

University of Ottawa Faculty of Law (Civil Law Section)

From the Selected Works of Hon. Gerald Lebovits

June, 2006

You Think You Have Issues? The Art of Framing Issues in Legal Writing—Part II

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JUNE 2006
VOL. 78 | NO. 5

NEW YORK STATE BAR ASSOCIATION

Journal



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You Think *You* Have Issues? The Art of Framing Issues in Legal Writing — Part II

Last month the *Legal Writer* offered some suggestions on writing deep issues. We continue.

Writing Deep Issues in a Brief

The outcome of a case rests on how the court approaches the issues presented. Framing the right issue and the right answer go hand-in-hand. As Justice Felix Frankfurter explained, “the right answer usually depends on putting the right question.”¹ In a brief, frame the deep issue so that if your question is accepted or answered in your favor, the case will turn your way.² The persuasive deep issue can have only one answer.³ Express the issue fairly to support your theory of the case.⁴ Find the premises that’ll make the court reach your conclusion.⁵ Spoon-feed your readers the issues to get the answer you want.⁶ The way you frame the issue “is the spoon you will use to feed” the reader.⁷

When writing a brief, put yourself in the court’s shoes.⁸ The court has neither the time nor the specialization to know everything about your case. Make your brief “completely self-contained, intellectually as well as physically.”⁹ Explain the problem in the case and argue the law.¹⁰ Tell the court the factors that’ll affect the parties and the public.¹¹ Include the relevant part of a statute, contract, regulation, or any other document, if your case rests on interpreting them.¹² A judge will always ask, “What question am I supposed to answer in this case?”¹³ State the answer to the question and how the court can, and why it should, rule for you. Give the court the issues in your case up front to capture the judicial

imagination,¹⁴ as explained in Part I of this column. Frame your issue in a way that “not only will help you capture the Court but which will stick your capture into the Court’s head so that it can’t forget it.”¹⁵ If you do all that, you’ve made the court’s job easy, and that’ll increase your odds of winning.

The majority of the briefs you’ll write won’t have dispositive precedents. So don’t “ru[b] the judges’ noses in the precedents.”¹⁶ Convince the court that your position “is the more reasonable one in light of all relevant circumstances.”¹⁷ Use case law, “not as a club with which to beat your opponent to death, but as a source of policies to guide decision.”¹⁸ Use case law to show that your position doesn’t violate settled law.¹⁹ Don’t argue that the result for which you’re advocating is “already ‘in’ the law”²⁰ when there’s no dispositive precedent.

When phrasing a persuasive deep issue, don’t state a false issue.²¹ Never invent or skew facts or leave out any determinative facts — those facts on which a case turns — even if they hurt you.²² From beginning to end, “you must maintain credibility and must fairly link the statement of the issue to your genuine argument on appeal.”²³

Here are some examples of persuasive deep issues.

New York prohibits a person from suing for breach of an implied warranty when that person knowingly purchased used goods. Sue Second-Hand bought a 1985 Lemon convertible with 12,000 miles on the odometer. Should Second-Hand’s claim for breach of implied warranty against Lemon

be dismissed, given that the car was used when she bought it?²⁴ [55 words]

At 10:30 one morning last fall, Father Michael Heaven was on his way to buy groceries for his parish when his car collided with Beelzebub Bumper’s car. The Salvation Church, which owned Heaven’s car, required its priests to buy groceries as part of their priestly functions. Was Heaven the Church’s agent at the time of the accident? If so, should the Church be liable for damages?²⁵ [66 words]

Shabby Steel manufactured and sold to Dumdum Designers a widget designed for a trolley system. With Shabby Steel’s knowledge and approval, Dumdum Designers acquired the widget and added a new motor and cable, and integrated the widget into its defectively designed dumbwaiter system. The dumbwaiter injured Red Burns. Is Shabby Steel liable for Burns’s injuries?²⁶ [55 words]

**Spoon-feed your issues
to your readers to get
the answer you want.**

These examples of persuasive deep issues present the legal controversy, introduce the relevant facts, and suggest an answer of yes. The reader understands the events and will be receptive to your arguments and analysis.

