

# Legal Analysis *and* Writing

*Third Edition*



*William H. Putman*

# CHAPTER 7

## Stating the Issue

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### Learning Objectives

After completing this chapter, you should understand:

- The elements of a well-crafted issue
- The value and importance of phrasing the issue narrowly and comprehensively
- The best way to assemble elements to communicate the issue effectively
- The importance of stating the issue objectively



"Mary, I want you to determine whether we can get the evidence suppressed in this case. I need a memo on this by the day after tomorrow, if possible." Jan handed Mary the case file as she gave these instructions. Mary Strate is a legal assistant working in an Oregon law firm that specializes in criminal defense. Jan Brite is her supervising attorney and, according to Jan, Mary is her "right hand."

After reviewing the case and conducting some research, Mary's focus turns to the significant facts relevant to the suppression of the evidence issue. She determines that there are several key facts. The state police seized the evidence during the execution of a search warrant. A state court judge improperly issued the warrant. The warrant was improperly

issued and, therefore, defective because the state police did not present to the court sufficient probable cause to justify the search. The opposing side, the state, concedes that the warrant was improperly issued. The officers did not know the warrant was defective and executed it in the good faith belief that it was valid.

Mary's research indicates that the resolution of the issue is governed by Oregon's exclusionary rule, which provides that evidence illegally seized may not be admitted at trial. The rule was adopted by the state supreme court and is not statutory. As Mary begins the assignment, her first question is how to phrase the issue. What is the proper format? What is the best, most effective way to communicate precisely what is in dispute in this case? The

Application section of this chapter presents the answer to the latter question. The material discussed in this

chapter prior to the Application section addresses the other questions Mary posed.

## I. INTRODUCTION

Chapter 6 points out that the most important step in the case analysis process is the correct identification of the issue. If the issue is misidentified, time is wasted researching and writing about the wrong question. Once the issue is identified, it is equally important to state it correctly. Of what value is it to identify the question correctly, then fail to communicate accurately what you have identified? Therefore, how Mary states the issue is of critical importance because the issue governs the direction of the research and communicates the nature of the dispute.

A well-crafted issue informs the reader of the scope of the memo by identifying in a sentence the precise legal question raised by the key facts of the case. It informs the reader of the relevant law, the key facts of the case, and the legal question raised by the law. The exactness and degree of specificity with which the question is posed determines its usefulness to the reader and researcher.

The goal is to inform the reader of what you have identified as the legal question raised by the dispute. This goal is achieved by focusing your attention on drafting the issue clearly, concisely, and completely. Because so much hinges on the correct presentation of the issue, several drafts may be required. Do not get discouraged. The final draft may not emerge until well into the process, and often not until after extensive research and writing.

Chapter 6 identifies the issue as being composed of the law, the question, and the key facts. The focus of that chapter is on how to identify these elements in a client's situation and a court opinion. Here, the focus is on how to present these elements when framing the issue—how to write the issue to ensure that the reader knows the precise legal question at the core of the dispute and how to present the law, question, and key facts to communicate the question in dispute effectively.

Ultimately, the issue is the legal question raised by the dispute. Because it is a question, it should be drafted as a question rather than a statement.

Although there are no established rules governing what the issue must contain or how to assemble it, the law, question, and key facts elements should be included to achieve the goal of clearly, concisely, and completely communicating the nature of the dispute. A simple test to determine whether the statement of the issue is complete (whether it does its job) is the following: *If the issue alone is read—if the rest of the memorandum or brief is lost or not referred to—would the reader know what specific legal question, concerning what law, and involving what facts, is in dispute in **this** case?* With this in mind, there are two ways to state the issue, one effective and one not:

- a shorthand, or broad, statement
- a comprehensive, or narrow, statement

### issue: shorthand/broad statement

A broad formulation of the issue that usually does not include reference to the specific facts of the case or the applicable law.

## II. SHORTHAND/BROAD STATEMENT OF ISSUE

A shorthand statement is a very broad formulation of the issue that usually does not include the specific facts or law.

**For Example**

- Did Mr. Smith commit a battery?
- Can Mr. Jones recover damages for negligence?
- Did the court err when it granted the motion to dismiss?
- Did the chair of the board violate his fiduciary duty?

A broadly framed issue is often used in conversation or oral communications when the participants are familiar with the facts and know the law that applies to the case. It is appropriate in this informal context. It may also be appropriate initially in the analytical process by helping to focus attention on the general area of the law that needs to be researched—for example, in the preceding list, the first two illustrations focus the researcher's attention on the general areas of battery and negligence. A broadly stated issue may be proper in such situations, but it is not appropriate in legal research and writing for several reasons:

1. It is not helpful or useful for the reader who is not familiar with the facts of the case. This may be a judge in the case of a brief in support of a motion, or an attorney in the office referring to an old memorandum in the office files. The reader may wonder who Mr. Smith is and what he did that may or may not be a battery.
2. It does not guide the reader to the specific law in question. What specific fiduciary duty did the chair of the board violate? What statute did he violate? What is the precise legal context of this dispute?
3. It is not useful to the individual drafting and researching the issue.

**For Example**

"Did Mr. Smith commit a battery?" is such a broad formulation of the issue that it is of little value.

Stated this way, the issue applies to all battery cases. So stated, it is useless. It fails to focus the researcher's inquiry or guide the researcher to the specific area of battery law in dispute.

In West's widely used key number system, there are more than one hundred battery subtopics under the topic "Assault and Battery." A broad statement of the issue forces the researcher to scan all the subtopics looking for the one that applies. If research is conducted electronically, such as with Westlaw, a broad search will locate hundreds, if not thousands, of cases—too many for the researcher to review. If the issue is stated comprehensively, or narrowly, the inquiry is narrowed.

