# PERSUASIVE ISSUE STATEMENTS[1]

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*This document is a guide to crafting effective issue statements[2] for legal briefs and other similar persuasive legal documents. While legal writers of all levels may find Parts I and II helpful, Parts III & IV are tailored to the more advanced legal writer. Part I discusses the basic purpose and elements of an issue statement and explores some traditional formatting options. Part II sets forth some considerations relevant to making an issue statement persuasive. Part III addresses how the issue statement might be tailored to fit the standard of review and the nature of the question before the court. Finally, Part IV presents a nontraditional but increasingly popular approach—the "deep issue" statement—which advanced writers may wish to consider when drafting legal documents.*

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[2] Issue statements may also be called "questions presented," such as in briefs to the Supreme Court of the United States.

# I. THE BASICS OF THE PERSUASIVE ISSUE STATEMENT

A brief is designed to convince a judge to rule in your client's favor. To this end, you must develop your theory of the case or appeal and persuade a judge that an order aligning with that theory will achieve the correct result. The issue statement, often the first substantive section of a brief, provides you the opportunity to convey your theory and suggest the appropriate outcome at the outset.

## A. PURPOSE

An effective issue statement is both informative and persuasive.[3] It serves three critical functions: it (i) identifies the legal issue you would like the court to address, (ii) frames the issue from your client's perspective, and (iii) suggests the result your client desires.[4] Therefore, when constructing your issue statement, you must consider how both the substance and form may impact the judge's perception of your client's theory.

## B. TRADITIONAL FORMATS

Several common formats are often used to ensure that the issue statement contains the necessary components: the controlling law, the legal question, and the legally significant facts (discussed at length in Section I.C, below). Although not the only appropriate ways to construct your issue statement, two methods that work well are (i) the "Under-Does-When" format and (ii) the "Whether" format.[5]

### 1. Under-Does-When

The "Under-Does-When" format presents the reader with a question. This structure first presents the reader with the controlling law and follows with the legal question and legally significant facts:

**Under** [controlling law], **does** [legal question] **when** [legally significant facts]?

When using this format, consider whether you are addressing an issue that is ongoing, has occurred, or may occur in the future, and adjust the language accordingly. Use of "did" or "would" is appropriate in place of "does" for past and future issues, respectively.

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[3] LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 175 (3d ed. 2011).

[4] *See* RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING 339 (7th ed. 2013).

[5] This document will address a nontraditional, multi-sentence format in Part IV.

2. Whether

The "Whether" format declares the issue to the reader. This structure first presents the reader with the legal question and follows with the controlling law and legally significant facts:

**Whether** [legal question] **under** [controlling law] **when** [legally significant facts].

## C. WHAT SHOULD AN ISSUE STATEMENT INCLUDE?

An effective issue statement includes three critical components: (i) the controlling law, (ii) the legal question, and (iii) the legally significant facts.

1. Controlling Law

The issue statement must refer to the controlling, or governing, law. This can be achieved implicitly or explicitly, with your desired level of specificity based upon the complexity of the case and issues involved. For example, if there are several constitutional issues, one of which is your client's right to free speech, it is probably helpful if you explicitly identify that the right to freedom of speech *under the First Amendment* is at issue. If, however, this is the only issue in the case, then you may instead choose to omit reference to the First Amendment, relying upon the judge's legal acumen and allowing her to infer that you are presenting a First Amendment issue by mentioning only your client's right to freedom of speech.

2. Legal Question

The legal question poses the precise legal issue that the court must decide. It informs the reader of the nature of the dispute. Assuming again that your client's right to freedom of speech under the First Amendment is at issue, the legal question will inform the reader of what must be resolved with regard to that right. For example, you might seek a determination of whether your client *has* a right to freedom of speech ("Does the First Amendment right to freedom of speech apply . . . ?") or that right may have already been acknowledged, in which case you might seek to determine whether a state *violated* your client's right ("Did the state violate John Doe's First Amendment right to freedom of speech . . . ?").

When drafting an issue statement, be careful not to avoid the actual question the court must decide by assuming away the answer.[6] For example: "Whether an identification should be suppressed where the identification procedures were unduly suggestive and unreliable." This issue statement avoids the operative legal question. No party would debate that an unduly suggestive and unreliable identification should be suppressed; rather, the question for the court is whether the identification was, in fact, unduly suggestive and unreliable.

