

INTRODUCTION:

The Lament About the Language:

Sumarians

A global language like English is truly democratic; it defies prescription. It is at best descriptive. What most people speak or write determines its standard. But, as observed by Steven Pinker, a noted cognitive psychologist and linguist, in his book **The Sense of Style: The Thinking Person's Guide to Writing in the 21st Century**, the moral panic about the decline of writing may be as old as writing itself.

Some of the clay tablets deciphered from ancient Sumerian include complaints about the deteriorating writing skills of the young. As to the linguistic changes, the youth, according to Pinker, renovate the language with a wild vigor.

King Edward VI of England is reported to have said way back in 1550:

“I would wish that... the superfluous and tedious statutes were brought into one sum together and made more plain and short, to the intent that men might better understand them; which thing shall most help to advance the health of the Commonwealth.”

On learned writing, **Learned Hand** said, “The language of law must not be foreign to the ears of those who are to obey it.”

THE PROCESS:

M A C J

Betty S. Flowers

For maximal efficiency, plan your writing projects. Try nonlinear outlining.

First, let's break down the writing process into its component parts.

It's useful to think of writing as a four-step process:

1. You think of things you want to say—as many as possible as quickly as possible.
2. You figure out a sensible order for those thoughts; that is, you outline.
3. With the outline as your guide, you write out a draft.
4. After setting the draft aside for a matter of minutes or days, you come back and edit it.

These four steps derive from a system developed by Dr. Betty Sue Flowers, a University of Texas English professor. She has named each of the steps:

- (1) *Madman*, the creative spirit who generates ideas;
- (2) *Architect*, the planner who ensures that the structure is sound and appealing;

(3) *Carpenter*, the builder who makes the corners square and the counters level; and

(4) *Judge*, who checks to see whether anything has gone wrong.¹

Each character represents a separate intellectual function that writers must work through.

Why Write a Judgment?

Judgment writing "imposes intellectual discipline on the author, requiring the judge to clarify his or her reasoning and assess the sufficiency of precedential support for it."

It legitimizes judging.

Judgments "provide the parties and the public with assurance that a given decision is not arbitrary, but rather is the product of the reasoned application of appropriate legal standards."

Clear Writing is Clear Thinking

Legal Reading need not be Letha Reading

The Common Man is the Ultimate Consumer

The Curse of Knowledge

Story Telling

Lord Denning:

I try to make my judgment live ... I start my judgment, as it were, with a prologue—as the chorus does in one of Shakespeare's plays—to introduce the story. Then I go from act to act as Shakespeare does—each with its scenes—drawn from real life ... I draw the characters as they truly are—using their real

names ... I avoid long sentences like the plague: because they lead to obscurity. It is no good if the hearer cannot follow them ... I refer sometimes to previous authorities—I have to do so—because I know that people are prone not to accept my views unless they have support in the books. But never at much length. Only a sentence or two. I avoid all reference to pleadings and orders—They are mere lawyer’s stuff. They are unintelligible to everyone else. I finish with a conclusion—an epilogue—again as the chorus does in Shakespeare. In it I gather the threads together and give the result.²

Prolixity:

Experts say clear writing begins with clear thinking; my experience says clear thinking begins with clear writing. I agree that most of the times we think and, then, write; but at times our writing itself is thinking—thinking with fingers. If it does not

sound tautological, thinking is a cognitive process, so is writing; each feeds the other.

Timothy Walker, an Ohio judge, parodied a lawyer saying 'I give you that orange':

I Give You An Orange

I give you that orange By this instrument under my hand and seal, I hereby alienate, bestow, confer, confirm, donate, give, grant, present, provide, and transfer unto you, whole and entire, all and singular, my claim, estate, interest, power, right, and title, in, over, and to, and advantage of and in, all that orange fruit, botanically known as *Citrus sinensis* of the genus *Citrus* of the family *Rutaceae*, more particularly described and delineated in the schedule to these presents, with all the rights, privileges, and immunities appertaining thereto, in accordance with and to the maximum extent of the law for the time being in force, with all its rind, skin, juice, pulp, fibre, membrane, and pips, together with all the liquid, solid, and gaseous components, elements, and ingredients thereof, and all other appurtenances appertaining thereto, and all right and advantage therein,

