8

Frame the deep issues at the outset so that you meet the 90-second test.

Quotable Quotes

"The best argument on a question of law is to state the question clearly."
—Rufus Choate, 1799–1859 (as quoted in Harley N. Crosby, "Mistakes Commonly Made in the Presentation of Appeals," in 3 Sydney C. Schweitzer, Trial Guide 1546 (1945)).

"Your business is to give the reader something of value he does not already possess. Do not bore him by putting in material he knows already, nor confuse him by including material that has no relation to your real point. Plunge in. An abrupt beginning is better than a dull one."

"[J]ust after being admitted to the bar, [I] was shocked when advised by S.S. Gregory, an ex-president of the American Bar Association—a man more than ordinarily aware of legal realities—that 'the way to win a case is to make the judge want to decide in your favor and then, and then only, to cite precedents which will justify such a determination. You will almost always find plenty of cases to cite in your favor.' All successful lawyers are more or less consciously aware of this technique. But they seldom avow it—even to themselves."

"In law the right answer usually depends on putting the right question."
—Estate of Rogers v. Comm'r, 320 U.S. 410, 413 (1943) (Frankfurter, J.).

"The wise man knows what the questions are. . . . The alternatives to asking answerable questions, and then making honest attempts to find answers to them, are clear—and disgraceful. We can ask no questions at all, either out of stupor or as a display of arrogance. We can ask questions that are misleading, or vague, or meaningless—to be answered, respectively, by mountebanks, the confused, and the very naive. Or, we may ask questions and then refuse to acknowledge them, as a gesture of fear, smugness, or irresponsibility."
"A lawyer who has never held a judicial office does not, I think, fully appreciate the importance of getting the principal facts and the main contention between the parties firmly fixed at the outset in the mind of the court. When he has done this, his labor is half over."


"The difficulty with the average advocate is that he succeeds primarily in confusing the court rather than clarifying the issues."

—Anonymous judge (as quoted in Frederick B. Wiener, Briefing and Arguing Federal Appeals 29 (rev. ed. 1967)).

"[T]he question presented in any case can be clearly and appealingly stated—or, contrariwise, unclearly and unappealingly."


"It may be argued that an essay involves so many complicated thoughts that no one sentence can be expected to summarize them all. But in most cases, and certainly in most brief essays, a failure to isolate the most important idea is usually an indication of sloppy thinking, not profundity."


"[I]t is unwise to allow the court to read a factual statement without first having presented the issues involved. The court should not be forced to guess, even for a moment, what questions it is asked to decide."


"Issues are the most important information attorneys give an appellate court. The courts decide issues, and determining what to decide is the sine qua non of any decision—an important truism. Rulings on the various issues in a case total up to a decision for the plaintiff or defendant . . . ."


"The issues should be stated so simply and so clearly that the judges will grasp them at once. Nowhere in the brief is clarity more important. Because the judges will normally examine both statements of the issues first, reading one after the other and comparing them, it is here that the brief writer makes an invaluable first impression."


"[E]fficiency does not mean the paper with the shortest length; rather, [it means] the paper that takes readers the shortest time to understand."


"Unfortunately, the judge does not possess the luxury of time for leisurely, detached meditation. You’d better sell the sizzle as soon as possible; the steak can wait."

"Start in the very first sentence with the problem in this case. Put it right up front. Start early. Don't bury it under a lot of verbiage and preliminaries."
—Nathan L. Hecht (as quoted in Bryan A. Garner, Judges on Effective Writing: The Importance of Plain Language, 73 Mich. B.J. 326, 326 (1994)).

"I like to see the most important issues framed up front. Of course, I expect to see what the writer considers her adversary's most vulnerable point; what I rejoice to see is a writer candidly recognizing what appears to the reading judge as her own most vulnerable issue and dealing with it."

"Readers are impatient to get the goods. And they resent having to work any harder than necessary to get them."

**Explanation**

Every brief should make its primary point within 90 seconds. But probably only 1% of American briefs actually succeed on this score. The ones that do are spectacular to read: within 90 seconds, the judge understands the basic question, the answer, and the reasons for that answer. These briefs are quick reads.

How does the brief-writer accomplish this? By cultivating a knack for framing issues well. To frame a good persuasive issue, you must:

- put it up front;
- break it into separate sentences, following a premise-premise-question form;
- weave in enough facts so that the reader can truly understand the problem; and
- write it in such a way that there is only one possible answer.

To do these things well, most lawyers must forget everything they ever learned in law school about framing legal issues. Forget the idea that you should begin with **Whether** . . . . Forget the notion that you should load all your points into one sentence (a format that ensures an unchronological presentation). Forget making the issue as abstract as possible.

What does a good persuasive issue look like? Take the following example:

As Hannicutt Corporation planned and constructed its headquarters, the general contractor, Laurence Construction Co., repeatedly recommended a roof membrane and noted that the manufacturer also recommended it. Even so, the roof manufacturer warranted the roof without the membrane. Now that the manufacturer has gone bankrupt and the roof is failing, is Laurence Construction jointly responsible with the insurer for the cost of reconstructing the roof?

Some briefs would take at least ten pages to deliver that information. And you wouldn't find this concise statement on page 10. Instead, you would find the tidbits within it strewn amid other facts throughout the
first ten pages. To glean the issue, the judge would have to read slowly with intense concentration. That's quite a demand to impose on busy judges. And yet brief-writers seem to make this imposition routinely.

A big part of the problem seems to stem from fear—fear that if the judge doesn't see the issue in the same way as the advocate, the advocate is sunk. "How do I know what the judge will latch onto?" the diffident advocate asks. "I won't state the issue in a single way. I'll talk about the case and the parties in a way that gives the judge several handles on the case. But I'm not going to marry myself to a single issue or set of issues." The result of this understandable fear, unfortunately, is that the advocate has no clearly framed issues—no theory of the case.

And the judge becomes frustrated. Only one thing matters to the judge: what question he or she is supposed to answer. "If I can figure that out," thinks the judge, "I'll be ready to decide the case. But until I find out what that is, I'm just grooping for it."

Framing the deep issue at the outset is a way of capturing the judicial imagination. Whoever does that in a given case is most likely to win.

I'm not much inclined to formulas, but if there's a good formula for beginning a court paper, I think it's this: "In deciding this [motion, etc.], the court need address only the following [two, three, or whatever number] issues: . . . ." What comes after the colon will be the most challenging thing you'll have to write: the deep issue.

What, precisely, is a deep issue? I've now used the term three times without defining it. Essentially, a deep issue is the ultimate, concrete question that a court needs to answer to decide a point your way. Deep refers to the deep structure of the case—not to deep thinking. The deep issue is the final question you pose when you can no longer usefully ask the following question, "And what does that turn on?" The best form it can take is that of the syllogism (see #11).

The first example below typifies the leaden, slow, unduly complex style of so many modern briefs. Try reading it for just 90 seconds to see what you can glean. Certainly you'll get something from it—a subject matter—but (unless you're a rare genius) you probably won't understand the issue.

Then turn to page 68 to see how the brief might have begun. There, the issue is fully comprehensible in less than a minute—probably much less. This example shows just what it means to spill the beans on page 1.

The example beginning at page 69 shows the deep issue at work in a summary-judgment reply brief. This example had an interesting result. Both sides had moved for summary judgment, but only Firemen's reply brief had showcased a deep issue up front. When the lawyers appeared for oral argument, the federal district judge announced that he felt prepared to rule already, having read the briefs: he would rule for Firemen's unless the FDIC's lawyers could show him why he shouldn't. They tried but failed. The judge then ruled for Firemen's, without any argument from Firemen's lawyers. The judge essentially adopted the deep issue on page 69 as his own.

