First Things First:
The Lost Art of Summarizing

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If you value clarity, if you insist on lighting the way for your reader, then you'll provide good summaries where they belong in just about every piece of legal writing: up front. You should always have one at the beginning or near the beginning, and if you're dealing with multiple issues, you should have one at the beginning of each issue. Call them what you will—summaries, overviews, brief answers, thesis statements, synopses—they are central to clear writing:

> A vast amount of empirical research has studied the effects of overviews on learning from written prose. The research support for this principle is broad and consistent. . . . [T]he support is sufficiently broad to establish the general value of overviews for understanding written text in any environment and for any audience.[1]

All legal writing should be front-loaded. It should start with a capsule version of the analysis. It should practice the art of summarizing.

SUMMARIES IN JUDICIAL OPINIONS — THE OPENING PARAGRAPHS

An often quoted article on writing opinions gives this advice:

> The importance of the first paragraph cannot be over-emphasized. . . . The readability of an opinion is nearly always improved if the opening paragraph (occasionally it takes two) answers three questions. First, what kind of case is this: Divorce, foreclosure, workmen's compensation, and so on? Second, what roles, plaintiff or defendant, did the appellant and the appellee have in the trial court? Third, what was the trial court's decision? A fourth question, What are the issues on appeal?, should also be answered unless the contentions are too numerous to be easily summarized.[2]

The advice is incomplete in two respects. It doesn't make clear that the court should set out the deep issue or issues, not just the superficial issues. And just as important, the advice doesn't say that the court should summarize its answer to the deep issues.

The term "deep issue" was coined by Bryan Garner, who explains that "the surface issue does not disclose the decisional premises; the deep issue makes them explicit. It yields up what Justice Holmes once called the 'implements of decision.'"[3] Garner identifies 12 categories of judicial openers along a continuum from "no issue" to "surface issue" to "deep issue." I can hardly add to his exposition, except to say that there will usually be degrees or levels of deepness to choose from and that briefs and memos may require slightly different choices than opinions will. I'll explain these two points more fully in the next two sections.

Meanwhile, let's remind ourselves what clarity—maximal clarity—demands of a judicial opener: (1) the crucial facts; (2) the deep issue, stated explicitly or implicitly in terms of the pertinent legal rule or requirement; and (3) the answer, which may involve simply applying the pertinent rule, or choosing between two possible rules, or sometimes applying an even deeper rule that I'll call the dispositive rule. Note that the answer goes beyond a mere yes or no; it includes the reasoning. All this may seem complicated, but you'll have no trouble identifying these parts in a good opener.

The only trouble is in finding good ones. (Are you surprised?) For instance, I looked at Volume 462 of the *Michigan Reports*, the most recent bound volume as I was writing. The first four opinions are per curiam opinions, with first paragraphs like this (it's one of the better ones):

> The defendant was convicted of delivering between 50 and 225 grams of cocaine, which presumptively requires a prison term of ten to twenty years. The trial court concluded that there were substantial and compelling reasons for departing from the statutory mandate, however, and imposed a prison term of five to twenty years. We agree with the dissenting judge in the Court of Appeals that the trial court considered an inappropriate factor in concluding that a departure was warranted. We thus reverse and remand to the trial court for resentencing.[4]

But the deep issue there was whether a defendant's expression of remorse is an objective and verifiable factor. It could have been included so easily: "We agree with the dissenting judge in the Court of Appeals that the trial court inappropri-

Footnotes

1. DANIEL B. FELKER ET AL., GUIDELINES FOR DOCUMENT DESIGNERS 16 (1981); *see also* Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 THOMAS M. COOLEY L. REV. 1, 12 (1992) (recommending summaries as an element of plain language); Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1, 6 (1996-1997) (again recommending summaries).
2. George Rose Smith, *A Primer of Opinion Writing for Four New Judges*, 21 ARK. L. REV. 197, 204 (1967); *see also* RUGGERO J. ALDISERT, OPINION WRITING 72-77 (1990) (citing Smith with approval but also recommending a conclusion in the first paragraph).
3. Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 4 (1994-1995) (citation omitted).
4. People v. Daniel, 609 N.W.2d 557, 557-58 (Mich. 2000).

ately considered a factor that was not objective and verifiable—defendant's expression of remorse." That one sentence identifies the pertinent rule and applies it to the crucial facts.

