

Got Issues? An Empirical Study about Framing Them

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Grounded in framing theory and the analyses of judges and commentators, this article examines issue statements in a sample of recent briefs from six states. The data cover various aspects of issue statements, including sentence structure, length, and the most common beginning words. Issue statements from recent briefs provide examples throughout the discussion. The article concludes with recommendations for framing effective issue statements.

Table of Contents

I. Methodology	4
II. The study results	5
A. Succinctness	5
B. Clarity	9
C. Sentence structure	11
1. <i>Single-sentence issues</i>	11
2. <i>Issues with sub-points or multiple sentences</i>	13
D. Opening words	16
E. Reference to the parties	17
F. Inclusion of facts	19
G. Framing for persuasiveness	22
III. Conclusions and recommendations	25

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*Gertrude Stein asked, “What is the answer?” . . . and when no answer came she laughed and said: ‘Then, what is the question?’ ”*¹

Stein knew that framing a question is a necessary step toward resolving it. Judges and commentators recognize the same principle when they stress the importance of the issue statement (sometimes called the *question presented*)² in an appellate brief. It provides the court’s first introduction to the case, and by conveying the substance of the question the court must decide,³ it offers “the lens through which the judge-reader filters the rest of the brief.”⁴ Some have even called the issue statement the most important part of the brief.⁵ It is a mistake, then, for a lawyer to miss this important opportunity to advocate by haphazardly writing the issue statement at the last minute.⁶

Framing theory, which has informed scholarship in several fields in recent years,⁷ helps explain why an issue statement’s wording is so important. Framing theory holds that people identify and label their experience through

¹ Elizabeth Sprigge, *Gertrude Stein, Her Life and Work* 265 (Harper & Bro. 1957).

² The court rules for the six states in this study use the following terms for the issue statement in a brief: Alabama: “Statement of the issues,” Ala. R. App. P. 28(a)(6); California: “Statement of the issues,” Cal. R. Ct. 8.520(b)(2)(B); Illinois: “Statement of the issue or issues presented for review,” Ill. Sup. Ct. R. 341(h)(3); Montana: “Statement of the issues presented for review,” Mont. R. App. P. 12(1)(b); New York: Statement of the “questions involved,” N.Y.C.P.L.R. 5528(a)(2); Vermont: “Statement of the issues presented for review,” Vt. R. App. P. 28(a)(1).

³ Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* 310 (4th ed., LexisNexis 2004) (stating that the question presented “frames the questions you want the court to answer”); Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 488 (2d ed., LexisNexis 2006) (stating that the issue statement should “clearly inform the court of the question or questions it has been asked to resolve”).

⁴ Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. App. Prac. & Process 7, 12 (1999). See also Frederick Bernays Weiner, *Effective Appellate Advocacy* 59 (Christopher T. Lutz & William Pannill eds., rev. ed., ABA Publg. 2004) (stating that the question presented “is an extremely important item, particularly since by stating [it] well[,] you are really choosing the battleground on which your litigation will be contested”).

⁵ E.g. Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 83 (Thomson West 2008) (stating that the question presented “may well be the most important part of your brief”); David E. Sorkin, *Make Issue Statements Work for You*, 83 Ill. B.J. 39, 39 (Jan. 1995) (“The most important part of a written analysis of a legal problem is the introductory statement of the issues.”); Schultz & Sirico, *supra* n. 3, at 310 (“The Questions Presented section is one of the most important sections of the brief.”).

⁶ Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 93 (3d ed., West 2003).

⁷ See Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 Annual Rev. Sociology 611, 611 (2000) (explaining that framing theory has been applied in the fields of cognitive psychology, linguistics, communication, political science, and sociology).

their mental frames.⁸ In his influential book on frame analysis, sociologist Erving Goffman defined frames as “schemata of interpretation” through which people “locate, perceive, identify, and label” experience.⁹ As political scientist James N. Druckman put it, a framing effect occurs when a speaker’s emphasis on certain considerations affects what others focus on in forming opinions.¹⁰ Frames are often expressed through language.¹¹

Researchers have applied framing theory to show that frames affect how people see issues.¹² This analysis has helped politicians influence public opinion by skillfully framing ideas.¹³ Similarly, a skillfully framed issue statement can help shape a court’s perceptions of an appellate case.

It is not surprising, then, to find abundant advice about how to frame an issue statement. That advice, however, is not always consistent. For example, some advise that an issue should be phrased as a question, often beginning with a verb like *can* or *does*,¹⁴ while others prefer a clause that begins with the word *whether*.¹⁵ Some say the statement should include enough facts to place the issue in context,¹⁶ while others prefer a more general statement.¹⁷ And some believe that an issue should be framed as a single sentence,¹⁸ while others prefer a multi-sentence format.¹⁹

⁸ Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* 21 (Harvard U. Press 1974).

⁹ *Id.*

¹⁰ James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. Pol. 1041, 1042 (2001).

¹¹ George Lakoff, *Don’t Think of an Elephant* xv (Chelsea Green Publg. 2004) (“We . . . know frames through language.”)

¹² Druckman, *supra* n. 10, at 1042.

¹³ See e.g. Lakoff, *supra* n. 11, at 4 (providing examples of language that has affected public opinion, including politicians’ use of “tax relief” to suggest that tax is an affliction); Thomas E. Nelson, Zoe M. Oxley & Rosalee A. Clawson, *Toward a Psychology of Framing Effects*, 19 Pol. Behavior 221, 224 (1997) (“Frames can be meaningful and important determinants of public opinion” that have affected opinions on subjects including welfare, affirmative action, and the causes of poverty.).

¹⁴ E.g. Richard K. Neumann & Sheila Simon, *Legal Writing* 250 (Aspen Publishers 2008); Deborah A. Schmedemann & Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 218 (3d ed., Aspen Publishers 2007).

¹⁵ E.g. Gertrude Block, *Effective Legal Writing for Law Students and Lawyers* 193 (5th ed., Found. Press 1999).

¹⁶ E.g. Bradley G. Clary et al., *Advocacy on Appeal* 41 (3d ed., West 2008).

¹⁷ See John C. Dernbach et al., *A Practical Guide to Legal Writing & Legal Method* 242 (3d ed., Aspen Publishers 2007) (identifying one style of issue statement that omits specific facts, but recommending as more effective a second style that does include facts).

¹⁸ E.g. Veda R. Charrow et al., *Clear and Effective Legal Writing* 285 (4th ed., Aspen Publishers 2007).

¹⁹ E.g. Bryan A. Garner, *The Elements of Legal Style* 185 (2d ed., Oxford U. Press 2002); Gerald Lebovits, *You Think You Have Issues? The Art of Framing Issues in Legal Writing—Part II*, 78

Amid all this advice, there is little information about how lawyers are actually framing issues.²⁰ To provide some data about current issue statements, this article reports a study of briefs written for six states' highest courts.²¹ Section I explains the study's methodology, and Section II presents its results and relates them to the literature on the subject. Section III concludes with recommendations for writing issue statements.

I. Methodology

This study covers issue statements from briefs filed with the highest courts of six states that vary in population, location, and degree of their courts' influence. The sample includes three populous states, California, New York, and Illinois, whose respective ranks in population in the 2000 census were first, third, and fifth.²² It also includes medium-sized Alabama, which ranked twenty-third in population, and less populous Montana and Vermont, which ranked forty-fourth and forty-ninth.²³ These six states are located in diverse geographic regions, from the east coast to the west coast and from New England to the south.²⁴

The highest courts of these six states have varying degrees of influence. Two scholars recently measured state courts' influence by tallying cases Shepard's marked as "followed" by other states' courts.²⁵ Counting decisions that were followed at least three times between 1985 and 2005, the study's authors ranked California first in influence, Illinois tenth, New York thirteenth, and Montana fifteenth.²⁶ Less influential Vermont and Alabama ranked twenty-ninth and thirty-sixth respectively.²⁷

My research assistants and I then located briefs from the six states through the following method. We searched the highest courts' databases on Westlaw for cases decided in the year 2007, identifying cases with posted opening briefs for both sides. We did not include amicus briefs, nor did we include cases where either main brief was filed by a party acting *pro se*, because our purpose was to study lawyers' practices. We examined the newest sets of

N.Y. St. B.J. 64 (June 2006) (both promoting multi-sentence "deep issue" statements).

