Questioning Questions Presented

By Diana V. Pratt

Appellate questions are designed to inform the court of the substantive issues involved in the appeal. Many questions submitted to our appellate courts, however, are framed like the following example:

> Whether the lower court erred as a matter of law when it granted defendant's motion for summary disposition despite the questions of fact that remained after discovery?
>
> The lower court answered "no."
>
> The appellant contends that the answer should be "yes."

This question fails both on substance and on form. Substantively, it provides little, if any, guidance to the appellate bench, and it makes little grammatical sense. Because the brief is labeled "Appellant's Brief," the court knows the appellant contends that the lower court erred in some way. Although the question does set the issue in its procedural posture, it gives no clue to the substance of the appeal. Grammatically, while the question ends in a question mark, the language reflects a truncated form of an assertion: The issue in this case is whether the lower court erred as a matter of law when it granted the defendant's motion for summary disposition despite the questions of fact that remained after discovery. As an assertion, this "question" should end with a period.

The court rule governing appellate issues is MCR 7.212(C)(5):

> A statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it. When possible, each answer must be given as "Yes" or "No";

The question presented above appears to follow MCR 7.212(C)'s format, but I believe the question is deficient because it focuses too much on the trial court's response or lack of it and the need to respond with a "yes" or "no."

This article tracks the origin of the court rule, explains its intent, and proposes a modest change that would recapture that original intent.

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History of the Court Rule

The court rule governing an appellant's brief before 1927 contained this language:

> RULE 40. The brief of a party bringing a cause into this court shall contain a clear and concise statement of the facts of the case, distinct from argument, and of the errors upon which he relies, the questions involved, and the manner in which they are raised. The court will consider such statement sufficient and accurate unless the opposite party shall point out in his brief wherein the statement is insufficient or inaccurate.[1]

In 1927, the legislature created the Michigan Procedure Commission to recommend revisions to the court rules.[2] The Commission published a 1928 report,[3] which proposed new rules and included notes explaining the changes. In one major change, the Commission suggested that in Supreme Court appeals, a transcript of the proceedings below substitute for the bill of exceptions. To accommodate this change, a Statement of Questions Involved would be required.

> In the second place, in order to offset the somewhat increased bulk of the transcript over that of the narrative form bill of exceptions, and to make it unnecessary to incur the expense of a printed copy of the transcript for every member of the court, the rules provide several means for making the brief itself supply the information which the judges now obtain from the bill of exceptions. These are:
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> 1. The requirement of a Statement of Questions Involved, as the first item in the brief. This compels an analysis of the case by the appellant and indicates the gist of his appeal. A Counter Statement may be set up in the appellee's brief. We have taken this from Pennsylvania where it has long been used. Rule 69, Sec. 2(3); Rule 70, Sec. 2(3).[4]

The proposed rule stated:

> (3) On the first page of the brief appellant shall, under the heading, "Statement of Questions Involved," state the questions involved in the appeal. Each question shall be numbered and set forth separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by a statement as to whether

> the lower court answered it "Yes," or "No," or qualified it, or failed to answer it, together with a statement that appellant contends that it should be answered "Yes" or "No" as the case may be. If a qualified answer was given to the question, appellant should indicate, most briefly, the nature of the qualification; or if the question was not answered and the appellate record shows the reason for the failure, the reason should be stated briefly in each instance without quoting the court below. All the questions and answers together should not exceed 20 lines, and must never exceed one page, and nothing else should appear on the first page of the brief. Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved.

The questions appear first in the brief; for the benefit of the court, they contain the gist of the appeal. The proposed language was adopted and became Rule 69 Sec. 1.[5]

After the proposed language, the report included notes explaining that the rule closely followed Pennsylvania's Rule 50:

> The statement of questions involved is designed to enable the court to obtain an immediate view of the nature of the controversy. It must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind whatsoever. It should not exceed six or eight lines, and must not, under any circumstances, exceed half a page. For any violation of this rule the paper-book will be suppressed and the appeal *non prossed*.... This rule is to be regarded as in the highest degree mandatory and admitting of no exception.