[6] EDWARDS, *supra* note 2, at 177.

### 3. Legally Significant Facts

The legally significant facts are those facts that impact the outcome of the case, and are not "merely explanatory or coincidental."[7] The facts you include here should be only those facts critical to the ultimate determination you would like the court to reach, and oftentimes the facts become apparent while or after you have written your argument. Therefore, it may be helpful to construct a comprehensive list of determinative facts while writing the argument and select the most critical of those facts for inclusion in your issue statement upon completion. You should present these facts accurately and avoid exaggeration, as these features will bear on your credibility and ultimately the persuasive effect of your issue statement (discussed further in Section II.C, below).

Having now read about each of these components, consider which of the following issue statements is more effective:

> [1] "Whether the search was supported by probable cause."
>
> [2] "Whether Officer Jones had probable cause under the Fourth Amendment of the U.S. Constitution to search Mr. Wright when Officer Jones saw Mr. Wright, a known criminal, running away from a grocery store moments after a robbery was reported."

The first issue statement merely alludes to the legal question, provides little information regarding the controlling law, and only informs the reader that a search took place. Additionally, an absence of determinative facts provides no context for a reader unfamiliar with the case. On the other hand, the second issue statement clearly indicates the legal question, identifies the controlling law, and provides facts that provide context and help to not only inform the reader, but also influence her perception.

## D. HOW LONG SHOULD AN ISSUE STATEMENT BE?

Despite its complexity and significance, your issue statement should be concise. The judge should be able to quickly and easily digest your issue statement, yet this brevity must not come at the expense of persuasion or factual accuracy. Typically, as discussed in Section I.B, above, the issue statement will be a single sentence. A good rule of thumb is to ensure that it is no longer than three or four lines.[8] Consider also whether your issue statement would pass the "breath test." That is, can it be read in one breath? If so, the length is probably appropriate.

Nevertheless, it is possible that your case and the nature of the issue may lend to a longer issue statement. Although this should be the exception, it may be necessary to lengthen your issue statement if many facts are critical to the issue in dispute. However, always consider the relationship between length and persuasiveness and ensure that the information remains digestible and will affect the judge's perception.

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[7] NEUMANN & TISCIONE, *supra* note 3, at 342.
[8] *Id.*

## II. MAKING THE ISSUE STATEMENT PERSUASIVE

The issue statement should be persuasive, presenting the issue in a light favorable to your position, but it should not be overly dramatic or argumentative.[9] The aim is instead to suggest a favorable answer while accurately stating the issue to be decided.[10] This aim is achieved through clarity of structure and usage, and through choices about how to frame the law, present the facts, and phrase the statement as a whole.

### A. CLARITY

Structure and usage play a significant role in enhancing persuasiveness. A concise issue statement that clearly addresses each of the components discussed in section I.C, above, will enable the reader to more easily digest the information provided and identify with your position. Both the "Under-Does-When" and "Whether" formats provide structure that lends to a clear message, especially with regard to the controlling law and the legal question. However, it is often more difficult to organize and present the legally significant facts in a readily understandable fashion. This is especially true when determinative facts are not interrelated, have occurred in different locations, or have occurred at different times. No universal rule governs these more complex factual situations; however, you must take the time to structure these facts and ensure they are clear to the reader. In addition to clarifying the facts themselves, you should clearly and consistently identify the parties so it is evident who has or has not engaged in any conduct at issue. The facts ultimately provide the context that affects the reader's perception of your theory.

Consider the following issue statements, which convey the same information but present the facts differently. Which do you believe is more persuasive?

> [1] Under the search-incident-to-arrest exception to the probable cause requirement of the Fourth Amendment, did the District Court properly suppress marijuana seized when Officer Jones entered Defendant's home, arrested him, handcuffed, and then about ten minutes later opened a laundry hamper that was about ten feet away from him?
>
> [2] Under the search-incident-to-arrest exception to the probable cause requirement of the Fourth Amendment, did the District Court properly suppress marijuana Officer Jones seized from a laundry hamper situated about ten feet from Defendant during a search that occurred about ten minutes after Defendant was arrested and handcuffed?