**For Example**

"Under California's tort law, does an individual commit a battery when the individual encourages and convinces his brother to beat another individual, and that individual is beaten as a result of the encouragement?" This narrow statement of the issue focuses the researcher's attention to that specific area of the digest involving individuals liable for battery, that is, Assault and Battery—Key Number 18, Persons Liable. If electronic research is conducted, the search is focused and only cases involving the liability of individuals encouraging a battery will be located.

As the preceding example illustrates, a comprehensive statement directs the researcher's inquiry to a specific subtopic in the digest, and research time is saved. Also, the question is not abstract. The reader does not have to refer to the facts to understand what is in dispute.

In summary, a shorthand or broad statement of the issue fails to inform. It results in an abstract question that forces the reader to engage in further inquiry to determine what specifically is in dispute in the case. In short, it is useless except in casual conversation or conversations where the participants are familiar with the case.

**issue: comprehensive/  
narrow statement**

A complete statement of the issue that includes the specific law, legal question, and key facts.

### III. COMPREHENSIVE/NARROW STATEMENT OF THE ISSUE

The most effective formulation of the issue is a comprehensive, or narrow, statement. In one sentence, the specific law, legal question, and key facts are presented. This form communicates the specific law that may have been violated in a specific fact situation, or whether and how that law applies in a specific situation. It conveys, in the terms and circumstances of the case, the precise law and question in dispute.

#### For Example

- Under the requirements of Florida tort law, can a claim for negligent infliction of emotional distress be made by a witness, not related to the victim, who witnesses a severe beating of the victim?
- According to New Washington's probate code, N. Wash. Code § 29-1-5, is a will valid if the witnesses are brothers of the testator?

Note that the specific law and question involved in the dispute are presented in the context of the facts of the dispute.

The value and importance of phrasing the issue comprehensively cannot be overemphasized.

1. For a researcher, it directs the research to the specific area of the law that controls the question raised by the facts involved in the dispute. This narrowing of focus saves research time because the researcher is immediately directed to the specific area of the law, and only cases with similar key facts need to be read. (See Number 3 in the previous section, Shorthand/Broad Statement of Issue.)
2. In an interoffice memorandum or a court brief, a comprehensive, or narrow, formulation of the issue sets the scope of the memo by informing the reader at the outset what precisely is in dispute. It does not force the reader to try to determine what the question is from the analysis section. It thereby makes it less likely that the reader will misunderstand what is in dispute.
3. In a law office setting, a narrowly framed issue saves time. Future researchers, by merely reading the issue, know precisely what law and facts a memorandum addresses. They are not forced to read the analysis section to determine whether the memo is related or may apply to the case that they are working on.

With the above in mind, the issue, then, should include the following three elements:

1. the specific *law or rule* that controls the dispute.
2. the *legal question* regarding the law raised by the facts.
3. the *key facts* that determine whether or how the law or principle applies.

The challenge is to include all three elements in one sentence; focus on

1. *completeness*: include the precise law, question, and key facts
2. *conciseness*: include no more than is absolutely necessary to guarantee completeness
3. *clarity*: craft the complete and concisely assembled material in the most effective manner (discussed in the following)

There are several ways to meet this challenge.

1. Present the facts first, followed by the legal question and the law.

**For Example** “Can a witness, not related to the victim, who witnesses a severe beating of the victim establish a claim for negligent infliction of emotional distress under Florida tort law?”

“If the brothers of the testator witness the will, is the will valid under the provisions of the California wills attestation statute?”

2. Present the law first, followed by the facts, and then the legal question.

**For Example** “Under Florida’s tort law, can a witness, not related to the victim, who witnesses a severe beating of the victim establish a claim for negligent infliction of emotional distress?”

“Under the California wills attestation statute, if the brothers of the testator witness the will, is the will valid?”

3. Present the legal question first, followed by the law and the facts.

**For Example** “Can a claim for negligent infliction of emotional distress be established under Florida tort law when a witness, not related to the victim, witnesses a severe beating of the victim?”

“Is a will valid under the California wills attestation statute if the brothers of the testator witness the will?”

4. Present the rule of law first, followed by the legal question and the facts.

**For Example** “Under Florida’s tort law, can a claim for negligent infliction of emotional distress be established when a witness, not related to the victim, witnesses a severe beating of the victim?”

“Under the California wills attestation statute, is a will valid if the brothers of the testator witness the will?”

Any of these structures may be used. There are no hard and fast rules that mandate the selection of one form over another. However, the format presented in Number 4 in the preceding paragraph is recommended. The formula for this format is presented in Exhibit 7-1.

### Exhibit 7-1

Formula Format for the Issue

#### Relevant Law + Legal Question + Key Facts

<b>Relevant Law</b>	The specific law that governs the dispute, for example, “Under Ind. Code § 29-1-5-5, legal execution of a will, . . .”
<b>Legal Question</b>	The question concerning the application of the law governing the dispute to the facts of the dispute, for example, “is a will validly executed . . .”
<b>Key Facts</b>	The legally significant facts that raise the legal question of how or whether the law governing the dispute applies. Facts that, if changed, would change or affect the outcome of the application of the law, for example, “when the one of the witnesses is the brother of the deceased?”

In sentence form, the formula in Exhibit 7-1 is: “*Under this law, what legal question is raised by these facts?*” There are several reasons for recommending this format.

1. It follows the standard legal analysis format, which proceeds from the general to the specific—the general law followed by the application of the law to the specific facts.

#### For Example

In a court brief or an interoffice legal research memorandum, the applicable law is presented first, followed by the application of the law to the specific facts.

The suggested format for the formulation of the issue presented in Exhibit 7-1 follows the same format: the general legal context is presented first, followed by the specific facts of the dispute.

