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# Screen Your Metaphors for Possible Backlash

## Even apt comparisons can become 'two-edged swords'

**By Kenneth F. Oettle**

Metaphors and other creative comparisons can be powerful and efficient rhetorical devices, conveying an entire factual and moral matrix in a nutshell (not really a "nutshell," which is a metaphor). A good metaphor can win a case.

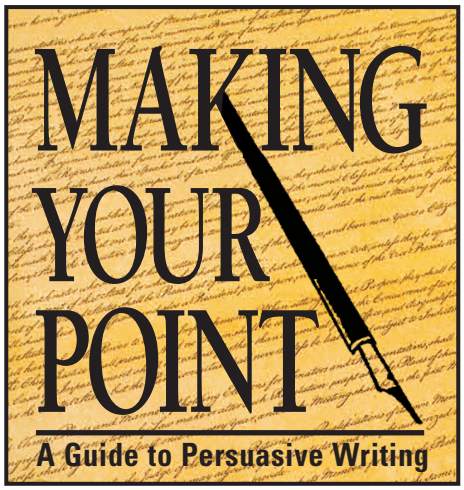
Conversely, a bad metaphor can lose a case. Metaphors are high risk, high reward weapons that attract immediate attention, like a machine gun in combat. If they don't hold up, your case may fall down.

For example, an associate wrote a brief in support of a motion to dismiss the complaint of an unlicensed broker seeking a commission on a real estate sale. A statute provides that persons who are not licensed as real estate brokers cannot collect a commission for bringing buyer and seller together. The brief began by saying that the broker was looking for a windfall.

Oops.

Windfall was not a good metaphor because it suggests the plaintiff would receive something for nothing. A windfall is "an unexpected, unearned, or sudden gain or advantage." *Merriam-Webster's Collegiate Dictionary*, 11th ed. 2003. Plaintiff wasn't seeking something for nothing. He was seeking something for something. He performed a service and sought to be paid for it. Unfortunately for him, a statute barred his recovery.

The assigning partner rewrote the opening to emphasize the public policy underlying the statute — to protect the public from misrepresentation, incompetence and sharp practice. The partner reasoned that the undisputed facts (no license) and the clear law (no license = no commission) needed little discussion and, therefore, that the writer's energy should have been directed at supporting the policy behind the statute so the court would feel better about enforcing the law as written.




The partner also felt that the windfall metaphor would have given the plaintiff an argument he didn't otherwise have: that he didn't want something for nothing, that he had provided value, and that it was the defendant who was looking for a windfall. The backlash from the imprecise metaphor could have given an apparent dead loser a rhetorical foothold and thus a fighting chance.

The windfall metaphor is an exaggeration because it overstates the defendant's position. The act of seeking something for nothing (seeking a windfall) is likely to be viewed (except perhaps by licensed brokers) as morally worse than having failed to obtain a broker's license. By invoking the windfall metaphor, defendant would have claimed higher moral ground than it deserved, and it would have purported to give the plaintiff a blacker hat than he deserved (another tired but functional figure of speech).

Generally, litigants invoke moral principles to show that the other side deserves to lose. "Deserve" is the set, and principles like "windfalls are bad" are subsets. ("You received a windfall, so you deserve to lose.") Our writer mistook the subset "windfall" for the set "deserve," figuring that whenever a plaintiff deserves to lose, the plaintiff is seeking a windfall. But the facts didn't fit.

I asked the writer why he chose windfall as his metaphor. He said that he felt it was powerful and that he didn't have a large number of metaphors from which to choose. Upon reflection, he agreed that windfall did not reflect the moral principle in play.

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**Mind Your Connotations**

Sometimes the problem with figurative language is more subtle. An otherwise apt comparison may deliver an unintended message if it emanates from the writer's personal agenda.

Suppose you wish to make the point that statements by an opposing expert are inadmissible as "net opinion," that is, they merely endorse a client's testimony, providing no independent reasoning. You contend that the expert shouldn't be permitted to add the weight of his credentials to the other side's case without explaining himself and thus exposing his position to criticism. You write the following:

> Conclusory statements by an expert that simply *bless* what the client says are inadmissible as net opinion.

Bless is figurative. Experts don't actually bless. They explain and opine. Bless suggests that the expert would be proffering an opinion as having value in and of itself, without supporting evidence, in the same way that a priest offers a blessing that has value in and of itself, without supporting evidence, because it invokes the parishioner's belief in a divine presence. The words may comfort, but the comfort is based on faith, not proof.

Your use of the word bless is ironic. It is intended to negate the expert's testimony by suggesting it is merely faith-based — good enough for a spiritual experience but not good enough for the courtroom.

The analogy is pretty good. The expert who delivers a net opinion is asking that his views be taken on faith, without factual support. The problem with using this comparison to demean the expert is that it inadvertently demeans the priest. By suggesting that the expert's words are empty, you suggest — though you don't mean to — that the priest's words are empty as well. Some readers may be offended, either because they are religious or because they don't like your taking a neutral party down a peg in an effort to elevate your case.

Am I being too picky? Maybe, but the writer who used bless to describe an expert's unsupported testimony acknowledged that he wasn't moved by rhetorical purposes alone. A little of his cynicism about religion seeped through. In other words, when he was taking a poke at the expert, he was also taking a poke at religion, unaware — until subsequent introspection — that he had done so. Unconsciously, he allowed a personal agenda to influence his choice of rhetorical device.

In the euphoria of creation, we are excited by our metaphors, and only reluctantly do we let them go. Before a brief takes final form, we need to evaluate all such comparisons, especially the putatively dispositive ones, because they draw as much fire as they are intended to deliver, and our case may suffer materially if they miss the mark or hit an unintended one. Comparisons need to be examined on both the macro level (is it apt, like "windfall"?) and the micro level (even if the comparison is on point, e.g., "bless," does it convey more than it should?).

## ***Puzzler***

How would you tighten and sharpen the following sentence?

> There is no dominant interest of the State of New Jersey mandating the application of New Jersey law to this contract.

Drop "there is" as unnecessary. Then let "dominant interest" command a verb of its own — "mandates." Verbs are more vibrant than "-ing" words (e.g., "mandating").

Similarly, the verb "apply" is crisper than the noun phrase "the application of," and "govern" is even stronger than apply. If you use govern, stick with its connotational match — "mandates" (governors issue mandates). If you use the softer verb "apply," you could (or not) use the softer verb "requires."

Reduce "interest of the State of New Jersey" to "state interest" to eliminate two prepositional phrases and the duplicative New Jersey.

> The new version:
> No dominant state interest mandates that New Jersey law govern this contract.
>
> Alternate version:
> No dominant state interest requires that New Jersey law apply to this contract. ■