

“A law-trained mind will not blindly adopt the analogy without independently weighing it.”

YOU ARE IN THE BUSINESS OF SELLING ANALOGIES AND DISTINCTIONS

BY SARAH E. RICKS

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This fall, I created an exercise to directly address the trouble my students have had in grasping how best to analogize and distinguish the key facts from decided cases, a problem both in objective writing in the fall and in persuasive writing in the spring.

The students readily recognize the persuasive value of a legal analysis that incorporates explicit analogies to the facts of decided cases, even early in the fall semester. Most students also are able to make verbal comparisons and contrasts between the facts of the client’s case and the facts of a decided case.

But while my students grasped the importance of drawing explicit analogies to and distinctions from decided cases, they had trouble expressing them in writing. Many thought that by simply juxtaposing an explanation of the law alongside their clients’ facts, they were communicating explicit analogies and distinctions. Others understood that, to draw an explicit analogy to a particular case, the writer should mention that case by name, but then failed to do more than that, leaving the reader scratching her head as to what fact in the decided case was being compared to what fact in the client’s case. Despite doing the hard work of mentally analogizing and distinguishing decided cases, students were failing to plainly communicate those comparisons and contrasts to the reader.

To help the students better communicate the analogies and distinctions they needed the reader to understand, this fall I created an in-class handout and exercise, breaking down the process into incremental steps. The exercise is equally adaptable to persuasive writing.

The Business of Selling Analogies

I told the students that, while no two cases were alike, two situations may be analogous and that their job was to persuade the supervising attorney that a court was likely to view the client’s facts as more similar to certain decided cases and less similar to other decided cases. To do so would require the students to draw analogies, such as “the apple in Case A is analogous to the tomato in Case B because both are red.” I used a market metaphor: “You are in the business of selling analogies and distinctions. Your job is to get the busy partner, and ultimately the court, to buy your analogy to a case and to buy your distinction of a case.”

In class, I walked them through the best way to sell the supervising attorney an analogy to a decided case, and ultimately, to sell the court the same analogy. First, in the explanation of the law, assure the supervising attorney that the decided case the student will later analogize to is binding legal authority. Otherwise, the court will not be constrained to follow it. (While analogies to nonbinding law will sometimes be necessary, for this exercise I wanted to focus students on the best source of analogies and the surest way to get the supervising attorney to buy the analogy.)

Second, again in the explanation of the law, assure the supervising attorney that the fact the student wants to analogize to was a key fact in that decided case. If the fact was not outcome determinative in the decided case, then neither will the presence or absence of that fact in the client’s case affect the outcome. Third, when applying the law to the client’s facts, give the supervising attorney sufficient information to permit him or her to independently evaluate whether the fact from the decided case really is similar to the fact in the client’s case. A law-trained mind will not blindly adopt the analogy without independently weighing it.

Keeping in mind that analogies must be explicit, I then asked the students to look at three attempted analogies to see if they could easily tell what analogy the attorney was trying to sell to the busy partner (and ultimately, the court). Because I wanted the students to focus on a single new skill, I chose a legal analysis the students already knew very well:

- Like the unattached garage in *Picaroni*, which was separated from the house by a walkway, here the trailer was separate from Ms. Peluso's main house.
- Like *Picaroni*, here the trailer was separate from Ms. Peluso's main house.
- Here, the trailer was separate from Ms. Peluso's main house.

The students easily grasped that the first analogy was superior because it explicitly equated the trailer to a specific fact in the decided case. That helped build the students' confidence. They easily understood that the second equated the trailer to some unspecified fact in *Picaroni* and that the third example drew no analogy at all but left it up to the reader to figure out how the law applied to the client's facts. We called the last example the "Happy Hour" analogy. That is, the message communicated to the busy partner was "Hey, Happy Hour's about to start, so this junior attorney can't be bothered to spend any more time on this memo."

I then shifted the students' attention to what information was necessary in the explanation of the law to set the stage for explicit analogies in the application of the law to the client's facts. Again using the market metaphor, I told them the busy supervising attorney is in the market for analogies between the client's facts and the key facts in binding legal authority. Because the court is the ultimate decision maker, and the court is constrained to act consistently with binding law, the supervising attorney is most interested in demonstrations of how the client's case is similar to critical facts from authority that will bind the court.

I had the students examine three explanations of a legal principle they knew well, asking each time whether the explanation made it easy to grasp whether the case discussed was 1) binding legal authority and 2) whether the facts mentioned were the key facts that determined the court's ruling. The first example did both. The second example provided the holding shorn of key facts, so the reader could not tell why the court reached its ruling. The third example provided many irrelevant facts from the case but again left out the outcome-determinative facts, leaving the reader in the dark as to the reasons for the court's ruling.

Again, the students' confidence was increased by their easy grasp of the superior explanation of the law.

