The Deep Issue: A New Approach to Framing Legal Questions

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Introduction

Though critical to good legal writing, issue-framing is a subject mired in confusion. In fact, anyone seeking to learn how to frame a legal issue is certain to hear some hogwash such as, "Phrase it in a single sentence," or "Start with the word *whether*," or "Omit all particulars." Largely because of all this benighted advice, lawyers' memos and briefs, as well as judges' opinions, often read like long-winded impromptu sermons, the point being only faintly discernible. Indeed, poor issue-framing is the most serious defect in modern legal writing.

We need a new paradigm. The well-written issue — what I call a "deep" issue — should:

- Consist of separate sentences.
- Contain no more than 75 words.
- Incorporate enough detail to convey a sense of story.
- End with a question mark.
- Appear at the very beginning of a memo, brief, or judicial opinion — not after a statement of facts.
- Be simple enough that a stranger, preferably even a nonlawyer, can read and understand it.

This model leads to tighter, more cogent writing by putting the context before the details. And, as I hope to demonstrate, it helps test how sound the ideas are.

A Neglected Art

Why the concern with issues? Because no point is more important in persuasive and analytical writing. If you have clearly in mind what question you're addressing, the writing will inevitably be much clearer than it otherwise would be.

That may sound obvious, but in fact very few legal writers frame their issues well. As a result, legal memos, briefs, and judicial opinions are often diffuse, repetitive, and poorly organized. Sometimes these documents do not reveal precisely what question they purport to answer, even to the reader who works hard to find out. When confronting a document of that kind, the industrious reader works in vain to find the main point — the upshot.

Any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer. The better the writing, the more clearly and quickly those things are delivered. The legal stylist should insist that the writing lead the reader to have those things well in mind within 90 seconds of picking up the document.

To do this consistently, the writer should open the discussion with a factually specific issue that captures the essence of the problem. Although few legal writers have mastered this technique, it is not new. Consider the following issue, framed in 1835:

> A Turk, having three wives, to whom he was lawfully married, according to the laws of his own country, and three sons, one by each wife, comes to Philadelphia with his family, and dies, leaving his three wives and three sons alive, and also real property in this State to a large amount. Will it go to the three children equally, under the intestate law of Pennsylvania?[1] [67 words]

Anyone of moderate legal sophistication can understand that question. And most readers, having seen the question, would probably like to know the answer.

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[1] *A Question of the Conflict of Laws*, 14 AM. JURIST 275, 275 (1835).

But six lawyers in ten would probably build up to the question with at least two pages of facts explaining how the Turk came to the U.S., when and where the marriages were solemnized, what the names and birthdates of each of the sons are, and so on. In other words, those six writers would open with a badly overparticularized statement of facts — a statement that would leave many readers bewildered about the upshot of it all.

Three more of the ten would probably assume that the intended reader knows the facts and therefore dispense with them altogether. If they were writing analytical memos, the so-called "issues" framed by these three lawyers would read something like this: "Is our client entitled to take one-third under Pennsylvania law?" Then the writing would launch into a legal discussion of the intestacy laws. Never mind that the intended reader and the writer don't have an identical understanding of the facts — something that will likely never emerge if the memo is written in this way. Further, a reader who later comes across the memo will remain none the wiser even after reading it in full; as a result, the memo can never be useful in future research.

Perhaps the one other lawyer would write an issue more like the 1835 version than either the overparticularized or the overvague approach, but hardly one in a hundred would frame it with equal brevity and clarity.

Those are the two goals of the deep issue: brevity and clarity. As between those two, of course, clarity is paramount.

The Clarity of a Deep Issue

A "deep" issue is concrete: it sums up a case in a nutshell, and is therefore difficult to frame but easy to understand. By contrast, a "surface" issue is abstract: it requires the reader to know everything about the case before it can be truly comprehended, and is therefore easy to frame but hard to understand.

Assume that a defendant is moving for summary judgment. Which of the following statements is more helpful?

1. Can Jones maintain an action for fraud?

2. To maintain a cause of action for fraud under California law, a plaintiff must show that the defendant made a false representation. In his deposition, Jones concedes that neither Continental nor its agents or employees made a false representation. Is Continental entitled to summary judgment on Jones's fraud claim? [49 words]

The shorter version sends the reader elsewhere to learn what, precisely, the issue is; the longer version asks the reader to do considerably less work. Whereas the surface issue says next to nothing about what the court is really being asked to decide, the deep issue explains precisely what that something is. To put it differently, the surface issue does not disclose the decisional premises; the deep issue makes them explicit. It yields up what Justice Holmes once called the "implements of decision."[2]

The goal is ease of understanding. Generally speaking, the more abstract the issue is, the more superficial it is: the reader must learn much more to make any sense of it. The more tangible the issue is, the deeper it is: the reader need hardly exercise the brain to understand.

Consider another set of examples — different versions of the same issue considered from the same side of the case:

1. Does the cessation-of-production clause modify the habendum clause in an oil-and-gas lease?

2. Since first considering the issue 30 years ago, this Court has consistently held that the word "produced" — as used in the habendum clause of an oil-and-gas lease — means "*capable* of being produced in paying quantities." Should this Court now adopt a novel interpretation that would cast doubt on the validity of tens of thousands of leases in the State? [61 words]

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[2] Quoted in John W. Davis, *The Argument of an Appeal*, in ADVOCACY AND THE KING'S ENGLISH 212, 216 (George Rossman ed., 1960).

The first is a dry legal question seemingly devoid of any real interest to anyone but oil-and-gas experts. The second, in addressing what are probably the judges' true concerns, defines the issue in a way that anyone can understand: its premises are explicit.

The Brevity of a Deep Issue

Besides being clear, a deep issue must be brief. Typically, a deep issue will range from 50 to 75 words. Ideally, 75 words is the upper limit.

Why? Because whenever an issue exceeds 75 words or so, the writer loses focus and the reader loses interest. If you can't frame your issue in 75 words, you probably don't know quite what the issue is.

Working out the 75-word issue can be excruciatingly difficult. Sometimes, in a complex piece of litigation, it can take days to refine the statement. But it's well worth the effort because you're more likely to spot problems in the logic, and you'll certainly write more cogently.

But is the 75-word limit always achievable? In my experience, it is. In fact, all the memo examples and briefing examples in this article — and hundreds of other issues I've looked at — have met this standard. And I haven't yet encountered the legal issue that couldn't be framed in 75 words. It may exist, but I haven't found it.

How Deep Issues Work in Memos

Almost all the examples so far have been persuasive issues — written from an advocate's point of view. But we should back up to the pretrial stage, when the lawyers are first analyzing problems. For the analytical issue differs markedly from the persuasive issue.

