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Session 2

Next-Level Appellate Briefs: Framing the Issues on Appeal

Presented by:

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Hon. Thomas M. Hruz, Wisconsin Court of Appeals District III, Wausau
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About the Presenters...

Joseph (Joe) A. Bugni is an attorney at Hurley Burish, focusing on trial and appellate litigation in both civil and criminal matters. In the thirteen years he spent with the Federal Defender's Office, in Milwaukee and as supervisor in charge of the Madison office, Joe handled over 600 federal cases and over sixty appeals. He has taken many cases to trial and received acquittals in a variety of different cases, including in a closely followed large white-collar conspiracy prosecution. In addition to his extensive trial experience, he has also been successful in the U.S. Court of Appeals for the Seventh Circuit with many appellate victories and two en banc arguments. Three of his Seventh Circuit briefs have been recognized as "the best briefs" by the State Bar of Wisconsin Appellate Practice Section. Articles about those briefs and the briefs themselves can be found here for the 2022 win, the 2020 win, and the 2016 win. After law school, Joe clerked for three years for then-Chief Judge William J. Zloch of the U.S. District Court for the Southern District of Florida and for two years for Judge Daniel. A. Manion of the U.S. Court of Appeals for the Seventh Circuit.

Judge Rachel A. Graham serves on the Wisconsin Court of Appeals, District IV, having been appointed in 2019 and elected in 2020. She grew up in Stevens Point and received her undergraduate degree from Northwestern University and her law degree from the University of Wisconsin Law School. Before becoming a lawyer, Judge Graham was a public school special education teacher and taught media production skills to high school students. Following law school, she clerked for the Honorable Ann Walsh Bradley and practiced commercial litigation at Quarles & Brady LLP. Judge Graham is a past recipient of the Seventh Circuit Pro Bono & Public Service Award. She currently serves as a director of the Wisconsin Trust Account Foundation and the Appellate Practice Section of the State Bar, and as president of the James E. Doyle American Inn of Court.

Judge Thomas Hruz has served on District III of the Wisconsin Court of Appeals since September 2014. Previously, he was a shareholder at Meissner Tierney Fisher & Nichols, S.C., where his practice focused on civil litigation, with an emphasis on appellate work. He served as a law clerk for Judge John Coffey of U.S. Court of Appeals for the Seventh Circuit and for Justice David Prosser of Wisconsin Supreme Court.

Anne-Louise T. Mittal is a senior counsel at Foley & Lardner LLP in Milwaukee, where she is a member of the firm's Consumer Law, Finance & Class Action practice, as well as the Appellate and Business Litigation & Dispute Resolution practices. Before joining Foley, Ms. Mittal was a clerk for the Honorable Diane S. Sykes of the U.S. Court of Appeals for the Seventh Circuit. She currently serves on the Seventh Circuit Advisory Committee on Circuit Rules and the Seventh Circuit Civil Pattern Jury Instruction Committee.

Nathan A. Petrashek is a staff attorney at the Wisconsin Court of Appeals. Prior to his appointment, he clerked for several state appeals court judges. He holds a B.S. in political science and public administration from the University of Wisconsin—Green Bay and a J.D. from Marquette University Law School, where he serves as adjunct faculty for the Appellate Writing and Advocacy course. He is a board member for the State Bar's Appellate Practice Section and co-authors "Standards of Appellate Review in Wisconsin." Nathan regularly presents at judicial education events and is a member of the American Bar Association, State Bar of Wisconsin, and Milwaukee Bar Association.

Next-Level Appellate Briefs: Framing the Issues on Appeal

Moderated by Anne-Louise Mittal

Presenters: Judge Rachel Graham, Judge Thomas Hruz, Joe Bugni, Nate Petrashek

I. Selecting issues for appeal - considerations

a. Preservation of issues – have issues been preserved for appeal in the trial court? What happens if they have not?

i. Issues not preserved in the circuit court will generally not be considered on appeal, though appellate courts do have the power to consider issues raised for the first time on appeal.

ii. Whether an issue has been adequately raised in the circuit court will be reviewed de novo.

b. Standards of review – what do they mean, when are they used, and how do they affect the selection of issues for appeal?

i. The standard of review affects the strength of an appellate argument and the likelihood of success.

1. De novo – independently; no deference to the circuit court. Used for issues of law (e.g., statutory interpretation, summary judgment).

