Why Analogies Often Fail

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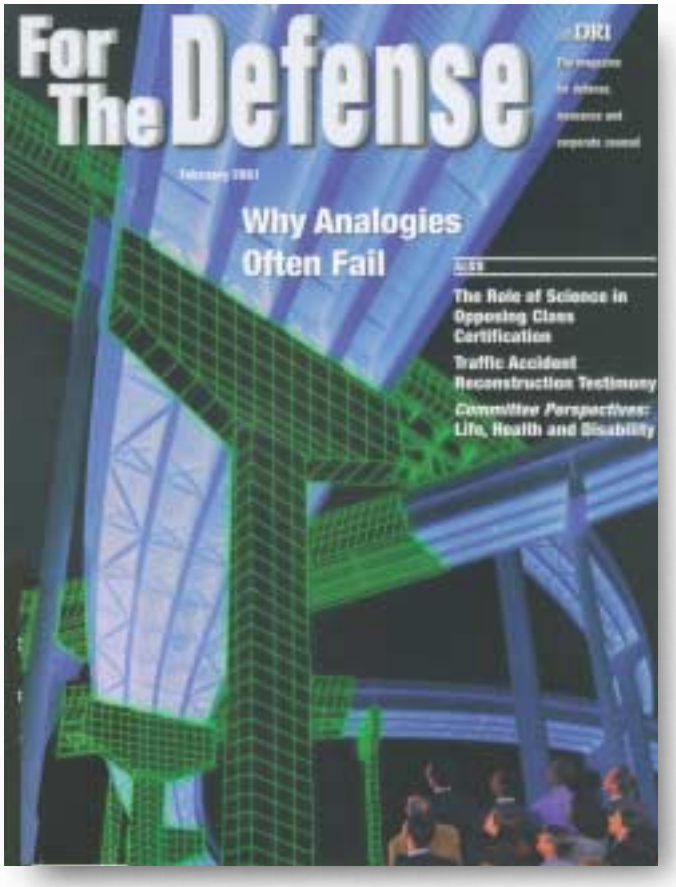

Analogies are one of the most prolific communication tools in the English language. You can find them in every field of human endeavor, from mathematics to religion, from politics to law.

Most lawyers believe that analogies are useful conceptual bridges, helping to communicate complex ideas to judges and juries in a more easily understood framework. But does this technique really work in the courtroom where persuasion is the ultimate goal? Are analogies really the powerful instruments of persuasion that most counsel believe them to be?

In approaching these questions, the authors and their colleagues could find no empirical research on the effectiveness of analogies in the courtroom. Hoping to fill that gap, the team reviewed more than two hundred mock jury deliberations which were preceded by comprehensive case summaries that included the use of at least one analogy. All types of cases were studied, including patent and trademark infringement, products liability, professional malpractice, employment, toxic tort, antitrust, shareholders' suits, and a variety of other business actions. The deliberations were reviewed to determine what impact, if any, the analogy had on the discussion amongst the jurors.

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What we found surprised us. In about 80% of the mock juries, we found that the analogy was simply ignored. Not one juror found the analogy compelling enough to use it to help persuade other jurors during the mock deliberations. When an analogy was brought up, jurors opposed to the presenter's view of the case usually ignored it completely, and went on to another issue. When the analogy was not ignored, one of two things usually happened: opposing jurors attempted to use it to their advantage, or they created their own alternative analogy, which they believed was a better analogy.

Jurors typically are not adept at creating their own analogies or even understanding others'. The well-thought-out analogy, presented to inspire clear thinking about the case, often ends up as part of a useless off-topic discussion that persuades no one. In fact, in our team's study of mock jury deliberations, there was only one instance in which a juror, upon hearing the case-related analogy, switched sides or substantially changed his or her opinion. We did, however, observe many lively arguments focused on which juror's analogy best fit the case. These discussions sometimes went on at length until someone in the group reminded the others that the case is not about either analogy. And *that* is one of the biggest problems with this linguistic device when applied to the art of persuasion— *it is not what your case is about*.

