

The authority above establishes that there is conduct that may render the spousal communications privilege invalid. In the instant case, as in *Joseph v. James*, a defendant attempted by the privilege to prevent a spouse from testifying, despite the fact that the spouse had in some way assisted in the cover-up of the criminal act now being charged. *Joseph v. James*, by applying Nev. Rev. Stat. § 445.150 provides limitations to the marital communications privilege.

Therefore, no privilege should attach to the defendant in the instant case.

§ 12.2

Citing Dissenting Authority

Never, ever rely on a dissenting opinion. (But if you do...)

A researcher would normally refrain from relying on dissenting authority. After all, a dissenting opinion does not carry the weight of law. Occasionally, you may find yourself in a situation in which your side has little authority upon which to rely. When this happens, the author must sometimes decide whether to cite a dissenting opinion. There are at least three instances when citing a dissenting opinion may be considered:

Responding to the opposing party's reliance on a case

If the opposing party has cited a case and that case has a dissent that works in your favor it may be a good strategy to cite to the dissent. Also, if the opposing party has already cited a dissent, you may consider doing so. Of course, in that case it may be even better strategy to go to the majority opinion within the same case.

Distinguishing Facts

Citing a dissenting opinion may be a good strategy when the dissent provides commentary which demonstrates that, had the facts been different, the majority would have ruled differently. This is often a matter of the dissenting author providing more detail about why the majority came to its conclusion, indicating that if the distinguishing facts had been interpreted differently, the court would have ruled differently.

Literary Citations

Writers sometimes quote dissenting opinions for literary, rather than legal, reasons. Suppose, for example, that a judge makes a very eloquent comment on the history of free speech in a dissenting opinion in a case involving pornography. The case you are researching is about flag burning, like pornography a free speech issue. You may quote the dissenting opinion for literary value, but you probably should not rely on the decision or logic of the court to influence the decision in your client's case.

EXAMPLE | CITING DISSENTING AUTHORITY

In *Smith v. State*, 154 Or. App. 71, 961 P.2d 228 (1998), the Court of Appeals of Oregon ruled that an officer's inquiry regarding a firearm after a traffic stop was "within the latitude granted" to police officers to provide for their own safety under reasonable circumstances (*Id.* at 72, 961 P.2d at 229).

The dissenting opinion disagreed with the interpretation of the facts by the majority, holding that the officer was involved in appropriate circumstances to allow the inquiry. Had the majority agreed with this fact analysis, the decision of the court would most likely support the logic of the dissent as to application of the law.

Use with caution

A paralegal or lawyer could cite the above dissenting opinion while pointing out that the dissent was based on a disagreement of fact, not an argument of law. However, using dissenting authority is not a common occurrence.

Citing dissenting authority is often an indicator of desperation. It is admitting, to the opposing counsel *and to the court*, that your case is coming from a point of weakness. Be careful when citing a dissenting opinion.