2. Erroneous exercise of discretion – Court of Appeals sustains a discretionary act if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. Used for discretionary decisions (e.g., admission or exclusion of expert testimony, attorney fee determinations).

3. Clearly erroneous - even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long

as the evidence would permit a reasonable person to make the same finding.

4. Any credible evidence/sufficiency of the evidence - if there is any credible evidence which, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned.

ii. Other "issue framing" standards (e.g., certiorari review, harmless error, etc.)

c. Potential relief – if the appellant succeeds, what relief can they obtain? In other words, what does the appellant want, and are there issues the appeal of which might allow them to obtain it?

i. Judgment in client's favor

ii. Continued proceedings

iii. New trial

iv. Etc.

d. Other considerations?

II. Docketing statements (§ 809.10(1)(d))

a. What is a docketing statement? What is it used for?

i. Must be filed alongside notice of appeal

ii. Used to determine whether appeal should be placed on the expedited appeals calendar

b. How are they treated in different districts?

c. How to prepare an effective docketing statement

i. Include complete and accurate listing of jurisdictional facts, nature of trial court proceedings, statement of issues, and applicable standard of review

ii. Other tips

d. "Issues" –

i. What function does the identification of issues on the docketing statement serve?

ii. Is this the final shot at identifying/framing issues on appeal?

1. No – appellant's brief must include required Statement of the Issues

2. Failure to include an issue in the docketing statement doesn't constitute waiver of that issue on appeal, but withholding available information can result in sanctions.

iii. What should attorneys keep in mind when preparing this section of the docketing statement?

1. Use as a tool to start thinking about the framing of the issues

2. Other tips and things to keep in mind

III. Framing the issues on appeal

a. Wis. Stat. § 809.19(1)(b): "A statement of the issues presented for review and how the trial court decided them."[1]

i. How does the Court use the statement of the issues in reviewing a case on appeal?

ii. What is the Court looking for from this section of the brief?

[1] For those who litigate in federal court, as well: Fed. R. App. P. 28(a)(5).

b. What makes for an effective statement of the issues presented for review? Things to consider in crafting your statement of the issues:
    i. Level of advocacy (versus neutrality)
    ii. Level of detail – what details should the attorney include? How much detail is too much?
    iii. Using the statement of the issues to tell your story
    iv. Best formulation for your issue (possible formulations include narrative; question; "Whether…")
    v. What not to do – what are some mistakes that practitioners make in framing the issues on appeal?
c. Wis. Stat. § 809.19(3)(a)2.: The respondent's brief "must conform with sub. (1), except that the statement of issues and the statement of the case may be excluded"
    i. When, if ever, should a respondent exclude the statement of the issues?
    ii. Considerations for a respondent in crafting responsive statement of the issues
        1. How can a respondent most effectively respond to the appellant's framing?
        2. How much freedom does a respondent have in "re-framing" the issues on appeal?
    iii. What not to do – what are some mistakes you see respondents make in their responsive statement of issues on appeal?

IV. Incorporating the issues into the rest of the brief – tips for weaving the issues, and the desired framing, throughout the rest of the brief

a. Statement of the Case (Wis. Stat. § 809.19(1)(d)): “must include: a description of the nature of the case; the procedural status of the case leading up to the appeal; the disposition in the trial court; and a statement of facts relevant to the issues presented for review, with appropriate references to the record.”
b. Argument, “arranged in the order of the statement of issues presented.” (Wis. Stat. § 809.19(1)(e).)
c. Point headings

Some Preliminary Thoughts on Appellate Issue Framing

Attorney Nathan A. Petrashek[1]

Prepared for: *Next Level Appellate Briefs: Framing the Issue on Appeal*, State Bar of Wisconsin Annual Meeting & Conference, June 19, 2025.

> Of course, the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. . . . Second, you have to capture the issue, because your opponent will be framing an issue very differently. You have got to so frame yours that it "sells the Court," to use the term of the marketplace, which I abhor—so that it "captures the field," is what I prefer, because I see this not as a matter of the marketplace but as a matter of war, once you're really into a case of appellate advocacy. And third, you have to build a technique of phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it.

Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 630 (1962).

The task Llewellyn sets forth for the appellate advocate is not an easy one. Llewellyn describes the facts and law as the building blocks of an appeal, but he identifies the issue statement as the first place that the appellate advocate begins weaving these pieces together into a beautiful tapestry. Thus, issue framing requires a mastery of both facts and law, an exacting attention to detail, familiarity with the tribunal that will hear the appeal, and a good grasp of language.

