STATING THE ISSUE IN APPELLATE BRIEFS

Mr. Cooper's Article is the result of considerable correspondence with appellate court judges. He wrote to them, asking what they considered to be the principal weaknesses in briefs submitted to their courts. Unanimously the judges agreed that the statement of issues was highly important, and nearly all of them reported that many of the statements of issues that they read were unsatisfactory. Mr. Cooper lays down six rules for a good statement of the issues and then discusses each rule in detail. The article is based upon a chapter in a forthcoming book, Writing in Law Practice to be published this year by Bobbs-Merill.

By FRANK E. COOPER*

JUSTICE FELIX FRANKFURTER, addressing The Association of the Bar of the City of New York a few years ago, described Chief Justice White as a lawyer who "was happily endowed with the gift of finding the answer to problems by merely stating them."[1]

This trenchant phrase describes the epitome of the art involved in drafting the "statement of the issue involved" on the flyleaf of an appellate brief. If it appears to the judge, upon reading the flyleaf, that the mere statement of the question makes the answer plain, then (happily assuming the answer is that for which the writer of the brief is contending) the brief-writer has accomplished the greater part of his task in a single paragraph. All that he need do in the rest of his brief is to fortify the conclusion that is implicit in the statement of the question.

It has often been said that the most important paragraph in a brief is the first one, in which appears counsel's formulation of the issues presented for decision. Much has been written of the vital role which this short statement has in influencing the ultimate decision in the case. It has been urged that many appellate cases might have been decided the other way had the losing party selected a different battleground, skillfully directing the court's attention to an issue which was overlooked in the acutal presentation of the case.

It is easy to find instances where a case that was lost below is won on appeal because counsel for appellant has argued his case on a different theory from that which was urged at the trial. But what of the cases where the appellate court is being asked to review the same issue which the court below considered? Of what importance is the "statement of issue" in these case?

To test the often-repeated assertion that judges attach great significance to the statement of issue involved, the author (following the advice of John W. Davis that if a fisherman really wants to know what bait is best, he should ask the fish) addressed inquiries to a number of appellate judges, asking them what they look for in a brief and what they consider the principal weaknesses in the briefs submitted to their courts. Many of the judges responded in considerable and specific detail.

They agreed unanimously that the statement of issues involved is highly important. Nearly all of the judges spoke with regret of the unsatisfactory quality of the statements of issues as presented in the briefs filed in their courts.

One of the judges wrote that the drafting of the statement of issues involved is the phase of appellate advocacy which calls for the greatest degree of skill — and he added that this part of the job is the one most frequently botched by counsel. Another complained that in more than half of the cases assigned

(Continued next page)

*Professor of Law, University of Michigan Law School

[1] Some Reflections on the Reading of Statutes (1947), page 8.

LAW . . . (Continued from page 163)

If psychiatrists really knew what happens to mentally ill people who get into trouble with the criminal law, I suspect that many of them could not help offering their services in a way which would make a significant difference to the operation of the insanity defense. In many parts of the country there may not be enough private psychiatrists to undertake this sort of work without—or even with—charge. But we shall never know just how serious the manpower problem is until we start making the best use of what is available. The seeds of the idea have already been sown in New York. What about the national level? What might come of an approach between the American Bar Association and the American Psychiatric Association, and perhaps the American Psychological Association—or between the Bar and these groups at the local level?

I do not know what the outcome would be, but I suspect it is worth trying. Once an increasing number of psychiatrists, and perhaps other behavioral scientists, such as clinical psychologists, become interested in adding the indigent accused, then other difficult problems—such as improving the quality and depth of their testimony—can be tackled. But that is another story.

Re-examining Administration of Criminal Justice

Plainly enough I have asked many questions and answered absolutely none. This is not just the natural reluctance of an appellate judge to comment upon problems which one day may get to him for decision. It is rather that we may be at the threshold of a major re-examination of the premises which underlie our system for the administration of criminal justice. If this is indeed so, I can only have added confirmation to a conclusion that there is much more to be done—in today's popular vernacular, more dialogue, more exploration, more trial and error. There are on and off the bench and among laymen closed minds to any re-examination of the long-standing basic fundamentals of criminal justice. But those minds may find that they must inevitably open. The march of events, the expanding scientific horizons promising greater knowledge of the reasons of human behavior, may prove irresistible.

President Kennedy pinpointed its complexity in his recent call for a national plan to combat mental retardation. His observations that "there are difficult issues involving not only our social responsibility for adequate care of the retarded, but the extent of the responsibility of the retarded individual himself, as, for example, when he gets into trouble with the law", and that "for a long time we chose to turn away from these problems", were preceded by this: "In addition to research the current problems are those of diagnosis, evaluation, care . . . a lack of public understanding and a dearth of private and public facilities."