²⁰ One recent study examined questions presented in the United States Supreme Court. Brady S. Coleman et al., *Grammatical and Structural Choices in Issue Framing: A Quantitative Analysis of "Questions Presented" from a Half Century of Supreme Court Briefs*, 29 Am. J. Tr. Advoc. 327 (2005).

²¹ Coleman et al. noted that a study of state court briefs might find different results from those their study found for the Supreme Court. *Id.* at 332.

²² U.S. Census Bureau, *Census 2000, Table 1: States Ranked by Population*, <http://www.census.gov/population/cen2000/phc-t2/tab01.pdf> (Apr. 2, 2001).

²³ *Id.*

²⁴ *Id.*

²⁵ Jake Dear & Edward W. Jessen, "Followed Rates" and Leading State Cases, 1940–2005, 41 U. Cal. Davis L. Rev. 683, 692 (2007).

²⁶ *Id.* at 696.

²⁷ *Id.*

briefs until we located fifty sets for each state. Through this method we found a total of 300 sets of briefs; most were from 2007 cases, but for New York and Alabama, this method required including some briefs from earlier cases. Some cases had briefs posted for more than two main parties, so the total number of briefs in the study is 626, which include a total of 1425 issue statements. Most of the briefs contain issue statements, but 48, or 3.3%, do not. Most of those—38—are appellees' briefs, where presumably the drafter was satisfied with the appellant's issue statement.

We then examined these briefs to see what kinds of issue statements lawyers are writing.

II. The study results

To analyze how lawyers frame issue statements, we looked at the following aspects of the issues section in each brief in the sample:

- A. Succinctness, as shown by the number of separate issues and their length in words.
- B. Clarity.
- C. Sentence structure.
- D. Opening words.
- E. Manner of referring to the parties.
- F. Inclusion of facts.
- G. Framing for persuasiveness.

A. Succinctness

Succinctness was the first trait we examined. Judges prize this attribute. In one recent study, judges ranked concision as the most essential element of good writing.²⁸ Another study showed that federal “[j]udges seem most interested in an advocate’s ability to be brief,”²⁹ and in a third study, many state and federal judges in New York and New England thought “briefs are not brief enough.”³⁰

Indeed, judges tend to form poor impressions of briefs written in wordy legalese.³¹ Judges and their research attorneys in one study read brief segments in either legalese or in plain English.³² They found the plain English briefs

²⁸ Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Leg. Educ. 80, 85 (2003).

²⁹ Kristen K. Robbins, *The Inside Scoop: What Federal Judges Think About the Way Lawyers Write*, 8 Leg. Writing 257, 279 (2002).

³⁰ David Lewis, *Common Knowledge About Appellate Briefs: True or False?*, 6 J. App. Prac. & Process 331, 335 (2004).

³¹ Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loy. L.A. L. Rev. 301, 313, 315 (1987).

³² *Id.* at 306.

more convincing³³ and thought the legalese briefs came from less prestigious firms and ineffective appellate advocates.³⁴ As Judge Lynn Hughes observed, “For a hundred years, good lawyers have been writing without all the garbage and in a simple, direct style.”³⁵

Findings of human cognition experts support these viewpoints by showing that long, complex sentences impede reader comprehension. Rudolf Flesch, who developed a widely used readability test,³⁶ observed that readers’ minds need to take breaks to sum up what they are reading.³⁷ For that reason, “the longer a sentence, the harder it is to read.”³⁸ The Flesch-Kincaid readability test relies on sentence length and vocabulary complexity to measure readability.³⁹ Shorter sentences contribute to a better readability score.⁴⁰ Following similar principles, Joseph Kimble advises legal writers to use short and medium-length sentences that average around twenty words.⁴¹

Many commentators stress that issue statements should be succinct. Both Mary Beth Beazley and Carole Berry believe that a judge may simply stop reading a lengthy issue statement.⁴² Worse, the judge may turn to the opposing brief to clarify the issues.⁴³ Even Bryan Garner, who recommends multi-sentence issue statements,⁴⁴ would still restrict their length: “About 98% of the time, if you can’t phrase your issue in 75 words, you probably don’t know what the issue is. It’s that simple.”⁴⁵

³³ *Id.* at 313.

³⁴ *Id.*

³⁵ Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 73 Mich. B.J. 326, 326 (1994).

³⁶ For example, Microsoft Word allows users to measure the readability of their documents through a version of the Flesch-Kincaid readability test. Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 Quinnipiac L. Rev. 147, 150 (2007).

³⁷ Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* 21 (HarperCollins 1979).

³⁸ *Id.* at 22.

³⁹ *Id.* at 21–22.

⁴⁰ *Id.* at 22–23. See also Sirico, *supra* n. 36, at 150–51 (describing the Flesch-Kincaid readability formula).

⁴¹ Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain English* 71 (Carolina Academic Press 2006).

⁴² Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 141 (2d ed., Aspen Publishers 2006) (“Questions that are too long are not read carefully—if they are read at all . . .”); Berry, *supra* n. 6, at 93 (stating that a long issue statement may cause “the reader . . . [to] give up in mid-question.”).

⁴³ Berry, *supra* n. 6, at 93 (stating that a lengthy issue may lead the reader to simply “turn to the opponent’s brief.”)

⁴⁴ See *infra* nn. 90–92 and accompanying text.

⁴⁵ Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate*

Some issue statements in this study violated that guideline. The following is one of the more verbose examples:

Whether the trial court abused its discretion in finding that there was no confidential communication or attorney-client privilege between Mrs. Lynch and Attorney Julie Wills regarding the deed transaction that is the [sic] and whether the court committed [sic] error by allowing Attorney Julie Wills to testify over objection of Mrs. Lynch about Mrs. Lynch's instructions and expressed intent and about her competence at the time of the execution of the deed which the Plaintiffs Lynch seek to set aside on grounds of fraud, deceit, trickery and coercion (C 1, 2), when Ms. Wills was the attorney who prepared the deed that Plaintiffs Lynch seek to set aside and who also was the notary who completed the notary's acknowledgment in that deed certifying that Juanita Lynch, who was known to her, acknowledged before her on August 30th, 2004 that being informed of the contents of the conveyance, she executed the same voluntarily on that date and when Defendant was present during the meetings between Mrs. Lynch and Attorney Wills where the discussions about Mrs. Lynch's intentions were had and when instructions were given by her for preparation of the deed.⁴⁶

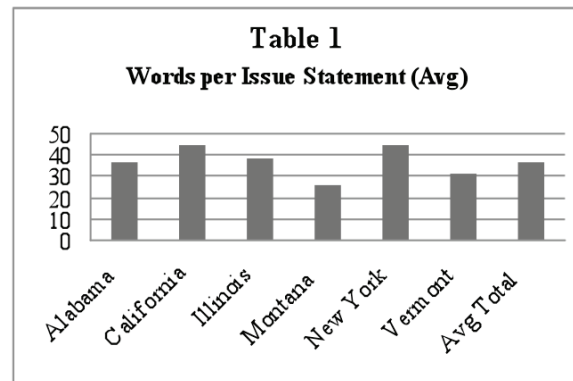
This statement crams 190 words into a single sentence with no fewer than fifteen subordinate clauses and twenty-five prepositional phrases, four of them in a cumbersome string.⁴⁷ Even its drafter got lost in the syntax, writing this nonsensical clause: "the deed transaction that is the and whether" A judge or research attorney is unlikely to make the effort to decipher a statement like this.

The average number of words for each discrete issue was 37. California and New York lawyers were the most verbose, averaging 45 words per issue, while Montana lawyers averaged only 26 words per issue, as shown in Table 1.

