selling, and judges have accurately been described as 'professional buyers of ideas.'") (quoting Girvan Peck, *Strategy of the Brief*, 10 LITIG. 26, 27 (1984)).