You probably found that the second example presented the facts in an order that allowed you to better understand the context of the question. This increased understanding, achieved through clear writing, enhances the likelihood that the reader will be persuaded.

[9] EDWARDS, *supra* note 2, at 178.
[10] *Id.* at 175.

## B. FRAMING THE LAW

The precedent associated with the controlling law is often not in equipoise, and you may choose to emphasize the law more or less depending upon how favorable you believe it is to your position. Although you should never omit or misrepresent the law, the specificity with which you address the controlling law and/or the language you use to describe it can signal your position to the reader. For example, where the law is more favorable to the opposing party, you may choose to address it with less specificity, perhaps omitting official section numbers or reference to constitutional provisions, which could suggest greater authority, and instead referencing only the underlying legal concept and focusing the majority of your issue statement on legally significant facts. On the other hand, where the law is favorable to your party, you might instead emphasize its origins and stature before addressing the facts.

Consider how the following issue statements, submitted by opposing parties in *Texas v. Johnson*, 491 U.S. 397 (1989), frame the issues differently to favor the parties' positions, especially with respect to the law:

> **[1] Petitioner's Issue Statement**:
> "Does the public burning of an American Flag during the course of a political demonstration constitute free speech subject to the protection of the First Amendment?"[11]
>
> **[2] Respondent's Issue Statement:**
> "Whether Tex. Penal Code Ann. § 42.09(a)(3), which penalizes such "physical mistreat[ment]" of "a national flag" as the actor "knows will seriously offend one or more persons likely to observe or discover his action," facially violates the First and Fourteenth Amendments to the United States Constitution."[12]

## C. PRESENTING THE FACTS

Although it may be tempting to skew the facts to include only the determinative information beneficial to your client, omitting key legally significant facts unfavorable to your client can reflect poorly on your credibility and thereby undercut persuasive effect.[13] Instead, you must address all legally significant facts accurately, relying upon emphasis to guide the reader's perception. You should work to draw the reader's attention to those facts most beneficial to you—this may be accomplished through both language choices and placement.

For example, if you were to present three legally significant facts, two of which were favorable to your client and one of which was not, it would probably be a poor choice to lead with the unfavorable fact. However, you might choose to couch the unfavorable fact between the two favorable facts, concluding with a favorable fact that resounds in the reader's mind. On the other hand, you might first provide the two favorable facts and present the unfavorable fact last, signaling that it should be of least importance in the ultimate determination. Additionally, you should not exaggerate facts for your benefit, as the aforementioned credibility concerns may result.

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[11] Brief for Petitioner at i., Texas v. Johnson, 491 U.S. 397 (1989) (No. 88-155).
[12] Brief for Respondent at i., *Johnson*, 491 U.S. 397 (No. 88-155).
[13] *See* NEUMANN & TISCIONE, *supra* note 3, at 344–45.

Lastly, the facts must not include legal conclusions. For example, if the question is whether evidence should be suppressed as an illegal search under the Fourth Amendment exclusionary rule, you should describe the police officer's actions (e.g., "when the officer looked through the defendant's window") rather than simply stating that the officer searched the defendant's home (which is a legal conclusion)."

The structure and language you employ will impact the reader's perception; yet your choice to accurately present all determinative facts should strengthen your credibility, and therein the reader's tendency to accept your theory.

### D. PHRASING THE ISSUE STATEMENT TO ELICIT AN AFFIRMATIVE ANSWER

Ultimately, the issue statement must suggest the answer you would like the court to reach. It is helpful to phrase the issue statement in a way that evokes a "yes" answer from the reader. Even "Whether" issue statements can yield a "yes" or "no" response despite their declaratory nature, so this aim remains regardless of format. Although it is possible to construct an effective issue statement that elicits a "no" answer from the reader, given that readers are inclined to believe you want a positive response, issue statements designed with the goal of a "no" response risk confusion[14] and weakened persuasive effect.[15]

## III. THE RELATIONSHIP BETWEEN THE ISSUE STATEMENT, THE STANDARD OF REVIEW, AND THE NATURE OF THE QUESTION BEFORE THE COURT