Unlike the persuasive issue, the analytical issue is open-ended. It doesn't have an implicit answer. Still, it makes the reader yearn to know the answer — e.g.:

1. Section 273 of the Immigration Act makes it a crime to bring an undocumented alien to the U.S. Meanwhile, section 2304 of the Maritime Act makes it a crime for the master of a vessel to fail to rescue persons aboard a vessel in distress. Does a master commit a crime under the Immigration Act when he rescues illegal aliens aboard a ship in distress and brings them to the U.S.? [71 words]

2. Mr. and Mrs. Zephyr were killed in the crash of an airplane negligently piloted by Mr. Zephyr. Their daughter, Kate, has sued the estate of her deceased father for the wrongful death of her mother. Does the doctrine of interspousal immunity bar Kate's recovery when there is no marital harmony to preserve? [52 words]

3. Appleseed School District, a public employer, has uncovered evidence that an employee in one of its school cafeterias is stealing money from the register. Appleseed wishes to confirm its suspicions so that it may fire the suspected employee. Is it legal under California and federal law for Appleseed to covertly videotape the employee at her workstation? If it is legal, do any restrictions apply? [64 words]

4. The Internal Revenue Service requires all persons who receive more than $10,000 in cash in a trade or business to report the payment and provide the name of the payor. Paul Smith, an attorney, receives $14,000 in cash from a client and reports the payment but omits the client's name in the belief that disclosure would violate the attorney-client privilege. Is there an attorney-client-privilege exception to the IRS disclosure requirements? [73 words]

5. Georgette Frye, Mayor of Monrovia, California, owns two office buildings in downtown Monrovia. The California Political Reform Act prohibits a public official from participating in a decision in which he or she has a material financial interest. Is Frye prohibited from voting on a Council resolution to provide a new sewer system for downtown Monrovia? [55 words]

6. Johnson was convicted of aggravated robbery in 1988 at the age of 16. Five years later, the Kansas Legislature enacted the Sentencing Guidelines Act, requiring that prior juvenile convictions be used to enhance the sentence of an adult convicted of a crime. After Johnson was convicted of criminal damage to property in 1994, the court used his 1988 conviction to enhance the sentence. Does this procedure violate the U.S. Constitution's ex post facto clause? [74 words]

7. Missouri law provides that a party to a contract cannot tortiously interfere with its own contract. Dr. Borstead claims that St. Anthony's Hospital tortiously interfered with a lease between himself and St. Anthony's Properties, Inc., the hospital's wholly owned subsidiary. Can St. Anthony's Hospital tortiously interfere with the lease of its wholly owned subsidiary? [54 words]

And precisely because readers want to know the answer to an analytical issue, there is no better way to capture their interest.

In an analytical memo, such an issue should be followed immediately by a brief answer (with reasons stated explicitly within it). Thus, the question and the answer amount to something resembling an executive summary: the reader understands the gist of the memo merely by reading the first few lines.

"But isn't that how most legal memos read?" you might ask. The answer, unfortunately, is no. Not at all. Given a sampling of hundreds of memos in major law firms and corporate law departments throughout the country, you'd find — as I have found — that only about 1% of the memos begin with a deep issue and a short answer.

Let's take an example. Harry, a first-year associate at a law firm, writes a memo for Sarah, his supervisor, on a matter that they've worked on together for six months. The memo begins this way:

> Does 29 C.F.R. § 181.009 apply to the Photostat transactions?

The follow-up discussion for this memo, under the heading "Discussion," is inevitable:

> 29 C.F.R. § 181.009 states in pertinent part: . . . .

Then a block quotation, and we're off to the tortoise races.

On a better day, Harry would have followed his surface issue with a short answer, but still the memo would be unsatisfactory. Why? First, because Sarah wouldn't know whether she and Harry had an identical understanding of what he refers to as "the Photostat transactions." Were there no nuances there? And what are the prominent aspects of those transactions? Second, even if Sarah and Harry once had identical understandings of "the Photostat transactions," their understandings have probably changed over time, so that six months later they think very differently about what they mean by that phrase. If the memo doesn't disclose the writer's premises, it will be impossible to assess the context in which it was written. Third, Sarah's and Harry's colleagues may wish to capitalize on Harry's research. Unfortunately, though, when they get Harry's memo, it reads like a private conversation in coded language.

Fourth — and perhaps most important — Barbara, the chair of the associates committee, reads the memo and feels stupid. And Barbara knows that good legal writing makes readers feel smart, whereas bad legal writing makes readers feel stupid. Barbara writes an uncomplimentary comment in Harry's file. His annual review will not be pleasant.

A fanciful scenario, you say? Well, it's played out routinely in hundreds of law offices throughout the United States. It would be interesting to quantify the amount of wasted time, money, and

energy that goes into producing and deciphering poorly written memos.

Before we leave Harry, it's a fair question to ask how he might have framed the Photostat issue. Here's one way:

> Photostat, Inc. is a Colorado franchiser that wants to sell franchises to foreign customers who will operate their franchises in foreign countries. FTC regulations require that franchisers disclose certain information to all prospective franchisees. Do these regulations apply to Photostat's sale of franchises to foreign franchisees? [46 words]

Once again, the issue is at least faintly interesting to most legal readers. And upon reading the short answer immediately following, the reader sees an orderly mind at work.

In sum, a memo containing a deep issue has the following advantages:

- Because the premises are explicit, the assigning attorney will typically be able to spot any erroneous assumptions.
- Both primary and secondary readers will be able to read and understand the memo. It won't read like a conversation between insiders.
- The memo will be more comprehensible, even to the insiders, a year or two after it's written.
- Colleagues researching similar points in different cases will find the memo more helpful.
- The analytical issue can be readily transformed into a persuasive issue, and thus the memo into a brief.

How Deep Issues Work in Briefs

Many advocates seem not to appreciate fully that the outcome of a case rests on how the court approaches the issues presented. As an advocate, you want to state the issue fairly, to be sure, but

in a way that supports your theory of the case. A good persuasive issue, in other words, should answer itself.

Take *Eisenstadt v. Baird*, in which the plaintiffs attacked a state law that prohibited the sale of contraceptives to unmarried people. Here is how the Supreme Court framed the issue:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[3]

Richard A. Posner has observed that the decision might not have seemed so clear-cut if the Court hadn't "set up a straw man" (to use his words).[4] If, instead, the Court had posed the question with different premises, the outcome might have been different:

> We must decide whether the state is constitutionally obligated to allow the sale of goods that facilitate fornication and adultery by making those practices less costly.[5]

How do the premises differ? The Court's premise is that the prohibition is an "unwarranted governmental intrusion"; Posner's hypothetical premise is that contraceptives "facilitate fornication and adultery."