with full, total, absolute, and complete power and right to bite, cut, eat, kiss, osculate, lick, masticate, chew, munch, suck, inhale, and otherwise consume the same, or give the same away, or sell or dispose of the same, or bequeath the same, with or without its rind, skin, juice, pulp, fibre, membrane, or pips, with some or all of its liquid, solid, or gaseous components, elements, and ingredients, and with some or all of its other appurtenances, as fully and effectually in all respects as I myself could, anything hereinbefore, or hereinafter, or in any other deed or deeds, instrument or instruments whatsoever, to the contrary in anywise notwithstanding, on the date first above mentioned.

Summary: I give you that orange.

Chinua Asuzu. *The Uncommon Law of Learned Writing*

THE STRUCTURE:

OPENING & ISSUES

Ways to Begin a Judgement:

Teaser Opener:

Teaser: Very Brief. It does not give away the result.

Provides the outline of the case in one paragraph and then introduces the issues.

Example:

The Employees' State Insurance Corporation ("ESI") manages a few medical colleges. To have his or her child admitted into the medical college, a person must be an "Insured Person." And the insured person has a quota. To have this quota, the person must fulfill three conditions: (1) He or she must be an "employee" as defined under the ESI Act; (2) the employee should have been in "continuous insurable employment" for a "minimum" period of five/four/three years as on "1st January of the year of admission"; (3) the employee must have paid at least 78 days' contribution in each contribution year.

Many employees have claimed the benefit under the quota, and those claims have thrown open two issues:

(1) Should an employee's "continuous insurable" service of five/four/three years be coterminous with 1st January 2107? In other words, should those who completed the period earlier than 1st January 2017 remain out of reckoning?

(2) Should the contribution be continuous and without a break even in the face of a statutory intervention?

(Bindu Radhakrishnan v. ESI. 2017 (4) KHC 876)

Summary:

- A great Teaser opening asks a compelling question and leaves the reader wanting to learn more.
- It works best for disputes that are legal at their core and that hinge on facts that can be easily grasped.
- It pairs well with a simple, natural style, and it demands ruthless editing.
- A great Teaser opening begins with a sentence that frames a legal issue or broad general principle.
- Follow that opening sentence with a couple of sentences either juxtaposing the parties' arguments or presenting the specific factual context.
- Conclude with a final sentence stating the question that the court must resolve.

Soundbite Opener:

Combines the outline of the case and the issues in one paragraph.

Examples:

(Kavitha G. Pillai v. The Joint Director, Director of Enforcement, Government of India. 2017 (3) KLT 1143)

Someone owns brand-new vehicles and valuable house-property. Faced with the allegation of cheating and defrauding many people in the name of medical-college admissions, she is called on to explain that the funds she used to buy the property are not proceeds of crime. The burden is on her. Her failing to explain, she faces money laundering charges. How to prove the source of funds and how to discharge the burden are the questions we face in this case.

Benjamin Goldgar, In re Earley

This matter presents a question that seems to be arising with increasing frequency. Triad Financial Corporation holds a judgment against debtor Robert Earley and has a lien on his wages under the Illinois Wage Deduction Act (the “IWDA”). In his chapter 13 plan, however, Earley proposes to treat Triad’s claim as unsecured. The question: must a debtor’s chapter 13 plan treat as secured the claim of a judgment creditor holding a garnishment lien on the debtor’s wages under the IWDA? The answer: no.

The Briefest Introduction:

Example:

This is the case of the barmaid who was badly bitten by a big dog.

Lord Denning, *Cummings v. Granger*

Summary:

Sound Bite Practice Pointers

- Start with a sentence that frames the legal issue (“This case is about”). For more color, consider styling the opening sentence as a question.
- Add a pair of sentences that either juxtapose both sides’ arguments or provide necessary factual and legal context to explain the court’s decision.
- Conclude with a final sentence announcing your decision.
- Edit for tone, seeking a balanced presentation of the facts. Does the losing party get a fair shake?
- Edit for style, cutting unnecessary qualifiers and heavy connecting words.