Courts 80 (2d ed., Oxford U. Press 2004).

⁴⁶ Br. of Appellee Rebecca Lynch Hamrick at 3, *Lynch v. Hamrick*, 968 So. 2d 11 (Ala. 2007).

⁴⁷ See Mary Bernard Ray & Jill J. Ramsfield, *Legal Writing: Getting it Right and Getting It Written* 307 (4th ed., Thomson West 2005) (advising writers to avoid strings of prepositional phrases because they "can waltz your reader right off to sleep").



The highest number of words in one discrete issue—313—appeared in the appellant’s brief in *Coleman v. Smith*.⁴⁸ Thirty-three other issues exceeded 100 words. The shortest coherent issue statement appeared in a Montana case: “Was counsel ineffective?”⁴⁹ That question lacks facts, violating the recommendations of most judges and commentators, but those who discourage the inclusion of details⁵⁰ might find it adequate.

The goal of succinctness can also be furthered by limiting the number of individual issues. Where a case includes multiple issues, the lawyer will need to include multiple questions presented.⁵¹ But judges and commentators almost all advise lawyers to limit their number, including only a few carefully chosen issues.⁵² Weak issues can dilute stronger ones.⁵³ Moreover, a judge may become impatient with too many issues. Judge Ruggero Aldisert explained how he reacts to the number of issues: “When faced with a brief that raises no more than three points, I breathe a sigh of satisfaction and conclude that the brief writer may have something to say.”⁵⁴ But “[w]hen I read an appellant’s

⁴⁸ Principal Br. of Appellant Berry D. Coleman at 4–6, *Coleman v. Smith*, 987 So. 2d 1126 (Ala. 2007).

⁴⁹ Br. of Appellant at 1, *State v. Gilbert*, 175 P.3d 306 (table), 2007 WL 4395983 (Mont. 2007).

⁵⁰ See Ill. Civ. App. R. 341(h)(3); N.Y.C.P.L.R. 5528(a)(2); Dernbach, *supra* n. 17, at 242 (noting that some drafters omit facts from their issue statements, but advising that it is more effective to include facts).

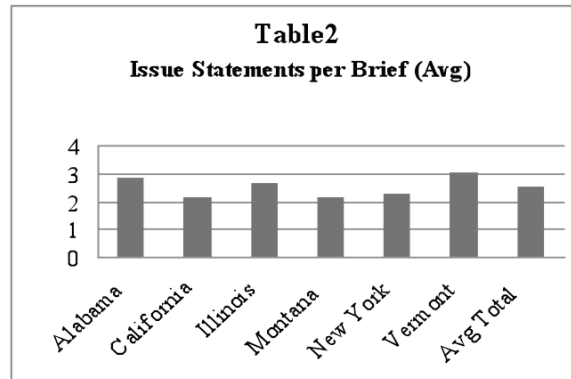
⁵¹ Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 320 (4th ed., Aspen Publishers 2006); Teresa J. Reid Rambo & Leanne J. Pflaum, *Legal Writing by Design: A Guide to Great Briefs and Memos* 394 (Carolina Academic Press 2001); Helene S. Shapo et al., *Writing and Analysis in the Law* 403 (5th ed., Found. Press 2008).

⁵² Clary, *supra* n. 16, at 35.

⁵³ Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 127(2d. ed., NITA 2003). See also Ursula Bentele & Eve Cary, *Appellate Advocacy: Principles and Practice* 466 (LexisNexis 2004) (stating that a lawyer can harm a client’s cause “by diluting the strong points in a brief with a collection of weak ones”).

⁵⁴ Aldisert, *supra* n. 53, at 129.

brief that contains more than six points, a presumption arises that there is no merit to *any* of them.”⁵⁵ The average number of issues for all briefs in this study was 2.53. Table 2 shows the average number of issues per brief for each state:



Vermont briefs had the highest average number of issue statements, with 3.02 per brief, while the states with the lowest numbers, Montana and California, averaged 2.19 and 2.15 respectively.

The highest number of issue statements in a single brief was twelve, in the appellant’s brief in the *Coleman* case⁵⁶ mentioned above. The case concerned whether a defendant had been properly served,⁵⁷ and tellingly, the opposing lawyer managed to restrict his issues to two.⁵⁸ Two other briefs contained eleven issues, and five briefs contained nine. Altogether, forty-three briefs, or 6.8%, transgressed Judge Aldisert’s guidelines by including six or more issues.

B. Clarity

A judge should not have to struggle to decode an issue statement, “and if asked to do so probably will not.”⁵⁹ Especially in that important section of the brief, the writer must strive for transparent clarity. Data cannot precisely quantify clarity, but our study included examples of issues that lacked it, like this one:

Whether defendant should be granted a new trial because he waived the presence of a court reporter for voir dire, and, if not,

⁵⁵ *Id.*

⁵⁶ Principal Br. of Appellant Berry D. Coleman at 4–10, *Coleman*, 987 So. 2d 1126.

⁵⁷ *Coleman*, 987 So. 2d at 1127.

⁵⁸ Br. of Def.-Appellee's Opposition to Pl.'s App. at 4, *Coleman*, 987 So. 2d 1126.

⁵⁹ Bentele & Cary, *supra* n. 53, at 472.

defendant was denied due process, a fair trial or the effective assistance of counsel by the failure to record voir dire?⁶⁰

By mixing several legal theories, this statement fails to focus on a single, clear question. The drafter should instead have narrowed the number of legal theories and written separate issues for each.

Another issue statement was unclear for a combination of reasons, including unclear terminology, confusing syntax, and lack of unity:

As to part B of chapter 383 of the Laws of 2001, did the court below err in holding that despite the New York State constitutional prohibition contained in the Bill of Rights, Article I, § 9, the Legislature, by reason of IGRA, could authorize the Governor to compact with Indians for a kind of Class III gaming on Tribal lands; and further whether despite Article I, § 9 the Legislature could make slot machines, held in the past to be contraband, lawful if permitted pursuant to an Tribal-State compact so that a Tribe could escape committing a federal offense aided by the State under 15 U.S.C. § 1175?⁶¹

This issue contains terms that need explaining. The syntax is also confusing, violating parallel structure by beginning the first main clause with *did* and following the semi-colon with a *whether* clause. Moreover, the two clauses contain points that should appear as separate issues. It seems unlikely to persuade a judge, and in fact, the drafter's clients lost.⁶²

The statement would be clearer expressed as two manageable sentences:

1. Did the state of New York violate the gambling prohibitions in Article I, § 9 of the state constitution by entering a compact with Indians for gaming on tribal lands under the federal Indian Gaming Regulatory Act?
2. Did the New York legislature violate the gambling prohibitions in Article I, § 9 of the state constitution when, in order to insulate an Indian tribe from violating the federal prohibition on possessing gambling devices, it legalized the slot machines permitted under a Tribal-State compact?

This version contains shorter, parallel sentences, and reduces the overall length from 109 to 81 words. It clarifies some of the mysterious terms, resulting in an issue that a judge is more likely to read carefully.

⁶⁰ Br. & Argument for Pl.-Appellee at 4, *People v. Houston*, 874 N.E.2d 23 (Ill. 2007).

⁶¹ Br. of Appellant-Respt. Mrs. Lee Karr at 8, *Dalton v. Pataki*, 835 N.E.2d 1180 (N.Y. 2005).

⁶² *Dalton*, 835 N.E.2d at 1198–99.