Rule 50 had been used successfully in Pennsylvania for 28 years[6] and was the impetus for a similar rule in the United States Court of Appeals for the Third Circuit.[7] The report also referred to an article written by Chief Justice von Moschzisker of the Pennsylvania Supreme Court, describing Pennsylvania's successful experience with appellate questions.[8] In the notes, the report includes examples taken from Pennsylvania appellate questions to illustrate the type of question the Commission intended to require. Each question is direct and contains the legal substance of the appeal without unnecessary verbiage or procedure. But notice that, unlike our current questions, which must be answered by "Yes" or "No," the first example is an either/or question:

> Will the use of two buildings, each divided into ten separate and private stalls or compartments, opening into a driveway of sufficient width to permit ingress and egress of automobiles to and from these stalls, when situated on a public street in a residential neighborhood but to be used for storage purposes only, constitute 'an offensive business' or a nuisance per se?
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> "Affirmed below."[9]

In my view, the Commission quoted this question because it contains the legal substance and it asks a direct question. Yet the question is deficient in three respects. First, because of the series of intrusive phrases, it's difficult to read. Second, as an either/or question, it fails to inform the appellate court of the issue it must decide. Had the question ended with "constitute a nuisance per se rather than 'an offensive business'" as the proposed Michigan rule required, the court's attention would be better focused. Third, the answer fails to answer the question. "Affirmed below" provides no information on what the lower court decided. A better answer might be "the lower court ruled that the buildings constituted a nuisance per se." With its proposed court rule, the Commission intended to overcome these deficiencies.

A second illustration, although also framed as an either/or question, provides a better example of what the answer should contain:

> Where by codicil to her will, a testatrix who died Nov. 23, 1924, directed if a life beneficiary under a trust created by the codicil 'shall die without leaving child or children, then and in such case, the principal monies of said trust fund shall go to and vest in my lineal descendants according to the intestate laws of the state of Pennsylvania.' and the beneficiary did so die, are the lineal descendants to be ascertained as of the date of the death of the testatrix or that of the beneficiary?
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> The court below held the date should be that of the beneficiary's death.[10]

Like the previous illustration, the question contains the necessary legal substance, and it asks a question. Yes, the question is too long and not particularly readable. But unlike the previous illustration, the answer is informative. The Pennsylvania Supreme Court understood from the outset what it had to decide in light of the lower court's decision.

The Michigan court rule adopted in 1936 required that the question be written "in the briefest and most general terms, without

names, dates, amounts or particulars of any kind" (as proposed in the 1928 report). Some substantive issues, however, are highly fact-dependent and, as in the second illustration, may result in long, unreadable sentences.

A third illustration demonstrates how one counsel solved the problem of length by setting out several sentences with the law, the facts, and then the question.

> A railroad tariff, covering shipments of coal, provided that railroad should pay shipper a rebate on all coal shipped thereunder and placed 'in naval vessels of the United States government.' Coal was placed on dredges of the United States Government operated by the United States Engineering Corps, a branch of the War Department. Are these latter 'naval vessels of the United States Government,' within the meaning of the tariff?[11]

Although not in traditional question form, this style is recommended by some experts[12] and has been used effectively in briefs submitted to the United States and Michigan Supreme Courts. Unlike the previous two examples, this question is framed as a yes/no rather than an either/or question.

The Michigan Procedure Commission's 1928 report, its notes and illustrations, and its proposed rule indicate what the Commission intended the questions to be. As the first item in the brief, the Statement of Questions Involved should inform the court of the substantive issue. Appellate counsel was required to analyze the case thoroughly, draft a question that contained the essence without unnecessary verbiage or detail, construct a yes/no question, and indicate the lower court's disposition on the substantive issue.

A Modest Proposal for Better Questions

To fulfill the Commission's intent that the questions explain to the appellate court what it must decide, I would propose the following.