Trailer Opener:

A Trailer is a cinematic term—and for good reason. Even in a routine case, a skilled, confident judge can spin an engaging tale in just a few lines, making you want to know more.

Summary:

- If the narrative speaks for itself, jump right into the tale, keeping details to a minimum.
- If some context would help the reader absorb the facts, start the introduction with an opening line that tells what the case is about, or what it's not about.
- Edit for tone. The point of a Trailer opening is to convey open-mindedness and receptivity to all sides' arguments, so resist the temptation to slant the presentation. Strip the introduction of authorial intrusions, especially adverbs, and consider framing the facts in the losing party's favor.

- And finally, edit for style. Replace long words with short ones, and vary sentence length to keep the narrative flowing.

Op-Ed Opener: Detailed and Resolved

They are more impressive and useful introductions, like thoughtful essays in which the judges identify the issue to be resolved in broader historical and philosophical legal contexts.

Like a Trailer, an Op-Ed aims to be patient, balanced, and neutral—communicating to the reader through its length and tone that the court is immersed in the details.

Example:

John Roberts, Attorney General's Office v. Osborne

DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure—usually but not always through legislation. Against this prompt and considered response, the respondent, William Osborne, proposes a different

approach: the recognition of a freestanding and far-reaching constitutional right of access to this new type of evidence. The nature of what he seeks is confirmed by his decision to file this lawsuit in federal court under [Section 1983], not within the state criminal justice system. This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way. Because the decision below would do just that, we reverse.

Summary:

- Lead off with a short and memorable opening line.
- Narrate the factual and procedural context.
- Introduce the parties and juxtapose their competing legal positions.
- Conclude with a sentence or paragraph summarizing the result and offering at least one reason in support.

What Style to Use and When?

When the issues are short, simple, and of interest mainly to the parties, a Sound Bite opening may serve.

When the decision is fact-dependent or appeals to a broader readership, a Teaser or Trailer opening may be the ticket.

But when the decision is complicated or controversial, a longer essay-like Op-Ed opening may strike the best balance between portability and self-containment.

FACTS:

- (1) cut clutter,
- (2) add background,
- (3) emphasize key points,
- (4) adopt a narrative voice, and
- (5) enhance visual appeal.

But how can you distill a stack of filings into something this taut? By cutting with abandon. Parties flood the court with excess details, so to avoid drowning, you should allow only some facts to rise to the surface.

As Chekhov famously put it, “If you say in the first chapter that there is a revolver on the mantel, it absolutely must go off by the second or third chapter.”

The first thing to consider cutting: dates.

Even when the time sequence matters, one solution is to replace exact dates with words and phrases that explain what happened, in what order, and for how long.

Example:

Benjamin Goldgar, In re Brent

In May 2010, [the] attorney filed a chapter 13 bankruptcy case

Shortly after filing the case, [he] filed a form fee application

Some months later, [the] chapter 13 trustee objected to his application

Incidentally, take a cue from **Holmes's** "We do not go into further details."

It's appropriate, and even desirable, to let the reader know that you're screening out noise to highlight signal

To sum up, if your legal analysis does not turn on one of these details, consider purging them from your fact or background statement:

- Dates and times
- Street addresses
- Money value in exact terms
- Weights, quantities, and other measures
- Quotations from the record
- Particulars (of people, places, entities, and pleadings)

Adding Background:

Adding background, by contrast, is more controversial—especially when “background” includes facts not in the record.

The world does not, of course, expect judges to live in a bubble.

Shine a Light: Emphasize Key Facts

Do You See What I See: Adopt a Narrative Voice

Voice: Pure and Impure

LOCKHART v. UNITED STATES (2016)

SOTOMAYOR, J., delivered the majority opinion of the Court.

KAGAN, J., filed a dissenting opinion, in which BREYER, J.,
joined.

Issue:

A person is subject to a 10-year mandatory minimum sentence for possessing child pornography if, but only if, he has a prior state-law conviction for “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.”

The question before the Court is whether the phrase “involving a minor or ward” modifies all items in the list of predicate crimes (“aggravated sexual abuse,” “sexual abuse,” and “abusive sexual conduct”) or only the one item that immediately precedes it (“abusive sexual conduct”).

