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When Working by Analogy, Elaborate the Comparison

Spell out your analogies to make them unassailable

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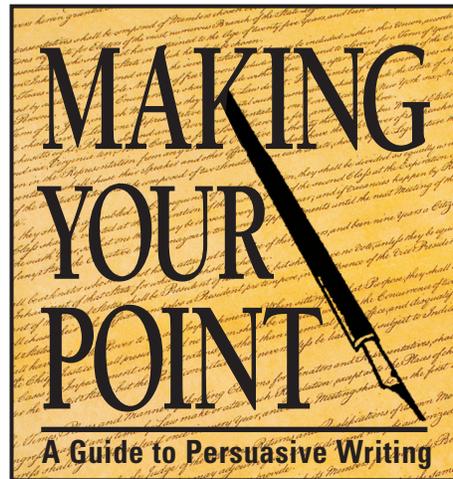
The facts of the cases on which you wish to rely are almost always different from the facts of your case, forcing you to argue by analogy. If the analogy is credible, you can profitably invoke *stare decisis*, the principle that prior rulings in similar cases control what is before the court. The tighter the analogy, the greater the pressure on the court to follow suit.

Suppose you represent a paint manufacturer. A batch of defective pigment ruined several vats of paint, and your client thinks the pigment manufacturer knowingly used substandard materials. You believe your client may have a cause of action under the state's Consumer Fraud Act for an unconscionable commercial practice.

You face two issues: (i) whether the Consumer Fraud Act protects corporations as well as individuals; and (ii) whether a manufacturer buying materials to be incorporated into an end product is a consumer under the Consumer Fraud Act, just as a purchaser of the end product at retail is a consumer.

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The first issue was resolved in your



favor in *Roe v. Jones*, which you will cite. The available precedent on the second issue is *Smith Air v. ABC Corp.*, in which a sole proprietor who manufactured air conditioning units was permitted to bring an action under the Consumer Fraud Act against a company that supplied defective generators for the air conditioning units. You want to analogize the defective air conditioner generators to defective paint pigment.

Many lawyers drawing this analogy would write something like the following in a summary judgment brief:

Just as a cause of action was found against the manufacturer of a defective generator as a

component of an air conditioner in *Smith Air v. ABC Corp.*, so should a cause of action be found against the manufacturer of defective pigment as a component of plaintiff's paint. Both products — the generators and the pigment — are components.

This is not bad, and kudos to the writer for using "defective" twice and for building parallel structure around the phrase "as a component of." But the analogy concludes prematurely. The adversary will contend that *Smith Air* is not precedential because the generators retained their identity within the air conditioning units, whereas pigment dissolves into paint, loses its identity, and cannot be viewed as a finished product. Arguably, if it can't be viewed as a finished product, then the person who buys it can't be viewed as a consumer.

This may be a distinction without a difference, but it's a predictable response by the pigment manufacturer. Your analogy can defuse this anticipated rejoinder if expanded to include the functions of the component parts so the reader can see that the essence of the analogy is in the function, not the physicality, of the component parts:

Smith Air is directly on point. Just as the manufacturer of the generator in *Smith Air* provided a component of the air conditioning unit, the supplier of

pigment provided a component of the paint. Just as the generator by itself was of no use to purchasers of the air conditioning unit, the pigment by itself is of no use to purchasers of the paint. Conversely, the air conditioning unit won't work without the generator, and the paint won't work without the pigment. That the pigment dissolves and the generator doesn't dissolve is of no significance. Both products are integral to the ultimate end product and useless apart from it. Both are supplied at arms length by independent vendors.

This paragraph flows easily into your internal summation:

An unconscionable commercial practice in the sale of a generator for an air conditioner is no different from an unconscionable commercial practice in the sale of pigment for paint. The point of *Smith Air* is that the purchase of component products is covered by the Consumer Fraud Act.

Don't wait for the reply brief to discuss functionality. You may be tempted to lay an ambush by drawing a light analogy based merely on the physicality of incorporation, teasing the other side into arguing that *Smith Air* is distinguishable because the generator does not lose its identity within the air conditioner, whereas the pigment dissolves into the paint. Then you would "really hit them" in your reply brief.

Don't outfox yourself. Make your strongest argument in your initial brief. If the opponent can't overcome your initial argument, the court won't even need to read your reply.

Opposing counsel may also try to cloud the issue by arguing that *Smith*

Air is not precedential because it involved a sole proprietor, not a corporation. This is an "apples and oranges" argument. The corporation vs. individual issue is irrelevant to the issue regarding component parts. Anticipating this argument, you could add a paragraph identifying the apples and the oranges:

The question whether the Consumer Fraud Act protects corporations as well as individuals is irrelevant to the issue whether the Act covers the purchase of component parts. A component is no less a product if purchased by a corporation than if purchased by an individual. In any case, coverage under the Consumer Fraud Act for corporations as well as individuals was established in *Roe v. Jones*.

Suppose the court in *Smith Air* didn't provide a rationale for finding a cause of action against the supplier of the air conditioner generators under the Consumer Fraud Act. The court said only, "The court sees no reason why the Consumer Fraud Act should not apply to the buyer of a component part just as it applies to the buyer of an end product."

Courts sometimes use the "see no reason" approach when they haven't fully analyzed the basis for their ruling. They are going on instinct, which is usually reliable, but a "see no reason" ruling can be frustrating to the winner, who has to unpack the reasoning on appeal, and infuriating to the loser, who is left with an amorphous target. Nothing stops you from completing the reasoning that the court curtailed.

You can explain that the public

policy supporting a cause of action under the Consumer Fraud Act for a defect in an end product applies equally to a defect in a component part. In both instances, the integrity of the transaction depends on the honesty of the seller. Though a manufacturer in the role of buyer may be more sophisticated than an individual consumer, the manufacturer is vulnerable to unconscionable conduct because, almost by definition, deceptive conduct negates commercial savvy.

Many writers would simply quote the court's "see no reason" language as if the declarative force of a statement by a court were enough. After all, if the court saw no reason, who are we to look for reasons? You can always find a reason if your equities are sound. You just have to think it through.

Puzzler

Which is correct — Version A or Version B?

Version A:

She is averse to having her drafts criticized.

Version B:

She is adverse to having her drafts criticized.

We are averse to things we find distasteful. The word describes a feeling. It comes from the same Latin root as "avert" — "to turn away or aside (as the eyes)." (*Merriam-Webster's Collegiate Dictionary*, 11th Ed.).

We are adverse to our adversaries — persons opposed to our interests. The word describes a position. Version A is correct. ■