As an advocate, you want to find the premises that will pull the court toward your conclusion, and then make your premises explicit. If the court decides to answer the question you pose, then the court will probably reach the conclusion you urge.

A noted advocate — who, exactly, is unclear, because the quotation is variously attributed to Rufus Choate, Clarence Darrow, and John W. Davis, among others — once said that he'd gladly take either side of any case as long as he could pick the

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[3] 405 U.S. 438, 453 (1972).

[4] RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 305 (1988).

[5] Adapted from *id.*

issues. If you pick the issues that are actually decided, you ought to win. It's that simple.

Karl Llewellyn, one of the great legal thinkers and writers of the 20th century, well understood this truth:

> 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.[6]

Llewellyn's initial point is the most powerful: the *first* art is framing the issue so that, if your framing is accepted, you win. The persuasive issue, then, can have only one answer.

Still, the persuasive issue is much more than a mere statement of the conclusion. The advocate comes forward asking the court to address a straightforward question — e.g.:

1. Texas law provides that a lease predating a lien is not affected in foreclosure. Nelson's lease predates Marshall's lien, on which Marshall judicially foreclosed last month. Was Nelson's lease affected by the foreclosure? [33 words]

2. Liability-insurance coverage for directors and officers of financial institutions is universally required in order to recruit well-qualified directors and officers. When the Trew Group acquired First Eastern from the FDIC in 1987, the FDIC agreed to pay the "reasonable and necessary" operating costs of First Eastern. Is the FDIC obligated to pay the cost of directors' and officers' liability insurance for First Eastern? [65 words]

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[6] Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 630 (1962).

3. On dozens of occasions over the course of a decade, United Peoria hired and paid a waste-hauler to haul its hazardous liquid waste to a landfill. In accordance with United Peoria's instructions, the hauler discharged thousands of gallons of United Peoria's waste into the landfill. Were these discharges an "accident" from United Peoria's point of view? [57 words]

4. Boskey Insurance issued an excess-insurance policy to BEC for liability exceeding $100,000. BEC represented to Boskey that it had purchased primary coverage (for the first $100,000 of liability) from Cooper Insurance. If Cooper becomes insolvent, should Boskey be required to step down and provide primary coverage when it never bargained for a role as — or contracted to be — a primary insurer, and when its premium reflected only the risk taken as an excess insurer? [75 words]

As in the first two examples, an issue often proceeds from the law to the facts. Yet, as in the third and fourth examples, it may sometimes proceed from the facts to the law. The only key to organizing the statements is to allow the whole to be readily absorbed — and this usually means putting the most challenging pieces of information at the beginning and the end (the emphatic positions), and the most easily comprehensible part in the middle. Following are still more examples:

5. Texas prohibits a person from bringing a claim for breach of implied warranty when that person knowingly purchased used goods. Paula Wheelock admitted at her deposition that she purchased a 1986 Chevrolet — the car she claims General Motors impliedly warranted — with 11,000 miles on the odometer. Should Wheelock's claim for breach of implied warranty be dismissed because the car was used when she bought it? [65 words]

6. 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? [55 words]

7. At 7:30 one morning last spring, Father Michael Prynne, 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 truck. The Catholic Church neither owned Michael Prynne's car nor required its priests to buy groceries as part of their priestly functions. Was Michael Prynne acting as an agent for the Church at the time of the accident? [71 words]

8. 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 — 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? [71 words]

9. In 1946, ABC manufactured and sold to Feldspar a hoist designed for attachment to a free-swinging trolley system. Thirty years later, without ABC's knowledge, Trubster acquired the hoist, added a new motor, pulley, and cable, and integrated the hoist into a fixed elevator dumbwaiter system. Is ABC liable for injuries resulting from integration of its hoist into a system defectively designed by Trubster? [64 words]

Occasionally, you'll need to assume that your audience knows something about some area of the law. In #10, the writer assumes that the reader understands comparative negligence. In #11, the writer assumes that the reader knows something about the availability of injunctions as a remedy. And in #12, the writer assumes that the reader knows basic trademark law.

10. Misunderstanding the comparative-negligence scheme in this state, the trial court erroneously instructed the jury that if Parker was 50% or more liable for the accident that injured him, he could not recover. Even so, the jury found that the defendant, Davis, was not liable for Parker's injuries. Was the erroneous instruction harmless error, when the jury never considered the degree of Parker's fault in the accident? [67 words]

11. Solsoft has granted a license to Creative Capital to use copyrighted computer software solely in support of Creative Capital's internal business operations. Creative Capital now says it will offer third parties services based on uses of that software. Under principles of copyright and breach of contract, can Creative Capital be enjoined from doing that? [54 words]

12. Nabisco uses its valuable "Shredded Wheat" trademark to identify Nabisco's breakfast cereal, but the Examiner rejected Nabisco's trademark application on descriptiveness grounds. A survey conducted last month shows that most cereal consumers associate the "Shredded Wheat" trademark with a single source, and that a significant percentage of consumers know that Nabisco is that single source. Should Nabisco's "Shredded Wheat" trademark be registered on grounds that it has acquired secondary meaning? [70 words]

Some briefs would take at least ten pages to deliver the information contained in any of those formulations. And you wouldn't find a concise statement even on page 10. Instead, you would find the relevant tidbits strewn amid other facts throughout the first ten pages. To glean the issue, the judge would have to read slowly, and 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, but rather 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." Unfortunately, the result of this understandable fear is that the advocate has no clearly framed issues — no theory of the case.

And the judicial reader becomes frustrated. Why? Because, at first, only one thing matters to the judge: "What question am I supposed to answer in this case? 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 groping for it."

Framing the deep issue at the outset is a way of capturing the judicial imagination. Whoever does that well is most likely to win. Indeed, a well-framed issue can often become the starting point for the majority opinion.

Deep Issues in Judicial Opinions

It's no accident that the most readable judicial opinions invariably begin with a brief statement of the overarching issue in the case. Among the ablest practitioners of this art was Judge Thomas Gibbs Gee, of the Fifth Circuit, who enshrined it as the first principle in his style sheet for opinions: "Try to state the principal question in the first sentence."[7]

Even when the judge ignores that advice, though, an adept legal reader will usually try to deduce from the judicial opinion just what the issue is. Let's take an example.

Probably the most famous hypothetical case ever posed is Lon Fuller's *Case of the Speluncean Explorers*.[8] In that case, a panel of five appellate judges, in the year 4300 A.D., must decide the fate of four cave explorers who — having been trapped in a cave for 23 days, told by miners that it would take 10 more to dig them out, and advised by doctors that all would die of starvation during that additional period — killed and ate one of their companions. The murder statute reads as follows: "Whoever shall willfully take the life of another shall be punished by death."