2. The rule should be presented first for readability purposes. A reader understands the importance of the facts in a dispute in the context of the law. If the facts are presented first and the law last, the reader must reread the facts to put them in the proper legal context because the legal context (the law that applies) is not known until the end of the issue.
3. The last and probably most important reason is that it is usually *easier to write the issue* following this format. This format is a most effective tool when confronting the complex challenges presented by multiple fact issues. Multiple facts are generally easier to write and read when placed at the end of a sentence. Try it. Once the specific law and significant or key facts are identified, it is much easier to craft the issue in the sequence of law + question + key facts.

For these reasons, the examples used throughout this chapter and the text follow the Relevant Law + Legal Question + Key Facts format.



## IV. ISSUE: LAW COMPONENT

Obviously, you must include the relevant law in the statement of the issue because every case involves whether or how a law applies in a specific fact situation. If it is not included, you are asking the reader either to guess or infer what law applies or conduct research to find the applicable law. To avoid possible confusion and save extra work, establish the relevant legal context at the beginning of the issue.

You may present the law in a broad context, such as “corporations,” or a narrow one, such as a specific section of a statute. Include the specific jurisdiction and the area of law.

### For Example

	<i>(jurisdiction)</i>	<i>(area)</i>
■ Under	New Washington	contract law
■ Under	N. Wash.Code § 35-42-7	kidnapping law

The law component of the issue is composed of either enacted law or case law. As defined in Chapter 1, the term *enacted law* includes any constitutional law or rule or enactment of a legislative body, such as a statute, ordinance, or regulation. Case law refers to any court-made doctrine, law, rule, principle, test, or guide.

### A. Issue Based on Case Law

When an issue is based on case law, do not refer to a single case citation because the case law is usually based on a group or body of cases, and generally no single case encompasses the relevant law. It is sufficient to present the law with a short introductory phrase that includes the jurisdiction and the area of the law. The easiest format is as follows:

	<i>(jurisdiction)</i>	<i>(area)</i>
■ Under	New Mexico	corporation law
■ Applying	Utah	emotional distress law
■ According to	Indiana	doctrine of res ipsa loquitur
■ In light of	California	definition of confinement in false imprisonment actions

However you state it, the description should be as focused and specific as possible. The goal is to inform the reader, as precisely as possible, of the area of law involved in the dispute. Therefore, such broad statements as “According to the Colorado case law...” or “Under the case law...” are generally not acceptable. Such statements are so broad as to be meaningless. The reader is given no direction about which area of the law is involved in the dispute.



Along these same lines, a specific description is preferable to a broad one.

#### For Example

- "Under Wyoming's definition of oppressive conduct by majority shareholders..." is preferable to "Under Wyoming corporation law..."
- "Applying Georgia's definition of consideration ..." is preferable to "Applying Georgia contract law..."
- "Under California's law of trespass to chattels ..." is preferable to "Under California tort law..."

Again, the key is to be as specific and focused as possible when describing the area of the law. The greater the specificity of the legal description, the greater the reader's understanding of what precisely is at issue in the dispute. If you are using a broad description, such as torts, reexamine the issue to determine if a narrower focus, such as false imprisonment, battery, and so on, can be applied.

### *B. Issue Based on Enacted Law*

You may present an issue based on enacted law, such as a constitutional provision or statute, in several ways. The various ways may include a specific citation, a title, and/or a description.

#### For Example

- *(citation)*      *(title)*  
"According to N. Wash. Code § 20-40-1, kidnapping ..."
- *(title paraphrased)*      *(description)*  
"Under the New Washington kidnapping statute, which includes intent to confine as an element of kidnapping, ..."
- *(title paraphrased)*  
"In light of the provisions of the involuntary dissolution of corporations statute,  
*(citation)*  
N. Wash. Corp. Code § 56-7-14,..."

The goal of clearly, completely, and concisely communicating the issue governs the choice or combination of choices selected. This, in turn, is governed by the complexity of the issue and the degree to which the description conveys the necessary information.

## 1. Enacted Law: Citations

Is it necessary or advisable to include the citation in the statement of the issue? Some believe the inclusion of the citation clutters the issue, arguing that it is not necessary because the citation can be determined by referring to the analysis section of the memorandum. Others believe the inclusion of the citation is, if not required, at least advisable. It focuses the reader on the exact section of the law in dispute, allowing the reader to refer immediately to that section if necessary. In a law office, a subsequent researcher reviewing a memo from the memo files, by referring to the issue, can tell what specific law is discussed in the memo. By merely referring to the issue, the researcher knows whether the memo involves the same law as the law being researched.

**For Example** A researcher is checking the office memorandum files to determine whether any research has been conducted on section 956.05(b) of the corporation statutes. If the citation is included in the issue, a mere glance at the issue tells the researcher whether the memo involves the same statute. The researcher's time is saved by not having to read the body of the memo to determine whether it is on point.

In some instances, the firm may require or prefer the inclusion or exclusion of the citation in the issue. In the case of a court brief, the court rules may determine the question. If the choice is yours, do what works. If the length or complexity of the issue precludes the use of the citation, then leave it out.

There are a couple of rules to keep in mind when a citation is being used.

1. Use the proper citation form. A brief summary of citation form is presented in Appendix C.
2. Do not use a citation alone. In addition to a citation, a title or description is necessary to inform the reader adequately of the legal context of the issue.

**For Example** *Incorrect:* "Under Ind. Code § 29-1-5-5, does..." Without a description or title, one does not know which area of the law is being considered. The reader will be forced to stop and look up the citation unless he or she is familiar with that particular section.

*Correct:* "Under Ind. Code § 29-1-5-5, legal execution of a will,..." The specific area of law covered in the citation is provided.

