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**Asking Effective Questions: Statement of Issues Presented for Review**

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**1. Asking Effective Questions: Statement of Issues Presented for  
Review**

“If I had an hour to solve a problem and my life depended on it, I would use the first 55 minutes determining the proper question to ask, for once I knew the proper question, I could solve the problem in less than five minutes.” Albert Einstein

“[I]n every sense of the word—and in all seriousness—it can be said that the most important paragraph in a brief is the first one, in which appears counsel’s formulation of the issues presented for decision.” Frank E. Cooper

“The best argument on a question of law is to state the question clearly.” Rufus Choate

“In law the right answer usually depends on putting the right question.”  
Justice Frankfurter

“The court should not be forced to guess, even for a moment, what questions it is asked to decide.” Honorable Edward D. Re

## **A. Placement and Inclusion of the Statement of Issues**

Check the applicable rules of court to determine where to place the Statement of Issues Presented for Review within the brief. Some court rules require the contents of appellate briefs to be placed in a specific order. Bryan Garner recommends placing the Statement of Issues on the first page of the brief unless court rules require otherwise.

Rule 28.3 of the Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit requires the following order for the contents of appellate briefs: (1) certificate of interested persons; (2) statement regarding oral argument; (3) table of contents with page references; (4) table of authorities; (5) jurisdictional statement; (6) *statement of issues presented for review*; (7) concise statement of the case setting out the facts relevant to the issues submitted for review; (8) summary of the argument; (9) argument; (10) short conclusion stating the precise relief sought; (11) signature of counsel or a party; (12) certificate of service; (13) certificate of compliance.

Federal Rules of Appellate Procedure Rule 28(b)(2) provides that the appellee's brief does not need to include a Statement of the Issues "unless the appellee is dissatisfied with the appellant's statement." Even if court rules do not require appellees' briefs to include a Statement of the Issues, appellees' briefs should *always* include a Statement of the Issues. Well-written Statements of Issues should lead the court to the conclusion that the attorney wants the court to reach for the client. *Thus, if the appellant's Statement of Issues is well-written, the appellee should be very dissatisfied with it.*

## **B. Purpose and Goals of Statement of Issues**

The Statement of Issues should clarify the issues before the court and thus provide focus and boundaries for the brief. The court should never wonder what question(s) it is being asked to decide. The Statement of the Issues should hit the bull's eye by asking the precise question that the court needs to resolve. It should *lead the court to reach the desired conclusion* while being reasonable, honest, and fair. It should *suggest an answer that is favorable to the client without explicitly stating it*. Thus, the Statement of Issues should be persuasive without being argumentative or conclusory.

### **C. Number of Statement of Issues**

The number of the Statement of Issues depends on how many issues are before the court. Each separate issue should be stated in a separate Statement of Issues. If the brief addresses more than one issue, the Statements of Issues should be numbered to correspond with the point headings in the argument section that answer the question posed in the specific Statement of Issues. Generally, a brief should contain one Statement of Issue for each *main* point heading.

### **D. Order of Statement of Issues**

The Statement of Issues should appear in the same order as the point headings in the Argument section. Place the Statement of Issue that pertains to the strongest argument first unless a threshold issue exists. If a threshold issue such as standing or prescription exists, place the Statement of Issues that pertains to the threshold issue first, even if it does not address the strongest argument.

### **E. Essential Ingredients of Statement of Issues**

A Statement of Issues should: (1) be persuasive without being argumentative; (2) ask the precise legal question; (3) reference favorable legal rule(s), unless the legal premise is obvious; and (4) include favorable facts unless the question is purely legal. For example, the following Statement does not include facts because the question is purely legal:

For the past thirty years, this Court has consistently held that the word “produced” as used in the habendum clause of an oil-and-gas lease means “capable of being produced in paying quantities.” Should this Court now adopt a novel interpretation that would cast doubt on the validity of tens of thousands of leases in the State?

### **F. Different Formats for Statement of Issues**

The most common formats used for Statements of the Issues include: (1) the “whether” format, which is a one-sentence format; (2) the “under-does-when” format, which is another one-sentence format; and (3) the Bryan Garner “deep issue” format, which includes more than one sentence.

One-sentence formats can work for some issues in objective office memoranda as well as persuasive documents *when the major premise or legal principle is obvious*. The “deep issue/more than one sentence” format is often the best formula to construct a *persuasive* Statement of the Issue when the major premise is not obvious. Because the “deep issue” format includes more than one sentence, it enables the writer to construct a persuasive issue statement, while avoiding overly long sentences. It is often impossible to combine favorable rules of law, favorable facts, and a question into one well-written sentence of appropriate length. When it is necessary to include favorable rules of law as well as favorable facts and a question, the “deep issue/more than one sentence” format is often the best format because it includes more than one sentence and thus avoids run-on sentences.