In Fuller's fictitious opinions, no two of the five judges approach the case in the same way. They all answer different questions. Here is how I would frame those questions:

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[7] *A Few of Wisdom's Idiosyncrasies and a Few of Ignorance's: A Judicial Style Sheet*, 1 SCRIBES J. LEGAL WRITING 55, 56 (1990).

[8] 62 HARV. L. REV. 616 (1949).

Truepenny, C.J.

> If a statute unambiguously requires the death sentence — without exception — for anyone who willfully takes another's life, may judicial sympathies properly lead an appellate court to make allowances for those who violate the statute under extraordinary circumstances?

Foster, J.: 1st issue

> Does the statutory law of murder apply to persons who find themselves buried and starving in a cave — their only hope being cannibalism — who, in short, have returned to a state of nature and drawn a new social compact?

Foster, J.: 2d issue

> The murder statute requires the death penalty for anyone who willfully takes another's life. Yet the statute has never been thought to apply literally to every case. Must we now apply it literally in a case in which everyone agrees that the result would be grossly unfair?

Tatting, J.

> Can I participate in a case in which I am repelled by either result, and in which I cannot resolve the doubts that beset me? (He decides that he cannot.)

Keen, J.

> Four speluncean explorers, trapped in a cave, killed Roger Whetmore and ate his flesh. Did they not willfully take Whetmore's life?

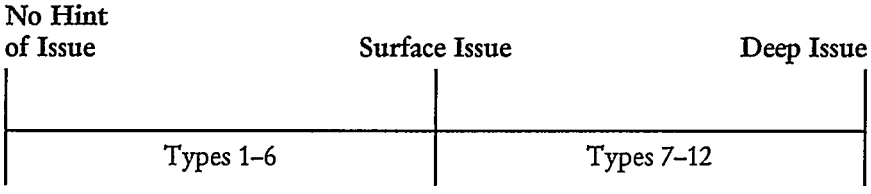
Handy, J.

> Four men, trapped in a cave, resorted to homicide and cannibalism to survive. Fully 90% of society and 90% of this court believe that these men should be pardoned or given a token punishment. They have undoubtedly already suffered more torment and humiliation than most people would endure in a thousand years. Should we now affirm their death sentences?

Consider which of those issues is best from the prosecutor's point of view, and which one from the defense lawyer's point of view. It's a matter of gauging which question most judges would want to answer — at least, assuming the judges are at all inclined to your view of the case. In my view, the best issues are clear-cut. For the prosecution, Keen's issue is best because it doesn't muddy the waters the way Truepenny's does by dragging judicial sympathies into the issue-statement. For the defense, Foster's second issue is best because it's a true legal argument based on an eminently plausible interpretation of a statute.

Let's return, though, to Gee's point: "Try to state the principal question in the first sentence." In fact, his own usual practice was to state it in the first *paragraph*, and the advice would be sounder if we replaced "sentence" with "paragraph." Still, the insight was a great one, and it provides a reliable standard by which to evaluate judicial openers.

Roughly speaking, there are a dozen types of judicial openers, which you can place on a continuum:



The least satisfactory opener for a judicial opinion has nothing to do — from all that appears — with the question that the court is to answer. The most satisfactory, on the other end of the spectrum, puts the issue neatly up front.

Of the dozen types — ranging from worst to best — the first six fall on the left side of the continuum, and the last six fall on the right. Here they are:

Categories 1 Through 6: Unsatisfactory Judicial Openers

1. The first type of opener — very common — states how the case got to the court when that's not a determinative point. In this type, the writer just perfunctorily announces why the court has heard the case — e.g., "This is an appeal by the State under Neb. Rev. Stat. § 29-2320 (Reissue 1989)."[9] The problem is that most readers are initially uninterested in how the case got there. They want to know about the core conflict.

How helpful as an opener is the following laborious treatment of procedure? Why are we being told any of this?

> This is the second appeal to this court relating to the resolution of the question of whether the plaintiff or the defendants held title to the property located at 8 Orange Street in New Haven, prior to the taking of the property by the city of New Haven by eminent domain in 1989. See *Papagorgiou v. Anastopoulous*, 23 Conn. App. 522, 582 A.2d 1181 (1990). There are two other actions involving this property presently pending in the courts. The first, which was argued with this appeal; *New Haven v. Konstandinidis*, 29 Conn. App. 139, 612 A.2d 822 (1992); is an appeal to this court from the granting of a summary process judgment of possession in favor of the city of New Haven against Angelika Papagorgiou, the plaintiff in this action. The other action, which has been stayed in the trial court pending disposition of this appeal, involves a challenge by the defendants in this action to the statement of compensation filed by the city of New Haven on August 11, 1989, in the condemnation proceeding. The plaintiff here, Angelika Papagorgiou, was permitted to intervene in the condemnation action because of her claim that she possessed equitable title to the property on the date of the condemnation.[10]

Even stripped of tedious detail, an opener in this category doesn't inspire confidence in the writer's logic:

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[9] State v. Foral, 462 N.W.2d 626, 627 (Neb. 1990).

[10] Papagorgiou v. Anastopoulous, 613 A.2d 853, 854 (Conn. Ct. App. 1992).

> This case comes to us on an expedited appeal filed by the government from an order granting a motion to suppress tangible evidence. We reverse.[11]

If all the information in the first of those examples is really necessary, it ought to appear *after* the facts — and well after the issue. As for the second, are we to conclude that this court invariably reverses expedited appeals filed by the government? In fact, if the second example is read literally, it contains a rather bad miscue.

And where does this non sequitur come from? It seems to result inevitably from the well-meaning view that the court's ultimate disposition should appear in the opening paragraph. Of course, it probably should, but only if it somehow follows from whatever has already been stated. If it doesn't relate to the preceding statements, then placing it at the outset suggests a grotesque lapse in logic.

2. The second type of opener hardly moves any closer to the issue. It states the subject matter of the case — and gives a resolution — but doesn't disclose the issue. This opener typifies opinions that never get around to clarifying the deep issues in the case. The court merely begins with either a procedural recitation or a general statement about what type of case it is. For example, the court might say, in substance, "This is a tort case. We reverse and remand." Whether the court ever really reaches the deep issues in the case seems often a matter of chance. Here are some typical examples:

> • This appeal from summary judgment challenges the district court's interpretation of a contract provision to require reimbursement of legal expenses incurred in litigation against a subrogated insurer. We affirm in part and reverse in part.[12]

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[11] United States v. Harris, 617 A.2d 189, 190 (D.C. 1992).

[12] Unpublished opinion of a state intermediate court.