When you're framing your issues, remember the great Herbert Wechsler of Columbia University. As his former student Jim Damis recalls, Wechsler said this about his U.S. Supreme Court briefs: "Half my time in writing a brief is spent framing the issue."
How Might That Brief Have Begun?

In the Supreme Court of Indiana

APPEAL FROM THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
MARION COUNTY, INDIANA

PLEBINOL CORPORATION,
Plaintiff-Appellee and Cross-Appellant,

vs.

THE TULL GROUP INC.

and

TULL AEROSPACE,
Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS
THE TULL GROUP INC. and
TULL AEROSPACE

Issue Presented

Plebinol's jury demand was for damages of nearly $1.1 million. But after the
demand, the intermediate court unanimously decided that $263,000 of the $1.1 million demand had been improperly submitted. Instead of offsetting this amount against the actual verdict, however, the court offset it against the inflated demand, as if the jury somehow knew to reject the improper portion. Shouldn't the improperly submitted amount have been offset against the verdict actually rendered?

Statement of the Case

In August 1985, Plebinol sued the Tull defendants (collectively, "Tull"), alleging that [etc.].
An Unusually Good Example

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE FEDERAL DEPOSIT
INSURANCE CORPORATION,

Plaintiff,

vs.

FIREMEN'S INSURANCE COMPANY
OF NEWARK, NEW JERSEY,

Defendant.

CIVIL ACTION NO. 9-7-25R7

Firemen's Reply to
FDIC's Summary-Judgment Brief

Preliminary Statement

The issue facing this Court boils down to a straightforward question of contractual interpretation:

Firemen's Insurance Company insured USAT against losses occasioned by real-estate documents that are "defective by reason of the signature thereon of any person having been obtained through trick, artifice, fraud, or false pretenses." Couch engaged in massive fraud when, with valid documentation, he sold USAT grossly undervalued mortgages. Does the mere fact that the mortgages were worth less than USAT thought mean that the sale documents were "defective" by reason of the signatures?

That is the overarching question that swallows all the subissues. In this reply, Firemen's seeks, in light of the FDIC's earlier brief, to develop this major issue and to treat the subissues as succinctly as possible.

Firemen's Reply to FDIC's Summary-Judgment Brief—Page 1

1. The language of the rider supports coverage only for fraud in the factum.

A. USAT doesn’t claim that the instruments are defective by reason of fraudulently obtained signatures.

There are two types of fraud. *Fraud in the factum* is “fraud as to the nature of the writing that one signs”—as when a blind person signs a will when misleadingly told that it’s just a letter. *Fraud in the inducement* refers to all other types of common-law fraud—that is, fraud “that induce[s] one to make an agreement,” such as lies that a given piece of land is arable when in fact it’s marshland. In mentioning fraud, the rider refers to defective instruments—i.e., “defective by reason of the signature thereon of any person having been obtained through trick, artifice, fraud or false pretenses.” No court has ever had any difficulty in deciding which type of fraud this rider refers to.³

USAT suffered a loss from fraudulently obtained real-estate loans—loans based on Couch’s misrepresentations about lien priority (fraud in the inducement). The

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2. Mellinkoff, supra note 1, at 258; see also Black’s Law Dictionary at 661 (defining the term as “(i) fraud connected with underlying transaction and not with the nature of the contract or document signed”).


Firemen’s Reply to FDIC’s Summary-Judgment Brief—Page 2
rider purchased by USAT covers only those losses resulting from real-estate loan documents that are defective because the signatures were fraudulently obtained (fraud in the factum). The FDIC stretches the language beyond recognition in claiming that the rider covers USAT’s loss.

For three reasons, it is difficult to take seriously the FDIC’s view that the rider should have used the phrase “fraud in the factum” in order to “provide clear notice to the policyholder of any limitations the insurer wished to impose.” First, few people—few lawyers, even—would know what the phrase “fraud in the factum” means. Second, as a drafting matter, the better practice is to say “in the plainest language, with the simplest, fewest, and fittest words, precisely what it means.” Third, the rider itself admirably captures the definition of fraud in the factum—so the Latinism was all the more undesirable.

Although the FDIC argues that the term “defective” should be interpreted broadly, it ignores most of the rider’s language: the loss must result from a defective document, and the cause of the defect must be a fraudulently obtained signature. The FDIC has not pointed—and cannot point—to any such defect.

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1 FDIC Brief at 11.
B. The language of the loan exclusion excludes a vast universe of fraud, whereas the rider revives coverage for the narrow, comparatively rare situation in which the fraud concerns the document itself and the signature.

Rather than repealing the exclusion wholesale, the rider merely carves out a minute exception to the exclusion—an exception relating to documents that are defective as a result of fraudulently obtained signatures.

1. The language isn't parallel: the loan exclusion relates to fraud in an entire loan or transaction, while the rider relates only to fraud in obtaining signatures on documents.

Although the FDIC argues that "[t]he phrase 'trick, artifice, fraud, or false pretenses' in paragraph 1 of the Rider is identical to the phrase appearing in [the loan exclusion]"6—as of course it is—the point is entirely irrelevant. Although that part of the phrasing is the same, the critical point is the changes that occur in other words:

<table>
<thead>
<tr>
<th>The Loan-Exclusion Language</th>
<th>The Rider Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>[L]oss resulting directly or indirectly from the complete or partial non-payment of or default upon any loan or transaction in the nature of a loan or extension of credit, whether involving the Insured as a lender or as a borrower, including the purchase, discounting or other acquisition of false or genuine accounts, invoices, notes, agreements or Evidences of Debt, whether such loan or transaction was procured in good faith or through trick, artifice, fraud, or false pretenses . . . .</td>
<td></td>
</tr>
<tr>
<td>Loss through the Insured's having, in good faith and in the course of business in connection with any loan, accepted or received or acted upon the faith of any real property mortgages, real property deeds of trust or like instruments pertaining to realty or assignments of such mortgages, deeds of trust or instruments which prove to have been defective by reason of the signature thereon of any person having been obtained through trick, artifice, fraud, or false pretenses . . . .</td>
<td></td>
</tr>
</tbody>
</table>

6 FDIC Brief at 14.

Firemen's Reply to FDIC's Summary-Judgment Brief—Page 4
The FDIC argues that the trick-artifice phrasing—which has been used to define fraud ever since Samuel Johnson wrote his *Dictionary* in 1755—"should be construed consistently, giving it the broadest possible interpretation to include all types of fraud, not just fraud in the factum." What the FDIC ignores, of course, is the uses to which tricks and artifices may be put: to induce someone to make an agreement (fraud in the inducement) or to deceive someone into signing a document that he or she believes to be something else (fraud in the factum). By its terms, the loan exclusion embraces the former (and more), while the rider embraces the latter.
Phrase your issues in separate sentences. Don’t start with *whether* or any other interrogative word.

Quotable Quotes

"[The following example] illustrates the problem of how to phrase an issue appealingly . . . .

1 Whether the owner of coupon bonds should include in his gross income the amount of coupons which he detached and gave to his son several months prior to maturity.

2 The taxpayer owned coupon bonds. Several months [before] maturity of the interest coupons he detached them and gave them to his son, retaining the bonds themselves. Is he relieved of income tax with respect to [these] interest coupons?

"Both are well-formulated questions. The second is probably a shade better because it stresses that the taxpayer retained the bonds and then asks on top of that whether he is relieved from tax . . . . Note also the change in the form of the question presented, from the one-sentence ‘whether’ form to the fact-statement-plus-question form, all in the direction of adding appeal."


