OUT of ORDER

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Don't Skimp on Statement of Issues, Seize the Court's Attention

by MARTIN SIEGEL

If there's never a second chance to make a first impression, as the cliché goes, what's the first impression to be made in appellate advocacy? Easy: the required statement of issues presented for review. Both Federal Rule of Appellate Procedure 28(a)(5) and Texas Rule of Appellate Procedure 38.1(f) require one.

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True, the statement requesting oral argument, if there is one, offers an earlier chance to grab the court's attention and make the case sound important. But the statement of issues represents the first opportunity to home in on the specific legal questions at the heart of the appeal and suggest why the court should resolve them in your favor.

It can seem like an unnecessary chore. Won't the court read the full brief, after which it should fully grasp what the case is about and who should win? Yes, but the statement of issues precedes the facts and argument and lets lawyers frame the appeal in the most advantageous way. Done well, it can color the court's view of everything that follows. For that reason alone, it should command ample time and attention from the drafter. Consider turning to it last, after an initial round of editing, when the facts and arguments have crystallized.

The statement of issues has a simple goal: making the desired outcome seem not just correct but obvious. While the issue must be presented fairly to avoid losing credibility and to assist the court, this part of the brief is advocacy no less than others. Neutrally and generically asking something like "Was the district court correct to grant summary judgment?" is bad because it under-informs the judges while missing the opportunity to persuade. The question should include the legal and factual detail necessary to capture the specific questions the court will have to decide and indicate the result.

At the same time, issues should be brief—say, one to three or four tightly edited sentences each. Leave out the particulars not needed to dictate the outcome. Judges might skip paragraphs of dense prose and long sentences with umpteen dependent clauses. If there is more than one issue, number and list them in the order presented in the brief, generally from most important to least.

There are different ways to achieve the desired effect. The most conventional is to frame each issue in a single sentence beginning with "whether," as in: "Whether a jury could find a police officer used constitutionally excessive force when he shot an unarmed suspect who raised his hands in surrender, yelled 'I give up,' and did nothing to threaten the officer before the shooting."

For what it's worth, a study of more than 1,500 briefs filed in the U.S. Supreme Court from 1953 to 2002—yes, someone actually tabulated this—revealed that most issues began with "whether," including almost all filed by the solicitor general. Brady S. Coleman, *et al.*, *Grammatical and Structural Choices in Issue Framing: A Quantitative Analysis of "Questions Presented" from a Half Century of Supreme Court Briefs*, 29 AM. J. TRIAL ADVOC. 327, 330-35 (Fall 2005).

A second approach is to cast the issue as a question: "Does the district court have personal jurisdiction over a realtor who has lived and operated a business in Houston for 10 years?" While less common than "whether" statements, the question is more natural and direct. It should usually be framed so the preferred answer is "yes."

When using a question, the "under-does-when" formulation is popular. "Using this form of issue statement, the writer asks if under a certain legal rule, does a certain result follow, when certain facts are present." Wayne Schiess, Elana Einhorn, *Issue Statements: Different Kinds for Different Documents*, 50 WASHBURN L. J. 341, 343 (Winter 2011).

Professor Mary Beth Beazley provides this example: "Under the Fourth Amendment's privacy guarantees, does an invitee into a residence have a legitimate expectation of privacy when the invitee's sole purpose for being present is to assist the resident in an illegal activity?" Mary Beth Beazley, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 170 (3d ed. 2010).

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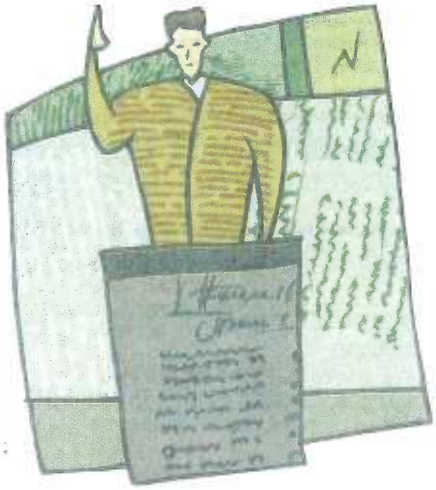
Another tack devised by legal writing guru Bryan Garner is the multi-sentence "deep issue." "The major premise is the controlling legal point. The minor premise is the factual point that ties into that legal point. And the conclusion is expressed as a question." BRYAN A. GARNER, THE WINNING BRIEF 87 (2d ed. 2004). Garner advises limiting the deep issue to 75 words. "If you can't frame your issue in 75 words, you probably don't know quite what the issue is." Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 5 (1994-95).

Here is an example he gives of a 55-word deep issue: "California Civil Code § 1504 states that a duly made offer of performance stops the running of interest on an obligation. Jim mailed a refund check to Tom, but Tom failed to cash the check for several years. Is Tom now entitled to the interest that accrued on the refunded amount while the check went uncashed?"

Finally, one caveat: Issue statements in petitions to supreme courts are different because they also have to persuade the court to review the case. Schiess and Einhorn, lecturers in legal writing at the University of Texas Law School, recommend keeping these "law-based and broadly applicable—not confined to a narrow set of facts," so the court will have jurisdiction and view the appeal as governing the largest possible set of future cases. "For that, the single-sentence issue statement can work well, for example: Should participant-on-participant sports injuries be assessed under the reckless-intentional standard of care or the inherent-risk standard of care?"



This is good advice, but unusual or especially important facts sometimes also affect high courts' decisions to hear cases. If there is something notable or interesting about the case that might make it stand out aside from the pure legal question, consider prefacing the issue statement with a brief introduction of three or four sentences that gives the attention-grabbing context. When competing against hundreds or thousands of other petitioners, it doesn't pay to hold back.

"If we ranked the metaphysical factors that go into decision-making, the initial impression received by the judge who reads your brief may be more important than any other aspect of the art of persuading," advises Third Circuit Judge Rugerro J. Aldisert. Rugerro J. Aldisert, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ADVOCACY 151 (2d ed. 2003). What's more, he notes, "You had better sell the sizzle as soon as possible. The steak can wait." TNL

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