- Otha "Buddy" Chandler, Jr. appeals his conviction on one count of causing a false entry to be made in a book, report or statement of a savings and loan association, a violation of 18 U.S.C. § 1006 (1988). We affirm.[13]

- We have for review *Murray v. State* [citation], based on conflict with *State v. Rucker* [citation]. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We quash the district court decision in *Murray*.[14]

- Defendant Grand Properties, Ltd. appeals the judgment of the trial court awarding the sum of $18,675.81 to plaintiff Latter & Blum, Inc. We affirm.[15]

This type of opener accounts for a significant percentage of American opinions.

3. A third type of opener — still on the left side of the continuum — states some facts but omits the issue and the resolution. Sometimes facts can be interesting: the authors of the following narratives at least tried to create reader interest. The first begins with startling facts but fizzles at the end of the sentence — the position of greatest emphasis — with the word *misdemeanor*. The result is what rhetoricians call "bathos," an anticlimactic progression from something serious to something commonplace:

> James Sumpter shot and killed his wife, Lois Sumpter, with a handgun. He was convicted by a jury of felony murder and of pointing a pistol at another, and was sentenced to life imprisonment and for a misdemeanor.[16]

The next example begins vividly — almost as if the author had attended a judicial-writing seminar and learned the wrong lessons.

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[13] United States v. Chandler, 910 F.2d 521, 521 (8th Cir. 1990).

[14] Murray v. State, 616 So. 2d 955, 955 (Fla. 1993).

[15] Latter & Blum, Inc. v. Grand Properties, Ltd., 617 So. 2d 80, 81 (La. Ct. App. 1993, writ denied).

[16] Sumpter v. State, 398 S.E.2d 12, 13 (Ga. 1990).

Note how the ending of the distress call is equated with the ending of three human lives — a rhetorical flourish whose effect seems callous at best:

> "We're going over, now!" Thus ended a brief distress call on the night of February 1, 1982 from the master of the fishing vessel CHICA to the Coast Guard, and shortly thereafter, his life and that of his two crewmen.[17]

But even an opener that states interesting facts — if that's all it does — falls short of focusing the reader on the legal issue and how it will be resolved.

And then, of course, some openers in this category do nothing at all to interest the reader — there are facts, yes, but hardly interesting ones:

> In 1975 Golden Sun Feeds, Inc. (GSF) entered into an agreement with the Chicago, Rock Island and Pacific Railroad (the predecessor of Chicago and North Western Transportation Company — CNW) to have a switch and spur track constructed to service its facility in Estherville, Iowa. GSF spent over $150,000 on this project. After 1981 GSF received a declining number of carloads over the track. In 1984, 1985, and 1986 it received no rail shipments and, in 1987, GSF received ten rail cars in order to test the cost as compared to truck shipments.[18]

4. The fourth category moves only a mite down the continuum: it states some abstract facts and the resolution of the case — but it doesn't state the issue. Often, as the following example illustrates, merely stating the facts will not lead directly to an issue:

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[17] Brophy v. Lavigne, 801 F.2d 521, 522 (1st Cir. 1986).

[18] Chicago & North Western Transp. Co. v. Golden Sun Feeds, Inc., 462 N.W.2d 689, 690 (Iowa Ct. App. 1990).

> The appellant, Lavon Guthrie, was convicted after a jury trial of the capital offense of murder committed during a robbery in the first degree, in violation of § 13A–5–40(a)(2), Code of Alabama 1975. At the sentencing phase of the trial, the jury voted unanimously to recommend that the appellant be sentenced to death. At the trial court's sentencing hearing held pursuant to § 13A–5–47, the trial court sentenced the appellant to death by electrocution.
>
> This case must be remanded to the circuit court for that court to determine whether the state exercised its peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky* [citation] and *Ex parte Branch* [citation]. Although the appellant neither raised this issue in the trial court nor argued it on appeal, the plain error doctrine requires our review of this issue.[19]

Take another example:

> In a civil-forfeiture action, the registered owner of a vehicle used in the commission of a felony appeals the trial court's determination that the vehicle was owned by his stepson. We affirm.[20]

The surface issue there is ownership. The deep issue is whether sufficient evidence overrode the legal presumption that the registered owner of a car is the true owner. The reason for the holding was that the stepson took possession immediately upon the stepfather's purchase; the stepson always used the car, the rest of the family rarely; the stepson "souped up" the car in various ways; and the stepfather made a nonverbal admission by nodding his head when his wife said that the car had been a graduation present to the stepson.

The court could have reached the deep issue more concisely by opening the opinion in this way:

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[19] Guthrie v. State, 616 So. 2d 913, 913 (Ala. Crim. App. 1992).

[20] Unpublished opinion of a state intermediate court.

> In this civil-forfeiture action, the registered owner of a seized car — one involved in drug transactions — contests the trial court's determination that his stepson owned the car. Because abundant evidence, including the stepfather's own admission to the police, overrides the legal presumption that the registered owner is the true owner and establishes that the stepson was the true owner, we affirm.

The advantage of this rewrite — into a "deep issue" form — is that, as the details are filled in later, the reader will assimilate them through the filter that the opener provides.

5. The next type — the fifth category — brings a glimmer of an issue. Here, the judicial writer states what the issue "involves" without saying what it is. In this category belong some of the most frustrating openers that legal readers encounter. Upon seeing words such as "The issue here . . . ," the reader inevitably perks up. But with the word "involves," the sentence typically crumbles:

- The issue here involves the rule requiring corroboration of the confession of an accused by some independent evidence of the *corpus delicti*. We return to this well plowed ground because of the contentions of the petitioner, Robert Leslie Ballard, Jr. (Ballard), who stands convicted, *inter alia*, of felony murder in an attempted robbery. Ballard contends that corroboration of the *corpus delicti* in this case requires independent proof of the attempted robbery. As explained below, this contention greatly overstates the corroboration requirement.[21]

- This case involves the transfer of assets by George Dumas to an *inter vivos* trust and a suit by his wife, appellee, alleging that the transfer of those assets constituted a fraudulent transfer and that her late husband intended to defraud her by depriving her of her elective share of his probate estate.[22]

In framing issues, the word "involves" ought to be a no-no.

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[21] Ballard v. State, 636 A.2d 474, 474 (Md. 1994).

[22] Dumas v. Estate of Dumas, 627 N.E.2d 978, 979 (Ohio 1994).

6. The sixth and final unsatisfactory opener brings us to the brink of an issue. Because it states what amounts to a surface issue, the reader can't really hope to understand it until after reading much more. The question is on the order of, "Has the plaintiff stated a claim?" You're only a little wiser after reading it.