"Such a formulation [i.e., the multisentence issue statement] has the advantage of being readable. It is just as concise as the one-sentence format and is much clearer."


"The purpose of using separate sentences . . . . is to help the reader. A one-sentence issue of 75 or so words is difficult to follow, especially when the interrogative word begins the sentence and the end is merely a succession of when-clauses—e.g.:

Can Barndt Insurance deny insurance coverage on grounds of late notice when Fiver's insurance policy required Fiver to give Barndt notice of a claim
'immediately,' and when in May 1994, one of Fiver's offices was damaged by smoke from a fire in another tenant's space, and when 10 months later, Fiver gave notice, and when Barndt investigated the claim for 6 months before denying coverage and did not raise a late-notice defense until 18 months after the claim was filed? [81 words]

"That's a muddle. Readers forget the question by the time they reach the question mark. Part of the reason is that the time is out of joint: we begin with a present question, then back up to what happened, and then, with the question mark, jump back to the present.

"The better strategy is to follow a more or less chronological order, telling a story in miniature. Then, the pointed question—which emerges inevitably from the story—comes at the end:

Fiver's insurance policy required it to give Barndt Insurance notice of a claim 'immediately.' In May 1994, one of Fiver's offices was damaged by smoke from a fire in another tenant's space. Ten months later, Fiver gave notice. Barndt investigated the claim for 6 months before denying coverage and did not raise a late-notice defense until 18 months after the claim was filed. Can Barndt now deny coverage because of late notice? [73 words]

"Instead of one 81-word-long sentence, we have five sentences with an average length of 15 words. And the information is presented in a way that readers can easily understand."


Explanation

The one-sentence version of an issue doesn't seem to be required anywhere, but it's a widely followed convention. And it's ghastly in its usual form because it leads to unreadable issues that are deservedly neglected. Either they're surface issues, or else they're meandering, nonchronological statements that can't be understood on fewer than three close readings. Besides, the common "Whether"-version isn't really a sentence at all—much less a question (hence the question mark is odd).

Although Wiener recognized even back in 1967 that the separate sentences had a way of "adding appeal," he didn't seem to recognize that the only way for legal issues to be predictably good is to use the multi-sentence version.

And my own example quoted above... how would most brief-writers state the issue? A sensible writer wouldn't want the 81-word version, but instead might produce something like this:

Whether Barndt Insurance can deny insurance coverage on grounds of late notice?

That's certainly readable, but it's uninformative. A reader would need to plow through a whole brief to feel comfortable answering that question. It's a classic surface issue.

But if the choice is between that one-sentence version and the 81-
word version quoted above, most would probably take the more reasonable 12-word sentence.

Anyone making that choice, however, ignores the true problem: we've simply started off with a miserably bad premise—that an issue must be cast in a single sentence. Where did we get this premise? It seems to come from a well-intentioned attempt to get issue-writers to be succinct. "By golly," the idea went, "we'll just force them to say it all in one sentence."

There are far better ways to enforce brevity (see #10). We shouldn't choose a method that impairs our ability to convey information clearly. You'll inevitably need to break down the sentences within the issue.

The Solicitor General's Office, which produces some of the best briefs to be found anywhere, often uses the multisentence approach, but not consistently enough. When the SG or any other advocate balls the issue up into one sentence, the facts and the law often get jumbled illogically. And the subject often gets separated from the verb. Here, for example, is an issue statement as the SG presented it to the U.S. Supreme Court in December 2001, with 65 words between subject and verb:

Whether an order of the National Labor Relations Board directing petitioner to pay back pay to an employee who was discriminatorily laid off for union-organizing activity in violation of Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(3), but only up to the date on which petitioner discovered that the employee was an undocumented alien not authorized to be employed in the United States, is a proper exercise of the Board's authority to remedy petitioner's violation of Section 8(a)(3) of the Act.*


Order is the subject; is is the verb. With the wide separation, it's hard for even the most tenacious of readers to remember what the subject is by the time the verb comes around. (See #34.) That's mostly a result of the straitjacketing one-sentence format. Notice what happens, though, when the same information is presented in two shorter sentences. It all unfolds more naturally:

The National Labor Relations Board ordered petitioner to pay back pay to an employee who was discriminatorily laid off for union-organizing activity, but only up to the date when petitioner discovered that the employee was an undocumented alien not authorized to be employed in the United States. Was this order a proper exercise of the Board's authority to remedy petitioner's violation?

That's an objectively worded issue because it includes only a factual premise and a question, without a legal premise (see #11). Many believe this is the most appropriate way of wording an issue in the Supreme Court—that is, not suggesting the answer. The point of the example, however, is to show how much more appealing—and how much more succinct—the same information is when put into a multisentence format.
You’ll find, quite consistently, that the one-sentence format causes an issue statement to degenerate. Try writing any of the following issues in a single sentence. Either you’ll be quite unhappy with the result, or else you’ll be satisfying yourself with a statement that’s less informative and less readable.

**Some Uncommonly Good Examples**

- In 1973, Archway manufactured and sold to Feldspar a hoist designed for attachment to a free-swinging trolley system. Thirty years later, without Archway’s knowledge, Trubster acquired the hoist, added a new motor, pulley, and cable, and integrated the hoist into a fixed elevator dumbwaiter system. Is Archway liable for injuries resulting from integration of its hoist into a system defectively designed by Trubster? [64 words]

- George Ratliff asks this Court to declare certain provisions of the Campaign Contribution Limits Act of 2003 unconstitutional or inapplicable to him. The Act does not go into effect until January 1, 2004. The Registry of Election Finance, which has the authority to enforce the Act, has not taken any action—or threatened to take any action—against Ratliff for violating the Act. Has Ratliff presented an actual controversy that would make declaratory relief appropriate? [75 words]

- Maryland law prohibits the discharge of effluent to which a permit-holder has added chlorine or chlorine-containing products. Zero Corporation, a permit-holder, is discharging unaltered municipal tap water that contains chlorine added by the city. Are these discharges legal under Maryland law? [44 words]

- The attorney-client privilege protects from disclosure only those communications that are kept confidential within the strict confines of the attorney-client relationship. Eagle Company disclosed communications to a third-party insurance broker after learning of Rush Insurance Company’s denial of coverage. Can Eagle Company now refuse to disclose these communications based on a claim of privilege? [57 words]

- Under New York law, a party to a contract may not bring a claim for fraud for unfulfilled promises of future performance made in the agreement. Forsythe Inc. and Stern Corp. entered into a buyout agreement. Forsythe alleges that representatives of Stern committed fraud by promising during negotiations and in the agreement that Stern would refer business to Forsythe after the buyout. May Forsythe recover for fraud in addition to its breach-of-contract claim? [75 words]

- Rule 25 requires a claim to be dismissed if an appropriate party is not substituted for a deceased party within 90 days after a suggestion of death is filed. Christine Black, the plaintiff, died on July 10, 2002.
Western Co. filed a valid suggestion of death ten days later. No party has been substituted for Christine Black, and it has been more than 90 days since July 15. Should Christine Black's claim be dismissed? [75 words]

- In August 2002, the Enclave signed a multiyear lease with Woodhill. Unknown to the Enclave, however, Woodhill had fallen into default on past-due assessments and, after the lease was executed, assigned its interest to the condominium association to avoid foreclosure on the building. Woodhill's successor now wants to cancel the lease even though the Enclave has fully complied with its obligations. May it do so, or is it bound by the lease terms? [74 words]