First, require that section of the brief to be labeled Appellant's (Appellee's) Statement of the Questions Involved. This change would obviate the need for language such as "the appellant contends that the answer should be 'yes.'"

Second, require that questions be not only concise, but legally substantive. This change would eliminate language such as "whether the trial court erred." Except when procedure *is* the legal issue, procedure should not be a part of the question. Here is an example of a concise, legally substantive question.

> Does an employee alleging disparate impact under the Age Discrimination in Employment Act, 29 USC § 623, bear the burden of persuasion on the "reasonable factors other than age" defense?[13]

Third, require yes/no questions. Although the current rule inherently requires yes/no questions, its focus is on the answers rather than the form of the questions. In my view, by including a requirement of yes/no answers, the Commission intended to prohibit either/or questions.

Fourth, when facts are necessary to the legal issue—as they so often are—encourage appellate counsel to use a paragraph format structured with the legal rule, the facts, and then the question. The following question was adapted from one submitted to the Michigan Supreme Court.

> The automobile-insurance policy excludes personal-injury-protection benefits for out-of-state accidents unless the claimant was "occupying" the insured vehicle when injured. The policy defines "occupying" as "in, upon, getting in, on, out or off." The claimant got out of the insured car to help change a flat tire. After he loosened the lug nuts, he began walking toward the back of the car. While he was walking, he was struck by a hit-and-run driver. Was the claimant "occupying" the car when hit?[14]

Fifth, change the nature of the lower court's summary answer to provide added substance. The answer should state briefly what the lower court decided or failed to decide on this substantive issue. The following illustrates an informative answer to the question posed above:

> The trial court entered summary disposition for the insurer based on fact that claimant was not an "occupant." The court of appeals reversed and remanded because a genuine issue of material fact existed on whether the claimant was "getting out or off" the vehicle for purposes of the no-fault act.

These modest changes would require appellate lawyers to draft questions that fulfilled the intent of the 1928 Commission. The first section of the brief would indeed inform the appellate court of the "gist of the appeal"[15] with a direct substantive issue. And the summary answer would provide the lower court's disposition on that issue. ■

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FOOTNOTES

1. Revised Rules of Practice in the Courts of Michigan (2d ed, 1902); Michigan Court Rules Annotated (1916); Michigan Court Rules and Michigan Judicature Act Annotated (1922).
2. 1927 PA 377.
3. Report of the Michigan Procedure Commission (Lawyers Club, Univ of Mich: October 1928).
4. Report at 10.
5. Michigan Court Rules Annotated (1930).
6. Report at 3.
7. FR App P 26.3(b) (CA 3 effective until 1967).
8. von Moschzisker, *A time-saving method of stating in appellate briefs, the controlling questions for decision,* 34 Yale L J 287 (1925).
9. *George v Goodovich,* 135 A 719 (Pa, 1927).
10. *Bonsall's Estate,* 135 A 724 (Pa, 1927).
11. *Campbell Coal & Coke Co v Pennsylvania R Co,* 135 A 650 (Pa, 1927).
12. Garner, *The Redbook: A Manual on Legal Style* 22.1(c) (2d ed, Thomson West: 2006) ("deep issues"); Oates, Enquist & Kunsch, *The Legal Writing Handbook: Analysis, Research, and Writing* 328–329 (3d ed, Aspen: 2002) ("multi-sentence format"); Oates & Enquist, *Just Briefs* 96–97 (Aspen: 2003) ("multi-sentence format"); Peck, *Writing Persuasive Briefs* 102–103 (Little Brown: 1984) ("readable formulation").
13. Adopted from the Petitioner's Brief in *Meacham v Knolls Atomic Power Laboratory,* ___ US ___; 128 S Ct 1118; 169 L Ed 846 (2008).
14. This illustration is based on Petitioner's Brief in *Rednour v Hastings Mut Ins Co,* 468 Mich 241; 661 NW2d 562 (2003).
15. Report at 10.