### *Examples of Statements of Issues using Different Formats*

#### *“Whether” format (one sentence format)*

The “whether” format begins with “whether” and ends with a period. Bryan Garner states: “Don’t start [Issue Statements] with *Whether* or any other interrogative word.”

#### *Example*

Whether Johnson can enforce the contract when he provided no consideration for it.

*The issue can be rewritten to avoid starting with whether, e.g., Can Johnson enforce the contract when he provided no consideration for it? The major premise—that a contract is not binding without consideration—is obvious and thus need not be stated.*

#### *“Under- does-when ” format (one sentence format)*

The “under-does-when” format begins with “under” or some variation of “under” and ends with a question mark. “Under” is followed by a reference to the applicable constitutional provision, statute, contract terms, or common law cause of action. Next, it asks the precise legal question, which begins with “does” or some variation of “does.” Finally, it concludes with

the favorable facts, which follow “when” or some variation of “when.” If more than a couple of facts are included, place a colon after “when” and list the facts, e.g., when: (1) fact; (2) fact; and (3) fact? Place a semicolon between the listed facts.

*Example*

Under the Fourth Amendment, did the police violate petitioner’s right to be secure against unreasonable searches when officers, acting without a warrant, attached a GPS device to his car?

In the example above, the major premise—that the Fourth Amendment protects against unreasonable searches and seizures—is included in the question.

*Bryan Garner’s “deep issue” (more than one sentence format)*

Bryan Garner’s “deep issue/more than one sentence” format mirrors a logical syllogism. It includes several sentences and ends with a question. Like a syllogism, it contains: (1) a major premise that states favorable principles of law/favorable contract provisions; (2) a minor premise that states favorable facts that directly relate to the legal principle in the major premise; and (3) a question that leads the reader to the desired conclusion. By placing favorable facts right after the favorable rules of law/favorable contractual provisions, the reader is subtly guided to answer the question favorably for the client.

When the major premise is obvious, it is not necessary to state it in the Statement of Issues. For example, the major premise—that a contract is not binding without consideration—is obvious in the following issue: Can Johnson enforce a contract when he provided no consideration for it? The issue appropriately states the precise legal question: can Johnson enforce the contract. It also includes the key fact: Johnson provided no consideration.

*Examples:*

*For former husband*

Under Louisiana law, a husband who is not the father of his wife's child is not obliged to pay child support for that child. Blood tests have conclusively shown that the former husband is not the father of the child. Is the former husband entitled to reimbursement for the child support that he paid under the false belief that he was the father?

*For former wife*

Under Louisiana law, a husband is presumed to be the father of a child born during the marriage and must pay child support unless he denies paternity within one year of the child's birth. The husband did not deny paternity until five years after the child's birth. Was the husband obliged to support the child until he proved that he was not the father?

## **G. Construction of Statement of Issues**

First, find the premise that will persuade the court to reach the desired conclusion. Second, identify favorable rules of law or legal principles. Third, identify favorable facts that relate to the rules of law or legal principles, unless the issue is purely legal. Fourth, construct a question that can only be answered in favor of the desired conclusion. The reader should never think "I do not know" after reading the Statement of Issue. The reader should immediately answer the question in favor of the desired conclusion.

## **H. Reference to People in Statement of Issues**

Bryan Garner uses the proper name of the parties. Avoid using terms such as appellant/appellee and plaintiff/defendant to refer to the parties. Some court rules state that the terms appellant and appellee should *not* be used. Similarly, the terms plaintiff and defendant should *not* be used unless the procedural posture of the party is at the heart of an issue on appeal.

## **I. Neutral Headings**

Bryan Garner uses neutral headings for multiple issues. The use of neutral headings emphasizes the issues and adds aesthetic appeal. Example of neutral headings:

- 1. Hearsay Evidence:** When a trial court admits hearsay evidence of prior bad acts, the court must make at least an inferential link between those acts and a material issue. The court admitted evidence of Peter Hulbert's temporally remote and intermittent prior bad acts but did not link this highly prejudicial evidence. Did the court improperly admit the evidence?
- 2. Overlapping Elements of Offenses:** Murder and manslaughter both require proof that a person "knowingly" killed another. Manslaughter adds the required showing that the person responded to a provocation that would lead a reasonable person to act irrationally. Ample evidence shows that Peter Hulbert had just learned that his wife had resumed infidelity and was sending licentious photos to her lover. Yet, the trial court's instructions disallowed the jury from considering this provocation. Did the trial court err?