- Under Louisiana law, a corporation must include all debt in its corporate-franchise-tax base. Louisiana's highest court has long held that an advance is not debt if the borrower is not obligated to repay it. Bayou Boats receives advances on its corporate-owned life-insurance policies, but it has no obligation to repay them. Must Bayou Boats include the advances as debt in its tax base? [67 words]

- In California, a parent may reduce a child-support obligation by showing that the child earned money and that the extra money reduced the child's need for support. Ronald Borden proved that his daughter earned money on her paper route after school, but he did not show that it reduced his daughter's need for support. Is Borden entitled to a reduction in his child-support obligation? [66 words]

- Every Michigan lease inherently imposes a covenant of quiet enjoyment on the owner. Easy Rentals has a ten-year lease on a building owned by James Yost. Under the lease's condemnation clause, the owner is not liable to the lessee if the building is condemned. Yost wants to rebuild on the site and has asked the city to condemn the existing building. Does Yost's request to the city breach the covenant of quiet enjoyment? [74 words]

- U.S. patent law protects only "novel" inventions and expressly bars protection for any invention that is offered for sale more than a year before the inventor applies for the patent. Stephen Phillips developed a prototype of a laser rangefinder and offered to sell it to Largent, Inc. More than a year later, Phillips applied for a U.S. patent on the rangefinder. Is Phillips barred from obtaining the patent? [68 words]

- A criminal defendant has the right to be present whenever prospective jurors are questioned on voir dire. During voir dire in this murder case, a prospective juror was questioned by the judge at the bench. Williams was present and positioned so that he could hear the conversation. He asked to approach the bench while the prospective juror was questioned, but his request was denied. Did that denial violate Williams's right to be present? [73 words]

- Under California and federal law, workplace conversation of a sexual nature is not sexual harassment if the plaintiff invited the interac-
tion. Hannah Ferguson admitted that she routinely confided in Calvin Haskell, the only male among her 12 coworkers, and told him about her sexual activities. She took offense at Haskell's reaction to one story and sued the company for hostile-environment sexual harassment. Is the company liable because of Haskell's conversation? [71 words]
Limit your issues to 75 words apiece.

Quotable Quotes

"The way an issue gets to be stated can have fateful consequences. The attention of the judge—catalyzed by the striking written or oral phrase—must be held through to the critical issue. Here concentration and clarity of expression may well become decisive."


"It is the rare case indeed—in fact, I have yet to encounter it—in which issues cannot be framed in 75 words. The 75-word limit is the result of experimentation and informal testing: once an issue goes beyond that length, it is likely to be rambling. You lose the rigor of concentrated statement. And you probably lose some readers."


Explanation

About 98% of the time, if you can’t phrase your issue in 75 words, you probably don’t know what the issue is. It’s that simple.

It takes hard work—I’ve seen people take a day to frame one question—but it’s well worth the effort. Why? You’re more likely to spot problems in your logic, and you’re more likely to keep the judge’s attention. More than that, you’ll be satisfying a yearning that almost every judge feels by explaining what the question is in bite-size form.

You’ll often be tempted to think that your case turns on issues that are too complex to be reduced to 75 words. Don’t kid yourself. Even intellectual-property cases are amenable to this treatment. Consider Bn.com’s winning appeal against Amazon.com in the Federal Circuit. In 2000, that court had to decide whether Bn.com had good defenses to Amazon.com’s infringement claim on its one-click buying system. Here’s how Steven I. Wallach of New York—along with his colleagues William G. Pecau, Jonathan Marshall, Michael N. Rosen, and Mark J. Sugarman, all of New York—framed the four questions using the deep-issue technique:

1. **Consistency of Construction.** Amazon.com’s patent claims ordering an item over the Internet with a “single action,” such as a mouse click. While
analyzing infringement, the district court construed "single action" as one action taken after descriptions of both the item and the single action are displayed simultaneously. But while analyzing validity, the court construed the claims differently, omitting the item-description requirement when determining whether prior art disclosed a "single action." Was this an error of law?

2. Prior-Art Disclosures. The district court granted an injunction, concluding that Bn.com's invalidity defenses lacked substantial merit. But all the claim elements were admittedly old except single-action ordering. And prior-art online ordering systems disclosed:
   - an "instant buy" button;
   - "one-click ordering";
   - a button reading "Chart ($.50)" for one-click ordering; and
   - a Web-page link for one-click ordering.
Expert testimony that these references invalidated the patent was unrebutted. Did the court err?

3. Noninfringement Defenses. The district court also concluded that Bn.com's noninfringement defenses lacked substantial merit. But during its infringement analysis, the court:
   - construed "single action" contrary to the doctrine of claim differentiation, the specification, and the prosecution history; and
   - construed "shopping cart" and "fulfill" by impermissibly relying on extrinsic evidence.
Under proper constructions of those claim terms, there is no infringement. Did the court err?

4. Underlying Errors. The district court's findings on other factors that must be weighed on a preliminary-injunction motion—irreparable harm, balance of hardships, and the public interest—are all based on the assumption that the '411 patent is valid and infringed. Given the legal errors underlying the court's analysis of the merits, did the court's analyses of those other factors themselves include legal errors?

Notice how each successive issue builds on the previous ones. The third issue is probably the most difficult; it requires more background in intellectual-property law than the others. Of course, in this as in all cases, the writer must consider what a generalist reader is likely to know already and avoid repeating it in full. So the phrase doctrine of claim differentiation is mentioned but not explained on the principle that any IP generalist—certainly one who sits on the Federal Circuit—knows something about this doctrine. And if not, it's fully explained in the body. The important thing for the writer is to convey as much as possible about each issue within the confines of a 75-word limit. The brief-writers here did that in a hotly contested case. And they won.*

Some advocates make the mistake of thinking they need to put every citation and abbreviation in the issue statement. Doing so typically just clutters the statement and beclouds the thought. Consider this example,

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from a brief filed in the U.S. Supreme Court by the Solicitor General’s office in December 2001:

The Food and Drug Administration Modernization Act of 1997 (FDAMA), 21 U.S.C. § 353a (Supp V 1999), provides a limited exemption from the new drug approval (and certain other requirements) of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 et seq. for drugs compounded by pharmacists. The question presented is whether FDAMA’s limitation of that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs, 21 U.S.C. § 353a(a) and (c) (Supp. V 1999), is consistent with the First Amendment.**

The citations need to be readily available in the brief; they just shouldn’t be allowed in the issue statement. Even though the whole issue is only 85 words, the thought tends to get lost in all the numbers. Consider how much cleaner that issue is without all the citational volume and section numbers, and with some of the ideas reordered for enhanced readability:

The Food and Drug Administration Modernization Act (FDAMA) exempts drugs compounded by pharmacists from certain requirements of the Food, Drug, and Cosmetic Act, including requirements for new-drug approval. But the FDAMA limits that exemption to pharmacists who do not solicit prescriptions for or advertise particular compounded drugs. Is this limitation consistent with the First Amendment?

Although the revised issue has only 57 words, a deep issue will typically have 60 to 75 words.