The Business of Selling Distinctions

We then turned our attention to "How to get the busy partner to buy your distinction of a binding legal authority." I explained the focus was on binding law because the most efficient way to distinguish nonbinding law is to point out that it is not binding. Because the steps were very similar to those necessary for persuasive analogies, the students' confidence grew.

First, in the explanation of the law, assure the busy supervising attorney that the fact from the decided binding authority that the student wants to distinguish was a key fact in the decided case. As with analogies, if the fact was not critical to the outcome in the decided case, then neither will the presence or absence of that fact in the client's case affect the outcome. Second, when applying the law to the client's facts, give the supervising attorney enough information to independently evaluate whether the fact from the decided case really is different from the fact in the client's case.

I told them the busy supervising attorney is in the market for distinctions between the client's facts and the key facts in binding legal authority. As with the analogy exercise, I had the students examine three explanations of a legal principle they knew well, asking each time whether the explanation made it easy to grasp whether the case discussed was: 1) binding legal authority and 2) whether the facts mentioned were the key facts that determined the court's ruling.

The first example did both. The second example provided the holding but no key facts, so the reader could not tell why the court reached that holding. The third example provided irrelevant facts from the case but left out the key facts, again failing to explain the reasons for the court's ruling. While the focus was on laying the groundwork for the later distinction of the cases, these examples also demonstrated the importance of thesis sentences in explaining the law.

Keeping in mind that distinctions, like analogies, must be explicit, I then asked the students to look at three attempted distinctions of

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the case just explained and asked if they could easily tell what distinction the attorney was trying to sell to the busy partner:

- Unlike the attached garage and enclosed patio in *Cook*, which qualified as integral parts of the main house because they were akin to additional rooms, here Ms. Murray’s trailer does not share any door with the main residence, even when the trailer is parked in the driveway.
- Unlike *Cook*, here Ms. Murray’s trailer does not share any door with the main residence, even when the trailer is parked in the driveway.
- Here, Ms. Murray’s [trailer] does not share any door with the main residence, even when the trailer is parked in the driveway.

The students easily identified the first distinction as most persuasive because it explicitly contrasted the trailer with specific facts from the decided case. They readily understood that the second contrasted the trailer to some unspecified fact in *Cook* that the writer did not bother to identify. They had no trouble seeing that the third example drew no distinction at all but left the hard work of applying the law to the reader. By then, some of the students were laughing at the hapless author of the third example.

Applying the New Skills of Selling Analogies and Distinctions

Then came the moment of truth: It is easier to recognize good legal writing than to create it. I had the students take out their copies of their own completed memos, which they had handed in but had not yet received back.

I asked them to look only at the section of the memo applying the most complex prong of the legal test and to highlight an important analogy that they had drawn between the facts of a decided case and the facts of the client’s case. They then asked themselves two questions: Does the analogy give the busy partner enough information to independently evaluate whether the fact from the decided case really is similar to the fact in the client’s case? If there are no case names in the application of the law, will the busy partner easily grasp what legal principles are being applied and

what their sources are? I heard groans, nervous laughter, and sighs of recognition in the room.

Keeping in mind the analogy they had highlighted, I then had them highlight the explanation of the legal significance of the fact they had analogized to in the application of the law. They then asked themselves three questions: Does the explanation of the law tell the busy partner that the decided case is binding legal authority? Does the explanation of the law clearly identify the fact you later analogize to as a key fact in the decided case? Does the explanation of the case include any unimportant facts that do not help the busy partner to understand why the court ruled the way it did? Again, sighs of recognition.

After the first time I taught this exercise, one student told me in an e-mail message that, until that class, he had not understood how best to draw comparisons between decided cases and his own case: “I think I was doing exactly what you mentioned in class—providing Piece A and Piece B, but not putting them together to create comprehensive Completed Puzzle C.” Another student came to my office to tell me she now realized the weaknesses in the memo she had just turned in. I think the exercise helped many other students reach the same point, which prepared them for the critical feedback on their memos that they were about to receive from me.

Finally, because the concept of explicit comparisons and contrasts is harder for students to implement in their own writing than it is for them to recognize in the writing of others, I repeated the self-editing portion of the exercise later in the semester, just before the students handed in their second memos.

Conclusion

I think this exercise helps students learn a core skill necessary for all legal analysis: extracting the governing legal principle from a case, explaining what key facts were critical to the outcome of the case, and then explaining how that governing legal principle applies to a new set of facts by explicitly comparing and contrasting their clients’ facts with the key facts of decided cases. Students seemed to understand that this is the same skill necessary to respond to the hypotheticals tossed at them in their doctrinal courses, and to appreciate having the process broken down into incremental, easily

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digested steps. Finally, students appreciated the self-editing process during class, which gave them both an objective tool for assessing whether an application of the law was as strong as it could be and a tool to help strengthen the analysis.¹

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¹ I have both a student handout version and a teacher's version of the above exercises, both of which I am happy to share if you contact me at sricks@camden.rutgers.edu.