STATING . . . (Continued from page 164)

to him, he has to read the whole of both briefs and then match one against the other in order to ascertain what the disputed question really is.

THE SIX TESTS

How is one to avoid the defects of which the judges complain — defects which are quite evident to any one who wishes to take the time and trouble to pick up a volume of any appellate court's "Records and Briefs" and glance through the "statements of issue involved" in the briefs on file? It is much easier, alas, to point out the defects in what someone else has written than to avoid like faults in one's own submissions. The art of stating the issue involved, like that of writing sonnets (and indeed there are intriguing relationships between those two literary disciplines), is one which the lawyer must teach himself.

But it may be suggested — with some degree of confidence, on the basis of the experience of legal writing workshop groups conducted during the last twelve years at the University of Michigan Law School — that progress can be made by checking what one has written against the following six tests:

1. The issue must be stated in terms of the facts of the case.
2. The statement must eliminate all unnecessary detail.
3. It must be readily comprehensible on first reading.
4. It must eschew self-evident propositions.
5. It must be so stated that the opponent has no choice but to accept it as an accurate statement of the question.
6. It should be subtly persuasive.

1. The Issue Must be Stated in Terms of the Facts of the Case. From the court's view point, the most important purpose of the statement of issues is to acquaint the court at the outset with the general outlines of the case. It should, as Ralph M. Carson once said, be so devised as to impart — on first reading — the "individual flavor" of the case. This is the first requisite.

The statement of issue may be likened to a lens through which the court views the facts and the law. Particular aspects of the facts, and particular principles of law having some relevance to the case, may loom large or fade into insignificance, depending upon the focus of the lens.

If demonstration were needed of the importance which the courts attach to the requirement that the issue be stated in terms of the facts, such demonstration could be afforded by examination of those cases where the court is divided. Frequently, in such cases, the majority opinion emphasizes one aspect of the facts, in its statement of the issue; and the minority opinion, emphasizing other aspects of the total factual complex, casts the issue in quite different form.

So important do appellate courts consider it to have the issue stated in terms of the facts of the case, that this requirement is frequently imposed by court rule. The Supreme Court of the United States, for example, provided (the quotation is from the 1954 rules) that the statement of the questions presented for review must be "expressed in the terms and circumstances of the case but without unnecessary detail". The requirement of the United States Court of Appeals for the Sixth Circuit is that the statement of each question involved must be "complete in itself, and intelligible without specific reference to the record".

How much appeal can be added to the statement of the issue by effective reference to significant facts may be illustrated by the statement filed in a case involving the question (stated abstractly) whether the drafting of legal documents by real estate salesmen involves the practice of law.

Counsel for the winning party no doubt made considerable headway with the court by its statement of the issue, which was:

> Have defendants practiced law . . . by reason of their having completed and filled out printed forms of offers to purchase real estate, warranty deeds, quit claim deeds, land contracts, land contract assignments, leases, and notices to terminate tenancy incidental to their handling and consummation of real-estate transactions in which defendants were acting as real-estate brokers, no separate charge having been made therefor?

2. The Statement Must Eliminate All Unnecessary Detail. In their anxiety to satisfy the court's desire that the issue be stated in terms of the facts of the case, many lawyers (report the appellate judges) outdo themselves, and as a result undertake to state too many of the facts when they state the question involved. (One particular aspect of this difficulty was highlighted by the penetrating suggestion of Justice Dethmers of the Michigan Supreme Court that lawyers too often clutter up the statement of issue with too much of what the brief-writer alleges to be the facts of the case.)

A statement which takes the form of a long meandering interrogatory, rambling all the way down the first page of the brief, usually accomplishes no more than to leave the impression that the case is so confusing that one will have to study the whole record to see what the issues are. Yet the records and briefs of every appellate court are infested with "statements of the issue" that occupy two-thirds or more of a printed page. There appears to be a persistent tendency to try to state the whole case in the statement of the issues, and this has caused appellate judges considerable distress.

The Wisconsin Supreme Court has taken a rather drastic step to correct the practice. Its rules specifically provide that the statement of issue shall be made "briefly, without detail or discussion, without names, dates, amounts, or particulars of any kind". The rule contains the further admonition that the statement in its entirety should not ordinarily exceed twenty lines.

One must, in short, eliminate all unnecessary detail. The essence of the case must be reduced to capsular form if the statement is to serve its purpose. A capsule, if it is to be swallowed easily, must be small.

3. The Statement Must Be Readily Comprehensible on First Reading. Surely it needs no argument to establish the proposition that the statement of issues involved cannot effectively accomplish its purposes unless it is readily comprehensible. Further, its meaning should be clear on first reading: if the judge's only reaction, after reading the statement, is one of bewilderment, there is always the danger that instead of going back and trying to puzzle out the meaning, he will turn to your opponent's statement of the issue — and your opponent will likely not state the question exactly as you would have wished.