But you may well ask, What about a complicated tax case? Is it really possible to do an issue within the 75-word limit? It’s certainly easy to exceed the limit, as the Solicitor General showed in an August 2000 brief. Whose eyes wouldn’t glaze over when trying to scale this 142-word obelisk:

Petitioners are shareholders in an insolvent Subchapter S corporation. During 1991, that corporation obtained a discharge of certain indebtedness. That discharge would have been treated as an item of “[i]ncome from discharge of indebtedness” (26 U.S.C. § 61(a)(12)) except that, because the discharge occurred when the corporation was insolvent, the item is expressly “not included in gross income” under 26 U.S.C. § 108(a)(1)(B). The question presented in this case is whether the amount thus expressly excluded from “income” is nonetheless to be treated as if it were an item of “income” which, under 26 U.S.C. § 1366(a)(1)(A), flows through to petitioners as the shareholders of the Subchapter S corporation, thereby increasing their basis in the stock of the corporation under 26 U.S.C. § 1367(a)(1)(A), and thereby allowing them to deduct losses they were previously unable to deduct because they had exhausted their basis by prior deductions.***

It starts with a fact, then adds another fact. Then it states a legal standard, followed by an exception to that standard. Then it begins to ask a question about that exception, but instead poses the question as if it had to do with

an exception to the exception already mentioned, followed by one new fact and then another. Even if it were tighter, the organization of the issue is all but hopeless. Throw out the unnecessary detail, put it into logical order, and you have a respectable 71-word issue:

Under § 108(a)(1)(B) of the Internal Revenue Code, the discharge of a Subchapter-S corporation’s debt isn’t included in gross income if the corporation is insolvent at the time. In 1991, PDW&A, an insolvent Subchapter-S corporation, obtained a discharge of debt. Its shareholders claim that the discharge should be counted as Income so that their basis in the stock will increase, thereby allowing them to deduct losses that they otherwise couldn’t. Are they right?

Even tax issues, you see, can be stated straightforwardly. Following are several more good examples.

Some Uncommonly Good Examples

- Under Wyoming law, administrative agencies have only those powers provided by statute. No statute gives the Wyoming Natural Resources Commission the authority to impose any sanctions for discovery abuse. May the Commission dismiss a permit application if it finds that the applicant has failed to respond to discovery requests? [49 words]

- Section 305 of the Government Code makes it a crime for a lobbyist to enter into a contingency-fee lobbying contract. Smith has agreed to lobby for water legislation on behalf of the Guernsey Corporation; if the legislation passes, Guernsey will pay Smith $1 million. Has Smith committed a crime? [50 words]

- For over 30 years, Texas courts have held that the term "single-family dwelling" imposes a use restriction unless the term appears in a section of the restrictive covenants solely governing the architectural form of dwellings. The Beautiful Valley covenants contain the term "single-family dwelling" in a section containing both use and architectural restrictions. Do these restrictive covenants prevent Mr. Johnson from running a boarding house in his home? [72 words]

- To decide a parent’s request to modify child-support obligations, Virginia law requires a trial court to consider both parents’ incomes. Mr. Smith requested a reduction of his child-support obligations. The trial judge refused to hear testimony from Ms. Smith about her income and reduced Mr. Smith’s obligation. Should this Court vacate the order and remand for the trial court to consider Ms. Smith’s income before setting the amount? [70 words]

- In 1981, Congress directed the HHS to replace the retrospective cost-based method of Medicare payments for kidney dialysis with a prospective payment method. In 1983, the HHS adopted regulations that included a retrospective cost-based limit on the bad-debt component of the payment, providing no valid justification for this de-
parture from the statutory requirement to use the prospective method. Is the HHS authorized to depart from the statutory requirement in this way? [74 words]

- The U.S. Supreme Court has mandated that lower courts must not "accept as true a legal conclusion couched as a factual allegation" in pleadings. Pantheon sued Panathon for trademark infringement but pleaded no facts in its complaint from which a court could determine ownership of the trademark asserted. Should this Court dismiss Pantheon's complaint for failure to state a claim on which relief may be granted? [66 words]

- After Desert Storm, the United States imposed sanctions against Iraq. A regulation implementing those sanctions bars the import of goods in which the Iraqi government has any present, future, or contingent interest. The Iraqi government's interest in oil bought by Paladin Oil Traders ended two years before Paladin tried to import the oil. Acting under the sanctions regulation, the U.S. Customs Service seized Paladin's oil shipment. Was the seizure legal? [70 words]

- Under Utah law, to recover for fraud a plaintiff must prove detrimental reliance on a deliberate misrepresentation. In a meeting with Perkins, Dedman allegedly misrepresented the price of his goods, saying that they were competitively priced when they were not. Perkins sued for fraud. But in his deposition, Perkins testified that he had made no decision based on anything said at that meeting. Can Perkins recover against Dedman for fraud? [70 words]

- The U.S. Supreme Court has held that Title VI of the Civil Rights Act of 1964 does not confer a private right of action under the statute or its implementing regulations. The plaintiffs here are a class of California schoolchildren who allege that the Department of Education has violated Title VI and its implementing regulations. Can these plaintiffs sue the Department of Education for violating Title VI or its implementing regulations? [71 words]

- Relevant evidence makes a fact of consequence more or less probable. In the sentencing phase of Gilkerson's trial, the state offered evidence about the length of Gilkerson's previous sentences. Gilkerson objected, saying that the length of past sentences is not relevant to his culpability for the current conviction; the state argued that the evidence shows that another short sentence would not deter Gilkerson from future crimes. Was the evidence relevant? [70 words]
11

Write fair but persuasive issues that have only one answer. Cast each issue as a syllogism. If you have several issues, give each one a concise, neutral heading.

Quotable Quotes

"In almost all cases . . . we find that we draw our conclusions from two related statements, the one a general statement covering many cases, which we may call the major premise, the other a particular statement of fact, which we may call the minor premise."

—Samuel S. Seward, Rhetoric in Practice 67 (1906).

"Of course, the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently. . . . And third, you have to build a technique of phrasing your issue which will not only capture the Court but which will stick your capture into the Court's head so that it can't forget it."


"[A] good statement of the question or issue involved is fairly complete. It raises an issue of law based upon the concrete facts of the case. It is all inclusive and aids an understanding of the argument."

—Mario Pittoni, Brief Writing and Argumentation 51 (1967).

"The issue to be argued must be raised in a way that will establish a point from which the writer can lead his readers to the conclusion he wishes to urge. That is, the introduction must in some fashion lead to a step of the argument by which the writer hopes to secure assent to his thesis."

"The rules of formal logic are invaluable to courts, and the fallacies of an argument may sometimes be most effectively exposed by casting it in the form of a syllogism."


"Questions . . . should be shaped as far as possible to compel a desirable response, or at the very least avoid an undesirable one."


"The way the issues are written will govern the court's first impression on the merits. Whatever the theme, each issue statement should incorporate specific facts and legal principles in a simple, concise, and accurate manner. The briefwriter must try to put the issues persuasively, but must not lose credibility by being strident or overstated."


"When presented with the properly framed major and minor premises of a syllogism, the human mind seems to produce the conclusion without any additional prompting. Moreover, the mind recognizes the conclusion to be of such compelling force that the conclusion simply cannot be denied. . . . The power of syllogistic argument leads to the only significant rule about crafting legal arguments: every good legal argument is cast in the form of a syllogism."


**Explanation**

A good issue statement generally mirrors a syllogism—the basis of all logical thought. You have a major premise stating the law, a minor premise presenting the facts that tie into that major premise, and a conclusion. But when cast as part of an issue statement, the conclusion becomes a question.

Yes, the best issues end with question marks. Why?

Because a bona fide question looks and sounds objective even when it's gently slanted. Rather than pushing your answer, you're putting a question on the table. You're also challenging your opponent to explain how the answer could be other than as you're suggesting. You're seizing the issue—and, as a rule, the side that successfully does that will win (see the Llewellyn quotation above).

