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

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BY GERALD LEBOVITS

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

Issues are the essence of a legal controversy. Framing issues is among the most important part of writing briefs and inter- or intra-office memorandums. Issues create the boundary of a legal controversy. Creating the issue as a question gives readers a story from your perspective to fit within that boundary. Like painters who combine color, perspective, and light to create a picture on a canvas, so do attorneys who combine fact, law, and issue to create a story on a page. Issue framing is an art, not a science — an art that can be acquired with practice.

What’s true for good issue framing is true for all legal writing: “good legal writing makes readers feel smart, whereas bad legal writing makes readers feel stupid.” There are different types of issues and different approaches to drafting them, but “good [legal] writing makes the reader’s job easy; bad [legal] writing makes it hard.” One way to make your reader work hard is to draft a superficial issue.

The Superficial Issue
A superficial issue lacks detail. It’s easy to frame but hard to understand. The reader is left trying to grasp what’s written instead of focusing on the argument. To understand a superficial issue, the reader must read additional facts and law from the body of the brief or memorandum. The more abstract or conclusory the issue, the more superficial it is. An example of a superficial issue: “Can Jones maintain an action for fraud?” Framing the issue this way doesn’t give the reader enough information about the legal controversy. It suggests nothing about your theme. The reader will be forced to enter a black hole in a search of a deeper issue. No better than a superficial issue is the one-sentence approach.

The One-Sentence Approach
The old-fashioned legal issue consists of one sentence, it begins with “whether,” it states the rule of law, and it lacks facts or details. Consider the following:

Whether a limited remedy fails of its essential purpose under Uniform Commercial Code § 2-719 when a buyer of a computer vital to the buyer’s business must wait a month for the seller to repair it and thus loses substantial profit?

This issue is unreadable. In the end it says nothing.

Most writers believe that this is the right way to write issues. The logic is that it must be right because other lawyers frame issues this way. But this approach frustrates readers. It makes them work unnecessarily to search the brief or memorandum for the true issues and the relevant facts. And sentences that begin with “whether” are statements; they shouldn’t end with question marks. Writing the issue in the old-fashioned one-sentence approach creates generic issues and generic facts.

The Deep Issue
Bryan A. Garner, America’s greatest legal-writing expert, proposes the “deep issue” approach to frame issues. At first glance, writing a deep issue seems basic and elementary, but it takes sophistication. The more tangible the issue, the deeper it is. A deep issue “sums up a case in a nutshell.” After you frame the deep issue, your readers should understand it easily and not exercise their minds. Writing a deep issue will force you “to simplify difficult ideas without over simplification.” The two goals when writing the deep issue are brevity and clarity. If you’re concise and clear, your reader will reward you by continuing to read.

Frame deep issues this way:

Front-load. Provide clarity by placing the deep issue at the beginning of a brief or memorandum. One of the biggest flaws in legal writing is not getting important information in front of the reader, right away. The first step to writing a deep issue is to follow the 90-second rule: Make your point within 90 seconds. Within 90 seconds, the reader should understand the question, the answer, and the reasons for the answer. Make sure your briefs or office memorandums make a good first impression. Catch the reader’s interest; make the reader want to read on.

Use separate sentences. The sentences should follow a statement—statement—question format. Writing the issue in one sentence leads to an incomprehensible issue. Issues that begin with “whether” followed by one convoluted sentence with unchronological statements won’t help the reader. Help your reader by giving information in “bite-size form.”

Order facts chronologically. If the facts are out of order, readers will forget the question by the time they get to CONTINUED ON PAGE 54
the end of the sentence. Tell a story in miniature.

**Be concrete.** Add detail — show, don’t tell — to convey a sense of story. Don’t characterize.

**Cut irrelevant facts.** Include only those details that advance your argument and help the reader understand the problem. Omit nonessential dates, times, places, persons, and particulars.

**Use about 50 to 75 words.** When you exceed 75 words, the writer loses focus and the reader loses interest. If you can’t frame the issue in 75 words, then you don’t know your issue. Neither will your reader.

**Highlight and incorporate the reasons for your conclusion.** When you provide reasons for your conclusion, you look thoughtful and sensible. When your reasons are absent, you look as if you’re hiding something. Giving the reasons for your conclusion will get you closer to a favorable outcome.

**Appear objective.** A deep issue in a brief should “look[] and sound[] objective even when it’s gently slanted.” A deep issue in an office memorandum should be objective.

**End with a question mark.** An issue is a question you want answered in your favor. As basic as it sounds, “the best issue ends with a question mark.”

**Get to yes.** Deep issues should answer themselves with a resounding “Yes.” Frame your issue positively. Stay away from negative language or negative answers.

**Divide your issues.** Use a different issue for each independent ground on which relief can be granted. You’re a defendant in trouble if your reader says “Yes, but so what; the defendant still loses.” And you’ve wasted an opportunity if your issue is too broad.

**Use counter-issues.** As the defendant, respondent, appellee, or party opposing a motion, you shouldn’t let the court rely on the other side’s presentation of an issue. Level the playing field with your own deep counter-issue.