## 2. Enacted Law: Titles and Descriptions

Whereas citations should not be used without a title or description, you can use a title or description without a citation when describing enacted law. Titles and descriptions provide the amount of information sufficient to inform the reader of the legal context of the issue. Although the citation is not required, its inclusion may be advisable for the reasons discussed in the preceding subsection.

A *title* of a constitutional section, statute, and so on, is a heading that provides the name by which an act or section is individually known. A description is a brief summary of the relevant portions of the act and may include part of the title.

**For Example** *Examples of titles:*

- Ind. Code § 29-1-5-2. Writing required—Witnesses, competency, interest.
- Cal. Corp. Code § 1800. Verified complaint; plaintiffs; grounds; intervention by shareholder or creditor; exempt corporations.

*Examples of descriptions:*

- "Under the Indiana statute that governs the writing and witnessing of wills,..."
- "In light of the provisions of the California corporation statute that applies to lawsuits against corporations and intervention by shareholders,..."

When using a title or description of enacted law, the guiding principle is whether it provides the reader with enough information to know the legal context of the issue.

The title alone may provide sufficient information. The terms from the titles in the following example are in *italic*:

**For Example**

- "Applying the provisions of Maryland's *kidnapping* statute,..."
- "Under California's holographic *wills* statute,..."

Occasionally the title may require modification. Words may need to be added or deleted to enhance clarity and readability. In the following examples, the title is presented followed by the modified statement of the issue containing additional language.

**For Example**

- Limitation of actions. (Title of N.M. Stat. Ann. § 41-1-2.) "Under the limitation of action provisions of New Mexico's wrongful death statute,..."
- Holographic wills; requirements. (Title of Cal. Prob. Code § 6111.) "According to the requirements of the holographic wills section of the California statutes,..."

Sometimes it is necessary to delete language from the title because it is not relevant to the issue or needed to enhance clarity. In the following examples, the title is presented first, followed by the modification containing less language.

**For Example**

- Verified complaint; plaintiffs; grounds; intervention by shareholder or creditor; exempt corporations. (Title of Cal. Corp. Code § 1800.) “Under the California corporation statute that allows the intervention by shareholders in dissolution actions,…”
- Writing required—Witnesses, competency, interest. (Title of Ind. Code § 29-1-5-2.) “In light of the requirements of the Indiana wills statute that governs witness competency,…”

*Comment:* In these examples, “exempt corporations, interest” and other language was deleted because these terms, although included in the title, are not relevant to the issue in the case.

If the title of a statute or law does not provide the required information or it is necessary to emphasize an aspect or element of the statute or law, the use of a description may be appropriate. In the following examples, the title is presented first, followed by an example.

**For Example**

- Nuncupative wills. (Title of Ind. Code § 29-1-5-4.) “Under the provisions of the Indiana statute that provides that an oral will does not revoke an existing written will,…”
- Limitations of actions. (Title of N.M. Stat. Ann. § 41-1-2.) “Under the wrongful death statute of New Mexico, which requires that an action be brought within three years of the date of death,…”
- Ski area sign requirements. (Title of Wash. Rev. Code § 70.117.010.) “Under the Washington statute that requires a resort to post a notice at the top of closed trails,…”

As mentioned, there are no rules mandating a particular format you must follow when composing the legal component of the issue. The unwritten rule, however, is to focus on the goal:

- *Is the information included sufficient to provide the reader with the specific legal context of the issue?*
- *Is the legal component of the issue stated so broadly that the reader will have to look elsewhere (in the analysis portion of the memorandum or in the statutes) to determine what precise area of the law is in dispute?*

### C. Format of the Law Component

There are two basic formats that may be followed when presenting the legal component of the issue.

1. the jurisdiction or citation followed by the title or description
2. the title or description followed by the jurisdiction or citation

**For Example** Jurisdiction or citation followed by title or description:

- “Under the New Mexico wrongful death statutes, ...”  

*(jurisdiction)*
*(title)*
- “Under the Washington statute that requires a resort to post a notice at the top of closed trails, ...”  

*(jurisdiction)*
*(description)*
- “According to Ind. Code § 35-42-3-3, kidnapping, ...”  

*(citation)*
*(title)*
- “Under Cal. Civ. Proc. Code § 340, which establishes a one-year statute of limitations in slander cases, ...”  

*(citation)*
*(description)*

**For Example** Title or description followed by jurisdiction or citation:

- “According to the wrongful death provisions of the Colorado statutes, ...”  

*(title)*
*(jurisdiction)*
- “In light of the requirement that drivers carry proof of insurance under California law, ...”  

*(description)*
*(jurisdiction)*
- “Under the kidnapping statute, Ind. Code § 35-42-3-3, ...”  

*(title)*
*(citation)*
- “Under the statute that requires skiers to ski within the range of their ability, Wash. Rev. Code § 70.117.020, ...”  

*(description)*
*(citation)*

## V. ISSUE: QUESTION COMPONENT

The **question component** is really what the issue is about. What legal question is being raised by the facts? In the formula adopted in this chapter, the question follows the law component. It must

1. relate to or concern the specific law included in the law component.
2. present the specific legal question raised by the facts.
3. link the law with the facts.

In the following examples, the question component is italicized. The linking verbs are boldfaced.

**For Example**

- Under New York landlord–tenant law, **does a landlord breach his duty to provide a habitable residence** when he fails to provide air conditioning?

