New Jersey Law Journal

VOL. CLXXXVIII – NO. 7– INDEX 528 MAY 14, 2007 ESTABLISHED 1878

Your Audience Has Changed Since Law School

Now your job is to show why you win, not what you know

By Kenneth F. Oettle

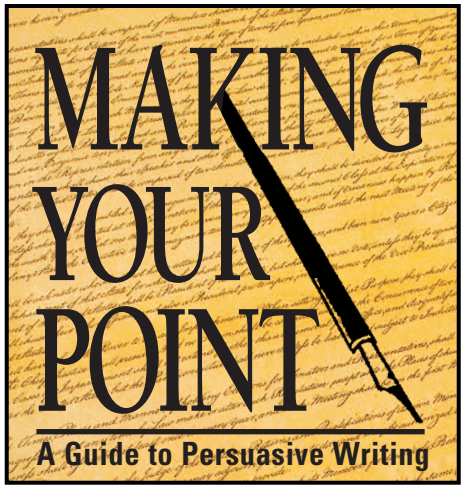
The "IRAC" format for presenting legal analysis ("Issue, Rule, Analysis or Application, Conclusion") is widely used in law school. It helps students learn to think like lawyers, that is, to identify issues, deduce the law by reconciling and distinguishing cases, and determine which facts trigger which legal principles. Paradoxically, an advocate who applies IRAC uncritically in actual practice may not be thinking like a lawyer.

In law school, the audience is the instructor. A student tries to persuade the instructor to award a good grade by showing mastery of the methods and the material.

In the practice of law, the audience and often the focus are different. Rather than grading you (though it is a kind of grading, I suppose), readers award a win or a loss (judges), continued employment and advancement (supervisors), or more business (clients). You write to persuade courts that your cause is just, supervisors that you are resourceful, thorough, and articulate, and clients that you are competent, aggressive, and on their side.

In practice, you aren't trying to persuade someone that you have learned what you were supposed to learn. You are trying to persuade someone to accept an idea and take action on it. Thus, the reliable law school protocol of presenting a legal test and analyzing how the facts meet the test, while useful, may have to be tailored.

Suppose your assignment is to write an argument point to establish that an issue decided in another litigation binds a party in your litigation under the doctrine of collateral estoppel. The issue in the other litigation was decided by partial summary judgment, and the other case is still pending.



The courts of your state apply a "five-pronged test" to determine whether collateral estoppel can preclude relitigation of an issue.

i. The issue must be identical;

ii. The issue must have actually been litigated in a prior proceeding;

iii. The prior court must have issued a *final judgment* on the merits;

iv. The determination of the issue must have been essential to the prior judgment; and

v. The party against whom collateral estoppel is asserted must have been a party or in privity with a party to the earlier proceeding.

The courts always state the test this way. Because you cannot invoke a final judgment on the merits, the test does not appear to be good for you.

Further research shows, however, that "final judgment" has been interpreted to include adjudications "sufficiently firm to be accorded conclusive effect," and partial summary judgment has been deemed such an adjudication, i.e., it can be considered "sufficiently firm."

How do you present this positive law while still respecting the standard articulation of the test? In the assignment from which this example is taken, the writer began the argument point by reporting that "courts apply a five-pronged test to determine whether collateral estoppel should preclude relitigation of an issue." The writer then dutifully set forth the five-part test, the third element of which is the requirement of a final judgment.

That was a mood killer. As a reader, I was immediately discouraged. I figured we would lose the collateral estoppel issue because we have no "final judgment on the merits."

The writer explained to me that she felt obliged to begin the standard test because it was repeated over and over in the case law — all five elements seriatim. She rationalized that she would

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The author is a partner and co-chair of the writing and mentor programs at Sills Cummis Epstein & Gross. Making Your Point, a Practical Guide to Persuasive Legal Writing*, a compilation of these columns published in 2007 by ALM Publishing, is available at LawCatalog.com. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.*

eventually clarify that a "final judgment" doesn't actually have to be final for collateral estoppel purposes; it can include interim rulings "sufficiently firm to be accorded conclusive effect."

The problem was that before I reached the good law, I had already concluded that we would lose the point. Having formed an opinion, I was invested in it, bound to it by the five-point test and by inertia — the tendency of a body at rest to stay at rest and a body in motion to stay in motion.

To break through the inertia, I had to tap some of the energy I had committed to the task of reading the draft. That was energy unnecessarily spent. I then expended more energy to overcome my suspicion that the writer might be reading the "sufficiently firm" exception too broadly just to please me.

But the loss of energy was a relatively minor concern. The news in the end was good. The more serious consequence of the writer's approach was that I didn't feel I was being served. I wanted the good news first, not in due course. Although I don't like to know how a TV drama comes out before I watch the show, I do like to know how the law comes out. I didn't feel the writer was attentive to my needs.

Because judges aren't computers, they also have needs. They have limited time and energy and want a smooth read. They want to understand the facts and the law, and they want to be shown the point up front, with support to follow. They don't want to be confused, and they don't want to be surprised. If any of this occurs, they will be irritated.

Worse, they will lose confidence in the writer, whose "ethos" (credibility) will suffer. An unnecessary show of respect for a five-pronged test that appears to hurt your case may suggest that you don't understand your case. If you are trying to foreclose an issue previously handled in a pending matter, why are you setting forth a test that requires a final judgment? The reader will be confused, at least initially, and may wonder if you are confused as well.

The problem is easy to solve. Just begin the argument point with the subset of the test that governs your situation:

> A determination of partial summary judgment is sufficiently firm to be considered a final judgment and thus to serve as a basis for collateral estoppel.

This is a true statement of the law. It's not how the courts typically state the test because it is only a subset, a relative rarity. But so what? You have deduced this subset as surely as you deduce the solution to your Sudoku puzzle. State the principle with confidence and then, having shaped the reader's mindset, set forth the rest of the test. In short, control the test and thus the reader, who will appreciate the guidance and will respect your sense of command.

Puzzler

How would you tighten and sharpen the following sentence?

> A psychiatrist found that the plaintiff had been injured by exposure to lead because of cognitive impairment.

Upon reflection, you know what the writer meant to say, but the words don't say it. The plaintiff wasn't injured "because of cognitive impairment." The impairment was the injury.

> The revised version:
> A psychiatrist found that the plaintiff had been cognitively impaired by exposure to lead. ■