

TEACHING STUDENTS TO MAKE EXPLICIT FACTUAL COMPARISONS

BY ANNE ENQUIST

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Writers' Toolbox ... is a regular feature of Perspectives. In each issue, Anne Enquist will offer suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles will share tools and techniques used by writing specialists working with diverse audiences, such as J.D. students, ESL students, and practitioners. Readers are invited to contact Professor Enquist at ame@seattleu.edu.

I particularly enjoy those moments in teaching legal writing when students see an intersection between writing and analysis. That's when students realize that the abilities to write well and think well are interwoven, like the warp and woof¹ of logical argument.

The interconnectedness of writing and analysis is well illustrated in the sentences students write comparing the facts of the analogous cases they discuss and their client's case. Students new to legal analysis often reveal their uncertainty about why they are discussing the facts of other cases by the tentative way they construct these sentences. Instead of making explicit factual comparisons, the novice legal writer is likely to start one of these sentences with something like "Like *Smith*, the defendant in the client's case ..."

This approach has at least three problems. First, merely mentioning *Smith* without more sends most readers scurrying back a page or two

to where *Smith* was discussed. The need to flip back is, at the very least, annoying to most readers, and it breaks up the line of thought the writer was developing. Second, the sentence has a basic precision problem. It is comparing a whole case, *Smith*, to a person, the defendant.² Third, and most importantly, "Like *Smith*, the defendant in the client's case ..." makes it the reader's responsibility to figure out what the factual similarity is between *Smith* and the instant case. What exactly is it in *Smith* that is analogous to the client's case?

Some students are fond of starting analogous case arguments with a sentence that begins "Like the defendant in *Smith*, the defendant in the client's case ..." or "Unlike the driver in *Lee*, the driver in the client's case ..." These beginnings are an improvement over the first "Like *Smith*" example because here at least the writer is comparing a defendant to a defendant and contrasting a driver with a driver. That lining up of one fact gives the reader a start at understanding the argument, but in most cases the writer has failed to state enough of the salient facts about the defendants or the drivers for the reader to see the similarities or differences.

Getting students to be explicit, to spell out exactly what is similar or different, is a crucial step toward getting them to realize whether the similarity or difference that they have identified is one that matters. Sometimes it helps if they make a parallel chart of the similarities or differences before they start writing sentences.

analogous case

defendants in *Smith*

allowed daughter's boyfriend

to use the family car to drive to a dance

boyfriend used car for a prank

and got into an accident

the client's case

defendants in the client's case (the Joneses)

allowed family friend

to use the family car to drive to work

friend used car for work-related errand

and got into an accident

“The interconnectedness of writing and analysis is well illustrated in the sentences students write comparing the facts of the analogous cases they discuss and their client’s case.”

¹ For those who have forgotten what "warp and woof" refer to, they are the intersecting yarns in cloth made on a loom. The warp refers to the lengthwise threads that are crossed by the filler woof, or weft, threads.

² Some authorities refer to this error as a faulty comparison. See, e.g., Morton S. Freeman, *The Grammatical Lawyer* 314 (1979).

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holding

family car doctrine does not apply
because
defendants’ permission limited to
driving to and from dance, not
prank
driver acted beyond the scope
of permission
defendants not liable

argument

family car doctrine should not apply
because
defendants’ permission limited to
driving to and from work, not
work-related errands
driver acted beyond the scope
of permission
defendants should not be liable

Now the trick is to translate the chart into sentences. Conventional wisdom recommends starting the sentence with the analogous case; after all, it is the precedent that the current case will be compared to or contrasted with, and it occurred first—literally—so starting with it follows chronological order.

The main point to convey to students, though, is that the reader will readily see the comparison if the writer matches the sentence structure in the first and second parts of the sentence. In the following example, the parallel parts are labeled A and A¹, B and B¹, and so on.

Of course students should not get the idea that they have to rigidly and mindlessly repeat the exact sentence structure in the second part that they used in the first part, but they should see that *some* repetition makes the comparison easier for the reader to follow. Moreover, the conscious use of the chart with parallel lists and repeated sentence structures should help students and their readers see further into the analysis. In fact, they might see some differences they had not noticed before. Once the facts in the example above are lined up, it doesn’t take a genius to see that driving a car as part of a prank is, arguably, not a natural extension of permission to drive to and from a dance and therefore not something the owners of the car should have anticipated when granting permission; but a work-related errand is, arguably, a natural extension of permission to drive to and from work and something the owners of the car may have anticipated when granting permission. (Yes, that last sentence used repeated sentence structure to help make its point, and it also demonstrates that the repetition can lead to overly long sentences, which is a problem we’ll address in a minute.)

Showing students multiple examples of how factual similarities and differences can be laid out in sentences underscores how sentence structure can be used to support meaning without suggesting

“Like the defendant in *Smith*, who allowed his daughter’s boyfriend to use the family car
A B
to drive to a dance, the defendants in the clients’ case allowed their family friend to use the
C A¹ B¹
family car to drive to work. The *Smith* court held that the defendants were not liable
C¹ D
because the driver acted beyond the scope of their permission. (cite) Their permission
E
was limited to driving to and from the dance; it did not extend to using the
F
car for a prank. (cite) Similarly, the Joneses should not be held liable because
G D¹
the driver acted beyond the scope of their permission. Their permission was limited to
E¹
driving to and from work; it did not extend to work-related errands.
F¹ G¹

to students that legal writing is merely a matter of plugging information into set formats. Below are a few more examples of comparing or contrasting charts and using “like” or “unlike” sentences.