One's own statements of the issue involved are always perfectly lucid — to their author. But when someone else is asked to read them, it is almost unfailingly distressing to note that phrases which are perfectly clear to you, in view of your complete knowledge of all the facts of the case, are meaningless to the uninitiated reader. The acid test was suggested by the late Judge Herbert F. Goodrich, who urged the brief-writer to read the statement of issues to his wife — if he has one, and if she will listen. If the statement has been well written she will understand it; for, as Judge Goodrich said, "There is no reason why legal propositions cannot be so stated that they can be understood by any intelligent listener."

Judge Prettyman summed it all up by suggesting "the lawyer's greatest weapon is clarity, and its whetstone is succinctness". Or, as Judge Goodrich expressed the thought: "The more clearly the point is made, and the more distinctly it stands out, the more easily the judge will understand it and, it may be hoped, in understanding it, appreciate its significance.[2]

[2] Herbert F. Goodrich, A Case on Appeal — A Judge's View; Appeals (American Law Institute, 1952), page 6.

How Many Issues Should Be Raised?

One aspect of the problem of achieving clarity — and thereby forcefulness — in the statement of the issues involved, is the necessity of determining how many issues should be raised when one is writing the brief for appellant.

It is a brave lawyer who is willing to submit his case on a single issue, waiving what appear to appellant to be numerous other flagrant errors. The appellate judges tell us, however, that they appreciate such bravery. Judge Goodrich suggested that a case with two or three points well presented is better than a brief covering a number of points. Justice Dethmers also mentioned that in many cases two or three issues are adequate. Justice Rossman urges the brief writer to limit himself to one or two points. But if (as many lawyers conclude in their more difficult cases) one feels that he must state at least four or five, or perhaps a half dozen issues (a number, incidentally, which practicing attorneys have often suggested as the maximum) the next question becomes: in what order should they be stated?

Put the strongest point first, the judges tell us, and hit it as hard as it can be hit. Strike for the jugular vein. To quote again from Judge Goodrich: "There should not be too many many points on appeal. A case with two or three points clearly stated and vigorously argued is much better than one filled with a dozen bases of complaint. If a court goes through a half dozen points which it regards too small to be material, it is likely to become a little impatient concerning the possibilities of the rest."[1]

4. The Statement of Issue Must Eschew Self-Evident Propositions. Understandably, appellate judges view with considerable cynicism, if not outright distrust, assertions that the question involved, is one to which there could be but one possible answer. Where the brief undertakes to suggest that, beyond any shadow of doubt, the question is so exceedingly simple that there is really no room for argument, the apellate judge is apt to turn his attention from your brief to your opponent's to discover whether he has found any more difficult question.

If opposing counsel's counter-statement of the issue involved makes it clear that the actual question before the court is far more complicated than would be suggested by the self-evident proposition first suggested, the attorney who sought to suggest that the question was really no question at all may have lost the confidence of the court at the outset.

Perusal of the "Records and Briefs" volumes in a law library unearths many examples of cases wherein the statement of issue in the opinion of the court makes it clear that the court concluded the question involved was much more complicated than counsel was willing to admit. Surely, the appellate judges who read the "statements of issue" set forth below must have felt — and possibly with an appropriate degree of irritation — that by the time they completed their study of the record, they would discover the case was much more difficult than was suggested by assertions, in the briefs, that the questions involved were:

> 1. Where, as a condition precedent to recovery, the assured is required to notify the insurer of any fraudulent or dishonest act on the part of an employee, not later than fifteen days after discovery of such, is the assured entitled to recovery when his own proof established that this condition was not complied with?
>
> 2. Whether the Commissioner of Internal Revenue was entitled under the Internal Revenue Code to charge this taxpayer for interests on amounts of money which were not part of the tax imposed on the taxpayer?
>
> 3. Can a State Court assume jurisdiction in a labor dispute in an industry affecting interstate commerce where such assumption of jurisdiction is in conflict with and intrudes upon the National Labor Relations Act and statutory scheme?

In one case a city elections official proposed to state the question to appear on a ballot in a municipal election by asking: "Are you in favor of creating more interest in the city library?" But the governor of the state (upon ascertaining that the substance of the proposal to be submitted to the electorate involved increasing the library commission from three to nine members, entailing certain additional expenditures) ruled that the question could not be submitted in the form proposed. Doubtless, appellate judges from time to time see equally atrocious examples.

A variant method of violating this caveat is to state the question in such a way that it appears to suggest a proposition which is obviously not the law — as when counsel advised the court that the issue was:

> Whether, as a result of this court's decisions in the baseball cases, the doctrine of **stare decisis** requires a holding that the theatrical business is excluded from the scope of the anti-trust laws?