C. Sentence structure

1. Single-sentence issues

Lawyers have traditionally framed issue statements in two standard structures: interrogative sentences or clauses beginning with the word *whether*,⁶³ each expressed as a single “sentence.” (The *whether* question presented, while not a grammatical sentence, is a “sentence” in that it ends with a period; the remainder of the sentence, “The issue is . . .,” is implied.)⁶⁴ The single-sentence format has several advantages. It is succinct. It also shows the connections among ideas through the grammatical relationships in the sentence. Words like *if* and *when* are helpful at doing this, as some of the examples in this article illustrate.⁶⁵

The briefs in an Alabama case⁶⁶ provide examples of both the interrogative and *whether* formats. The state phrased its issue as an interrogative sentence:

Did Jallad’s multiple convictions for conspiracy violate his double jeopardy rights when the evidence established that Jallad entered into separate agreements to commit several theft and burglary transactions?⁶⁷

In the same case, the convicted defendant’s issue statement began with *whether*:

Whether the multiple convictions were multiplicitous and violative of double jeopardy principles embodied within the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 9 of the Alabama Constitution of 1901.⁶⁸

Most of the complete sentences (excluding *whether* issues) in the sample—607—were interrogative sentences ending in question marks. The

⁶³ See Berry, *supra* n. 6, at 93–94; Edwards, *supra* n. 51, at 318; Neumann & Simon, *supra* n. 14, at 250–51 (each identifying two traditional formats for questions presented: 1) a clause beginning with whether and ending with a period and 2) a sentence beginning with a verb and ending with a question mark).

⁶⁴ See Beazley, *supra* n. 42, at 136 n.2 (explaining that a question beginning with *whether* is a sentence fragment, with the words “The issue is” omitted); Berry, *supra* n. 6, at 93–94 (stating that beginning with *whether* results in an ungrammatical sentence, but noting that *whether* questions are accepted or even preferred in some places); Garner, *supra* n. 45, at 75 (noting that a *whether* question is not a true sentence).

⁶⁵ See *infra* nn. 67, 71, 115 and accompanying text.

⁶⁶ *Ex parte Jallad*, 988 So. 2d 946 (Ala. 2007).

⁶⁷ Br. of Respt. at 3, *Ex Parte Jallad*, 988 So. 2d 946 (Ala. 2007).

⁶⁸ Br. of Petr.-Appellant Ibrahim Muhammed Jallad at 5, *Ex Parte Jallad*, 988 So. 2d 946.

interrogative sentence has the advantages of being direct and easier to control than the *whether* format.⁶⁹ Some suggest phrasing an interrogatory issue in an “under-verb-when” format,⁷⁰ as in this example:

Under constitutional standing principles, is there a proper “case and controversy” when a member of the class of disadvantaged borrowers challenges . . . [a statutory maximum interest rate] on equal protection grounds?⁷¹

This format proceeds logically by starting at a general level, with the law, and then moving to a more particular level, the facts.⁷² Only four issues in the study sample followed this exact format, but it is nevertheless a viable structure for controlling the components of an issue.

A minority of the single-sentence issues—176—were declarative sentences ending in periods, a format Judge Aldisert advocates.⁷³ A Vermont brief contained an issue in that format:

The court’s adjudication of the support arrears was consistent with statutory and case law and should be affirmed.⁷⁴

The *whether* structure is more formal and remains common in the United States Supreme Court.⁷⁵ It appeared in a substantial minority of the issues in our study, at 45%, and in more than half of the issues in Illinois and Alabama. Its common use notwithstanding, some commentators discourage the *whether* format because it can lead to awkward phrasing.⁷⁶ Judge Aldisert bluntly advises, “[D]o not be a ‘whether-man.’ ”⁷⁷ This issue illustrates the problem:

⁶⁹ See Edwards, *supra* n. 51, at 317 (stating that the interrogative format is “[t]he easiest way to draft a Question Presented”).

⁷⁰ See Beazley, *supra* n. 42, at 136; Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research and Writing* 398 (4th ed., Aspen Publishers 2006). See also Edwards, *supra* n. 51, at 317 (recommending beginning with a verb such as *can* and ending with a *where* clause).

⁷¹ Br. of Appellee at 5, *Express Enter., Inc. v. Waites*, 979 So. 2d 754 (Ala. 2007) (bracketed wording added for clarity).

⁷² See Block, *supra* n. 15, at 193 (recommending that an issue should be framed “from general to specific”).

⁷³ Aldisert, *supra* n. 53, at 141.

⁷⁴ Br. of Appellee-Def. at 1, *Youngbluth v. Youngbluth*, 936 A.2d 1318 (Vt. 2007).

⁷⁵ Coleman et al., *supra* n. 20, at 336 (reporting that about 84% of U.S. Supreme Court questions presented in the year 2001 began with the word *whether*).

⁷⁶ E.g. Neumann & Simon, *supra* n. 14, at 250 (suggesting that lawyers avoid the “whether” format because it “can seem artificial and harder to read”); Schmedemann & Kunz, *supra* n. 14, at 218 (stating that the issue should be a “full question” rather than a phrase beginning with “whether”).

⁷⁷ Aldisert, *supra* n. 53, at 141.

Whether compliance with the Rules of Judicial Conduct, which declare that they are intended to “provide a structure for regulating conduct through disciplinary agencies,” but “are not designed or intended as a basis for civil liability or criminal prosecution,” may be enforced by a District Attorney⁷⁸

The part quoted here (which omits a second *whether* clause) is difficult to follow partly because the writer got so lost in the syntax as to separate the main subject and verb by 37 words.⁷⁹

There is even some confusion about the proper end punctuation for a *whether* issue. In our sample, 76% of the *whether* statements ended with periods, while the remainder ended with question marks. The period is correct, because grammatically the structure is an indirect question, not an interrogative sentence.⁸⁰

2. Issues with subpoints or multiple sentences

A few commentators suggest using subpoints where the issues are inter-related.⁸¹ In our sample, only 79, or 5.5%, of the issue statements included them. This example of closely related subpoints appeared in a California case:

Does Education Code Section 7054 require school districts to uniformly prohibit use of taxpayer-funded internal mailboxes for partisan political campaigning?

a. Does Section 7054 apply equally to prevent all persons and entities from using public funds, services, supplies or equipment for partisan political campaigning?

b. Does Section 7054 apply to the use of internal mailboxes constructed and maintained by school districts?⁸²

Other issue statements include multiple sentences, and some of those include introductory statements.⁸³ Justice Antonin Scalia and Bryan Garner

⁷⁸ Br. of Def.-Respt. at v, *People v. Garson*, 848 N.E.2d 1264 (N.Y. 2006).

⁷⁹ See Richard C. Wydick, *Plain English for Lawyers* 41–43 (5th ed., Carolina Academic Press 2005) (advising that a sentence is more difficult to understand if it has a long separation between its subject and verb).

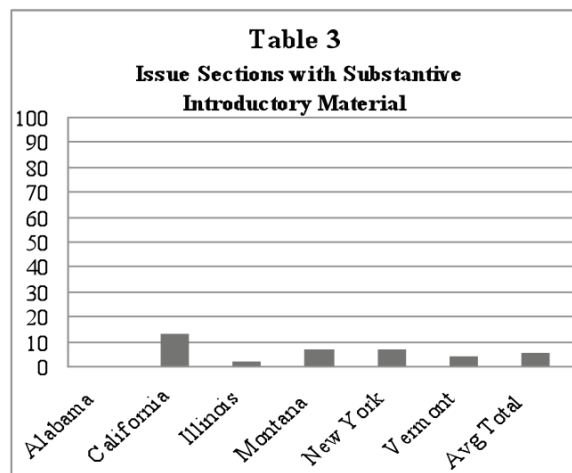
⁸⁰ Block, *supra* n. 15, at 193; Schultz & Sirico, *supra* n. 3, at 310–11.

⁸¹ E.g. Clary et al., *supra* n. 16, at 35 (stating that “[i]f you have a case that has inter-related issues, you should consider presenting them as subparts of a single issue rather than distinct issues,” but recommending against the use of subparts to try to make a long list of issues appear shorter).

⁸² Ans. Br. on the Merits at 7, *San Leandro Teachers’ Assn. v. Governing Bd. of San Leandro Unified Sch.*, 171 P.3d 545 (Cal. 2007).