- This is an appeal from the forfeiture of two bail bonds to appellee, the State of Maryland. Appellant, Fred W. Frank Bail Bondsman, Inc., on behalf of Allegheny Mutual Casualty Company and All American Bail Bonds, has appealed from an order of the Circuit Court for Wicomico County denying its Petition to Strike Forfeiture, Set Aside Judgment, and Release Bond. On appeal, we are asked:

  > Whether the Circuit Court erred in denying the Petitions to Strike Forfeiture, Set Aside the Judgments Against the Bail Bondsman and the Surety, and Release the Bonds because it was impossible for the surety to fulfill its contractual obligation to produce the defendants.

  Finding no error, we shall affirm the judgment of the circuit court.[23]

- Earl Rhymer appeals the denial of his petition for post-conviction relief. He raises five issues for our review, which we consolidate into four and restate as follows:

  I. Whether Rhymer should be granted post-conviction relief based on newly-discovered evidence.
  II. Whether the post-conviction court denied Rhymer due process and a fair hearing.
  III. Whether the post-conviction court failed to issue sufficient findings of fact and conclusions of law.
  IV. Whether Rhymer was denied the effective assistance of trial and appellate counsel.

  We reverse and remand.[24]

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[23] Fred W. Frank Bail Bondsman, Inc. v. State, 636 A.2d 484, 485 (Md. Ct. Spec. App. 1994).

[24] Rhymer v. State, 627 N.E.2d 822, 823 (Ind. Ct. App. 1994).

Although the writer wisely focuses on the issue, the opener fails: far too much is being postponed. The issue-statement is unedifying.

Categories 7 Through 12: Satisfactory Judicial Openers

7. The seventh type comes much closer to the deep issue: the writer gives everything but one dispositive fact. This category approaches the ideal because the reader now knows what to look for — something the writer hasn't yet been explicit about. The writer could make the reader's job easier by supplying whatever that something is. In the following examples, what's the one missing ingredient that would transform the introductory passage into a deep issue?

- William Fraser appeals from an order dismissing his amended complaint under Super. Ct. Civ. R. 12(b)(6) for failure to state a claim upon which relief could be granted. Fraser had sued appellees Gottfried and Bush for an accounting, money damages, and other relief based on appellees' supposed breach of a partnership agreement, but the trial court ruled that the complaint failed to allege the existence of a partnership. We disagree and, accordingly, reverse and remand for further proceedings.[25]

- Donald Smith appeals from a Workers' Compensation Board decision denying Smith's petition to commute his future benefits into a lump-sum settlement. 39 M.R.S.A. § 71–A (1989). Smith contends that there is no rational basis for the hearing officer's decision that a lump-sum settlement would not be in Smith's best interest. Because we conclude that the hearing officer had a rational basis for his decision, we affirm the decision and decline to reach the issues raised by Great Northern Paper Co. and the amicus parties.[26]

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[25] Fraser v. Gottfried, 636 A.2d 430, 430 (D.C. 1994).

[26] Smith v. Great N. Paper, Inc., 636 A.2d 438, 439 (Me. 1994).

In the first of those openers, we need to know — succinctly — what the complaint alleged. In the second, we need to know just what the rational basis is. With those facts supplied, both could easily be transformed into deep issues.

8. The eighth category — already in the upper reaches of American judicial writing — provides a strong narrative setup with something approaching a deep issue. Like a brief, a judicial opinion shouldn't begin with a "statement of facts" or "factual background" section — though many opinions do just that. Instead, the opinion should set the stage for factual exposition — usually by providing a deep issue. The following examples come close to succeeding because they blend analytical language into the facts being supplied:

- Although the substantive issues raised by this appeal are fairly significant, they are not nearly as significant as the procedural quagmire that we find before us. What began as a developer's test of a newly enacted Anne Arundel County tax ordinance has brought to light an apparent anomaly in the statutory scheme that provides administrative review by both the Anne Arundel County Board of Appeals (the Board) and the Maryland Tax Court of the imposition of certain local taxes.[27]

- Arrested for feeding the pigeons and walking her dogs in the park, Anita Kirchoff recovered $25,000 from the police. The defendants gave up, but Kirchoff's lawyers did not. They wanted some $50,000 in fees under 42 U.S.C. § 1988. The district court gave them $10,000 on the ground that their contingent fee contract with the Kirchoffs entitled them to 40% of any award. The case requires us to decide whether the contingent fee is the appropriate rate under § 1988 when the case resembles private tort litigation in which contingent fees are customary. First, however, we pause for the facts.[28]

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[27] Crofton Partners v. Anne Arundel County, 636 A.2d 487, 488 (Md. Ct. Spec. App. 1994).

[28] Kirchoff v. Flynn, 786 F.2d 320, 320 (7th Cir. 1986).

The second example states both the essential facts and the issue with elegant economy, and neatly ushers us into a narrative of what happened to cause the lawsuit. Still, we're left to wonder how the issue will be resolved — and that may leave us feeling unfocused. Then again, this example may generate enough interest that the reader will be naturally inclined to read further.

9. In the ninth category, the writer frames the deep issue — elegantly or inelegantly — but postpones the answer. Though most modern judicial writers consider it desirable to state the court's resolution up front, along with the reasoning in a nutshell, there are exceptions. If the issue is cleanly stated and sufficiently intriguing, it might just as well stand alone in the opener, as in the examples following. Such openers can cue us quite effectively, as these four examples illustrate:

- This case presents the question whether certain statutes and regulations of the State of Mississippi violate our constitutional guarantee of freedom of speech because they effectively ban liquor advertising on billboards and in printed and electronic media within the state.[29]

- We have for review *Metropolitan Dade County v. Metro-Dade Fire Rescue Service District*, 589 So. 2d 920 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified to this Court the questions resolved by its opinion as ones of great public importance. *Id.* 589 So. 2d at 924 n.6. The district court did not articulate a question; however, we have constructed the following question for resolution:

  > Does the Dade County Commission have legislative authority over the Metro-Dade Fire and Rescue Service District to determine what specific governing powers the district's governing body may exercise when the voters of

[29] Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314, 316 (5th Cir. 1983) (per Gee, J.) (postponing until the last page the holding that, indeed, advertisers' constitutional rights had been violated).

> Dade County have passed an amendment to the county charter which specifically states that the County Commission shall not be the governing body of the district?[30]

- The issue in this case is whether a court may render a judgment partially maintaining an exception of no cause of action when the judgment adjudicates one or more, but less than all, of the demands or causes of action asserted against the excepting party. A related issue is whether the party opposing the exception must appeal from the judgment partially maintaining the exception in order to prevent the judgment from acquiring the authority of the thing adjudged. These issues implicate the concepts of cumulations of actions and joinder of parties, partial final judgments, and appealability of partial final judgments.[31]

- The Federal Bureau of Investigation (FBI) has accumulated and maintains criminal identification records, sometimes referred to as "rap sheets," on over 24 million persons. The question presented by this case is whether the disclosure of the contents of such a file to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (1982 ed., Supp. V).[32]

Even so, a stall is a stall, and readers may impatiently flip to the last paragraph to appease their wakened curiosity.