Example:

defendant in *Sheldon* = Ms. Olsen (the defendant in this case)

used parents’ house ≠ used halfway house

for many activities ≠ for only a few activities

therefore house ≠ therefore halfway house

was center of domestic activity ≠ was not center of domestic activity

“Unlike the defendant in *Sheldon*, who used her parents’ home for many activities, Ms. Olsen used the halfway house for only a few activities. Therefore, unlike the parents’ home in *Sheldon*, which was a center of domestic activity, the halfway house in the instant case was not a center of domestic activity.”

Example:

driver in *Cook*, Whitner, = Ms. Foster (the driver in this case)

paid room and board = paid room and board

family’s adult daughter ≠ family friend

lived with parents ≠ lived with Nguyens

since death of husband ≠ while attending university

“Like the driver in *Cook* who paid for room and board, Ms. Foster also paid for room and board; however, unlike Whitner, who was the family’s adult daughter who had lived with her parents since the death of her husband, Ms. Foster was only a family friend who was living with the Nguyens while she attended the university.”

In the example above, the facts in both the analogous and instant case are virtually identical on one or two points but distinguishable on other points. In situations in which some facts are analogous and others are distinguishable, students can also use the sentence structure below.

“As in *Cook*, the driver in the present case paid for room and board; however, unlike Whitner, who was the family’s adult daughter who had lived with her parents since the death of her husband, Ms. Foster was only a family friend who was living with the Nguyens while she attended the university.”

The “As in *case name*,” structure should be used with some care. Consider the example below.

Example:

analogous case = **the client’s case**

Chea employee’s stress = Officer Wu’s stress (the employee in this case)

resulted from a series of incidents = resulted from three different incidents

Incorrect:

“As in *Chea*, Officer Wu’s stress resulted from three different incidents: the Aurora Bridge accident, the City’s failure to notify him about his exposure to HIV, and the WTO riots.”

The sentence above incorrectly says the employee’s stress in *Chea* also came from these same three incidents that caused Officer Wu’s stress.

Corrected:

“Like *Chea*, in which the employee’s stress resulted from a series of incidents, in the instant case, Officer Wu’s stress resulted from three different incidents: the Aurora Bridge accident, the City’s failure to notify him about his exposure to HIV, and the WTO riots.”

In some situations, students will need to list many facts in order to compare or contrast cases, and doing so in one long sentence would affect readability. For those situations, they should have some companion sentence structures in their repertoire.

Examples of companion sentences:

In *Cook*, because Ms. Whitner ate most meals with the family, had her own room in the family home, was assigned several family-related chores, and was included in the family holiday photo, the court held that she was “treated as a member of the family.” (cite) Similarly, because Ms. Foster ate three to four times a week with the Nguyens, shared a room with their daughter, and vacationed

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in Oregon with them, the court should decide that she was treated as a member of the family.

In *Cook*, the court noted numerous examples of how Ms. Whitner was treated as a member of the family: She ate most meals with the family, had her own room in the family home, was assigned several family-related chores, and was included in the family holiday photo. Similarly, in the present case, Ms. Foster can also point to numerous examples of how she was treated as a member of the family: She ate three to four times a week with the Nguyens, shared a room with their daughter, and vacationed in Oregon with them.

Interestingly, however, distinguishing facts often works best through a series of sentences with juxtaposed parts.

Example:

Cook is easily distinguishable from the present case. Ms. Whitner ate most meals with the family; Ms. Foster ate only three to four times a week with the Nguyens. Whitner had her own room in the family home; Foster shared a room with the Nguyens' daughter, but after October spent most nights at her boyfriend's apartment. Whitner was assigned several family-related chores, including cooking once a week and taking out the trash; Foster was never asked to perform any chores and was instead treated more like a guest. Whitner was included in the family holiday photo and wrote her own paragraph in the family Christmas letter; Foster was included in the Nguyens' Oregon vacation, but she paid for her own room, meals, and souvenirs. Therefore, although Ms. Foster was still living with the Nguyens at the time of the accident, the court is unlikely to find that Ms. Foster was treated as a member of the family.

Once students get the idea, it is fairly easy for them to come up with a variety of sentence structures for making factual comparisons. The examples above can open their eyes to some possibilities, but they will be even more receptive to the notion of explicit factual comparisons if they see a variety of examples written in a familiar context, such as their last assigned memo or brief. Once they have thought through how the facts are similar or different, they will be ready for that next important step: discussing whether the court's reasoning in the analogous case applies and whether that reasoning leads to a similar or different result for the case they are analyzing.

Although law students often complain about writing, many enjoy the “click” that occurs in their heads when writing and analysis work together symbiotically. The result—tightly woven arguments—is the fabric of strong legal analysis.

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