After the four per curiams comes an authored opinion with these first two paragraphs:

> The question in these consolidated appeals is whether the state of Michigan was barred by [a statute] from indicting defendants for conspiracy to possess with intent to deliver more than 650 grams of a mixture containing cocaine when they had previously been convicted in federal court in Florida of conspiracy to possess with intent to distribute more than five kilograms of cocaine.
>
> I would hold that the state prosecution was not barred by [the statute] because conspiracy charges are not a violation of "this article" (article 7 of the Public Health Code) for purposes of the statute. The statute does not apply because the conspiracy charges arose under chapter 24 of the Penal Code, not under article 7 of the Public Health Code. Therefore, I would reverse the judgments of the trial court and Court of Appeals and reinstate defendants' convictions.[5]

That just about gets it. That gets to the deep issue (although, unfortunately, (1) you have to read a footnote to find the statutory rule against double convictions for violating "this article," and (2) the initial paragraph is a 62-word sentence in reverse chronological order). Notice the two uses of *because* in the second paragraph. That's a good sign. *Because* is the word that signals an answer, the word that almost forces the writer to explain.

I spent a long day reading all the opinions in Volume 462. By my reckoning, only 9 of the 27 opinions set out the deep issue, coupled with an answer, in the opening paragraphs. Here's another one that does; the court is choosing from possible rules:

> In this premises liability case the plaintiff, Violet Moeller, was injured when she tripped over a concrete tire stop in defendant church's parking lot. Plaintiff was visiting the church to attend bible study. Plaintiff sued the church, alleging that the defendant negligently placed the tire stops and failed to provide adequate lighting in the parking lot.
>
> At trial, the jury was instructed on the obligations property owners owe to licensees. The jury returned a verdict in favor of the church. The Court of Appeals reversed and remanded the case for a new trial after determining that the trial court erred by instructing the jury on the obligations owed to licensees rather than "public invitees" as defined in 2 Restatement Torts, 2d, § 332, p. 176.
>
> We granted leave in this case to determine the proper standard of care owed to individuals on church property for noncommercial purposes. We hold that the trial court correctly instructed the jury that such individuals are licensees and not invitees. Accordingly, we reverse the Court of Appeals decision and reinstate the trial court judgment in favor of the church.[6]

This could have been shorter, though, especially since the next section of the opinion is called "Factual and Procedural Background." A revised version:

> In this premises-liability case, the plaintiff, Violet Moeller, was injured when she tripped over a concrete tire stop in defendant church's parking lot. She was visiting the church to attend bible study. The Court of Appeals determined that Moeller was not a licensee but rather a "public invitee" as defined in 2 Restatement Torts, 2d, § 332, p. 176. We disagree. We hold that to become an invitee, a person must show that the premises were held open for a commercial purpose. We reject the Restatement's definition of "public invitee."

Finally, here's another incomplete opener:

> We consider in this case the trial court's decision to suppress defendant's voluntary confession on the ground that defendant did not "knowingly and intelligently" waive his *Miranda* rights. We conclude that the trial court applied an erroneous legal standard in assessing the validity of defendant's *Miranda* waiver. Moreover, we conclude that the waiver was valid. Therefore, we reverse the trial court's decision suppressing defendant's confession.[7]

This misses the crucial facts and the dispositive legal rule. A revised version:

> The defendant waived his *Miranda* rights and confessed to murder. According to a psychiatric expert, he was delusional and believed that God would set him free if he confessed. The trial court concluded that his waiver was not "knowing and intelligent" [the pertinent rule]. But the court erred in focusing on why the defendant confessed. The proper test for waiver is whether defendant understands the *Miranda* rights [the dispositive rule], not whether he understands the consequences of waiving them.