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When writing a generic trial brief, or trial memorandum of law, your guide should be an appellate brief, with minor alterations. Place your issue in the “Question Presented” section. Next, include a “Statement of Facts.” Following the statement of facts should be your “Argument” section, together with point headings and sub-point headings. State the relief you’re seeking at the beginning of your argument section. Last, include a short “Conclusion” section in which you again tell the court what relief you’re seeking. This is the basic layout of your brief. These “rules” should serve as a guide, not as a complete reference for brief writing.

When you have more than one issue, number them and match them up with the numbered point headings in your argument section, as if the issues are the questions and the point headings are the answers. You can have more than one issue, but don’t resort to the kitchen-sink approach, unless you’ve got a death-penalty or similarly important case in which you must protect and preserve the record. Otherwise, choose between one and four issues: “Restricting yourself to four or fewer issues [is] called the ‘courage of exclusion.’”²⁷ Include more than four issues and the reader will lose focus. You’ll have diverted attention from your crucial issues. When choosing issues, be selective.

Court Rules

Incorporate deep issues in your briefs, but not at the expense of breaking court rules. Instead, take advantage of the rules to make the court want to rule for you. Many courts have intricate rules regulating the form and the substance of briefs. Briefs usually contain the following items: (1) table of contents; (2) table of authorities (also known as “table of citations” or “table of cases, statutes, and authorities”); (3) issues presented (also known as “questions presented,” “questions involved,” or “statement of issues to be decided”); (4) nature of the case and facts (also called a “statement of the

case” or “counter-statement of the case”); (5) summary of argument (where you outline your facts and law or summarize your argument section, depending on the jurisdiction) (6) argument; (7) conclusion; and (8) appendix.

In the New York State court system, write trial briefs (also called trial memorandums of law or memos of points and authorities) as you would an appellate brief.

In New York, the Appellate Terms of the First and Second Departments have different rules. The Appellate Term²⁸ for the First Department, aside from a page limitation of 50 pages for the main brief, does not provide any rules for the form and content of briefs.²⁹ The Appellate Term for the Second Department, Second and Eleventh Judicial Districts, requires that all briefs comply with CPLR 5528 (which pertains to the content of briefs and appendices) and CPLR 5529 (which pertains to the form of brief and appendices).³⁰ The same rule applies for the Appellate Term for the Second Department, Ninth and Tenth Judicial Districts.³¹

In New York, the First,³² Second,³³ Third,³⁴ and Fourth³⁵ Departments have specific and almost identical rules for the content of an appellant’s brief. The Third Department’s rules are broad and general compared to the other departments. The Second and Third Departments provide that briefs must comply with CPLR 5528 and 5529. All four departments in New York require, among other things, a table of contents.³⁶ Some of the departments specifically require a table of authorities (First³⁷ and Fourth³⁸), while other departments briefly mention it in passing (Second³⁹) or not at all (Third). All four departments require that briefs contain “questions involved.” The First⁴⁰ and Second⁴¹ Departments specifically provide that the questions involved contain no names, dates, amounts, or particulars. These departments require that the questions involved be followed immediately by the answer given by the court from which the appeal is taken. The Third and Fourth Departments require that

briefs comply with CPLR 5528 and 5529 when writing the questions involved.⁴²

CPLR 5528(a) provides that when writing the “question involved,” each question must be followed by the answer given by the court below. The question involved may contain no names, dates, amounts, or particulars. The First, Second, and Fourth Departments require a statement of the nature of the case and facts.⁴³ The Third Department requires compliance with CPLR 5528.⁴⁴ CPLR 5528(a)(3) provides that a statement of the nature of the case and of the facts will determine the questions involved. Make sure you support any references to pages in the appendix. The First, Second, and Fourth Departments also require an argument section.⁴⁵ The Third Department provides that you comply with CPLR 5528 in this respect.⁴⁶ CPLR 5528(a)(4) requires that the argument section be divided into points with distinct headings. All four departments provide specific rules for the content and form of the appendix.⁴⁷

New York’s rules don’t provide for a preliminary statement, but most lawyers write one and include it just before or after the questions involved. A preliminary statement expands on the questions involved, gives some procedural history, dates, names, places, and particulars, and sums up the argument to follow.

When writing a question presented in any of the Four Departments, therefore, write it as the CPLR provides.