- Under Cal. Civ. Proc. Code § 340, which establishes a one-year statute of limitations in slander cases, *did the statute of limitations **begin to run*** when the newsletter was printed or when the newsletter was distributed to the customers?
- According to the statute governing oppressive conduct, Cal. Corp. Code § 1800, *does a majority shareholder **engage** in oppressive conduct* when he refuses to issue dividends while providing himself with bonuses equal to twice his salary?
- Under the Colorado law governing ski resorts, *is a resort **responsible** for warning skiers of hazardous areas between ski runs?*

Note that in all the preceding examples, the question specifically relates to the law included in the issue. Note, also, that the question links the law to the facts. This linkage may be accomplished through the use of **linking verbs**. There are many possible linking verbs, such as *constitute*, *establish*, and various forms of *to be*—for example, *is*, *was*, and so on. In drafting this component of the issue, the main focus is to ensure that the legal question raised by the facts is included. In other words, under the law included in the issue, is the precise legal question raised by the facts clearly presented?

## VI. ISSUE: SIGNIFICANT/KEY FACTS COMPONENT

The last section of the formula for writing an issue is the presentation of the key facts. Chapter 5 discusses what key facts are, and how they are identified. It is especially important to keep in mind the goals of clarity, completeness, and conciseness because cases with multiple or complex facts often make these goals difficult to achieve. The **facts component** must

1. be readable.
2. include key facts legally relevant to the law component.
3. set the factual scope of the legal question.

The facts component should not be so complex that the reader has trouble understanding the issue.

It is always preferable to include all key facts. Where, however, there are multiple key facts, it may be necessary for the sake of clarity to take other steps, such as categorizing, condensing, or listing the facts. Examples of the key facts component follow.

### For Example All key facts included:

- According to the provisions of Colorado's ski safety act, does a resort have a duty to warn skiers of ice hazards on expert runs?
- Under the holographic will statute, Colo. Rev. Stat. § 15-11-503, is a holographic will valid if it is handwritten by a neighbor at the direction of the testator, but not written in the testator's handwriting?

*Comment:* Note that the facts are presented clearly and in a logical sequence.

**For Example** Key facts condensed; some included, and some referred to:

- Under Ohio's corporation law governing oppressive conduct, does oppressive conduct occur when a majority shareholder of a closely held corporation engages in several acts that may be harmful to a minority shareholder, such as refusing to issue dividends and firing the minority shareholder from her position in the corporation without a stated cause?
- Under Texas's constitutional provision prohibiting cruel and unusual punishment, are conditions of confinement cruel and unusual when the confinement may be unhealthy in several ways, such as the total calories served to each inmate daily are less than the recommended minimum and the jail cells are kept at a temperature less than 60 degrees in the winter?

**For Example** Key facts are presented in general categories:

- Under Indiana corporation law, does oppressive conduct occur when a majority shareholder engages in several actions that are beneficial solely to the majority shareholder and detrimental to the interests of the minority shareholders?
- Under Arizona's constitutional provision prohibiting cruel and unusual punishment, are conditions of confinement cruel and unusual when they are unsanitary, unsafe, and in violation of health codes?

*Comment:* Note—take care to avoid distorting or misstating the issue when condensing or categorizing the key facts. In the previous examples, assumptions are contained in the categorizations. As stated, the issue assumes the actions of the majority shareholder are solely beneficial to the majority shareholder, and assumes the conditions of confinement are unsanitary. To avoid these problems, present multiple or complex facts in the form of a list.

**For Example** Key facts are listed:

- According to the provisions of California corporation law, Cal. Corp. Code § 1800, does oppressive conduct occur when a majority shareholder
  1. fires a minority shareholder from her job without stating a reason.
  2. refuses to issue dividends when the corporation has a cash surplus of over \$1,000,000 and there are no plans for use of the money by the business.
  3. triples his salary three times within one year and his salary was twice the amount of similarly situated employees when the raises were given.
  4. gives himself a \$100,000 cash bonus without a stated reason for the bonus?



- Under the United States Constitution's prohibitions against cruel and unusual punishment, are conditions of confinement cruel and unusual when
  1. the food is nutritionally deficient in that the total calories per meal are less than the recommended minimum.
  2. jail cells designed for one inmate currently house three inmates.
  3. jail cell temperatures are routinely kept at less than 60 degrees in the winter.
  4. jail cells are roach- and ant-infested?

Remember, it is always best to include all key or significant facts in the facts component of the issue. If to do so would make the issue unreadable or lacking in clarity, however, one of the options presented in the preceding examples may be employed.

## VII. ETHICS: OBJECTIVELY STATING THE ISSUE

The preceding sections discuss the structure of the issue. An additional matter to keep in mind when composing the issue is to state the issue objectively. "State ... objectively" means to write the issue in a manner that fairly and completely presents all the key facts and not to construct it in a manner that favors an outcome.

Rule 3.3(a)(1) of the Model Rules of Professional Conduct provides that a lawyer should not make false statements of law or fact to a tribunal. Broadly interpreted, this means that matters should not be presented in a manner that may mislead the court. Therefore, when writing for the client, the supervising attorney, and often for the court, state the issue objectively so that a conclusion is not suggested, nor is the reader misled. The purpose of legal analysis, whether in a letter to the client, an office legal memorandum, or a court brief, is to inform the reader how the law applies to a particular legal problem, not to mislead or distort the law and its application.

There are several additional reasons why the issue should be stated objectively.

1. A one-sided presentation of the facts or an elimination of some unfavorable key facts can mislead the reader and may result in disaster. Either the opposing side or the court will discover and point out the misrepresentation.
2. Ultimately the law will govern the issue, and usually no amount of creative phrasing will change the outcome. Provide the reader with an objective presentation of the facts, and let your legal argument do the persuading.
3. If the issue is presented in a biased or slanted manner, the reader may question the ability and credibility of the author and discount the legal argument that follows.

### For Example

"Applying Colorado's law of conversion, does conversion occur when an individual, with a known reputation as a thief and having a burglary conviction, takes and uses his neighbor's electric saw without permission?"