The Rule of Last Antecedent

Sotomayor:

We conclude that the text and structure of §2252(b)(2) confirm that the provision applies to prior state convictions for “sexual abuse” and “aggravated sexual abuse,” whether or not the convictions involved a minor or ward.

JUSTICE KAGAN, with whom **JUSTICE BREYER** joins, dissenting.

Imagine a friend told you that she hoped to meet “an actor, director, or producer involved with the new Star Wars movie.” You would know immediately that she wanted to meet an actor from the Star Wars cast—not an actor in, for example, the latest Zoolander. Suppose a real estate agent promised to find a client “a house, condo, or apartment in New York.” Wouldn’t the potential buyer be annoyed if the agent sent him information about condos in Maryland or California? And consider a law imposing a penalty for the “violation of any statute, rule, or regulation relating to insider trading.” Surely a person would have cause to protest if punished under that provision for violating a traffic statute. The reason in all three cases is the same: Everyone understands that the modifying phrase—“involved with the new Star Wars movie,” “in New York,” “relating to insider trading”—applies to each term in the preceding list, not just the last.

Her Justification:

A leading treatise puts the point as follows: “When

there is a straightforward, parallel construction that involves all nouns or verbs in a series,” a modifier at the end of the list “normally applies to the entire series.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012); compare *id.*, at 152 (“When the syntax involves something other than [such] a parallel series of nouns or verbs,” the modifier “normally applies only to the nearest reasonable referent”). That interpretive practice of applying the modifier to the whole list boasts a fancy name—the “series-qualifier canon,” see *Black’s Law Dictionary* 1574 (10th ed. 2014)—but, as my opening examples show, it reflects the completely ordinary way that people speak and listen, write and read.¹

Example:

Diane Wood, JCW Investments v. Novelty, Inc.

Somewhat to our surprise, it turns out that there is a niche market for farting dolls, and it is quite lucrative. Tekky Toys, an Illinois corporation, designs and sells a whole line of them. Fred was just the beginning. Fred's creators, Jamie Wirt and Geoff Bevington, began working on Fred in 1997, and had a finished doll in 1999. They applied for a copyright registration on Fred as a "plush toy with sound," and received a certificate of copyright on February 5, 2001; later, they assigned the certificate to Tekky.

Clean-Up: Enhance Visual Appeal

formatting. Numbered lists and bullet points can make particular "chunks" of facts visible and memorable, and longer sections can benefit from headings as well.

Summary:

- Subtract all details—proper names and titles, calendar dates, times, street addresses, quantities and weights—that play no role in the analysis.

- Add well-known facts necessary to establish context, but avoid relying on facts that are unsupported or that are likely to be disputed.
- Emphasize the facts that are the most important to your reasoning.
- You can also de-emphasize marginal facts by summarizing them in a sentence, using abstract words and conclusions.
- The court can function as character in the story who expresses a point of view. The court is a teacher, a guide, a resource to the reader. Don't be afraid.
- Formatting devices can help the reader process complex facts. Use headings, subheadings, bullet points, and numbered paragraphs to draw the reader's attention to facts, to facilitate comparisons, and to highlight disputes.

The Analysis:

In crafting his legal analysis in support of this unpopular result, Chief Justice Roberts follows four guiding principles:

Snyder v. Phelps

- * Track a logical progression in the paragraph openers.
- * Start paragraphs by referring to a point from the end of the previous paragraph.
- * Preempt likely objections and concerns.
- * Integrate key quotations from case law without burdening the reader with excess detail and regurgitated language.

- Keep most paragraphs short.
- Start paragraphs with a central point that the rest of the paragraph develops.
- Make sure that those paragraph openers follow logically from one to the next.
- Cite only enough authorities to prove your point.
- Quote sparingly and thoughtfully.
- Transition smoothly within paragraphs and between them.

Anticipating reader questions in the order they're likely to occur is a great way both to organize an opinion and to ensure that you've tagged all the bases when reaching a decision that's likely to prove controversial.