The New York Court of Appeals requires, among other things (1) a table of contents; (2) a table of cases and authorities; and (3) an appendix.⁴⁸ In motions for permission to appeal in civil cases, the court requires a (1) notice of motion; (2) statement of the procedural history; (3) jurisdictional statement; (4) statement of the “questions presented” for review; (5) disclosure statement; and (6) copies of all orders, opinions, or memorandums from the court below. The questions presented must state why they merit the court’s review: that the issues are novel or of public importance, that

they present a conflict with the court's prior decisions, or that they involve a conflict among the departments of the Appellate Division. You must identify the particular portions of the record where the questions reviewed are raised and preserved.

Nowhere in the Court of Appeals's rules does it state that the questions presented be followed immediately by the answer given by the court below. But briefs submitted to the Court of Appeals have questions presented that are contemplated by the CPLR. Here's an example of a "question involved" that the CPLR contemplates, taken verbatim from a famous prosecution brief to the Court of Appeals:

May a police officer approach and question a man when, during a patrol at night in an area of Manhattan in which numbers of burglaries have recently taken place, the officer observes that man walking at a fast pace, with a noticeable limp, covered with snow and carrying a television set in a pillow-case thrown over his shoulder.

Answer of the court below: No, testimony and circumstances were inadequate to provide the detective with sufficient cause to approach and question the defendant.⁴⁹

For the most part, writing a deep issue in this manner under New York's rules for the Appellate Term, Appellate Division, and Court of Appeals will be difficult because the question involved cannot be detailed. It's wise to frame your issue so that the answer implied is "yes," but the answer to the question will depend on how the court below ruled. As the above example shows, however, by including concrete facts you can still tailor your deep issue to conform to the CPLR and court rules. You can also include deep issues when writing the statement of the case. The facts you incorporate will help the court determine the issues involved.

In the federal system, when writing trial briefs, which the courts call memorandums of law, the Eastern, Northern, Southern, and Western

Districts of New York don't give specific rules about how issues should be compiled or organized. But both the Eastern and Southern Districts tell you to set forth in point headings your "points and authorities."⁵⁰ In the Northern District, the only rules about memorandums of law tell you to have a table of contents and parallel citations.⁵¹ In the Western District, the only limitation for a memorandum of law is a 25-page limit.⁵² The district courts' rules in New York therefore allow lawyers to use deep issues exactly as this column suggests.

When submitting a brief to a federal court of appeals like the Second Circuit, for example, comply with Rule 28 of the Federal Rules of Appellate Procedure. Under this rule, briefs should contain, among other things, the following items, in this order: (1) corporate disclosure statement; (2) table of contents; (3) table of authorities; (4) jurisdictional statement; (5) statement of the issues presented; (6) statement of the case; (7) summary of the argument; (8) argument; (9) short conclusion; and (10) certificate of compliance.⁵³ The brief must also conform to the local rule of court. The Second Circuit requires that you follow Rule 28 as well as Local Rule 28,⁵⁴ which provides that briefs be free from "burdensome, irrelevant, immaterial, and scandalous matter."⁵⁵ In your statement of the issues presented to the Second Circuit, use this column's deep-issue approach.

When submitting briefs to the United States Supreme Court, "the statement of the questions presented must precede all other matters, including the table of contents."⁵⁶ The Court requires the following items in this order immediately after the cover page: (1) questions presented; (2) list of all parties unless the caption contains all parties as well as an amended corporate disclosure statement; (3) table of contents and authorities; (4) citations of the (un)official reports of the opinions and orders entered by courts and administrative agencies; (5) statement

of jurisdiction; (6) constitutional provisions, treaties, statutes, ordinances, and regulations verbatim with citations; (7) statement of the case along with the facts; (8) summary of the argument; (9) argument; and (10) conclusion. How you frame the issue to the Court suggests "the importance of conveying this vital information to the court at the very beginning of the brief."⁵⁷ Supreme Court requirements encourage lawyers to write a deep, persuasive question.

Organizing Deep Issues

Once you've narrowed down your issues, address them logically. In briefs and inter- or intra-office memorandums, organize them as follows:

- Discuss threshold issues before you discuss the merits of the case. A threshold issue is often a procedural issue, like whether the court has jurisdiction to consider the merits. Sometimes a threshold issue is substantive, like a statute-of-limitations question. Threshold issues can be dispositive.
- Lead with your best issue. The best issue is the one on which the reader is most likely to agree with you. Within your best issues, put essential things first. (This suggestion applies only to briefs, not office memorandums.)
- Discuss large claims or issues before you discuss less significant ones.
- If all the claims are equally large, discuss the claim that affects the litigation most. Thus, in a criminal appeal in which a defendant seeks a new trial or, alternatively, a reduced jail sentence, first discuss whether the appellate court should grant a new trial.
- Move logically through statutory or common-law tests. Often a case will depend on whether a litigant satisfied a multi-factor test enumerated in a statute or a seminal case. Discuss the issue in the sequence in which the statute or case lays out the factors.