*Comment:* The statement is not objective. The facts relating to the individual's reputation and conviction are prejudicial and not relevant. Readers will conclude either that you do not know what relevant facts are or that you are trying to influence them.

**For Example** “Under the Colorado ski act, does a resort have a duty to warn of an obviously dangerous ice hazard?”

*Comment:* In this example, assume these additional facts are left out: the skier was a novice skier skiing on an expert ski run, and the nature and degree of the ice hazard has not been determined. The issue is not stated objectively for two reasons.

1. The ice condition is described in such a way as to lead the reader to a conclusion that it was dangerous.
2. A key fact is omitted: the skier is not an expert. This fact could very well govern the outcome of the case. It may be that the ice condition is hazardous only to novice skiers, and because the run is an expert run, the resort does not have a duty to warn. This fact will come to light as the case progresses, and its omission serves only to mislead. The reader will conclude that you are misstating the question with the intent to mislead or that you do not understand the law.

**For Example** “Under the United States Constitution’s prohibitions against cruel and unusual punishment, are conditions of confinement cruel and unusual when the conditions are unsanitary and unhealthy?”

*Comment:* The issue is stated prejudicially and too broadly. It is prejudicial because it assumes that conditions are unsanitary and unhealthy. Whether the conditions are unsanitary and unhealthy is what is in dispute and has yet to be decided. It is too broad because the facts concerning the conditions are not included, just conclusions about the facts. What are the factual conditions that are allegedly unsanitary and unhealthy? Are the jail cells unclean? Is the water unsafe to drink?

*Always state the issue objectively.* When in doubt, err on the side of completeness.

If condensing or categorizing key facts results in a biased or distorted statement of the question, do not condense or categorize. It is better to have a long or complicated issue than a loss of credibility.

In many instances, when the question is to be presented to a court in a court brief, it may be desirable to state the issue in a persuasive manner. This may be necessary when you are trying to persuade the court to adopt a legal position or concept that is favorable to the client. Great care must be taken when constructing an issue persuasively to avoid misleading the court or misrepresenting the issue. The examples presented in this section point out some of the hazards.

Persuasive issue writing is generally applicable in the courtroom in oral argument or in trial and appellate briefs. It usually is not applicable in research and writing projects assigned to legal assistants, such as the preparation of an interoffice legal memorandum. The considerations involved in persuasive issue writing and persuasive writing in general are addressed in Chapter 14.

## VIII. GENERAL CONSIDERATIONS

There are several general considerations to keep in mind when drafting an issue.

### A. Name

Do not identify people or events specifically by name. Specific names have no meaning to the reader unless they are familiar with the case or unless they have read the body of the memorandum. When a research memo is retrieved from the office memo files, the reader probably will not be familiar with the names of the people or events.

**For Example** *Incorrect:* "Under ..., did oppressive conduct occur when Tom Hardin refused to issue a three dollar dividend and gave himself a \$20,000

bonus?"

*Correct:* "Under ..., does oppressive conduct occur when a majority shareholder, who is also the sole director of a closely held corporation, refuses to issue dividends and grants himself a \$20,000 bonus?"

### B. Approach

Write the issue several times. Have an issue page in your research outline or material, and keep that page nearby. Whenever it comes to you how to state the issue (regardless of how broadly or poorly phrased), write it down on the issue page. This way your ideas are not lost.

Even your poorly drafted constructions of the issue may contain something valuable. You may ultimately have a page full of various formulations of the issue. The final draft may require a combination of the various initial drafts, and having them all in one place may help you put together that combination. See Chapter 10 for a discussion of the use of an outline when drafting the issue.

The following is a *basic approach*.

1. State the question in the context of the general area of law. For example:  
Was there false imprisonment?
2. Identify the specific law that applies.
3. List all the key facts.
4. Put the elements in the sequence recommended in this chapter.

<i>Law</i>	<i>Question</i>	<i>Facts</i>
Under . . . . .	is . . . . .	when
In light of . . . .	did . . exist . . . . .	when
According to . .	does . constitute . .	when
Applying . . . . .	was . required . . . .	when
Under . . . . .	does . establish . . .	when

### C. Multiple Issues

Separate the issues. If the research involves several related questions or complex questions, break the questions into individual issues. Address them one at a time, applying the principles presented in this chapter.

## IX. Key Points Checklist: *Drafting an Issue*

- ☐ Do not expect to state the issue accurately on the first draft or early in the research and analysis process. A broad statement may be all you can come up

with until you research and study statutory and case law. The key facts may not emerge until you have studied the case in depth.

- ❑ Always prepare a comprehensive/narrow presentation of the issue. Include the specific law, the legal question, and the key facts.
- ❑ Remember the format recommended in this chapter for presenting the issue: Relevant Law + Legal Question + Key Facts. It is easier to draft the issue in this format.
- ❑ If you get stuck, *start*. If you cannot seem to get started writing, just write anything about the issue on the issue page, that is, *start*.
- ❑ Sometimes when you are stuck, it may be that you need to *stop*. Often the brain needs time to assimilate information. Take a break. Sleep on it. The brain will continue to work while you rest, and after you wake, it may all fall into place.
- ❑ Remember, the issue is the legal question in dispute in the case and should be phrased as a question, not a statement.

## X. Application

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Presented below are two examples that illustrate the principles discussed in this chapter. Each example includes a discussion of the application of those principles.

### A. Chapter Hypothetical

This example is based on the memorandum assignment introduced at the beginning of the chapter. In the assignment, Mary Strate, the legal assistant, determined that the key facts are

1. the state police were acting in good faith when they relied on the validity of the search warrant.
2. the evidence was seized pursuant to the execution of the warrant.
3. the warrant was improperly issued due to judicial error.