When crafting an issue statement for an appellate brief, it helps to be mindful of the applicable standard of review.[16] For example, if the court will review your appeal under the deferential "abuse of discretion" or "clear error" standards, you should ordinarily not frame your issue statement as if the appellate court will be deciding the issue in the first instance. Instead, you may want to focus on the evidence that was before the lower court (or jury), the factors the trial judge did and did not consider, the legal standard that the trial judge chose to apply in making her decision, or whether the trial judge's decision was reasonable. For instance, in appealing a trial judge's decision to exclude evidence under Fed. R. Evid. 403 – which is reviewed for abuse of discretion – you would not ask "whether the evidence was more prejudicial than probative," because that presupposes de novo review. Instead you would ask something along the lines of "whether the trial judge's determination that the evidence was more prejudicial than probative was reasonable."

Another relevant consideration is whether you are presenting a pure question of historical fact, a pure question of law, or a mixed question of law and fact.[17] Although there are no bright-line rules, certain issue-statement formats tend to work better for some of these kinds of questions

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[14] *See id. at* 343.
[15] *See* EDWARDS, *supra* note 2, at 177.
[16] For more information on standards of review, see *Identifying and Understanding Standards of Review*, GULC Writing Center (2013), *available at* http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/standardsofreview.pdf.
[17] *See* EDWARDS, *supra* note 2, at 176.

than for others. For example, the under-does-when format is tailor-made for mixed questions of law and fact, where the court must apply a legal standard to a set of historical facts. "Under" represents the law, "when" represents the facts, and "does" represents the application of the law to those facts. However, this format may not work as well when the question concerns only the finding of historical facts. This is because there is no "under" to address. You are not presenting a question of law or of the application of law to fact. Thus, the "whether" format may work best:

> **"Whether the trial court properly found that defendant discharged his gun where seven other individuals with firearms were present and the origin of the shell casing at issue could not be definitively determined."**

If you were to rephrase the above issue statement using the under-does-when format, where would the "under" go?

Similarly, the "whether" format may work best for a pure legal question:

> **"Whether a conspiracy to commit extortion requires that the conspirators agree to obtain property from someone outside the conspiracy."[18]**

If you were to rephrase this issue statement using the under-does-when format, where would the "when" go? Another way to phrase this question might be to use a modified version of the under-does-when format: under-does-only when.

> **Under the Hobbs Act, does a conspiracy to commit extortion exist only when the conspirators agree to obtain property from someone outside the conspiracy?**

The lesson here is not that there is a single best format for a given kind of legal question, but that the effective advocate will consider the standard of review and the nature of the question, and then will experiment to find the clearest and most persuasive phrasing.

## IV. AN ALTERNATIVE APPROACH: THE DEEP ISSUE STATEMENT

Although most first-year legal writing courses focus on teaching the one-sentence issue statement, there are other approaches. One that is particularly (and arguably more) effective is the "deep issue statement."[19] At its most basic, the deep issue statement consists of three sentences

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[18] Petition for Writ of Certiorari, *Ocasio v. United States*, No. 14-361 (U.S. 2014).

[19] *See* BRYAN A. GARNER, THE WINNING BRIEF 53–97 (2d ed. 2003) ("Essentially, a deep issue is the ultimate, concrete question that a court needs to decide a point your way. *Deep* refers to the deep structure of the case—not to deep thinking. The deep issue is the final question you pose when you can no longer usefully ask the follow-up question, "And what does *that* turn on?"); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 85 (2008) (introducing the deep issue statement as "the most persuasive form of an issue statement"). While this document focuses on the "deep issue" approach, other multi-sentence formats are used as well. *E.g.,* NEUMANN & TISCIONE, *supra* note 3, at 341 (explaining the approach of "[r]eciting the determinative facts in complete sentences and then stating the issue, as a question, in a separate sentence (or several issues in several

(premise–premise–question), and should be no longer than seventy-five words.[20] It is designed to improve upon the traditional one-sentence issue statement in two ways. First, it is easier to read and follow because it presents the key context before asking the question, and it divides a long-winded single sentence into a few shorter sentences. Second, it can be more persuasive because it gives a bit more freedom presenting the law and facts, and it contains a syllogism that strongly suggests the desired answer. Consider these two examples:

> **<u>Traditional "Whether" Statement:</u>**
> "Whether there was a violation of the OSHA requiring every incident-investigation report to contain a list of factors that contributed to the incident, when the investigation report on the June 2002 explosion at the Vespante plant listed the contributing factors in an attachment to the report entitled 'Contributing Factors,' as opposed to including them in the body of the report?"[21]

> **<u>Revised into a Deep Issue Statement:</u>**
> "OSHA rules require every incident-investigation report to contain a list of factors that contributed to the incident. The report on the June 2002 explosion at the Vespante plant listed the contributing factors not in the body of the report but in an attachment entitled 'Contributing Factors.' Did the report thereby violate OSHA rules?"[22]

Just about any reader would find the deep-issue version easier to digest. In fact, in its three multiple-sentence form, it is actually *shorter* than the single-sentence version. Additionally, you may have found that, because you were provided the legal standard and the key facts first, you had a more solid grasp of the proper outcome by the end of the final sentence.

The difference can be even starker, particularly because traditional one-sentence issue statements often state the governing law in general terms, but do not explain the *substance* of the legal standard. The deep issue statement provides the space to do so. Consider these examples:

> **<u>Traditional "Under-Does-When" Format</u>**
> Under Louisiana paternity law, does a husband have to pay child support for his wife's child until he proves he is not the father when he did not deny paternity until five years after the child's birth?

> **<u>Deep Issue Format</u>**
> "Under Louisiana law, a husband is presumed to be the father of his wife's child and must support the child unless he denies paternity within one year of the child's birth. Rousseve did not deny paternity until five years after Aleigha's birth. Was he obligated to support Aleigha until he proved that he was not her father?"[23]

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separate question-sentences)"); LAUREL CURRIE OATES ET AL., JUST BRIEFS 22 (3d ed. 2013) (describing essentially the same approach as Neumann and Tiscione, but labeling it more succinctly as the "multiple sentence format").

[20] GARNER, *supra* note 18, at 75.

[21] SCALIA & GARNER, *supra* note 18, at 87.

[22] *Id.*at 88.

[23] *Id.* at 86–87.

In the one-sentence version, the reader is missing a key piece of the equation: the legal standard. Thus, the reader cannot possibly know the proper answer without reading ahead in your brief. On the other hand, adding a description of the husband presumption would make the first statement too long. The solution is the deep issue statement! By the time the reader finishes the deep issue statement, she would be hard pressed to believe the answer could be anything other than "yes."

If we deconstruct the paternity example above, we see that it takes the form of a **syllogism**. The first sentence is a **major premise**, the second sentence is a **minor premise**, and the final sentence asks a question, the answer to which is strongly suggested by the syllogism. Another benefit of the deep issue statement is that it avoids the problem of unmatched tenses that often makes one-sentence issue statements confusing. The traditional example above switches back-and-forth between present and past tense. With the deep issue statement, that problem is easily avoided.

Finally, here is an example of a deep issue statement that contains five sentences (yes, this is allowed) but is still within the seventy-five word limit:

> "A criminal defendant has the right to be present whenever prospective jurors are questioned on voir dire. During voir dire in this murder case, a prospective juror was questioned by the judge at the bench. Williams was present and positioned so that he could hear the conversation. He asked to approach the bench while the prospective juror was questioned, but his request was denied. Did that denial violate Williams's right to be present?"[24]

This issue statement is clear and crisp. Additionally, because breath-test constraints are gone, the writer is able to include a fact that is probably not legally significant but is certainly a strong component of his theory of the case: that this is a *murder* trial with serious potential consequences for the defendant.

When deciding whether to try the deep issue statement or stick with a more traditional format, you should consider what your audience expects.[25] If you have no reason to believe the court deciding your case is predisposed against a multiple-sentence issue statement, you might just frame your argument more effectively and satisfy the reader's thirst for clarity with the deep issue statement.

[24] GARNER, *supra* note 18, at 75.
[25] But there is a good chance the judge is not wedded to a single-sentence format. *See* SCALIA & GARNER, *supra* note 18, at 87 ("Some counsel erroneously assume that a court rule requiring the brief to contain a statement of the question presented demands a one-sentence question that contains all the relevant premises. The result is often a rambling statement that no mortal reader could wade through.").