⁸³ See e.g. Neumann & Simon, *supra* n. 14, at 251 (suggesting as an alternate format a

recently wrote that introductions may be appropriate in courts that do not require a Summary of the Argument section, so long as the introduction does not repeat material included elsewhere in the brief.⁸⁴ Neumann and Simon suggest including an introductory statement as one option, but they caution against using it to avoid editing that could produce a single effective sentence.⁸⁵ Table 3 shows the number of issues sections in our sample that contained substantive introductory material⁸⁶ that was not part of a discrete question.



Overall, 33 (2.3%) of the issue sections included separate, substantive introductory material. The most issue sections containing it appeared in California (13) and New York (7).

Of the individual issues within issue sections, the great majority—95%—consisted of a single “sentence” in either the interrogative, declaratory, or *whether* format. But a small number—66, or 4.6%—contained multiple sentences. Michael and Jane Tigar recommend the multi-sentence issue “if breaking it down will add clarity.”⁸⁷ Judge Edward Re wrote that, where a terse question has been certified to an appellate court, a lawyer could use the additional sentences to present a short summary of the facts.⁸⁸ A recent study

multi-sentence question presented with an introduction that presents some key facts).

⁸⁴ Scalia & Garner, *supra* n. 5, at 91–92.

⁸⁵ Neumann & Simon, *supra* n. 14, at 251.

⁸⁶ We did not count non-substantive introductions like “The following are the issues in this case.”

⁸⁷ Michael E. Tigar & Jane B. Tigar, *Federal Appeals: Jurisdiction and Practice* 449 (3d ed., Westgroup 1999). *See also* Oates & Enquist, *supra* n. 70, at 398–99; Clary et al., *supra* n. 16, at 37 (presenting the multi-sentence structure as an alternative format).

⁸⁸ Edward D. Re, *Brief Writing and Oral Argument* 107 (9th ed., Oxford U. Press 2005). *See also* Rambo & Pflaum, *supra* n. 51, at 393; Michael R. Fontham et al., *Persuasive Writing and Oral Advocacy in Trial and Appellate Courts* 36 (2d ed., Wolters Kluwer 2007) (stating that the multi-sentence format may be helpful in a complicated case, but that “phrasing the issue as a single

showed that multi-sentence issues increased in United States Supreme Court between the years 1975 and 2001, with an overall increase from 5% to 15%.⁸⁹

Garner recommends a particular kind of multi-sentence format, the “deep issue,”⁹⁰ which he defines as “the ultimate, concrete question that a court needs to answer to decide a point your way.”⁹¹ It takes the form of a multi-sentence syllogism incorporating a statement of the law, relevant facts, and a question.⁹² In their recent book on advocacy, Scalia and Garner call the deep issue “the most persuasive form of an issue statement”⁹³ and contend that a one-sentence statement often rambles to the point of being unreadable.⁹⁴

The deep-issue format appeared in a recent Illinois brief:

Reviewing courts have discretion to affirm a judgment on any alternative grounds the record supports. In moving for summary judgment in the trial court, defendants argued that there were no triable issues of material fact as to any alleged willful and wanton conduct. Although the trial court did not grant summary judgment to defendants on this issue, in the Appellate Court, plaintiffs argued that there were genuine issues of material fact as to whether defendants were willful and wanton. Did the Appellate Court abuse its discretion in ruling on this issue?⁹⁵

Table 4 shows the extent to which “deep issues” appeared in the study sample.

question is preferable”).

⁸⁹ Coleman et al., *supra* n. 20, at 338.

⁹⁰ Garner, *supra* n. 45, at 86–87.

⁹¹ *Id.* at 56.

⁹² *Id.* at 86–87. Garner offers this example of a deep issue:

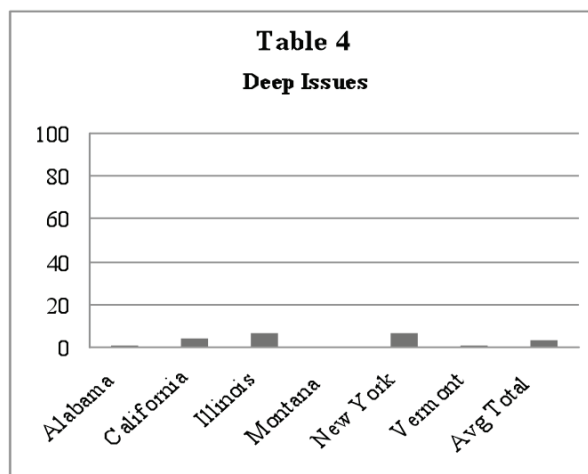
Under Washington law, county commissioners may not appoint a civil servant for a term that is longer than the commissioners’ own elective terms. The Skulalia County commissioners, who serve three-year terms, appointed Bartleby as county manager. In a tight labor market, Bartleby was able to negotiate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

Id. at 89.

⁹³ Scalia & Garner, *supra* n. 5, at 85–88.

⁹⁴ *Id.* at 87.

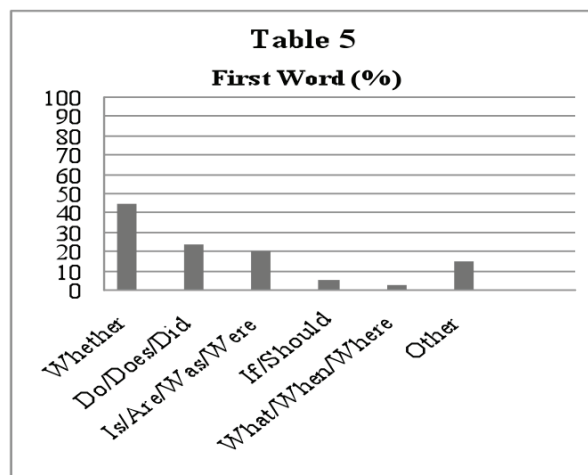
⁹⁵ Br. of Defs.-Appellees Chi. Youth Ctr. & James Collins at 3, *Murray v. Chi. Youth Ctr.*, 864 N.E.2d 176 (Ill. 2007).



Overall, 1.4% of the issues in the sample followed the deep-issue format. New York and Illinois had the most briefs using deep issues, with seven each. The deep issue, then, is beginning to appear in some briefs, but it has not made significant inroads in the states in the study sample.

D. Opening words

We also examined the opening words of the issue statements. In doing so, we excluded the words *a*, *an*, and *the*, and we did not count first words of introductory material that preceded the actual question. Table 5 shows the most common opening words, and Table 6 shows the opening words by state.



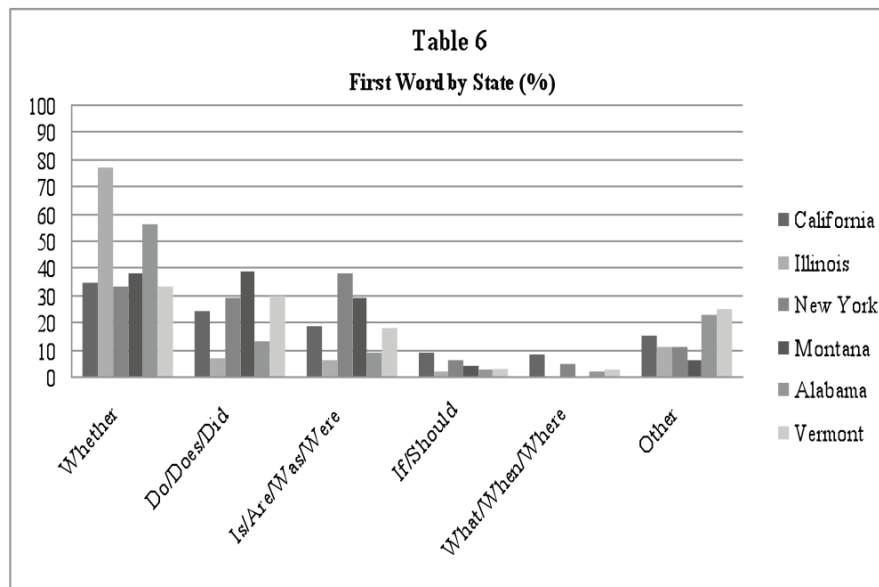


Table 6 shows that *whether* was the most common first word in five of the six states. In New York, forms of the verb *to be* began the most issues.

