

# MAKING SOUND CASE ANALOGIES

## A mooting warm-up exercise<sup>1</sup>

- No two cases are exactly alike. But two situations may be analogous.
- To persuade a court to rule in your client's favor, you need to convince it that the facts of your client's case are more similar to certain decided cases and less similar to other decided cases.
- **You are in the business of selling analogies and distinctions.**
- In this exercise we will use the assigned precedent found on your Mooting Topics page and attempt to begin the process of drawing analogies to or distinguishing them.

### **I. Selling analogies**

The best way to get the court to buy your analogy to a decided case is to:

- assure the court that the decided case is binding legal authority (this is normally not an issue for us as we are using Supreme Court precedent);
- assure the court that the fact you want to analogize to was a key fact in the decided case; and
- give the court enough information to independently evaluate whether the fact from the decided case really is similar to the fact in your client's case.

### **A. What analogies are the most helpful for court?**

**Draw analogies between your client's facts and the key facts in a binding legal authority.**

Let's use the *Donnelly v. Lynch* case as an example. There the Court found that an annual Christmas display in the city's shopping district, consisting of a Santa Claus house, a Christmas tree, a banner reading "Season's Greetings," and a crèche (*Weihnachtskrippe*) did not violate the Establishment Clause because it was a passive display of religion that was not intended to advance or have the overriding effect of advocating a particular religious view (Applying the so-called Lemon Test). Key to the Court's ruling was the existence of secular displays surrounding the religious one and the view that the display's

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<sup>1</sup> Adapted from an exercise created by Sarah Ricks, Rutgers, The State University of New Jersey School of Law.

purpose was to celebrate a larger secular holiday whose origins were Christian but today has a larger meaning.

- Which facts here are similar to your case?
- Which are different?
- Are these similar and/or different facts central to the case?

## **B. What analogy are you selling?**

**Analogies must be explicit and obvious.**

- How is the Texas or Kentucky Ten Commandments display similar to the display in *Lynch*?
- Help the court visualize the similarities.
- Explain the content of the display and compare it to the one in *Lynch*.
- The goal here is to convince the Court that there was no improper religious purpose or effect by comparing your case to a case where the Court found that a display containing religious content did not advance religion.

## **II. Selling Distinctions**

The best way to get the court to buy your distinction of a binding legal authority is to:

- 1 assure it that the fact from the decided case was a key fact in the decided case; and
- 2 give it enough information to independently evaluate whether the fact from the decided case really is different from the fact in your client's case.

### **A. What distinctions are you selling?**

Make distinctions between your client's facts and the key facts in the binding legal authority. Remember, if the fact from the binding legal authority that you want to distinguish from your client's case was not key to the outcome of the decided case, noting the difference will not effectively distinguish your client's case from the decided case. Again using the *Lynch* case, opponents of the displays in Texas and Kentucky will need to distinguish this case:

Example – “Unlike the display in *Lynch*, the display in the McCeary County Court House . . . .”

- Here you allow the Court to visualize the display by describing it and then point out how it is different than the one in *Lynch*.

- You can also argue about intent and purpose, again by pointing to facts in the McCearry County case that indicate a different purpose than the one found by the court in *Lynch*.

**B. What distinctions are you selling?**

**Distinctions must be explicit and obvious.**

- Look carefully at the display in *Lynch*.
- What elements of it led the Court to conclude that the city did not intend to promote a particular religious view?
- What elements of it led the Court to conclude the display did not have the effect of advancing religion?
- Then figure out how elements of the display your case concerns are different, so different that they should result in the court concluding that the display either has the purpose or effect of advancing religion.

**Exercise**

- After our Improv exercise, you should now be very familiar with the facts of your case.
- Read the cases assigned as precedent. Determine whether they are helpful, unhelpful or both to your argument.
- Identify the central facts of the cases.
- Then start comparing these the central facts in your case for purposes of drawing analogies (meaning you want the Court to use the precedent) or making distinctions (meaning you don't want the Court to use the precedent).
- As a group debate each case, trying to convince each other why the case is or is not precedent.