LOOKING DEEPER INTO ONE OPINION

A few years ago, to test styles of opinion-writing, I rewrote a fairly routine opinion of the Michigan Court of Appeals.[8] I labeled one version X and the other version O, and sent them

5. People v. Hermiz, 611 N.W.2d 783, 784 (Mich. 2000) (citations omitted).
6. Stitt v. Holland Abundant Life Fellowship, 614 N.W.2d 88, 90 (Mich. 2000) (citations omitted).
7. People v. Daoud, 614 N.W.2d 152, 153-54 (Mich. 2000) (citation omitted).
8. Wills v. State Farm Ins. Co., 564 N.W.2d 488 (Mich. Ct. App. 1997).

out randomly to several hundred Michigan lawyers. I asked the lawyers which opinion they preferred and why. (For the "why," I included a list of possible reasons.) Result: 61% of 251 lawyers preferred the revised version.

A full report on this study will appear in *The Scribes Journal of Legal Writing*. For now, suffice it to say that the revised opinion followed a number of the guidelines for writing in plain language: break the material into sections and use headings, organize by putting more important information before less important, cite only the controlling cases, omit other unnecessary detail, use topic sentences that advance the analysis, keep the paragraphs short, use plain words, and provide summaries at the beginning and at the major breaking points.

Now, the results of my study were certainly not produced by any one change or technique. Still, the difference between the two opinions' first paragraphs, where the writer should get down to the nitty-gritty, is striking:

Original:

> Plaintiff Robert Wills filed a declaratory judgment action against defendant State Farm Insurance Company to determine whether defendant has a duty to pay benefits under the uninsured motorist provisions found in plaintiff's policy with defendant. Pursuant to the parties' stipulated statement of facts, the trial court granted summary disposition in plaintiff's favor upon finding coverage where gunshots fired from an unidentified automobile passing plaintiff's vehicle caused plaintiff to drive off the road and suffer injuries. Defendant appeals as of right. We reverse and remand.

Revised:

> **Summary**
>
> Robert Wills was injured when someone drove by him and fired shots toward his car, causing him to swerve into a tree. He filed a declaratory-judgment action to determine whether State Farm had to pay him uninsured-motorist benefits. The issue is whether there was a "substantial physical nexus" between the unidentified car and Wills's car. The trial court answered yes and granted a summary disposition for Wills. We disagree and reverse. We do not find a substantial physical nexus between the two cars, because the bullets were not projected by the unidentified car itself.

Why does the original fall short? It doesn't get to the deep issue. And it doesn't get to the answer, which in this case involves a deeper, dispositive rule—namely, that "substantial physical nexus" requires contact with something that the phantom car itself projected.

Let me explain what I mean by levels of deepness. All legal analysis is based, explicitly or implicitly, on the deductive reasoning that we recognize as a syllogism. Often, the minor premise of the syllogism involves reasoning by analogy. In the case I tested, there are four syllogisms; the minor premise of each one depends for its validity on the deeper syllogism that follows it. In the figures below, the a, b, and c stand for major premise, minor premise, and conclusion. The sentences are not smooth, but I believe that the forms are correct.

1. a. A policyholder must show injury arising from the use of an uninsured motor vehicle to recover under the policy.

b. The policyholder, Wills, cannot show bodily injury arising from the use of an uninsured motor vehicle.

c. Therefore, the policyholder cannot recover under the policy.

2. a. Under the policy, a vehicle whose driver is unknown and which "strikes" the insured's vehicle is an uninsured motor vehicle.

b. The other vehicle had an unknown driver, but it didn't strike the insured's vehicle.

c. Therefore, the other vehicle was not an uninsured motor vehicle.

3. a. According to previous decisions involving indirect physical contact, a "substantial physical nexus" between the unidentified car and the object it casts off or projects is required for "striking" the insured's vehicle.

b. There was no substantial physical nexus between the unidentified car and the object it projected.

c. Therefore, the unidentified car did not strike the insured's vehicle.