Practice Pointers for the Analysis

- Remember these six questions to organize your legal analysis:
 - 1) What logical questions might occur to a reader who is skeptical of your reasoning, and in what order? Answer those questions one at a time with just a sentence or two apiece.
 - 2) Why should your answers be trusted? Under each answer, list the applicable authorities, facts, and reasons, and then explain the connection between authority and answer in your own words. Quote and copy sparingly at this juncture.

3) Is your answer to any question likely to be controversial? If so, acknowledge all viable counterarguments (“To be sure,” “Although it is true that,” and so forth) and explain why they should not prevail.

4) What natural or logical divisions would make the analysis easier to navigate? Consider breaking down the overall structure by topic, by party, by motion, by claim, by chronology, or by any other principle that bestows a beginning, middle, and end onto the analysis.

5) Use traditional outline structure (I, II, III; A, B, C), a modified structure, bullet points, headings, or other visual cues to organize your analysis. If you or your court disfavor these devices and prefer either the uninterrupted-essay approach or the continually

numbered-paragraphs approach, break up long paragraphs so that the analysis isn't overwhelming.

6) Finally, add cues to help the reader navigate at the micro level within the sections. Start with a short “umbrella” paragraph previewing the analysis; add a short “umbrella” paragraph at the start of each section; always present old information before new; add transitions within and between paragraphs to show how your points connect to one another; and end each section with a short conclusion.

Try these techniques on your analyses as well:

- When analogizing, home in on key facts that link the cases while avoiding extraneous facts.

- When distinguishing, avoid getting bogged down; focus on the key points of difference, and omit extraneous facts.
- Whether you are analogizing or distinguishing, favor merged snippets and single-sentence quotations in parentheticals over block quotes regurgitated from the case you're analyzing.
- Use parentheticals for apt single-sentence quotations. Otherwise, use them to explain why a case is on point—or not. Begin with a participial phrase describing exactly what the court did and why. Because parentheticals can be hard to read, make sure that yours follow parallel structure.
- If you must use a block quote, don't just dump the quote and run; use the lead-in sentence to tell the reader what the quote has

to say about the point you're making, and why the reader should care. Think of it as introducing a stranger to a friend.

- Don't be afraid of the occasional footnote to discuss arguments and authorities that do not warrant treatment in the text but that might still interest the reader. For example, a footnote can be a great place to acknowledge the history of a law, to distinguish a line of cases, or to incorporate a policy argument.

Interlude: 16 Key Edits 1. Avoid “with respect to,” “with regard to,” “regarding,” “concerning,” and, for British English types, “with regards to” and “in regard to.”

Favor “on” or “about” or “for” or “as for.”

2. Avoid “subsequent to.”

Favor “after.”

3. Avoid “moreover” and “furthermore” and “additionally.”

Favor “also.”

4. Avoid “inter alia.”

Favor “among other things.”

5. Avoid “prior to.”

Favor “before.”

6. Avoid “even assuming” or “even assuming *arguendo*” or “*assuming arguendo*” or “*arguendo*.”

Favor “even if.”

8. Avoid “in the present case,” “in the instant case,” “in the case at bar,” or even “in this case.”

Favor “here,” and put it inside the sentence.

Example: The petitioner here contended that

9. Avoid “is not required to.”

Favor “need not.”

10. Avoid “in its response to the Motion” and other long procedural descriptors.

Favor “responds.”

11. Avoid “demonstrates.”

Favor “shows” or “proves.”

12. Avoid “therefore” or “consequently” or “accordingly.”

Favor “so” or “thus” or “then.”

14. Avoid “pursuant to.”

Favor “Under”

15. Avoid “proceeded.”

Favor “went on.”

16. Avoid “where” for conditions.

Favor “when” or “if.”

Nominalization versus Verbs

“The word was the Verb, and the Verb was God.”—Victor Hugo.