10. The tenth category — drawing ever closer to the fully deep issue — has all the basic ingredients, but abstract facts. Some judicial writers manage to state the key facts, the legal question presented, and the conclusion, all with admirable succinctness. Consider the following example, from a recent United States Supreme Court opinion:

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[30] Metro-Dade Fire Rescue Serv. Dist. v. Metropolitan Dade County, 616 So. 2d 966, 967 (Fla. 1993) (question put into lowercase).

[31] Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So. 2d 1234, 1235 (La. 1993).

[32] United States Dep't of Justice v. Reporters' Comm. for Freedom of Press, 489 U.S. 749, 751 (1989).

> An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.[33]

The problem there is excessive abstractness. Such a recital feels devoid of human interest.

Occasionally, however, the issue may be so riveting that the concrete facts can wait for further development:

> Today we are asked to decide whether an elected judge may constitutionally be reprimanded for making truthful public statements critical of the administration of the county judicial system of which he is a part. Concluding (1) that such statements address matters of legitimate public concern and (2) that the state's interest in promoting the efficiency and impartiality of its courts does not, under the circumstances of this case, outweigh the plaintiff's countervailing first amendment right to air his views, we reverse the judgment of the district court and remand for further proceedings.[34]

11. The eleventh category is a special one: the perfect way to handle a messy appeal, where the best you can do is describe the issues and their resolution. In the example below, Judge Gee fully orients us to the concrete facts, the issue, the reasoning, and the conclusion — no small feat in a complicated case:

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[33] Illinois v. Perkins, 496 U.S. 292, 294 (1990).

[34] Scott v. Flowers, 910 F.2d 201, 201 (5th Cir. 1990).

> Appellant Jeetendra Bhandari sued appellee First National Bank of Commerce after First National declined to issue him a credit card. First National refused Bhandari credit in part because he was not a citizen of the United States. The district court held that neither 42 U.S.C. § 1981 nor the Equal Credit Opportunity Act ("ECOA") gave Bhandari a legal remedy for private alienage discrimination. The court determined, however, that First National had violated the ECOA by not telling Bhandari all its reasons for denying him credit. The court awarded damages, costs, and attorneys' fees. Bhandari appeals, contending that the district court erred in various respects. We hold that the law of this Circuit recognizes actions for private alienage discrimination under § 1981, but that alienage discrimination is not actionable under the ECOA. Accordingly, we affirm in part, reverse in part, and remand.[35]

To avoid getting bogged down in Bhandari's various claims, Gee used general language at a crucial point in the paragraph: "Bhandari appeals, contending that the district court erred *in various respects*." In many judges' hands, that three-word phrase (*in various respects*) would be expanded into three paragraphs or even three pages of exposition, all before the holding is announced. But Gee understood the need for *swiftly* identifying the type of case and the issue. Then, of course, the opener proceeds with the bifurcated holding.

Here's another example in this category:

> This is an appeal from a jury verdict in favor of Dudley M. Maples in the Lauderdale County Special Court of Eminent Domain. The State Highway Commission ("the Commission") sought to condemn a portion of Maples' property for purposes of a highway expansion project, offering Maples fair market value for the affected tract. Maples filed a Statement of Values which included not only a claim for the fair market value of the land taken, but also for damages to the remainder resulting from diminished access. The jury awarded Maples more than the Commission proposed to pay, but substantially less than Maples

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[35] Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1084 (5th Cir.), *superseded*, 829 F.2d 1343 (5th Cir. 1987), *vacated*, 492 U.S. 901 (1989).

> demanded. Maples appeals, assigning eight errors, arguing generally that he did not receive a fair trial, that the jury award was insufficient, that Lauderdale County should not have been a named defendant, and that the court erred in not allowing him to recover expenses and attorney's fees for the defense of the suit. Finding no reversible error, we affirm.[36]

If the court tried to capsulize its reasons on each of the eight alleged errors — or on each of the four main thrusts — the opener might have been extended intolerably.

12. Now to category number twelve. Below are three openers that have all the essentials: concrete facts, a deep issue, and a clear resolution. And even though these openers aren't flawless, they're the best here collected. They grab the reader's attention with their wording, both concise and precise. In short, they do exactly what an introduction should do: they introduce. And what follows each opener should be an elegant opinion:

- While investigating some serial murders near Kansas City, Hough, a federal undercover agent, posed as a prisoner confined in the same cell as the primary suspect in the murders, Perkins, who had been jailed on unrelated charges. On Hough's second day as Perkins's cellmate, Perkins confided that he knew where two of the bodies were buried. He now claims that his incriminating statements should be held inadmissible because he had received no *Miranda* warnings. But we disagree because the warnings are not required when a suspect, though unaware that his conversation is with a law-enforcement officer, engages in the conversation voluntarily.[37]

- Appellant, Frederick Ward Associates, Inc., appeals from a declaratory judgment entered in the Circuit Court for Cecil County (Cole, J.) in favor of appellees, Venture, Inc., and

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[36] Maples v. Mississippi State Highway Comm'n, 617 So. 2d 265, 266 (Miss. 1993).

[37] Revision of the first example under category #10 — with hypothetical concreteness supplied.

> Charles Cupeto. The court ruled that appellant's judgment against a "Chris Walker" did not constitute a lien against land deeded to a "John C. Walker" and subsequently transferred to appellees. Appellant asks:
>
> > Did the court err in ruling that the judgment entered against "Chris Walker" does not constitute a lien against land owned by him, but titled in the name of "John C. Walker"?
>
> We answer this question in the negative and, therefore, affirm.[38]

- Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (1988). As one means of improving water quality, Congress ordered the Environmental Protection Agency (EPA) to design pretreatment standards for industrial water discharges into publicly owned treatment works. 33 U.S.C. § 1317(b). Under the Act, someone who knowingly violates these standards and knows that he or she thereby places another person in imminent danger of death or serious injury commits a felony. 33 U.S.C. § 1319(c)(3) (1988 & Supp. II 1990). Does this criminal sanction apply when the imminent danger is not to people at the publicly owned treatment works, municipal sewers or other downcharge, but rather to employees handling the pollutants on the premises from which the illegal discharge originates? We hold that it does not.[39]

Imagine how much shorter judicial opinions might be if the deep issue were to become standard. But, of course, without better briefing, courts would find it difficult to frame deep issues consistently. Still, it can be done, as Judge Gee and various others have demonstrated.