E. Reference to the parties

In writing an issue statement, a lawyer might refer to the parties with names (“James and Mary Smith”), roles (“the employees”), or procedural designations (“plaintiffs” or “appellants”). Some court rules provide guidance about this. Among the six states studied here, New York requires that issues be framed “without names,”⁹⁶ and Illinois requires a statement “without detail,” offering examples that do not use names.⁹⁷

If the question presented is the first section of the brief, as is required by some courts, using roles instead of names makes sense because the court does not yet know the parties’ connection to the case. Many commentators recommend this approach.⁹⁸ Linda Edwards suggests choosing either roles or names, depending on what works best for the specific case.⁹⁹ She also cautions against using the appellate designations (such as *appellant* and *appellee*), which can be confusing because the court must stop to remember the

⁹⁶ N.Y.C.P.L.R. 5528(a)(2).

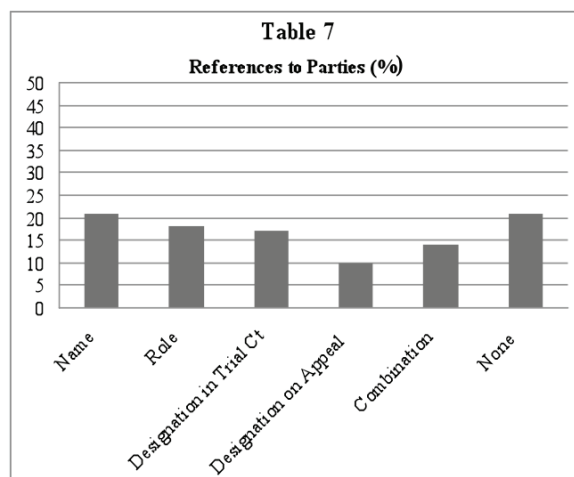
⁹⁷ Ill. Civ. App. R. 341(h)(3).

⁹⁸ *E.g.* Rambo & Pflaum, *supra* n. 51, at 390 (recommending referring to the parties in “generic terms” like “demonstrators”); Shapo et al., *supra* n. 51, at 405 (recommending that parties be referred to “by general description” such as “a member of the bar”); Schultz & Sirico, *supra* n. 3, at 310–11 (recommending against specific names and providing examples that use roles).

⁹⁹ Edwards, *supra* n. 51, at 318.

procedural positions of the parties.¹⁰⁰ Garner also dislikes using procedural designations and recommends using the parties' names instead.¹⁰¹ A less common suggestion is to use the party designations from the lower court (such as *plaintiff* and *defendant*).¹⁰²

Table 7 shows how the issue statements in the sample referred to the parties, and Table 8 shows the same data for each state.



¹⁰⁰ *Id.* The federal rules explicitly recommend avoiding appellate procedural titles:

In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties’ actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” “the stevedore.”

Fed. R. App. P. 28(d).

¹⁰¹ Garner, *supra* n. 45, at 182.

¹⁰² *E.g.* Dernbach et al., *supra* n. 17, at 241–42 (providing examples that refer to a party as “defendant”).

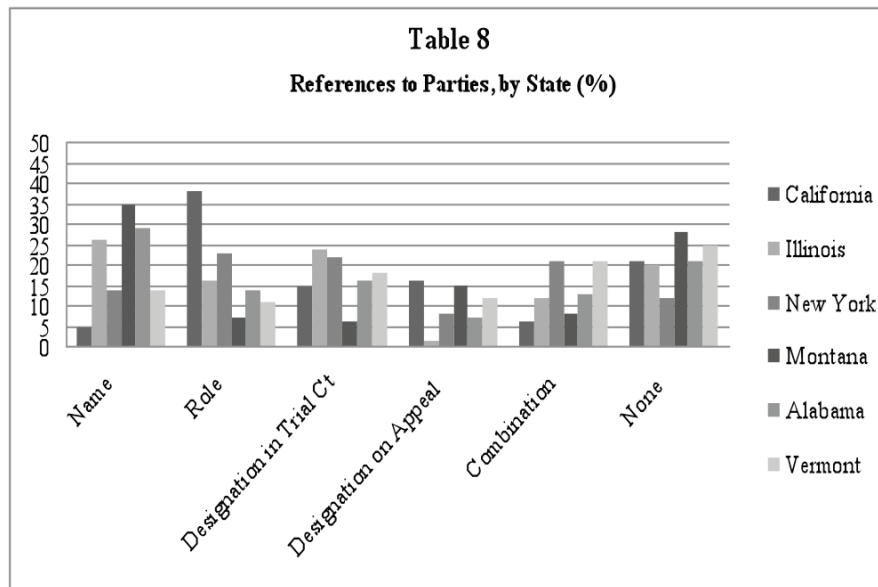


Table 8 shows that lawyers in the six states most often referred to the parties in the following ways: in California, by roles; in Illinois, by designation in the trial court; in New York, by roles (by only a small margin), followed by designation in the trial court; in Montana, by names; in Alabama, by names; and in Vermont, with a combination, followed by designation in the trial court. Overall, the least common way of referring to the parties was by designation on appeal.

F. Inclusion of facts

There is no settled consensus on whether an issue statement should include facts. Sometimes the issue is purely one of law, as in the following example:

Whether the Workers' Compensation Court has sole jurisdiction over a fee dispute pursuant to § 39-71-613(5), MCA (2005).¹⁰³

In such a case, including facts will not clarify the question presented.¹⁰⁴ But in many other instances, some legally relevant facts will apprise the court of the specific issue.¹⁰⁵ Two authors who believe an issue should include facts offer the following example as too general:

¹⁰³ Ans. Br. of Respt. Mont. St. Fund's at 1, *Pinnow v. Mont. St. Fund*, 172 P.3d 1273 (Mont. 2007).

¹⁰⁴ Diana V. Pratt, *Legal Writing: A Systematic Approach* 261 (4th ed., West 2004); Shapo et al., *supra* n. 51, at 404.

¹⁰⁵ See e.g. Bentele & Cary, *supra* n. 53, at 470 ("The question should contain facts sufficient to allow the court to come to a preliminary conclusion as to the correct answer.");

“Whether there was probable cause for the defendant’s arrest.”¹⁰⁶

They provide this contrasting example as including enough legally relevant facts to identify the specific issue:

“Whether there was probable cause for a warrantless arrest, in a public restaurant, based upon the largely uncorroborated tip of an anonymous informant, when the tip had been contradicted by other information obtained by the arresting officers.”¹⁰⁷

However, two states covered in this study steer lawyers away from providing factual detail. Illinois’s rules require a statement “without detail or citation of authority” and offer the following illustrations:

“Whether the trial court ruled correctly on certain objections to evidence.” [or]

“Whether the jury was improperly instructed.”¹⁰⁸

Similarly, the appellate division of New York’s supreme court requires a “concise statement . . . without names, dates, amounts, or particulars . . .”¹⁰⁹ The New York Court of Appeals (the state’s highest court) has no such explicit rule,¹¹⁰ but briefs filed there also follow the general civil rules that apply in the appellate division.¹¹¹ Garner finds such rules “unfortunate,” and advises lawyers to include facts where the rules allow them.¹¹² Interestingly,

Berry, *supra* n. 6, at 91 (stating that an abstract issue is not helpful to the court and that “a better approach is to interweave the facts”); Clary et al., *supra* n. 16, at 34 (recommending that lawyers “highlight and incorporate your key favorable facts”); Re, *supra* n. 88, at 104 (stating that the issue statement should “include the key facts of the case”); Scalia & Garner, *supra* n. 5, at 26 (recommending that lawyers “[f]ill in the facts that narrow the issue to precisely what the court must decide”); Shapo et al., *supra* n. 51, at 402 (stating that a question presented should include “the key facts of the case”); Tigar & Tigar, *supra* n. 87, at 448 (recommending that facts be included in the question presented). *See also* S. Ct. R. 14(1)(a) (stating that the question presented should be “expressed concisely in relation to the circumstances of the case”).