Transition Words and Phrases:

To provide another point

Additionally

And

Along with

Also

Another reason

As well (as)

Besides

Further

Furthermore

In addition

Moreover

Nor

What is more

To conclude:

Accordingly

All in all

Consequently

Hence

In brief

In conclusion

In short

In sum

In summary

In the end

Then

Therefore

Thus

To summarize

To extract the Essence:

At bottom

At its core

At its root

In effect

In essence

In the end

The bottom line is that

To show cause and effect:

And so

And therefore

And thus

As a result

Because

For

For that reason

In consequence

On that basis

So

That is why

To that end

To this end

With that in mind

To draw an analogy or comparison:

As in X, Y

As with X, Y

By analogy

By extension

Here

In each case

In like manner

In the same way

Just as X, so Y

Like X, Y

Likewise

Similarly

So too here

So too with

To draw a contrast:

At the same time

But

By contrast

Despite

For all that

Instead

However

In contrast

In the meantime

Nevertheless

Not

Rather

Unlike (in)

Yet

To give an example:

As an example

As in

By way of example

First, second, third, etc.

For example

For instance

For one thing

Imagine (as first word of sentence)

Including

In that regard

Like

Say

Such as

Suppose (as first word of sentence)

Take (as first word of sentence)

To illustrate

To concede a point or to preempt a counterargument:

All of that may be true, but

All the same

Although

At least

At the same time

Even assuming

Even if

Even so

Even still

Even though

Even under

For all that

Of course

On the other hand

Otherwise

Still

That said

Though some might argue

To be sure

True enough

To redirect:

At any rate

(Even) more to the point

In all events

In any event

To emphasize or expand:

All the more reason

All the more X because Y

By extension

Especially

Even more (so)

If anything

In effect

In fact

In other words

In particular

Indeed

Not only X, but (also) Y

Particularly

Put another way

Put differently

Simply put

Practice Pointers for Style Must-Haves

Sentence Strategies:

- As your default style, strive for natural and direct speech. Avoid the common trap of overwritten, overwrought prose.
- Replace cumbersome sentence openers like *Additionally* and *However* with short conjunctions and short, light phrases.
- Try to write one sentence per page that starts and stops on the same line.
- For variety and reader engagement alike, include the occasional question or rhetorical question.
- Check all series and comparisons for parallel form.

Word Strategies

- Replace the common wordy phrases listed in Part 4 with the suggested lighter or shorter alternatives.
- For key passages, replace abstract or trite verbs with “zinger” verbs. Consult my list of 55.
- Use the occasional pair of dashes to highlight a word or phrase that would otherwise go unnoticed.
- For strong comparisons or contrasts, consider using a semicolon.
- Use the occasional colon as a replacement for causal words and phrases like because or due to the fact that.

- Broaden the array of transition words and phrases that you use to link your points.
- Consider linking the beginning of a new paragraph with something that the reader remembers from the end of the paragraph before.

How Language Transforms Your Writing:

Metaphorical Use:

Oliver Wendell Holmes Jr.,

New York Trust Co. v. Eisner

Upon this point a page of history is worth a volume of logic.

Oliver Wendell Holmes Jr.,

Towne v. Eisner

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Oliver Wendell Holmes Jr.,

Rock Island A. & L. R. Co. v. United States

Men must turn square corners when they deal with the Government.

Or

“the inner workings of government must be flexible on occasion”
rather than this?

Oliver Wendell Holmes Jr.,

Bain Peanut Co. v. Pinson

We must remember that the machinery of government would not work if it were not allowed a little play in its joints.

Oliver Wendell Holmes Jr.,

United States v. Abrams, dissenting

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached **by free trade in ideas**—that the best test of truth is the power of the thought to get itself accepted **in**

the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Robert Jackson,

West Virginia State Bd. of Education v. Barnette

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Louis Brandeis,

New State Ice Co. v Liebmann, dissenting

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. **It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory;** and try novel social and economic experiments without risk to the rest of the country.

John Roberts,

Virginia Office for Protection & Advocacy v. Stewart, dissenting

[T]here is indeed a real difference between a suit against the State brought by a private party and one brought by a state agency. It **is the difference between eating and cannibalism; between murder and patricide.** While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting

there that attracts notice. I would think it more an affront to someone's dignity **to be sued by a brother than to be sued by a stranger.** While neither may be welcomed, that does not mean they would be equally received.

Learned Hand,

Harrison v. United States

[C]onspiracy, that darling of the modern prosecutor's nursery.

Learned Hand,

NLRB v. Federbush Co.

Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each

interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part.