In any event, the judge won't accept any answers until he or she figures out the question. If you supply it ready-made, the chances are greater that the judge will see the question as you see it. If you don't supply an explicit question, the judge's formulation is more likely to differ from what you'd like it to be.

And remember: this formulation is inevitable because judges typically want to begin by understanding the questions they're being asked to answer.

There are essentially two types of issue statements: analytical and persuasive. An analytical issue is objectively stated—it doesn't suggest an
answer. It's appropriate for a research memo or an opinion letter. A persuasive issue is subtly slanted toward an answer. It’s usually intended for a brief (trial or appellate).

Each type has a predictable form, best analyzed by considering the elements of a categorical syllogism:

All men are mortal. [Major premise]
Socrates is a man. [Minor premise]
Therefore, Socrates is mortal. [Conclusion]

These elements should be arranged in legal issues in this way:

**Analytical Issue**
- Minor premise
- Conclusion?

**Persuasive Issue**
- Major premise
- Minor premise
- Conclusion?

**Short Answer**
- Major premise

The major premise is the controlling legal point. The minor premise is the factual point that ties into that legal point. And the conclusion is expressed as a question.

Consider this example:

<table>
<thead>
<tr>
<th>Analytical Issue</th>
<th>Persuasive Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delaware's blue-sky laws protect investors from various kinds of securities fraud. Ellsmere, a Delaware resident, engaged in various securities transactions with Balancio Securities. Through April 2001, the transactions occurred outside Delaware; beginning in May 2001, most of the transactions occurred in Delaware. Do the blue-sky laws apply to these transactions?</td>
<td>Delaware courts have consistently held that Delaware's blue-sky laws do not apply to securities transactions that take place out of state. All the transactions between Balancio Securities and Ellsmere before April 2001 occurred outside Delaware—in Kansas, Nebraska, and South Dakota. Should this Court dismiss Ellsmere's claims under the blue-sky laws for the transactions completed before April 2001?</td>
</tr>
<tr>
<td><strong>Short Answer</strong></td>
<td></td>
</tr>
<tr>
<td>Delaware courts have consistently held that Delaware's blue-sky laws do not apply to securities transactions that take place out of state. So the transactions that occurred through April 2001 are not subject to the blue-sky laws, and Ellsmere cannot maintain an action in Delaware court for those transactions. But the transactions beginning in May 2001 are subject to the blue-sky laws, and the Delaware courts will assume jurisdiction over a claim that Balancio has violated those laws in transactions that occurred in Delaware.</td>
<td></td>
</tr>
</tbody>
</table>
To a clear-headed thinker, the analytical issue precedes the persuasive one. This example shows how to turn a good research memo into a brief: take the short answer, turn it into a major premise (the first sentence of a persuasive issue), trim the minor premise as necessary to get everything within a 75-word compass, and then pose the logical conclusion as a question.

You may wonder whether the elements must appear in this order. The answer is yes—although there may be rare variations from it. Putting the minor premise first, followed by the major premise and then the conclusion, isn't nearly as persuasive. It looks too pat when the answer immediately precedes the question, as here:

All the transactions between Balancio Securities and Ellsmere before April 2001 occurred outside Delaware—in Kansas, Nebraska, and South Dakota. Delaware courts have consistently held that Delaware's blue-sky laws do not apply to securities transactions that take place out of state. Should this Court dismiss Ellsmere's claims under the blue-sky laws for the transactions completed before April 2001?

Besides, when the issue reads this way, the first sentence has no context. In the syllogistic format, the legal premise supplies the context for the more specific factual premise.

You may also wonder whether the minor premise needs to be so specific. The answer once again is yes: within the 75-word limit, you need to make the minor premise as specific as you reasonably can (see #12). This will enhance your credibility. If you state a conclusory minor premise, readers aren't likely to believe what you're saying. Consider this variation:

Delaware's blue-sky laws do not apply to securities transactions that take place out of state. All the relevant transactions occurred outside Delaware. Should this Court dismiss the claims?

The writer is asking for a leap of faith. Too much is being held back for the middle part of the writing; instead, the writer can do lots of good here with a greater level of concreteness.

By the way, one of the several shortcomings of a one-sentence whether-issue is that it leads to greater vagueness in the facts, as well as to an unchronological presentation. Consider one more variation on our blue-sky-laws issue:

Whether this Court should dismiss Ellsmere's claims based on Delaware's blue-sky laws when the transactions at issue took place out of state and the Delaware courts have already held that the blue-sky laws do not apply to securities transactions that take place out of state?

That's not horrible, but it's far from great—especially on a first reading. It begins in the present (should this Court dismiss), moves to the transactions (several years ago), and then moves to precedent (many years older). It's harder to get your mind around that sort of long sentence fragment. (Oh, yes, the whether makes the issue an ungrammatical sentence fragment.)

Did you know that it's possible for every legal argument to be framed as a syllogism? Not only that. Every legal argument should be framed as a syllogism.
There's one other thing about the syllogism. Although you generally want a major premise stating the law, that's true only if the judge needs to be reminded about the law. You don't need a major premise that says, "The First Amendment of the U.S. Constitution protects freedom of speech." Everybody knows that, and you shouldn't waste any of your precious 75 words on something that basic. So in the first example below, you don't need to remind the reader about fundamental fairness in our criminal-justice system. But in all the others, the legal premise needs an explicit statement: it's a helpful reminder.

Some Good Examples

- David Jackson will probably be convicted of capital murder and sentenced to death at next week's trial unless he can present evidence of his mental retardation. Jackson's expert on mental retardation must undergo emergency surgery to remove a cancer that his doctors have just discovered. Should the court grant Jackson's motion for continuance to allow him time to find a new expert? [62 words]

- Under Mississippi discovery rules, computer-stored information is as freely discoverable as tangible, written materials. Even though the defendants' second request for production asked for computer-stored information, the State refuses to search its computers. Given that a search for this computer-stored information would not entail any more effort than searching for tangible, written materials, should this Court compel the State to produce it? [68 words]

- Florida rules allow deposition testimony to be used at trial only if the witness cannot be located after a good-faith attempt to serve a subpoena or if the witness is more than 100 miles from the court. Judge Hand, in Miami, barred the use of the deposition of Jack Throckmorton, an Orlando resident, because the proffering party did not show a good-faith attempt to serve a subpoena. Was Judge Hand's ruling erroneous? [74 words]

- Under Washington law, county commissioners may not appoint a civil servant for a term that is longer than the commissioners' own elective terms. The Skulalia County commissioners, who serve three-year terms, appointed Bartleby as county manager. In a tight labor market, Bartleby was able to negotiate a five-year employment contract. The commissioners accepted and signed the contract. Is Bartleby's contract enforceable? [63 words]

- Under Missouri law, permanent-total-disability benefits are awarded in a workers'-compensation case only if the worker cannot return to any employment in the open labor market. John Shepelwich was injured on the job and applied for permanent-total-disability benefits. Doctors and vocational experts who treated or evaluated him all reported that he could work at available light or sedentary jobs.
Should Shepelwich have been awarded permanent-total-disability benefits? [72 words]

- The Immigration Act lets the Attorney General grant permanent residency to an undocumented alien who has lived in the U.S. continuously for at least ten years and can show that deportation would cause extreme hardship to an immediate relative who is a U.S. citizen. Laura has lived in Texas since 1980 and has a three-year-old U.S.-born daughter who depends on her for support. May the Attorney General grant permanent residency to Laura? [74 words]