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[38] Frederick Ward Assocs., Inc. v. Venture, Inc., 636 A.2d 496, 496 (Md. Ct. Spec. App. 1994).

[39] United States v. Borowski, 977 F.2d 27, 27 (1st Cir. 1992).

The Vocabulary of Judicial Issues

Many examples quoted above contain phrases that every appellate judge ought to keep handy:

> *This case presents the question whether . . . .*
>
> *The case requires us to decide whether . . . .*
>
> *Today, we must decide whether . . . .*
>
> *We are confronted with the question whether . . . .*

Because these phrases usually signal a deep issue, they are worth adding to the stock judicial vocabulary. If the writer can't fill in the blank, then more thought is required before the writing can begin. Concededly, though, given the state of American brief-writing, the blanks will often be devilishly hard to fill in.

For maximal clarity and rhetorical impact, the word *because* should figure prominently in most opening paragraphs. A good formula is *Because . . . , we hold that . . . .* If the *because*-clause is long, the judge could reverse the clauses: "We hold that . . . for two reasons. First, ... Second, ..."

The difference between openers that use that formula and those that don't is palpable. Consider how these two openers, by the same judge, affect you as a reader. The first gives only a conclusion, while the second couples a reason with the conclusion:

> • The petitioner-appellant in this case, Martha's Vineyard Scuba Headquarters, Inc. (Mavis), took not a particle of comfort when an order was entered in a federal district court awarding title to various artifacts received from a sunken ship to a rival, Marshallton, Inc. (Marshallton). Mavis appeals. We affirm.[40]

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[40] Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked, and Abandoned Steam Vessel, 833 F.2d 1059, 1061 (1st Cir. 1987).

> • A disappointed faculty member, Harriet Spiegel, sued the trustees of Tufts College in the United States District Court for the District of Massachusetts following rejection of her tenure application. The district court dismissed most — but not all — of her statements of claim without requiring defendants to answer, and thereafter authorized a partial judgment in Tufts' favor . . . . Because we conclude that the judgment was prematurely entered, we dismiss the appeal.[41]

Readers' Reactions to Deep Issues

The purpose of using separate sentences and of limiting the issue to 75 words 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 chronological order, telling a story in miniature. Then, the pointed question — which emerges inevitably from the story — comes at the end:

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[41] Spiegel v. Trustees of Tufts College, 843 F.2d 38, 40–41 (1st Cir. 1988).

> 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 claim 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.

Because seasoned legal readers are always impatient to reach the issue, opening a memo, brief, or judicial opinion with the deep issue satisfies a need that almost all readers feel.

But is the 75-word limit a fair one? Where does it come from? It 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 a concentrated statement. And you probably lose readers.

The Importance of It All

At first glance, these principles of issue-framing may seem elementary. Yet, judging from most legal writing, they are not at all obvious. And, in any event, stylists who cultivate the ability to frame good issues know just how difficult it is: it requires a great deal of mental energy.

It is therefore easy to forgo the effort, and many writers do. Legal writers everywhere seem preoccupied with answers, and rarely with the questions they are answering or the premises from which their conclusions might follow. As a result, much of the "analysis" and advocacy that goes on is sloppy — or worse.

Even the greatest legal intellects must remain vigilant about these points. One of the most important 20th-century legal philosophers warned about how easy it is to stumble over fundamentals. H.L.A. Hart was writing about theories of punishment,

but the same point holds true in any field: "One principal source of trouble is obvious: it is always necessary to bear in mind, and fatally easy to forget, the number of different questions [that various theories] seek to answer."[42] Even the great philosophers, then, can benefit from giving more thought to their issues.

Charting a Course

For the past six years, deep issues have been the cornerstone of my CLE teaching. The ideas underlying the deep issue have been tested now on thousands of lawyers throughout the United States — lawyers who have helped refine these ideas. And the lawyers I deal with week by week confirm what I have long thought: the deep issue is central both to good writing and to good thinking.

Yet the idea is still considered novel: one-sentence surface issues still pervade law-school writing texts, appellate-practice texts, and collections of model briefs. In fact, Illinois appellate rules contain "model" issues that have all the classically bad qualities.[43]

But perhaps things are changing. Many advocates now use deep issues, and they report good results. Perhaps the law-school text-writers will adapt their recommended forms so that law graduates won't have to unlearn so many bad habits.

Undoubtedly the most important reform, though, must occur in court rules. If courts began to mandate deep issues, they would find it easier to handle their caseloads. Many weak cases would die because the exercise of writing a deep issue would reveal their weaknesses more palpably than anything else. Strong cases would prevail more easily because their strengths would be made plainer than they typically are today.

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[42] H.L.A. Hart, *Postscript: Responsibility and Retribution*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 210, 231 (1968).

[43] *See* ILL. SUP. CT. R. 341(e)(3).

Therefore, in rules on briefing, courts might include a provision that reads something like this, a possible amendment to Federal Rule of Appellate Procedure 28:

28. Briefs

(a) **Contents.** A brief must contain:

. . .

(5) a list of one or more questions presented for review.

(A) The questions should be stated in the following form:

(i) in separate sentences, with factual and legal premises followed by a short question;

(ii) in no more than 75 words per issue;

(iii) with enough facts woven in that the court will understand how the question arises in this particular case.

(B) The following issue statements illustrate the clarity and brevity to be aimed for:

(i) 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?

(ii) Under Florida law, administrative agencies have only those powers provided by statute. No statute gives the Florida Natural Resources Commission the authority to impose sanctions for discovery abuse. May the Commission nevertheless dismiss a permit application if it finds that the applicant has failed to respond to proper discovery requests?

> (iii) Under California 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 for relevant information. Given that a search for this computer-stored information would not entail any more effort than searching for tangible, written materials, did the trial court err in ordering the State to produce it?

A less elaborate rule might read as follows:

> (5) a statement of the issues presented for review, each issue preferably being phrased:
>
> (A) in separate sentences that show how the legal question arises;
>
> (B) in no more than 75 words; and
>
> (C) with a question mark at the end.

With either rule, of course, advocates would complain. After all, this method of issue-framing isn't easy.

But perhaps the profession would gradually regain a skill that it has lost. What is that skill? Well, it is multifaceted and difficult to describe without lapsing into clichés such as these:

- home in on the problem;
- separate the wheat from the chaff;
- see the forest, not just the trees;
- cut to the chase;
- go to the heart of the matter;
- convey the big picture;
- aim at the bullseye;
- zero in.

But the very fact that we have so many clichés referring to aspects of this skill demonstrates how highly we value it in the Anglo-American tradition.

If readers yearn to understand the problem and resent having to sweat unnecessarily to understand it, then most legal writers engender resentment every day. They could instead build credibility. And as far as I know, the deep issue is the best model for doing that consistently.