Oliver Wendell Holmes Jr.,

Schenck v. United States

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

Issues:

Issue formulation is a deft tool for piercing the soul of the litigation.

Frankfurter: "In the law ... the right answer usually depends on putting the right question."

The Quality of the answer depends on the quality of the question.

A court may resolve a case on a point of law neither side argued.

Litigants are free to chart their litigation. But judges decide cases; they do not judge debates between counsel.

If a threshold issue resolves a case, the judge should go no further: Attorneys, but not judges, may argue in the alternative and in the conjunctive.

Don't start a follow-up issue with If the answer [to the previous question] is in the affirmative ... or Presuming without conceding. You're the judge, remember? You already know the answer. You have nothing to presume or concede. So include a subsidiary or follow-up question under the main issue.

Example:

The Appellant is an educational institution. Is it therefore exempt from companies' income tax? If so, does exemption from companies' income tax translate automatically into exemption from education tax?

To reformulate an issue, find governing law and isolate legally significant facts.

1. Place the issue upfront.

Whether in the circumstances of this case the appellant is entitled to judgment.

It is asinine, bovine, puerile, or vapid. (Chinua Asuzu. Judicial Writing)

An issue statement like this should attract a professional-malpractice suit against the advocate. This issue statement is void of meaning, utility, or value.

Types of Issues:

- the whether fragment;
- the one-sentence statement (often including the word whether);
- the one-sentence question;
- the Catholic catechism;
- the under-does-when formula; and
- Garner's deep-issue format.

The Whether Fragment:

Whether or not the judgment of the trial court was based on legally admissible evidence?

Whether the appellant was actively instrumental to the arrest and detention of the respondent?

Whether, in the circumstances of this case, the Court of Appeal had the jurisdiction to dismiss the appellant's appeal?

The One Sentence Statement (often including whether)

The issue is whether the doctrine of federal preemption overwhelms state legislation on a matter on the residuary list.

The question in this case is whether a party-appointed arbitrator must disclose conflict of interest.

Was the lower court competent to make up an order that was not prayed for by a party to the suit without first asking the parties to address the court specifically on that issue?

Note: Banish question as to whether and question of whether.

Just write question whether.

The Catholic Catechism

Behold the childlike (but not childish) simplicity of classical Catholic catechism.

Q: Who created you?

A: God created me.

Q: Why did God create you?

A: God created me to know Him, love Him, and worship Him in this world, so that I may live with Him in eternal joy in the next world.

Issue:

Does an assailant commit assault when, facing the victim, the assailant brandishes a machete at the victim menacingly, causing the victim to fear for life or limb?

The Under-Does-When Formula:

Under [applicable law---statute or other legal rule or regime] does [legal issue] when [legally significant facts]?

Issue

Under section 138 of the Negotiable Instruments Act, does a Criminal Court lack the jurisdiction to try a case of a dishonoured cheque, when the cheque was issued only as a security?

Under the Land Use Act, can a Collector revoke the assignment when the assignee is using the land for non-agricultural purposes because of the area's urbanisation?

Under the doctrine of eminent domain, must the state pay reasonable compensation for property it acquires when the acquisition is for reasons of national security?

Garner's Deep-Issue Formula:

Garner's deep issue, or deep question, "takes the form of a three-sentence syllogism; the first sentence is the major premise or the rule of law, the second is the minor premise or the facts to which the law is applied, and the third is the conclusion couched as a question."

The proper technique, then, is to precede the question with a short introductory paragraph stating the facts or circumstances [that] will give meaning to the question.

Deep issue features the following:

- It consists of separate sentences.
- It contains no more than 75 words.
- It includes enough detail to convey a sense of the story. It should contain explanatory narrative. So, "weave concrete facts into your

issue statements, so that you tell a story in miniature, with names and all."

- The last sentence is a question, ending with a question mark.
- It should appear at the beginning of the judicial decision, before the facts section.
- It should be simple enough that a lay stranger can read and understand it.

Example:

To maintain a passing-off action, a claimant must show that the defendant's goods so resemble the claimant's as to be likely to deceive. The evidence here is that though the resemblance is close, nobody is deceived. Is the defendant liable in passing off?

Notes Taking – Non-linear Method

The Elements of Eloquence