

Law

• The Art of Appellate Advocacy
IRAC, SHMIRAC
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Special to The Daily Record
February 11, 2008

Today's column is about war, but not the war in the Middle East, as assumed by some of you who are probably also thinking, based on the title of this article, that I can't spell worth a damn and really wasn't kidding when I wrote that piece a year or so ago about my verbal SAT score being so low that even Ripley's didn't believe it. The assumption that today's discussion is about Iraq is understandable in light of the fact that this column has in the past occasionally strayed from the topic of appellate advocacy. Those wanderings have always been justified by some thinly veiled link to brief-writing tips and suggestions, but it would take an entire article to explain that link if today's subject was Iraq. So that's not the war that I'll be discussing today.

No, today's article involves a different kind of conflict and focuses on a weapon of mass destruction many of us first learned about in law school and now use in battling our adversaries in the fight to convince the appellate court to rule in our favor. That instrument of war is commonly known as IRAC, which stands for Issue, Rule, Application and Conclusion.

The typical way in which this weapon is engaged is, as its acronym suggests, something like this: The writer identifies the issue lying at the center of the dispute, discusses the rule that governs the resolution of the issue, engages in an analysis that applies the rule to the pertinent facts, and wraps everything up for the appellate court by stating that there is only one conclusion that the judges could possibly reach: namely, that you win and the garbanzo bean on the other side loses.

For many years I was a firm believer in IRAC and fought scores of battles with it in the legal arguments that I wrote. Most of those arguments were successful, which I attributed at the time to my IRAC weapon of choice. Of course, I now know that some of those cases could have been won by my dog Sparky, who, as much as I love him, is really not very smart and has a lot less gray matter than my other dog, Dusty, who has a particularly impressive ability in using his non-IRACian communication skills to manipulate humans into giving him treats that he doesn't deserve and doing other things that most self-respecting individuals would

never do. Which is my way of saying that IRAC is not all that it is cracked up to be.

My main objections to this method of legal writing are twofold. First, IRAC wastes valuable time that busy judges don't have much of to spare and that the brief-writer can ill-afford to squander. If you have done your job properly, the reader will know what the issues and applicable rules in your case are by the time he or she finishes reading the pre-argument portions of your brief. That's one of the objectives, among others, that you should have accomplished in writing the statement of the case, the questions presented, the statement of facts, and the summary of argument. You don't need to go through this exercise again by writing a page or more in the argument telling the reader that the issue for the court to decide is blumpf and the rule governing the disposition of that issue is shlumpf.

The other problem I have with IRAC is that it encourages the writer to engage in a neutral discussion of the law rather than a forceful and persuasive legal argument. Context is critical to any argument (checklist item No. 21), but beginning your venture with drawn-out explanations of the issue and the rule is a big step down a road that you'll have to get off at some point. Unless, of course, your plan is to chat rather than argue your case, which is fine for an ALR article or a gossip column but not an appellate brief.

Which brings me to the suggestion du jour to think about when writing and editing the argument section of the brief.

Checklist item No. 26: Use SHMIRAC, not IRAC. The SHMIRAC approach to legal writing is when you simultaneously apply, or shmush, the Issue, Rule, Application and Conclusion elements of the famous legal formula that we were taught in law school. Rather than waste the judges' time with a sluggish opening poisoned by inertia, come out of the gate swinging by applying all of these elements at once. The net effect of SHMIRAC is that you will be arguing your case from the beginning (checklist item No. 20), and will look much more like an advocate and much less like a pointy-headed law professor.

Not that there's anything wrong with pointy-headed law professors.

So, what am I talking about, you may ask? Instead of beginning an argument by telling the reader that "the central question that this case presents is whether the anesthesiologist's negligence was a superseding cause that relieved the surgeon of liability for the plaintiff's injuries," and following that up with a sentence or two about the superseding cause rule, and following that up with a sentence or two about how the rule should be applied and what conclusion the court should reach, argue succinctly that "the judgment against the surgeon should be reversed because the anesthesiologist's negligence constituted a new and independent force that broke the chain of causal connection with the original wrong." You can still utilize a lot of the legal information and verbiage called for by the IRAC approach, but using SHMIRAC forces you to argue from the beginning and craft a much more pointed discussion designed to persuade the reader.

So the choice is yours. Do you want to be pointy-headed? Or just plain pointed?

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