- Federal Rule of Evidence 8 requires that a complaint give a "short and concise" statement that puts the defendant on notice of what issues the plaintiff will raise. Erickson filed a 203-page complaint against Brokerage for fraud. The complaint consists largely of multiple-page quotations from Brokerage research reports, followed by generic statements that the reports are fraudulent. Should Erickson's complaint be dismissed for failure to comply with Rule 8? [71 words]

- When a corporate executive communicates with in-house counsel, the attorney-client privilege protects only those communications made for the purpose of obtaining or rendering legal advice. Allan Jones, vice president of Widget Co., had a conversation with Jeanine Meecham, in-house counsel for Widget Co., in which Jones sought both business and legal advice. Are the portions of that conversation pertaining to business advice protected by the attorney-client privilege? [69 words]

- Under California common law, a creditor can obtain an equitable lien on a debtor's property only if the debtor intended to grant the creditor a lien on that specific property. Pat Jones, a creditor of this bankruptcy estate, claims an equitable lien in escrowed funds based on an escrow agreement that does not expressly or implicitly grant Jones a lien on those funds. Does Jones have a lien on the escrowed funds? [72 words]

- The Americans with Disabilities Act protects a disabled employee who can perform the essential functions of the job if the company makes reasonable accommodations. Gail Duval, who became disabled, was terminated by Wyman Corp. and sued under the ADA. In her deposition, she testified that when she was terminated, her disability had rendered her unable to perform her job even with accommodations. Was Duval protected under the ADA? [68 words]

### Multiple Issues with Neutral Headings

Scott P. Stolley of Dallas, an accomplished appellate practitioner, has developed a good method for "naming" issues—by providing a neutral label for each one. Both examples below are from his briefs. In the actual briefs, each passage quoted below is followed by the statement of facts.
Example A

**Issues**

The Borens' appeal presents three main issues:

- **Date of the Breach or Tort.** When the precise date of the breach or tort is ascertainable, a medical-malpractice plaintiff who sends the statutory notice must sue within two years and 75 days after the breach or tort occurs. It is undisputed that Dr. Kellogg examined Mrs. Boren only once and that the Borens did not sue until two years and 76 days later. Are the Borens' claims time-barred?

- **Waiver.** At trial, the Borens argued that the limitations period was extended by a continuous course of treatment. On appeal, the Borens have abandoned this argument and have raised two new arguments—that the state constitution's Open Courts provision saves their claims, and that the limitations period did not begin to run until William Boren was born and became a "patient," four days after Dr. Kellogg saw Mrs. Boren. Have the Borens waived these new arguments?

- **Open Courts.** The Borens' wrongful-death and survival claims are statutory claims not recognized at common law. The Open Courts provision preserves only common-law claims. Does the Borens' Open Courts argument therefore fail?

Example B

**Issues**

The appeal by the Thompsons and Ms. Taylor-Evans presents three main issues:

- **Applicability of Chapter 38.** Chapter 38 of the Texas Civil Practice and Remedies Code does not permit recovery of attorney's fees from an insurer whose policy is subject to article 21.21 or 21.21-2 of the Texas Insurance Code. State Farm's policy covering the Colby family is subject to both of those articles. Did the trial court therefore properly deny attorney's fees under Chapter 38?

- **"Legal Entitlement."** Attorney's fees are recoverable under chapter 38 only if a defendant fails to pay an amount owed. Uninsured-motorist benefits are not owed until the insured satisfies a condition precedent—namely, that the insured be "legally entitled" to recover from the uninsured motorist. Did the trial court properly deny attorney's fees here, given that the claimants failed—until after judgment was entered—to establish a "legal entitlement" to recover from the Colbys?

- **Presentment.** As a further prerequisite to recovery of attorney's fees under chapter 38, the claimant must also "present" the claim. Here, there is no evidence that Thompson's parents or Ms. Taylor-Evans ever made "presentment," and further, there is no evidence that any claimant ever made "presentment" after belatedly establishing an arguable entitlement to recover from the Colby family. Did the trial court therefore properly deny attorney's fees to the claimants?
12
Weave facts into your issues to make them concrete.

Quotable Quotes

"In the majority of cases the chief difficulties of the brief writer are not to prove certain legal propositions, but to show that certain legal propositions are applicable and controlling under the specific facts of the case in hand."

"An abstract style is always bad. Your sentences should be full of stones, metals, chairs, tables, animals, men, and women."
—Alain de Lille (as quoted in Rudolf Flesch, The Art of Readable Writing 83 (1949; repr. 1967)).

"Writing should be concrete. It should evoke images and refer to something the reader can identify with particular experiences. A general concept like motion is interesting to a philosopher, but an ordinary reader wants to know what is moving, how fast, whether it is going toward him or away from him, and what effect the motion of this object will have on his income or his likelihood of getting a good night's sleep."

"Writing too largely in abstract terms is one of the worst and most widespread of literary faults. It sounds learned; it saves the writer from having to use his eyes and ears; and it makes slovenly thinking possible because it does not require definiteness."
—David Lambuth et al., The Golden Book on Writing 32 (1964).

"Not in all, but in most cases, the issues can only be described by reference to the facts as well as the law."

"The more abstract your argument, the more you should lace it with graphic illustrations, analogies, apt quotations, and concrete details. These are aids not only to your reader's understanding but also to his memory."
"It is inadequate merely to state the legal issue without any reference to the factual setting in which it arises (e.g., 'Whether the defendant is entitled to judgment notwithstanding the verdict' or 'Whether the trial court's instructions were erroneous and prejudicial')."


"The most helpful statement of an issue is in terms of its facts, not as an abstract question of law. The statement should show the precise point of substantive law and its applicability to the facts at hand. Thus, 'was plaintiff guilty of contributory negligence?' does vaguely indicate the general issue; but how much more helpful to the court's concentration and understanding of the issue is: 'Plaintiff's car struck the rear of a vehicle operated by the defendant, who had made an emergency stop without signaling. Where plaintiff admits that he could not have stopped his car within an assured clear distance ahead, is he chargeable with contributory negligence so as to bar his recovery?'"


"I spend a lot of time avoiding conceptual discussions or translating them, where possible, into Joe Six-Pack language. You would be surprised how often abstract concepts conceal a failure to come to grips with the precise issues or facts in the case."


**Explanation**

Unfortunately, some court rules actually require that advocates write "a concise statement, not exceeding two pages, of the questions involved without names, dates, amounts or particulars, with each question numbered, set forth separately and followed immediately by the answer, if any, of the court from which the appeal is taken."*  

If you're bound by such an unfortunate rule—which seems like an inarticulate warning against overparticularization (see #27)—follow it. You can still follow most of the advice given here about issue-framing. You'll just be doing it more abstractly.

The better approach is typically to weave concrete facts into your issue statements, so that you tell a story in miniature, with names and all. But remember that you want only the particulars that are important—the ones that help the reader understand the problem.

In fact, when brief-writers try to frame their issues in the syllogistic format outlined in #11, they typically stumble—if they do stumble—on

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*N.Y. C.P.L.R. 5528(a) (McKinney 1996) (emphasis added). Cf. Pa. R. App. P. 2116(a) ("The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It [i.e., the statement of the questions, presumably, but perhaps a question] should not ordinarily exceed 15 lines, must never exceed one page, without any other matter appearing thereon. This rule is to be considered in the highest degree mandatory . . . .")*.  

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the middle part of the syllogism. That is, their facts are too abstract or conclusory, or else they're chronologically scrambled. Within your 75-word limit, try to be as concrete as you can helpfully be. And sustain the story line as long as you can before asking a short, punchy question. Try not to bring up new facts in the question, as by including a when-clause in the question. Avoid saying, "Is Putnam liable when . . . ?" Instead, say what happened, and then end with "Is Putnam liable?"