¹⁰⁶ Tigar & Tigar, *supra* n. 87, at 448.

¹⁰⁷ *Id.*

¹⁰⁸ Ill. Civ. App. R. 341(h)(3).

¹⁰⁹ N.Y.C.P.L.R. 5528(a)(2). That rule also requires that a brief state the lower court’s answer to each issue. *Id.* Many of the New York briefs in the study sample did include brief answers immediately following each separate issue. We did not count those answers as part of the issue statements.

¹¹⁰ *See* N.Y. Ct. R. 500.13.

¹¹¹ *See* Lebovits, *supra* n. 19, at 64, 53 (“Briefs submitted to the Court of Appeals have questions presented that are contemplated by the CPLR [Civil Practice Law & Rules].”).

¹¹² Garner, *supra* n. 45, at 93–94 (urging lawyers to include particulars where the rules permit that).

even though the Illinois and New York rules discourage the inclusion of details, Table 9 shows that a substantial number of questions presented in those states did include facts.¹¹³ Writers who provide facts should select them carefully, including enough legally relevant facts to explain the issue, but not so many as to “clutter the question and cloud the issue.”¹¹⁴

In making judgments about whether issue statements included facts, we looked for mention of facts specific to a case, like the references to the underlying assault action and the insured’s claim of self-defense in this California issue:

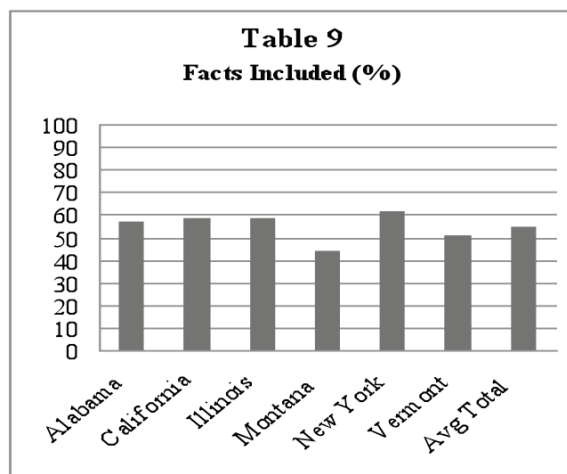
When a liability policy covers injury arising from an “occurrence,” which is defined as an “accident,” does the insurer have a duty to defend an action for assault if the complaint alleges the insured was acting under an unreasonable and negligent belief he was acting in self defense?¹¹⁵

Table 9 shows the percent of issue statements in our sample that included facts:

¹¹³ For example, an Illinois case included this issue: “Whether the occurrence of a fire in a room where a patient is restrained falls within the common knowledge of laymen so that the applicability of *res ipsa loquitur* can be decided without the need for expert testimony.” Br. of Pl.-Appellee Almon B. Heastie at 2, *Heastie v. Roberts*, 877 N.E.2d 1064 (Ill. 2007). And a New York brief included this issue: “Does the New York City Transit Authority have a duty to maintain the safety of, or to warn its invitees of hazardous conditions existing on, a stairway owned by another party over which it has an easement and right-of-way?” Br. of Pl.-Respt. at 4, *Bingham v. N.Y.C. Transit Auth.*, 864 N.E.2d 49 (N.Y. 2007). A commentator has noted that New York lawyers routinely ignore the Civil Practice Law and Rules. Paul H. Aloe, *Civil Practice*, 53 Syracuse L. Rev. 353, 378 (2003).

¹¹⁴ Berry, *supra* n. 6, at 92.

¹¹⁵ Ans. Br. on the Merits at 2, *Delgado v. Interins. Exch. of the Automobile Club.*, 169 P.3d 101 (Cal. 2007).



G. Framing for persuasiveness

The commentators agree that a question presented should advocate for the client. The lawyer must do this with subtlety, though, lest he or she lose credibility with the court.¹¹⁶ The question should be stated fairly,¹¹⁷ in a measured and professional tone,¹¹⁸ to “appeal to the court’s sense of equities and fairness.”¹¹⁹ It must not overstate or distort the client’s case.¹²⁰ And it should not assume a point that the court must decide.¹²¹

Persuasiveness cannot be measured empirically, but data can quantify a trait that affects it: whether the issue is framed to prompt a *yes* or *no* answer.¹²² Questions that use an *either-or* or an open-ended format are weaker because they appear equivocal, like this example:

Can cities adopt laws to aid their longstanding and well-settled authority to control the grounds for eviction and to provide

¹¹⁶ Scalia & Garner, *supra* n. 5, at 85.

¹¹⁷ *Id.* at 83.

¹¹⁸ *E.g.* Aldisert, *supra* n. 53, at 142 (quoting the U.S. Supreme Court Rule 14(a), which requires that questions presented “not be argumentative”); Berry, *supra* n. 6, at 91 (“Subtle wording that suggests a favorable outcome is the hallmark of a good question.”); Cathy Glaser et al., *The Lawyer’s Craft* 375 (Anderson 2002) (suggesting that the lawyer avoid judgmental adjectives and adverbs).

¹¹⁹ Slocum, *supra* n. 3, at 488.

¹²⁰ Dernbach et al., *supra* n. 17, at 242. *See also* Edwards, *supra* n. 51, at 319 (stating that “overzealous advocacy [in a question presented] is counterproductive”).

¹²¹ Beazley, *supra* n. 42, at 139 (providing this example of an inappropriate assumption: “Will this Court find that condition X exists when Appellant has established all of the factors necessary for condition X?”).

¹²² Schmedemann & Kunz, *supra* n. 14, at 218 (stating that “by tradition” an issue statement “should be answerable with a ‘yes’ or ‘no’”).

remedies for wrongful conduct, or does Civil Code Section 47(b), the “litigation privilege,” preempt all such laws?¹²³

This question misses a chance to advocate because it does not state what outcome the client desires.

By contrast, framing the question so a “yes” answer favors the client is often effective.¹²⁴ The issue statements in a recent Montana case illustrate this tactic. The convicted defendant’s counsel worded the issue so that a “yes” answer would favor the defendant:

Did the district court err when it admitted enlarged photograph pictures of Appellant and a co-defendant?¹²⁵

The state phrased the question so a “yes” answer would favor the state:

Did the district court properly exercise its discretion in admitting enlarged photographs of Hodgett and a codefendant?¹²⁶

Both questions are measured in tone, yet by evoking strategic “yes” answers, each furthers the goal of “ ‘mak[ing] the court want to decide that issue in favor of the author’s client.’ ”¹²⁷

Table 10 shows the percent of issue statements in the sample for which a “yes” answer would favor the clients.

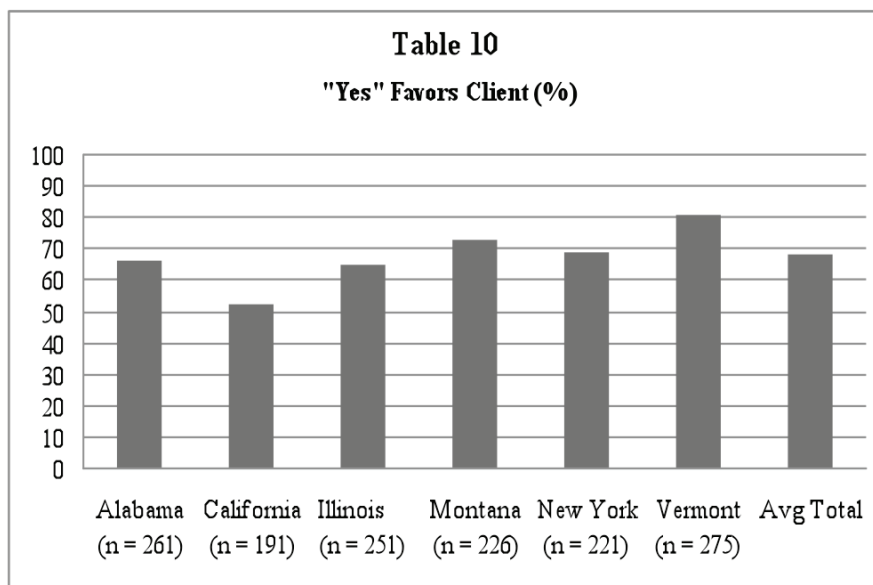
¹²³ Pet. for Rev. at 1, *Action Apt. Assn., Inc. v. City of Santa Monica*, 163 P.3d 89 (Cal. 2007).