**The Hybrid Approach**

Some lawyers combine the old-fashioned and deep-issue approaches by framing the issue in one sentence and incorporating concrete facts. Consider this: “Can a pleading defect be corrected by a ‘supplemental petition’ or must the correction be designated an ‘amended petition’ to be effective?” Another example of the hybrid approach is to frame an introductory question followed by several short one-sentence questions:

- Should an order granting a new trial be subject to appellate review in New York, as it is in the other 49 states, the District of Columbia, and the federal courts?
- Are a litigant’s rights under the New York and United States Constitutions violated by New York’s practice of immunizing new trial orders from review?
- Should a trial court be required to state its reasons for granting a new trial?

This approach might work given these facts, but it might fail in a different case. The better way to persuade the reader is to use the deep-issue approach. It gives readers several sentences to digest, one bite at a time.

**Finding Deep Issues**

The three things you must deliver in any brief or memorandum are the question, the answer, and the reasons for that answer. Begin writing only after you understand your facts and issues. Determining your theme will bring you to your legal issues. A clear issue will guide the reader and provide a road map for the entire argument. The clearer the issues, the quicker the reader will grasp the argument. Frame your issues so that your reader will understand your theme easily.

The key is to determine your essential issues. Figure out from your client’s perspective how a court can solve the problem in your case. Ask yourself, “What relief am I seeking for my client?” After studying the relevant law, you’ll be able to narrow the facts so that when they’re applied, you’ll prevail. The concrete facts in your case applied to the relevant law will give you your deep issue. Your deep issue will reflect your theme.

**Writing the Deep Issue: Some Do’s and Don’ts**

The facts in your deep issue must be stated honestly. Don’t distort. If you do, your adversary might point it out, or your reader will catch you even if your adversary doesn’t.

Don’t include facts in your issue that “assume as true what is actually hotly disputed.” Don’t argue your facts; save your argument for your argument or discussion section. Use neither argumentative nor biased words. Lead your readers to the cliff, but let them jump off themselves.

In a brief, the facts you use should favor your side. Emphasize the facts that “lead to the answer that you want.” That’ll force the reader to agree with you. Don’t give the other side’s facts. You’re not denying the other side’s claim. You’re just not yet at the stage at which you’ll want to acknowledge and contradict them.

In an office memorandum, write your facts objectively. One way to be neutral in a memorandum is to give facts that favor and oppose the conclusion you’ll ultimately reach or recommend you’ll ultimately offer.

When organizing deep issues in both briefs and office memorandums, place “the most challenging pieces of information at the beginning and the end (the emphatic positions), and the most easily comprehensible part in the middle” of a sentence.
arrange your deep issue from the law to the facts or from the facts to the law.

Writing Deep Issues in an Office Memorandum

The main focus in an intra- or inter-office memorandum, as opposed to a trial memorandum, is to analyze issues and predict outcomes. In a memorandum, the issue is framed analytically. An analytical deep issue differs markedly from a persuasive deep issue in a brief in that analytical issues are open-ended and objective. Analytical issues should be phrased to make the reader yearn for the answer yet should not suggest an outcome. A few examples of the analytical deep issue:

Immigration Act § 273 makes it a crime to bring an undocumented alien to the United States. Maritime Act § 2304 makes it a crime for the master of a vessel to fail to rescue persons aboard a vessel in distress. Does a master who rescues illegal aliens aboard a vessel in distress and then brings these aliens to the United States commit a crime under the Immigration Act?

The interspousal immunity doctrine furthers public policy by preserving family harmony. Kitty Hawk sued her deceased father’s estate for her mother’s wrongful death in an airplane crash. Does the doctrine of interspousal immunity bar Kitty’s recovery when there is no longer any marital harmony to preserve?

RRR School District, a public employer, suspects that Deep Pockets, an employee, is stealing money from the register. RRR

These examples illustrate how to write effective deep issues in a memorandum. They contain concrete facts in separate sentences; they contain about 50–75 words; they look and sound objective; they give a reason for the conclusion; and they end with a question mark.

A memorandum containing deep issues has many advantages over one that’s superficial or has one-sentence issues. Here are several:

- The assigning attorney will see erroneous assumptions;
- A reader will understand the memorandum;
- The memorandum will be understood long after it’s written;
- Colleagues researching similar points in different cases will find the memorandum helpful; and
- The analytical deep issue can be transformed later into a persuasive deep issue in a brief.

When writing an office memorandum, follow the standards of your law firm or legal department. A memorandum will have the following items, in this order: (1) heading (To; From; Re [or Subject]; Date); (2) issue or question presented; (3) conclusion or short answer; (4) statement of the facts; and (5) discussion. A memorandum is objective; it advocates a particular view, but only after it considers both sides. Adopt a “non-partisan tone.” Serve the client’s interests by scrupulously and realistically analyzing the various views objectively. Discuss not only the favorable information in the case but also the unfavorable. If you can master writing objective deep issues in a memorandum, then you’ll be able to transform them into persuasive deep issues in a brief.

Next month: This column continues writing deep issues in briefs and organizing issues.

6. Adapted from Larsen, supra note 5, at 39.
8. Id. at 3.
9. Id.
10. Id. at 4.
14. Id.
16. Id. at 75.
17. Deep Issue, supra note 2, at 5.
18. Upshot, supra note 15, at 76.
19. Id.
20. Id.
21. Id. at 75.
22. Id.
24. Id.
25. Adapted from Hankinson, supra note 23, at 2.
27. Larsen, supra note 5, at 39.
29. Id. at 253.
30. Id.
32. Id. at 6.
33. Adapted from Deep Issue, supra note 2, at 6.
34. Id.
35. Id.
39. Id. at 152.

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