Why does Lewellyn place such emphasis on the framing of the issue? It is, generally speaking, prime real estate—one of the first places busy judges will look when picking up the brief. The issue statement will signal how much "heavy lifting" the judge will need to do in terms of the complexity of the case, but also in terms of personal effort to resolve it. A judge will likely view a chaotic, perfunctory, or otherwise unclear issue statement as a sure sign of troubled waters ahead in the remainder of the brief.

What follows are some preliminary thoughts on effective appellate issue framing. I have formulated them as "dos and don'ts" because I believe them to be generally good advice, but of course every rule has exceptions. In terms of hard and fast rules, WIS. STAT. RULE 809.19 gives us only one pertaining to this matter: a brief must include "[a] statement of the issues presented for review and how the trial court decided them." *See* WIS. STAT. RULE 809.19(1)(b).[2]

[1] The views expressed herein are solely those of the author.

[2] Note, however, that WIS. STAT. RULE 809.19(3)(a)2. allows the respondent's brief to omit a statement of the issues.

DO: Consider length

There has been a trend toward longer issue statements in recent years, "deep issue" statements that interweave facts and law to function more persuasively than an abstract and neutral recitation of the question presented. Bryan Garner recommends a "deep issue" statement have these characteristics:

- Consist of separate sentences.
- Contain no more than 75 words.
- Incorporates enough detail to convey a sense of story.
- Ends with a question mark.
- Appear at the very beginning of a memo, brief, or judicial opinion – not after a statement of facts.
- Be simple enough that a stranger, preferably even a nonlawyer, can read and understand it.

Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1 (1994). In general, incorporating facts into the issue statement serves two functions: (1) it gives the judge a preview of the case and has a subtle persuasive effect by allowing the advocate to highlight the dispositive facts; and (2) narrows the issue the court must decide.

There are still adherents to the "old school" method of issue framing. In some cases, the circumstances might point toward a straightforward statement of the issue, as in the petitioner's brief in *Williams v. Reed*, 145 S. Ct. 465 (2025):

QUESTION PRESENTED

Whether exhaustion of state administrative remedies is required to bring claims under 42 U.S.C. § 1983 in state court.

The respondent in that case, defending Alabama's exhaustion requirement, took a "deep issue" approach:

QUESTION PRESENTED

Under 42 U.S.C. §1983, state officials who deprive a person of a federal right "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Under Alabama's unemployment-compensation scheme, disputes over unemployment benefits—whether grounded in state or federal law—must be adjudicated by state administrative officials before a state court judge has jurisdiction to adjudicate them. Does §1983 preempt that structure?

Both types of issue statements will require careful decision-making about what information to include and emphasize.

DON'T: Lose the forest for the trees

Related to the complexity and length issue above, sometimes issue statements try to do a little too much heavy lifting. The issue statement should be a concise snapshot of what the court needs to decide; it need not encompass every fact, sub-issue or point of law that the argument will discuss (leave that for the argument section). Consider this framing of the issue from the respondent's brief in *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22 (2025):

QUESTIONS PRESENTED

In pleading state-law claims, Respondents alleged a litany of damning facts, including some violations of the Food, Drug, and Cosmetic Act (FDCA). State law supplied both the causes of action and the remedies, but under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) the case may nonetheless arise under federal law if the federal violations are necessarily raised, actually disputed, substantial, and resolvable without upsetting federalism. This Court held that even necessarily raised FDCA violations embedded in state-law claims are not substantial, *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), but the lower court upheld jurisdiction, relying on *Grable* and discounting *Merrell Dow*.

Immediately, Respondents demonstrated that each federal issue was neither necessary nor substantial by amending the complaint as of right to excise them entirely. The questions for this Court are:

1. Whether the jurisdictional test from *Grable* should be overruled.

2. Whether jurisdiction to decide federal questions survives the plaintiffs' voluntary abandonment of every federal question.

3. Whether a district court retains supplemental jurisdiction under 28 U.S.C. § 1367 over state-law claims even after the plaintiffs have voluntarily eliminated all federal issues.