¹²⁴ See Berry, *supra* n. 6, at 92; Edwards, *supra* n. 51, at 319; Oates & Enquist, *supra* n. 70, at 399; Shapo et al., *supra* n. 51, at 406.

¹²⁵ Br. of Appellant at 1, *State v. Hogsett*, 175 P.3d 305 (table), 2007 WL 424845 (Mont. 2007).

¹²⁶ Br. of Respt. at 1, *State v. Hogsett*, 175 P.3d 305.

¹²⁷ Aldisert, *supra* n. 53, at 143 (quoting Philadelphia attorney James D. Crawford).



Overall, 68% of the issues were phrased to prompt favorable “yes” answers.

But aiming for a favorable “yes” is not the only effective approach; sometimes evoking a “no” is persuasive.¹²⁸ In one Illinois case, for example, a provider of excess insurance argued that it should not have to pay for a loss.¹²⁹ One of its issue statements was worded this way:

Whether a primary insurer can seek contribution from a true excess insurer in an attempt to completely shift its obligation to pay to a true excess insurer.¹³⁰

The favorable answer for the excess carrier is “no.” The tactic worked because it made payment by the excess carrier seem unreasonable. (The excess carrier won the case.)¹³¹

A second way to persuade subtly is through word choice and arrangement, a strategy limited only by a lawyer’s creativity and skill. An example of this tactic appeared in a California privacy case:¹³²

¹²⁸ See Beazley, *supra* n. 42, at 138 (stating that drafting so that a “yes” answer favors the client is not always the most effective strategy). *But see* Neumann & Simon, *supra* n. 14, at 255 (stating that the answer the drafter of an issue statement wants “is always ‘yes’”).

¹²⁹ *Kajima Const. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 879 N.E.2d 305, 307 (Ill. 2007). See also *supra* nn. 66–67 and accompanying text.

¹³⁰ Supp. Br. of Appellee at 3, *Kajima Const. Servs.*, 879 N.E.2d 305.

¹³¹ *Kajima Const. Servs.*, 879 N.E.2d at 315.

¹³² *Sheehan v. S.F. 49ers*, 169 P.3d 883 (Cal. 2007).

Whether a business may prevent *any judicial scrutiny* of a *privacy intrusion* under Article I, section 1 of the California Constitution, *no matter how severe or unjustified* the intrusion may be, *simply by informing customers* that they must acquiesce in the forfeiture of their constitutional rights as a condition of obtaining access to its commercial goods and services.¹³³

The drafter hoped to evoke a “no” answer that would favor the clients, who objected to being searched before a sporting event. The statement succeeds because the italicized language makes a “yes” answer seem extreme. (The court granted the drafter’s requested review).¹³⁴

III. Conclusions and recommendations

An effectively crafted issue statement will define the question to be considered and begin disposing the court to decide in the client’s favor. Through its professional wording and tone, the statement will make a good initial impression, encouraging the court to read on with some confidence in its drafter. Those general principles are not in dispute. But the specifics of issue statements’ length, structure, and content vary considerably, as this study showed. Still, some of the issue statements in the sample appeared more effective than others, prompting the following recommendations.

- Writing a good issue statement requires careful thought.¹³⁵ A lawyer should expect to devote sufficient time to composing one,¹³⁶ resisting the temptation to leave this important component to the last minute.¹³⁷
- Clarity and succinctness are of the highest importance. Scalia and Garner state that clarity “trumps all other” attributes of writing,¹³⁸ and they

¹³³ Appellant’s Opening Br. at 1, *Sheehan*, 169 P.3d 883 (italics added).

¹³⁴ *Sheehan*, 169 P.3d at 883.

¹³⁵ See e.g. Glaser et al., *supra* n. 118, at 374 (writing a good issue statement “requires a considerable amount of thought”); Neumann & Simon, *supra* n. 14, at 252 (“drafting a Question Presented can be one of the more difficult tasks in legal writing”); Slocum, *supra* n. 3, at 489 (writing a good issue statement “will require significant thought and revision”).

¹³⁶ See e.g. Bentele & Cary, *supra* n. 53, at 472 (stating that “it often takes a long time to write a good Question Presented”); Schultz & Sirico, *supra* n. 3, at 310 (stating that drafting the Questions Presented section of a brief is an undertaking “to which you should devote a significant amount of time”).

¹³⁷ See Berry, *supra* n. 6, at 93 (pointing out that many brief writers miss the important opportunity to advocate in issue statements and instead “simply toss them together in the final stages of assembling the brief”).

¹³⁸ Scalia & Garner, *supra* n. 5, at 107.

identify brevity as a close second.¹³⁹ Many sources contain helpful suggestions for achieving these qualities.¹⁴⁰

- Most discrete issues in the sample consisted of a single “sentence,” either interrogative, declarative, or in the *whether* format. An interrogative question is often easier to control than the *whether* format, which has a tendency to generate awkward phrasing. Those who choose the *whether* structure should note that it is a declarative statement and should end with a period.¹⁴¹

Separate, substantive introductory material appeared in 2.3% of the issue statements in the sample. And the multi-sentence deep-issue format¹⁴² is gaining adherents,¹⁴³ although it remains only a small portion of the sampled issues. In deciding on the most effective format for a particular case and court, a lawyer can exercise creative judgment to choose among the alternatives,¹⁴⁴ maintaining a consistent format for multiple issues.¹⁴⁵

- A brief’s credibility will be enhanced by restricting the total number of questions presented to a manageable few.

- It is often clearest to refer to the parties by their roles (such as *employer* and *employee*). Using names may work if the brief has already introduced the parties. But procedural titles on appeal (such as *appellant* and *appellee*) are less effective, because they mean the court must continually check the parties’ positions in the case.

- Unless the question is purely one of law, the drafter should include some legally relevant facts to put the issue in context.

- The issue statement should not assume a point that the court must decide.

- The issue statement should advocate, but do so with subtlety.

- The issue should be answerable by *yes* or *no*; issues in an *either-or* or open-ended format lose persuasive power by appearing equivocal. Many

¹³⁹ *Id.* at 112.

¹⁴⁰ E.g. Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* (2d ed., Aspen Publishers 2005); Judith D. Fischer, *Pleasing the Court: Writing Ethical and Effective Briefs* (Carolina Academic Press 2005); Bryan A. Garner, *Legal Writing in Plain English* (U. of Chi. Press 2001); Kimble, *supra* n. 41; Wydick, *supra* n. 79.

¹⁴¹ See Garner, *supra* n. 45, at 75 (noting that a question mark after this declarative form is “odd”).

¹⁴² See Scalia & Garner, *supra* n. 5, at 85–88 (advocating the “deep issue”).

¹⁴³ Coleman et al., *supra* n. 20, at 338.

¹⁴⁴ Neumann & Simon, *supra* n. 14, at 251 (advising lawyers to try both the single-sentence and multi-sentence formats and “choose the format that works best”).

¹⁴⁵ Oates & Enquist, *supra* n. 70, at 399 (stating that the drafter should use the same format throughout multiple questions presented).

lawyers attempt to evoke a *yes* answer that favors the client, but evoking a *no* answer can sometimes be effective.

- Conflicting court rules trump any of these recommendations.

Based on this study's analysis of recent issue statements, the above suggestions can guide a brief writer in framing an effective issue—one that may even entice the court to adopt its language in a favorable decision.