- When the answer to one question depends on the answer to an earlier question, resolve the first question first. The reader will understand relationships more easily that way, and you'll avoid awkward cross-referencing. Discussing issues in the order they arose facilitates understanding if the issues arose chronologically. Everything else being equal, discuss issues by a hierarchy of authority: constitutional questions first, then statutory questions, then common-law questions.

Conclusion

Issue framing, among the most important aspects of legal writing,⁵⁸ is among the most ignored. The lawyer who frames the issue well might be the lawyer who wins.⁵⁹ Lawyers often focus on getting the law right rather than writing well,⁶⁰ but the two can't be separated. Don't lump all the critical information in the middle of a document, hoping that the reader will find the issue underneath all the legal words. Instead, make the reader's job easy. Say something of substance at the beginning and the end.⁶¹ Use the deep-issue method to create a picture for readers that'll stand out in their mind — long after your brief or memorandum has been read. ■

1. *Estate of Rogers v. Comm'r*, 320 U.S. 410, 413 (1943).
 2. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 *Scribes J. Legal Writing* 1, 11 (1994) (hereinafter "Deep Issue").
 3. *Id.*
 4. *Id.* at 10.
 5. *Id.*
 6. Richard A. Posner, *Convincing a Federal Court of Appeals*, 25 *Litigation* 3, 3 (Winter 1999); Marcia L. McCormick, *Selecting and Framing the Issues on Appeal: A Powerful Persuasive Tool*, 90 *Ill. B.J.* 203, 204 (Apr. 2002).
 7. McCormick, *supra* note 6, at 204.
 8. Posner, *supra* note 6, at 4.
 9. *Id.* at 3.
 10. *Id.*
 11. *Id.*
 12. *Id.*
 13. Deep Issue, *supra* note 2, at 14.
 14. *Id.* at 15.
 15. Bryan A. Garner, *Issue Framing: The Upshot of It All*, *Trial*, Apr. 4, 1997, at 74 (citing Karl L. Llewellyn, *A Lecture on Appellate Advocacy*, 29 *U. Chi. L. Rev.* 627, 630 (1962)).