## **J. Deep Issues & CREACC**

1. Sentences in the deep issue format correspond with the steps in the CREACC organization of the Argument.
2. Review of CREACC Organization of Argument.  
C=State conclusion on the issue that is the topic of the heading or subheading.  
R=State the general rules of law/contract provisions that govern the issue that is the topic of the heading or subheading.  
E=Explain the rules of law stated in the R/Rule step above by stating additional rules of law or by stating how the rules of law were applied to specific facts in precedent cases. State the holding, reasoning, and facts of precedent.  
A=Apply the rules of law and holdings of precedent to the facts of the case before the court and state a conclusion on the application.

C= Address any counterarguments regarding the conclusion that was stated in the point heading as well as in the first C step of CREACC under the point heading, and at the end of the A step.  
C=Restate Conclusion.

### 3. Deep Issues & CREACC

- The question at the end of the Statement of the Issue can be converted into a declarative sentence that supports your client. Thus, the question can become a point heading that states the conclusion you want the court to reach, e.g.,
  - Last Sentence/Question in Statement of the Issues:  
Did the court improperly admit the evidence?
  - Point Heading: The trial court improperly admitted evidence of Peter Hulbert's temporally remote and intermittent prior bad acts because it did not link this highly prejudicial evidence with a material issue.
- The major premise (statements of law/contract provisions) in the Statements of the Issues can be used in the Rule step of CREACC, e.g., The court must make at least an inferential link between prior bad acts and a material issue before admitting hearsay evidence of those acts. Do not cite authority for rules of law in the Statement of Issues. In contrast, cite authority for the same statement(s) of law in the Rule step in your argument.
- The minor premise (statements of fact) in the Statement of Issues can be applied in the A step of CREACC or the counterargument step of CREACC, e.g., The court admitted highly prejudicial evidence of remote and intermittent prior bad acts without linking these acts to a material issue.

### **K. Dos and Don'ts of Statements of Issues**

#### **Do**

- Make them persuasive — suggest an answer that is favorable to your client.
- Clearly define the issues before the court.
- Include a separate Statement of Issue for each major issue before the court.



- Keep them short and concise. Bryan Garner says to limit to seventy-five words.
- Reference favorable law/legal principles/contract provisions.
- Include the specific facts of the case unless the issue is a pure question of law.
- Make sure that the only possible answer to the question is one that is favorable to the desired conclusion for your client.
- Run spellcheck and grammar check.

### **Don't**

- Be objective.
- Over-state your case and lose credibility with the court.
- Load with adjectives and argumentative consequences.
- Be conclusory on an ultimate issue before the court.
- Include citations.

## **L. Which Statement of the Issue is Best —1 or 2?**

1. Did the police violate petitioner's Fourth Amendment rights when they seized the evidence during a search of petitioner's residence?
  2. Was the evidence seized in a search of petitioner's residence inadmissible on Fourth Amendment grounds when: (1) petitioner gave his consent only after the police officer implied that he had legal authority for the search regardless of consent; and (2) the police officer did not have a search warrant?
- 
1. Whether Miller's injuries are covered by worker's compensation.
  2. Louisiana law provides that worker's compensation covers injuries that occur within the course and scope of employment, including brief deviations from work-related tasks. Miller, a truck driver, was filling his truck with gas for a work-related task when he went into a gas station's convenience store to buy coffee to keep him awake. After purchasing the coffee, he slipped on the store's wet floor. Are his injuries covered by worker's compensation?

### **M. What is Wrong with These Statements of Issues?**

1. Did the incident-investigation report on the June 2017 explosion at the Exxon plant violate OSHA rules?
2. To maintain a cause of action for fraud under California law, a plaintiff must show that the defendant made a false representation. Is Continental entitled to summary judgment on Jones's fraud claim?
3. Was the father denied his constitutional right to raise his children when they were removed from his custody without due process of law?

### **Resources**

Byran A. Garner, The Winning Brief (3d ed. 2014).

Michael R. Fontham & Michael Vitiello, Persuasive Written and Oral Advocacy in Trial and Appellate Courts (3d ed. 2013).

Richard K. Neumann, Jr., J. Lyn Entrikin & Sheila Simon, Legal Writing (3d ed. 2015).

Hon. Edward D. Re, *Brief Writing and Oral Argument* 117 (4th ed. 1974).

Antonin Scalia & Bryan Garner, Making Your Case, The Art of Persuading Judges (2008).

Nancy L. Schultz & Louis J. Sirico, Jr., Legal Writing and Other Lawyering Skills (6th ed. 2014).

Helen S. Shapo, Marilyn R. Walter, & Elizabeth Fagans, Writing and Analysis in the Law (6th ed. 2013).