For those bound by a don't-give-us-any-particulars rule, it's probably worth citing a couple of winning issues before a state supreme court. William J. Conroy and Robert Toland II of Wayne, Pennsylvania—along with Joseph A. Katarinic of Pittsburgh—used the multiple-sentence approach with success before the Pennsylvania Supreme Court in 2002. In fact, they succeeded in getting the court to reverse on the briefing alone—a rare event in that state. Here are their winning issues, written under the constraint of minimizing particulars:

1. Waiver. Rule 227(b) provides that objections to the jury instructions may be made anytime before the jury retires. Here, Defendants objected on the record during the charge conference—well before the jury retired. Yet the Superior Court ruled that Defendants had waived their objections because they had not moved for nonsuit or directed verdict. Does this ruling depart from Rule 227(b) and established caselaw to create a new "waiver rule" without foundation in law?

2. Crashworthiness. All the parties tried this case under a crashworthiness theory. Yet the trial court refused to instruct the jury on the elements that this Court and the Superior Court have held must be established for crashworthiness liability; instead, the jury instructions reflected the materially different standards of general strict liability. Did the court err in refusing to instruct the jury on the elements of crashworthiness?

Those issues do a great job of showing syllogistic reasoning. And they passed the ultimate test: they won a reversal.**

Some Good Examples

- At 7:30 one morning last spring, Father Michael Pryrne, a Roman Catholic priest, was on his way to buy food for himself at the grocery store when his car collided with Ed Grimley's pickup truck. The Catholic Church neither owned Father Pryrne's car nor required its priests to buy groceries as part of their priestly functions. Was Father Pryrne acting as an agent for the Church at the time of the accident? [72 words]

• In New York, a person who knowingly purchases used goods cannot bring a claim for breach of implied warranty. Sandra O'Keefe admitted at her deposition that she bought her 2001 Acura—the vehicle that she claims the manufacturer impliedly warranted—with more than 11,000 miles on the odometer. Should O'Keefe's claim for breach of implied warranty be dismissed because the car was used when she bought it? [67 words]

• The Colorado Water Board lowered Cherry Creek's minimum stream flow from 12 cubic feet per second to 7. The Board's decision—reached after four public hearings on the subject—was based on recommendations of both the Colorado Division of Wildlife and three independent aquatic biologists, all of whom concluded that 7 cubic feet per second was the optimal minimum for Cherry Creek. Was the Board's decision arbitrary and capricious under the Administrative Procedure Act? [74 words]

• New York domestic law provides that a maintenance agreement is not binding if it was made under duress or is patently unfair. At the end of her 18-year abusive marriage, Sallie, who has only a ninth-grade education and no financial experience, agreed to a maintenance award so low that she cannot afford food for her children. Should this Court invalidate Sallie's maintenance agreement? [65 words]

• Under Printeen Corp.'s collective-bargaining agreement, the company may fire an employee for good cause. Jane Smith, an employee at Printeen, was temporarily assigned by her immediate supervisor to a position she didn't want to fill. She then left the plant premises without authorization, as a result of which the company had to shut down part of the production line overnight. Did the company have good cause to fire Smith? [70 words]

• Pavemasters, a contractor, agreed to install a masonry surface at Lincoln Hospital. Before the work began, the hospital repeatedly asked about the design's drainage system, but Pavemasters did not answer. Only after installation was well underway did Pavemasters admit that the project included no drainage system. The hospital later sustained water damage because rainwater did not drain properly. Is Pavemasters responsible for the cost of repairing the water damage and installing a drainage system? [74 words]

• State Bar conflict-of-interest rules prohibit an attorney from representing a party in a divorce action if the attorney has previously represented both parties in other litigation. Janie Wilson and her husband Bob hired attorney Ben Bailey when they purchased some property. Two years later, Janie hired Bailey to represent her in her divorce from Bob. Is Bailey barred from representing Janie? [63 words]

• New Hampshire criminal procedure bars a defendant from withdrawing a guilty plea after being sentenced. In 1999, McNair agreed
to plead guilty to petty burglary for a probated sentence. Now he has been charged with violating the terms of his probation and faces the probability of a prison sentence. McNair contends that because the sentence may still be changed, he retains the right to withdraw his guilty plea. Is he right? [71 words]

- In Georgia, an out-of-court conversation is admissible as evidence if it explains a person's conduct or state of mind. While visiting the Johnsons on April 2, Marshall watched as (1) Mr. Johnson accused his wife of adultery with his best friend, (2) she confessed, and (3) he slapped her. Two hours later, after Marshall had left, Mrs. Johnson was murdered. Is Marshall's testimony about the conversation admissible in Mr. Johnson's murder trial? [74 words]

- A foreign national who has been "firmly resettled" in a third country is ineligible to apply for asylum in the United States. Before entering the U.S., Marla Simonich, a citizen of Bosnia-Herzegovina, spent 15 months in a refugee camp in the Netherlands. At the camp she was forcibly confined, had no access to education or employment, and was not eligible to apply for residence in the Netherlands. Did Marla firmly resettled in the Netherlands? [75 words]

- Federal jurisdiction under the Alien Tort Statute requires that the plaintiff allege a violation of the law of nations, such as acts of torture committed by government officials acting under color of state authority. Mueller Corp. is a defense contractor. Palmer alleges that Mueller employees, who are all private citizens, harassed, assaulted, and attempted to kidnap him. Has Palmer alleged a claim for torture in violation of the law of nations? [71 words]

- The Supreme Court has held that the Fourth Amendment is not violated when a police officer makes a custodial arrest after seeing the person commit a misdemeanor traffic offense in a public place. A police officer saw John Phillmore driving on Main Street without headlights after dark—a misdemeanor. The officer arrested Phillmore. Did the arrest violate Phillmore's Fourth Amendment rights? [61 words]

- Under New York law, a good-faith purchaser for value cannot acquire valid title to stolen property. In 1939, Nazi troops stole the painting Portrait of a Woman from the Bronsky family home in Poland. In 1956, Jane McConnell purchased the painting from a reputable New York gallery. McConnell died in 2002, leaving the painting to her daughter, Maeve. Does Maeve McConnell now have valid title to the painting as against the Bronsky family heirs? [75 words]

- The First Amendment lets school districts regulate student speech only if the speech substantially disrupts school operations. McRae and Barnes were alone in a hallway of Eclipse Middle School. McRae asked to copy Barnes's homework. Barnes refused, and McRae threatened to hit him. A teacher in a nearby classroom overheard the threat and reported McRae, who was suspended. Can the
school justify the suspension by asserting that bullying is always and inherently substantially disruptive? [74 words]

- Under Texas law, an attorney who has "committed a crime of moral turpitude" can be suspended from the practice of law. Phyllis Locke, a Texas attorney, was arrested for possession of illicit drugs. While her case was being investigated, but before she was prosecuted (much less convicted), the State Bar of Texas suspended her law license. Is an arrest without a conviction for a crime of moral turpitude sufficient to justify the suspension? [73 words]

- Leonard Slocum Jr., a mentally retarded minor whose father has physically abused him, has become the state's ward and begun a habilitation program that has helped him demonstrably. His father, Slocum Sr., petitioned to become Leonard Jr.'s guardian, but the court found him unfit because of the abuse and because he has sired four illegitimate children by a 25-year-old mentally retarded woman—formerly his ward. Did the court abuse its discretion? [73 words]