The petitioner took a different approach, omitting any mention of a perceived incongruity in the Supreme Court's case law and presenting the matter as pure statutory questions (with some procedural facts):

QUESTIONS PRESENTED

This case presents two separate but related questions concerning the ability of a plaintiff, in an action properly removed to federal court pursuant to 28 U.S.C. § 1441(a) on the basis of federal question jurisdiction under 28 U.S.C. § 1331, to compel a remand to state court by amending the complaint to omit federal questions:

1. Whether such a post-removal amendment of the complaint defeats federal question subject matter jurisdiction.
2. Whether such a post-removal amendment of the complaint precludes a district court from exercising supplemental jurisdiction over the plaintiff's remaining state-law claims pursuant to 28 U.S.C. § 1367.

Which gives the court a clearer picture of what it needs to decide?

DON'T: Make the job of the appellate advocate harder than it has to be

Reference again the above examples from *Royal Canin*. Now, consider that neither the petitioner nor the Supreme Court in its resulting opinion, ever referred to the *Grable* case that the respondents had asked the Supreme Court to overrule. The *Grable* case, by contrast, dominated the respondent's statement of the issue: it was featured prominently in both the "deep issue" section and was presented as the number-one question facing the Court. Based solely on the respondent's question presented, one would assume that the respondent could win only if *Grable* was overruled. (Not true, as it turns out; the Supreme Court unanimously agreed with the respondent that the federal court lost supplemental jurisdiction when the federal-law claims were withdrawn).

It is hard to win an appellate case. It is even harder to do so when the issue statement or language used in a brief suggests that the advocate bears a burden that is not, in fact, present. This is a common problem in legal writing even beyond the issue statement, particularly when using "throat-clearing" language like "clearly." Say, for example, that the appellate attorney needs to demonstrate that the circuit court erroneously exercised its discretion when it excluded some evidence. It does no favors for that advocate's position if they write something like, "The court clearly erred by excluding the evidence." By suggesting that their argument meets a higher standard ("clear error"), they are subtly raising the bar for their own argument in the judge's mind.

DON'T: Try to get too clever

Here is the appellant's statement of the issue presented in *American Family Mutual Insurance Co. v. Secura Insurance, A Mutual Company*, No. 2021AP1831, unpublished slip op. and order (Feb. 23, 2023):

STATEMENT OF ISSUES

Does Appellant need to submit expert testimony to explain to a jury how/when/why water freezes?

Answered by the trial court: Yes.

A pithy statement that seemingly illustrates the absurdity of what the circuit court had done. The problem: it was not reflective of the issue actually before the court, a fact the court called out in its opinion and order:

> We agree with American Family that it is common knowledge that water freezes when it is 32 degrees or colder. The problem with American Family's argument, of course, is that it does not follow from this commonly understood fact that water will freeze in a pipe that is located inside the exterior wall of a condominium unit when it is very cold outside and the ambient air in the unit is heated to 48 degrees.

DO: Carefully consider the standard of review

"Determining the correct standard of review, of course, is something an appellate court does at the very beginning of its work, and it definitively controls how we address questions of both fact and law." *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, 32, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion).

The standard of review is the lens through which the appellate court will deal with an issue, examine the correctness of factual findings by the trier of fact, examine the correctness of a court's application of the law, or examine the appropriateness of a court's discretionary act. Because the standard of review informs every aspect of the appellate court's task, it should generally play a prominent role in the framing of the issue on appeal. Some examples:

> 1. Was the evidence insufficient, as a matter of law, to support Lee's convictions for possession of a controlled substance with intent to distribute?
>
> This Court should answer: "No."

***

2. When an employer adversely treated and terminated a single employee for living with their partner, does the municipal commission err as a matter of law in concluding these acts are not prohibited discrimination?

Trial Court: No.

***

4. Did the circuit court erroneously exercise its discretion in denying Security National's Motion to Bifurcate the trial of the breach of contract action from any trial on insurance bad faith and other tort claims?

ANSWERED BY THE TRIAL COURT: No. The trial court ruled that primarily for reasons of judicial economy, the breach of contract and multiple tort claims would be tried together.

***

1. Did the Circuit Court erroneously exercise its sentencing discretion by refusing to consider Mr. Rios's drug addiction in its assessment of the *McCleary* factors?

***

On certiorari review of a probation-revocation decision, this Court may not substitute its judgment for DHA's. The Court's inquiry is limited to whether DHA's decision was reasonable and supported by substantial evidence. Here, DHA based its decision to revoke Curtis's probation on his numerous supervision-rules violations, his disrespect for his probation, and to avoid unduly depreciating the nature of his criminal offense and protect the public from further crime. Was DHA's decision reasonable and supported by substantial evidence?

The circuit court answered yes.

This Court should answer yes.