5. The Statement Must Be So Drafted that the Opposite Party Will Accept It as Accurate. If appellant's statement of the issue fairly and accurately presents an issue which he is entitled to have the court consider, he has attained an initial and important objective — that of being able to fight the appellate battle on a terrain which is favorable to him. But if opposing counsel can point out to the court that appellant's statement of the "question involved" is unfair, or that it overlooks a significant circumstance which might be controlling of the decision, this initial advantage is lost. What is worse, appellant is at a disadvantage, for the court has been compelled to suspect his candor and fairness.

How high one can be hoist with his own petard, if his statement of the issue is inaccurate, can be illustrated by a case in the United States Supreme Court on review of a state court decree enjoining a union from picketing plaintiff's place of business for the purpose of inducing plaintiff to require his employees to join defendant union. As the case was initially presented to the Supreme Court, counsel for the union said that four questions were involved: (1) May a state bar peaceful picketing merely because the picketing is carried out by workmen not employed by the picketed employer? (2) May a state declare peaceful picketing coercive merely because of the absence of a direct employer-employee relationship? (3) May a state court make "insubstantial findings of fact screening reality" and use these findings to declare conduct unlawful which otherwise would be lawful and protected by the Federal Constitution? (4) May a state outlaw peaceful picketing because it "has the potentiality of inducing action in the interests" of the union rather than the employer?

This statement of the issues not only violated the fourth commandment, **supra** (eschew self-evident propositions); it was clearly inaccurate as well. Counsel for employer was quick to say that the issue actually was whether appellant union was deprived of its constitutionality guaranteed rights by the decree of the state court which enjoined peaceful picketing, if its purpose was to compel an employer to coerce his employees into joining a union. This statement of the case was ultimately ac-

(Continued on page 168)

[1] Herbert F. Goodrich, **A Case on Appeal — A Judge's View**; Appeals (American Law Institute, 1952), page 6.

STATING . . . (Continued from page 166)
cepted (in effect) by counsel for the union, who finally conceded that the issue was "whether picketing in an effort to persuade an employer to unionize his employees is unlawful", thus being forced to the craven admission that the case did not really involve any of the four issues which he first insisted were presented.

Occasionally, judicial opinions reflect the judges' reaction to counsel's statement of the issues. For example, in Mazer v. Stein, 347 U.S. 201, 74 S. Ct. 460 (1954), counsel for one of the parties had advised the Court that the issue was "Can a lamp manufacturer copyright his lamp bases?" This statement of the question, the Court observed, contained "a quirk that unjustifiably broadens the controversy".

Diligent search of the opinions discloses a surprising number of cases in which appellate judges have commented in their opinions on the quality of the statement of issues which counsel had set forth in their briefs. Their off-the-record comments bespeaking a lack of confidence in counsel whose statements of the issue are inaccurate, would doubtless be even more impressive than the more restrained comments found in published opinions.

One of the most precious gems which my search has disclosed was written by trial counsel for a large utility company who, in the heat of anger, declared in the initial draft of his appellate brief that the sole issue was "Did the Lower Court err in declining to follow and apply the rule established by the Supreme Court decisions?" Fortunately, the restraining influence of his co-counsel resulted in drastic revisions of this gem, before it was printed and submitted to the court.

6. The Statement Should Be Subtly Persuasive. It has been suggested that the brief-writer should strive to state the issue involved in such a way that the mere statement of the question (while avoiding the error of pretending that the issue involved is no more than an obvious, self-evident proposition) subtly suggests the desired answer. Many eminent counsel have asserted that this is the summit of successful statement of the issue — that in the perfect brief, which someone will write some day, the mere statement of the issue will win the appeal.

But from the judges comes a word of warning. If the judges perceive an attempt to inject argument, they are beset with doubts that perhaps the question has been twisted out of shape. They are likely to turn to the brief of the opposite party to see if he agrees that the question has been stated accurately. If the opponent has pointed out any inaccuracy or slanting in one's statement, the effect may be devastating. The counsel whose statement is challenged may have lost the confidence of the court with his very first sentence.

One should, indeed, as Judge Rossman has said, attempt to phrase the issue "in appealing form" — for the reason, as the Judge put it, "many times an issue well phrased inclines the mind to its acceptance". But one must be careful not to submit a question which is perceptibly warped or slanted or pointed or twisted, or one whose accuracy can be challenged by the opponent, or one which suggests that the only issue really involved is a clearly self-evident proposition.

The statement must be scrupulously accurate and fair; it should appear to be an impartial (but not disinterested) presentation of the question. It may, withal, effectively be cast in language that is insidiously persuasive, subtly persuading without seeming to do so.