16. Posner, *supra* note 6, at 4.
 17. *Id.*
 18. *Id.*
 19. *Id.*
 20. *Id.*
 21. Charles R. Calleros, *Legal Method and Writing* 432 (4th ed. 2002).
 22. See generally *The Legal Writer, Legal-Writing Ethics — Part I*, 77 *N.Y. St. B.J.* 64 (Oct. 2005); *The Legal Writer, Legal-Writing Ethics — Part II*, 77 *N.Y. St. B.J.* 64 (Nov./Dec. 2005).
 23. Calleros, *supra* note 21, at 432.
 24. Adapted from Deep Issue, *supra* note 2, at 12.
 25. *Id.* at 13.
 26. *Id.*
 27. Henry Weihofen, *Legal Writing Style* 258 (2d ed. 1980) (quoting John W. Davis).
 28. See generally Gerald Lebovits & Deborah E. Fisher, *Winning Residential Appeals: Perfecting, Briefing, and Orally Arguing Appeals in the Appellate Term and Beyond*, 1 *Landlord-Tenant Prac. Rep.* 7 (June 2000) (Part III of the authors' three-part article).
 29. See 22 *N.Y.C.R.R.* § 640.5.
 30. 22 *N.Y.C.R.R.* § 731.2(a).
 31. 22 *N.Y.C.R.R.* § 732.2(a).
 32. 22 *N.Y.C.R.R.* § 600.10(d)(2).
 33. As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* § 670.10.1(a) and 670.10.3(g)(2) available on Lexis, McKinney's Rules of Court, or the Second Department's rules 670.10.1(a) and 670.10.3(g)(2) available at <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rules are incorrectly cited as 670.10-a(a) and 670.10-c(g)(2).
 34. 22 *N.Y.C.R.R.* § 800.8(a).
 35. 22 *N.Y.C.R.R.* § 1000.4(f)(6).
 36. 22 *N.Y.C.R.R.* §§ 600.10(d)(2)(i) (1st Dep't); 670.10.3(g)(2)(ii) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(f)(6) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* § 670.10.3(g)(2)(ii) available on Lexis, McKinney's Rules of Court, or <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(ii).
 37. 22 *N.Y.C.R.R.* § 600.10(d)(2)(i).
 38. 22 *N.Y.C.R.R.* § 1000.4(f)(6).
 39. 22 *N.Y.C.R.R.* §§ 670.10.3(a)(3) and 670.10.3(b). As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* § 670.10.3(a)(3) and 670.10.3(b) available on Lexis, McKinney's Rules of Court, or <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rules are incorrectly cited as 670.10-c(a)(3) and 670.10-c(b).
 40. 22 *N.Y.C.R.R.* § 600.10(d)(2)(ii).
 41. 22 *N.Y.C.R.R.* § 670.10.3(g)(2)(iii). As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* § 670.10.3(g)(2)(iii) available on Lexis, McKinney's Rules of Court, or <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(iii).
 42. 22 *N.Y.C.R.R.* §§ 800.8(a) (3d Dep't); 1000.4(f) (4th Dep't).
 43. 22 *N.Y.C.R.R.* §§ 600.10(d)(2)(iii) (1st Dep't); 670.10.3(g)(2)(iv) (2d Dep't); 1000.4(f)(6) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* § 670.10.3(g)(2)(iv) available on Lexis, McKinney's Rules of Court, or <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(iv).
 44. 22 *N.Y.C.R.R.* § 800.8(a).
 45. 22 *N.Y.C.R.R.* §§ 600.10(d)(2)(iv) (1st Dep't); 670.10.3(g)(2)(v) (2d Dep't); 800.8(a) (3d Dep't); 1000.4(f)(6) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* 670.10.3(g)(2)(v) available on Lexis, McKinney's Rules of Court, or <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-c(g)(2)(v).
 46. 22 *N.Y.C.R.R.* § 800.8(a).
 47. 22 *N.Y.C.R.R.* §§ 600.10(c) (1st Dep't); 670.10.2(c) (2d Dep't); 800.8(b) (3d Dep't); 1000.4(d) (4th Dep't). As of January 18, 2006, for the Second Department, rely either on 22 *N.Y.C.R.R.* 670.10.2(c) available on Lexis, McKinney's Rules of Court, or <http://www.courts.state.ny.us/courts/ad2/pdf/rulesofprocedure.pdf>. On Westlaw and the bound New York Codes, Rules and Regulations, the rule is incorrectly cited as 670.10-b(c).
 48. 22 *N.Y.C.R.R.* § 500.13(a).
 49. Edward D. Re & Joseph R. Re, *Brief Writing & Oral Argument* 249 (7th ed. 1993) (quoting People's brief submitted to New York Court of Appeals in *People v. Moore*, 47 *N.Y.2d* 911, 419 *N.Y.S.2d* 495, 393 *N.E.2d* 489 (1979)).
 50. *S.D.N.Y. L.R.* 7.1; *E.D.N.Y. L.R.* 7.1.
 51. *N.D.N.Y. L.R.* 7.1(a)(1); 12.1(a).
 52. *W.D.N.Y. L.R.* 7.1(e).
 53. See *Fed. R. App. P.* 28.
 54. *Id.*
 55. Local Rule 28, available at <http://www.ca2.uscourts.gov>. (Follow "Clerk's Office" hyperlink; then follow "Rules" hyperlink; then follow "Local Rule 28. Briefs") (last visited Jan. 9, 2006).
 56. Re & Re, *supra* note 49, at 110; see also Rule 24 of the Supreme Court of the United States, available at <http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf> (last visited Jan. 9, 2006).
 57. *Id.*
 58. Deep Issue, *supra* note 2, at 2.
 59. *Id.* at 11.
 60. Wayne Schiess, *The Five Principles of Legal Writing: Any Lawyer Can Improve His or Her Writing — and Probably Needs To*, 49 *Prac. Law.* 11, 12 (June 2003).
 61. Margaret Graham Tebo, *Get It Write the First Time: Organization, Attention to Detail Are the Keys to Effective Legal Writing*, 43 *A.B.A. J.* 1 (Nov. 2002).

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