So why are analogies so popular when there is no empirical evidence to support their effectiveness? Why do so many lawyers we work with search for a perfect analogy for his or her case? To understand why this happens, consider when the urge to find an analogy is greatest: isn't it when you are having difficulty communicating the real problem? Isn't it when the complexity of the communication you need to establish with the judge or jury is so great it seems overwhelming? Under these conditions it is easy to understand why one would turn to some other problem or image to make life simpler, something more within the realm of personal experience.

There is nothing wrong with working with analogies if they help you understand your case better. Analogies can be inspirational. Sometimes they can help you understand the real problem you are dealing with, but they are unlikely to help you persuade a jury that you should win the case. Courtrooms are different from classrooms and after-dinner gatherings. While education and entertainment are important, ultimately the objective is to persuade, and this is where analogies fall short.

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There are several reasons why analogies usually fail to persuade. First and foremost, of course, is the fact that the content of the analogy itself is, by its very nature, not the concept or idea the lawyer is trying to communicate. It is only "similar to" the real target problem.

Analogies presented by trial lawyers are rarely perfect. Lengthy analogies are the most problematic. The more extensive the analogy, the less it will resemble the target problem. We have often seen opposing counsel completely tied up in a lengthy, complex analogy, creating mass confusion where he or she sought clarity.

To create effective analogies you must be brief—a phrase is better than a sentence—and you must connect with your listeners' experience, not yours. But that is much easier said than done. How many sports analogies have been presented to predominately female juries? Because many women are not particularly interested in sports, they may have difficulty understanding a sports analogy, and therefore comparing an aggressive supervisor to "blitzing linebackers sacking the quarterback" will fail to persuade. But it could be worse. Sports analogies could strike a sensitive emotional chord in some of the women whose husbands spend every weekend in front of the TV watching sports and ignoring her. When they hear your sports analogy, they think about their problem, not yours.

Bad analogies proliferate. You can find collections of the worst analogies ever heard, yet almost no collections of good analogies. There is always some difference between the analogy and the target problem that can be exploited in order to disarm the analogy's effectiveness.

Even seemingly good analogies can be easily deflected or used against you. We recently heard a plaintiff's attorney remark during closing argument in a medical malpractice case that "Doctors are much like ostriches when it comes to their errant colleagues and your verdict can force them to take their heads out of the sand," to which the defense countered with: "The only people with their heads in the sand are the plaintiffs who do not want to acknowledge that doctors are only human and that this doctor did everything he possibly could for a patient who was very seriously ill."

Judges are no different from jurors, although perhaps better able to turn your analogy against you. Witness what happened to Richard Schmalensee, an MIT professor who recently appeared before Judge Thomas Penfield Jackson in the Microsoft antitrust litigation. The federal government and 19 states accused Microsoft of unfairly wielding its market power to crush the competition. Appearing as the last witness for Microsoft, Schmalensee argued that the popularity of Microsoft's operating system does not mean that other companies cannot develop competing systems. "That's like saying I have a grocery store and you don't—and that makes it hard to compete with me in groceries." The judge, finding his analogous version of the case better, responded, "While your competitor is building his little neighborhood store, you are building a supermarket and your competitor has fewer and fewer customers because they are looking for products in your megamarket and your competition is always trying to play catch-up." Of course, neither the original analogy, nor the judge's extension, has much to do with the complexities of antitrust law as it is applied to the market for computer operating systems and related software. As vehicles of persuasion, it is safe to say that neither analogy was effective.

So does this mean that analogies should be abandoned altogether? Decidedly not. Freud once remarked that analogies prove nothing but they make us feel at home. So if they make you feel secure, if they help you understand your case and build your confidence, if they lend some compelling language and drama to grab jurors' attention, by all means present one or two. Just don't spend all your time developing that perfect analogy because there isn't one, and even if you find it, it probably will not be effective anyway. Every time you have the urge to analogize, instead realize that the time you spend trying to figure out an analogous problem is time that would be more profitably spent figuring out how to communicate the *real* problem, the problem that you need to successfully communicate if you are to convince the judge or jury and thereby win your case.

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