Mary's research reveals that the law governing the issue is the state court's adoption of the exclusionary rule.

There are several ways the issue can be framed.

- A. "Should the evidence be suppressed?"
- B. "Does Oregon's exclusionary rule require the suppression of the evidence?"

*Comment:* Both issues A and B are too broad. They are examples of a shorthand statement of the issue. Issue A is so broadly phrased that it is of little value to the reader. What law is involved? What facts? This statement of the issue could apply to any case involving the suppression of evidence. Issue B informs the reader of the applicable law but omits the facts necessary for the resolution of the question. Both of the issues require additional reading and research to determine the law and facts involved in the dispute in the case.

- C. "Does Oregon's exclusionary rule require the suppression of evidence seized by officials acting upon a warrant improperly issued due to judicial error?"

*Comment:* This construction of the issue is neither objective nor complete. It leaves out a key fact: the officers were acting in good faith when

they relied on the validity of the warrant. This key fact is critical if the state's exclusionary rule has an exception that allows the admission of evidence when officers execute a warrant in the good faith belief that it is valid. Failure to include this key fact misleads the reader and slants the question in favor of suppression.

- D. "Under Oregon's exclusionary rule, must evidence be suppressed when it is seized by law enforcement officers acting in the good faith belief in the validity of a warrant that was invalid due to judicial error?"

*Comment:* This statement of the issue is complete. It identifies the law in question, includes all the significant or key facts that are necessary for the resolution of the issue, and informs the reader of what legal question must be resolved. It meets the test presented at the beginning of the chapter: *Does the reader, by reading the issue alone, know what specific factual dispute concerning what law is involved in this case?*

### **B. False Imprisonment**

The client, Steve, has a history of respiratory problems. Tom is an acquaintance of Steve who is secretly jealous of him. Both Steve and Tom vie for the affections of Karen. One cold winter evening, before leaving for a party at Tom's house, Steve took some cough medicine for a cold he had been fighting. After a few drinks at the party, he told Tom he did not feel well and wanted to lie down for a minute. Tom directed him to a back bedroom. Steve went to the room and promptly fell into a deep sleep.

The bedroom had recently been converted from a storage room. It had no windows, and Tom shut the heat off when he did not have guests. The door to the room was usually kept open, and the room stayed reasonably warm. It quickly became very cold, however, when the door was shut. Tom, knowing Karen was coming to the party, checked on Steve. When he saw Steve was asleep, he locked the bedroom door and did not turn on the heat.

Three hours later, after Karen left, he unlocked the bedroom door. Steve woke up shortly thereafter and left. He was not aware that he had been locked in the room until Tom told him several days later. As a result of being in the cold room, Steve's cold got worse and he incurred medical expenses. Steve wants to know whether he can sue Tom for false imprisonment. Assume this takes place in Montana. Some of the ways the issue can be framed are as follows:

- A. "Can Steve recover his medical expenses?"  
B. "Under Montana law, did false imprisonment occur?"

*Comment:* These issues are incomplete and too broadly framed. Issue A is of little value, as it provides the reader with no information, no guidance as to the facts of the case. Stated this way, the issue could apply to a thousand cases. Issue B provides the law but no facts. It could apply to any false imprisonment case. Neither issue communicates the specific law or facts in dispute in this case.

- C. "Under Montana law, does false imprisonment occur when an individual maliciously locks another in a room and turns off the heat, intending to cause the person harm?"

*Comment:* This issue is incomplete, inaccurate, and not objective. It leaves out the critical key facts that Steve was unaware of the confinement and was harmed. It is inaccurate because it states that Tom intended to cause Steve harm, and there are no facts to support this. It is

not objective because it characterizes Tom as malicious and intending to cause harm. It is a prejudicial formulation of the issue that misleads the reader and is slanted against Tom.

- D. “Under Montana tort law, does false imprisonment occur when an individual, suffering from a cold, is locked in an unheated room while asleep and is unaware of the confinement, but suffers physical harm as a result of a worsening of the cold due to the confinement?”

*Comment:* Issue D is complete. The reader is provided with the question, the law, and all the key facts necessary to determine what must be decided under the law. Without any additional reading or research, the reader is informed of the specific legal and factual context of the dispute.

## Quick References

enacted law: citations	000	issue: objective statement	000
enacted law: descriptions	000	issue: shorthand/ broad statement	000
enacted law: titles and descriptions	000	law component	000
ethics	000	linking verbs	000
facts component	000	multiple issues	000
issue: comprehensive/ narrow statement	000	question component	000

## Summary

Writing the issue is one of the most critical tasks in the legal research and writing process. It should communicate what is in dispute. To accomplish this task, it is necessary to identify the question to be resolved completely, concisely, and clearly. A poorly crafted issue either fails to inform because it is too broad, or misleads because it adds improper information or omits critical information.

There are two ways to state an issue.

1. A shorthand/broad statement that presents the question in the context of the general area of the law
2. A comprehensive/narrow statement that presents the specific question in the context of the relevant law and specific facts

A broad statement may be appropriate in a situation where the participants are thoroughly familiar with the case. A comprehensive, or narrow, statement is the appropriate form for use in research and writing. It specifically identifies all the essential information necessary to understand and resolve the dispute.

There are several formats that may be followed when crafting the issue, but the recommended format is as follows:

Relevant Law + Legal Question + Key Facts

There are several reasons for this recommendation. First, it follows the standard legal analysis format of the presentation of the law followed by the application



of the law to the specific facts. Second, it is easier to draft an issue when the facts are inserted at the end.

When drafting the issue, always include the jurisdiction and area of the law in the law component. The question portion must introduce the specific law presented in the law component. The fact section should present all key facts if possible, although it may be necessary to categorize or condense the key facts.

