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Prevailing in the Face of "White Horse" Authority

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I. Introduction

Client walks through your door seeking to hire you in order to win a "must win at all costs" case. Your knowledge of the law and your preliminary research uncovers strong, directly-on-point authority– "white horse" authority– against your client's position. Do you turn the client away? Represent him or her, but warn him or her of the fruitlessness of the endeavor? Or do you have certain lawful, effective and ethical tools at your disposal that may be used to turn your client's frown upside down?

This paper explores the techniques and strategies that you may– and must not– use to maximize your client's change of success while maintaining– even enhancing– your reputation as an effective ***and*** ethical appellate attorney.

II. What is this "White Horse" Authority that you speak of?

A "white horse" authority is one that is, or appears to be, or is promoted as being, as directly, factually, and legally on point with the facts presented by your client's case, as is humanly possible. The best explanation of the phrase that I have found is contained in a 1993 opinion from the Texarkana Court of Appeals:

> The term white horse case has appeared in twenty-six published appellate cases in Texas. According to BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 577 (1987), this term (along with the terms horse case, gray mule case, goose case, spotted pony case, and pony case) means a reported ease with virtually identical facts, which therefore should determine the disposition of the instant case. At least one source reports that this term was coined in Dallas, Texas. According to what is probably an apocryphal story, around the turn of the century a Texas law firm had a case

> in which a white horse owned by the client's taxi service reared in the street, causing an elderly woman to fall and injure herself. The partner handling the case asked a young associate to find a case on point. The associate came back several hours later with a case involving an elderly lady who had fallen in the street after a taxi company's black horse had reared in front of her. When the associate took this case to the partner, the partner said, "Nice try, son. Now, go find me a white horse case."

Hilland v. Arnold, 856 S.W.2d 240, 242, n.1 (Tex. App.– Texarkana 1993, no writ).

III. Why is it Bad if "White Horse" Authority Exists Directly Against Your Client's Position?

Our common law legal system is based, in large part, upon the public's perception of the importance of *stare decisis*. Under *stare decisis*, once a court has laid down a principle of law as applicable to a certain set of facts, it will usually adhere to that principle, and apply it to all future cases, in which the facts are substantially the same, regardless of whether the parties and/or property at issue are the same. *Horne v. Moody*, 146 S.W.2d 505, 509 (Tex. Civ. App.– San Antonio 1940, writ dism'd) (cited in Black's Law Dictionary, 5th Edition at 1261)).

Just last week, a very divided United States Supreme Court considered the importance of– and lack of importance of– *stare decisis* to our system of justice. In *Michigan v. Bay Mills Indian Community*, 2014 U.S. LEXIS 3596 at 28-29 (U.S. May 27, 2014), Justice Kagan, writing for the majority, stated:

> *Stare decisis*, we have stated, "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U. S. 808, 827 (1991). Although "not an inexorable command," *id.,* at 828, *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop "in a principled and intelligible fashion," *Vasquez v. Hillery*, 474 U. S. 254, 265 (1986). For that reason, this Court has always held that "any departure" from the doctrine "demands special justification." *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984).

In response, Justice Thomas, in a dissenting opinion, wrote, in relevant part, as follows:

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