The issue should be objectively presented and not phrased so as to mislead the reader or misrepresent the nature of the dispute. A well-crafted issue meets the following test: *Does the reader, by reading the issue alone, know what specific legal question, concerning what law, involving what facts, is in dispute in the case?*

## Internet Resources

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As of the date of the publication of this text, there are no Web sites dedicated specifically to stating the issue. However, the topic of how to state the issue is often discussed along with issue identification, therefore, the methods discussed in Internet Resources in Chapter 6 might prove helpful.

## Exercises

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*Additional assignments are located on the Online Companion and the Student CD-ROM accompanying the text.*

### ASSIGNMENT 1

Distinguish between a broad and narrow formulation of an issue. Describe the elements of a narrow statement of an issue. Why is it important to phrase an issue narrowly when engaged in legal writing?

### ASSIGNMENT 2

The statute is Cal. Corp. Code § 1800. The title of the statute is: Verified complaint; plaintiff; grounds; intervention by shareholder or creditor; exempt corporations. The statute applies in dissolution cases and includes the grounds for dissolving a corporation. The dispute involving this corporation statute is whether there are grounds for dissolution of the corporation.

#### Part A

Draft the law component of the issue, including the relevant portion of the title.

#### Part B

Draft the law component of the issue and include the relevant portion of the title and the citation.

#### Part C

Draft the law component of the issue using a description that focuses on an element of the statute. The element in question is the requirement of shareholder deadlock. Assume the statute provides that a court may dissolve a corporation in the event of a dispute among the shareholders only if there is shareholder deadlock.

#### Part D

To the answer in part C above, add the statutory citation.

### ASSIGNMENT 3

The statute is Georgia Code Ann. §11-2-314. The title of the statute is: Implied warranty; merchantability; usage of trade. The question is whether there is an implied warranty of merchantability. In the following problems, draft a comprehensive/narrow statement of the issue in the Relevant Law + Legal Question + Key Facts format; for the law component, use the Georgia statute. When drafting the law component, include the citation and a relevant portion of the title.

#### Part A

Alice purchases a new toaster from a booth



at the flea market. The market is open year-round and the same products are always sold at the booth.

#### Part B

Alice purchases a new toaster at a garage sale.

#### Part C

Alice becomes ill from a soft drink purchased at a local fast-food restaurant.

#### Part D

Alice, while shopping at the flea market, purchases a soft drink from a vendor at the market. She becomes sick from the drink.

### ASSIGNMENT 4

Perform Assignment 3 using a description of the title when drafting the law component, rather than a relevant portion of the title.

### ASSIGNMENT 5

Perform Assignment 3 using your state commercial code statute governing the warranty of merchantability and the sale of goods.

### ASSIGNMENT 6

In the following problems:

- Draft a shorthand/broad statement of the issue.
- Draft a comprehensive/narrow statement of the issue in the Relevant Law + Legal Question + Key Facts format. For the law component in problems A through C, use either the relevant section of your state's probate code or New Wash. Prob. Code § 60, Exception Pertaining to Holographic Wills. Assume this statute applies to all the fact situations presented in problems A through C. For each problem, draft the issue twice. One draft should contain the title or a description of the title. One draft should contain the title or description and the citation.

#### Part A

**Key Facts:** A will is handwritten. One half is in the testator's handwriting, and the other half is in the handwriting of a witness. The will is properly witnessed.

**Question:** Is the will valid?

#### Part B

**Key Facts:** A will is handwritten. One half is in the testator's handwriting, and the other half is in the handwriting of a witness. It is witnessed by three witnesses, two of whom will inherit under the will.

**Question:** Is the will valid?

#### Part C

**Key Facts:** A will is handwritten. One-half is in the testator's handwriting, and the other half is in the handwriting of a witness. The testator's name was signed by a witness at the direction of the testator.

The will was properly witnessed.

**Question:** Is the will valid?

### ASSIGNMENT 7

In the following problems:

- Draft a shorthand/broad statement of the issue.
- Draft a comprehensive/narrow statement of the issue in the Relevant Law + Legal Question + Key Facts format.

#### Part A

**Key Facts:** An individual on a radio talk show states that all the town's psychiatrists are frauds.

**Question:** Is the statement "concerning" the plaintiff?

**Law:** Assume the law of slander in your jurisdiction is case law (court-made) and one of the elements is that the statement must concern the plaintiff.

#### Part B

**Key Facts:** Use the same facts as in the preceding problem, with the additional fact that the plaintiff is the only psychiatrist in the town.

**Question:** Same as in A.

**Law:** Same as in A.

### ASSIGNMENT 8

Redraft the following issues in the format presented in this chapter.

#### Part A

Can a bystander who witnesses the death

of a victim from three blocks away recover for negligent infliction of emotional distress under Ohio law?

**Part B**

Does oppressive conduct occur, according to the provisions of the Texas Corporation Code, when a majority shareholder refuses to issue dividends, triples his salary, and grants himself excessive bonuses?

**Part C**

The issue is whether a newspaper that publishes an article indicating that Tom Smith has criminal connections has committed libel according to Florida tort law.

**Part D**

Do law enforcement officers commit a battery when, while making a lawful arrest, they encounter resistance, use force to overcome that resistance, and continue to use force after the resistance ceases?

**FOR FURTHER READING**

Ray, Mary Barnard, and Barbara J. Cox. *Beyond the Basics*. St. Paul: West Publishing Co., 1991. This text presents an excellent and expanded discussion of the Relevant Law + Legal Question + Key Facts format recommended in this chapter.



For additional resources, visit our Web site at [www.paralegal.delmar.cengage.com](http://www.paralegal.delmar.cengage.com)



Additional assignments are located on the Student CD-ROM accompanying the text.