4. a. The object must be projected by the unidentified car itself to meet the requirement of a "substantial physical nexus."

b. The bullets were not projected by the unidentified car itself.

[Analogy: This case is like another one in which someone in the unidentified car shot the policyholder while he stood beside his car. This case is distinguishable from cases in which the unidentified car threw a rock or dropped a piece of metal on the road.]

c. Therefore, the requirement of "substantial physical nexus" is not met.

Now you see what's wrong with the original first paragraph. Although it does state the crucial facts, it barely gets to the first level of reasoning, the first syllogism; it just concludes, baldly and superficially, that plaintiff has no uninsured-motorist coverage. The revised version, on the other hand, gets down to the last syllogism. It gets down to the *ratio decidendi*, the dispositive rule.

SUMMARIES IN BRIEFS AND MEMOS

Good summaries in briefs and memos will contain the same three elements that opinions do: the crucial facts, the deep issue, and the answer. The differences are mainly structural: in briefs and memos, the issue is stated explicitly and the answer follows in a separate part. This may, in turn, present a choice of how deep to go into the issue.

Let me illustrate with that uninsured-motorist case, *Wills*. It's mundane, but typically mundane, and thus a good example.

Suppose you were stating the issue in the insurance company's brief. (Incidentally, I'll follow Garner's sensible advice to not cram everything into a single sentence.[9]) You might start the issue with these facts: "Robert Wills was injured when somebody drove by him and fired shots toward his car, causing him to swerve into a tree. Only the bullets—and nothing from the unidentified car itself—struck Wills's car." Then, as you round out the issue, you have a choice about how deep to go in the sentences that follow those first two. Here are the possibilities, from surface issues to increasingly deeper issues:

- Can Wills recover uninsured-motorist benefits?

- Can Wills show that his injury arose from "the use of an uninsured motor vehicle" as defined in his policy?

- To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car "struck" his car. Can Wills make that showing?

- To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car "struck" his car. And according to cases involving indirect "striking," there must be a "substantial physical nexus" between the cars. Can Wills show a substantial physical nexus?

- To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car "struck" his car. And according to cases involving indirect "striking," there must be a "substantial physical nexus" between the cars created by something that is projected by the unidentified car itself. Can Wills show that the unidentified car itself projected the bullets that hit his car?

You can see that it's increasingly difficult to frame the issue concisely as you go deeper into the levels of analysis. I would probably settle for the third bullet dot. Oddly enough, the third formulation seems more persuasive than the fourth, with its vague—and unhelpful—concept of "substantial physical nexus." The third issue is more persuasive because the facts (in the first two sentences) suggest no "striking."

After so stating the issue, you could answer as follows in the Summary of Argument part of your brief:

> Wills's policy with State Farm provides coverage for bodily injury "arising from the use of an uninsured motor vehicle." The policy defines an uninsured motor vehicle as one whose driver is unknown and which "strikes" the insured's vehicle.
>
> In this case, the unidentified car did not strike Wills's car, even indirectly. In other cases involving indirect contact, the Court of Appeals has ruled that the striking object must be cast off or projected from the unidentified car itself; only then is there a "substantial physical nexus" between the two cars. And here the bullets that hit Wills's car were not projected by the unidentified car itself, but by a gun.

Later, of course, would come the Argument section, with a point heading and another summary after the point heading. (Some writing texts call this second summary a thesis statement.) Inevitably, the second summary will require some repetition, but an adroit writer can minimize it. Thus:

> **Plaintiff Wills cannot show that the unidentified car "struck" his car.**
>
> Wills cannot show that the unidentified car "struck" his car, as his policy requires him to do, because he cannot show that the unidentified car *itself* fired the bullets. It's not enough that the bullets came from a gun fired by someone riding in the car.
>
> Here is the policy language at issue . . . .

Now, let's briefly go back. How would you frame the issue for the plaintiff, who of course lost? I suspect that he was trying to distinguish an earlier case in which the policyholder was hit by bullets shot from a moving car as he stood outside his car; the bullets hit him, not his car.[10] So plaintiff Wills might frame his issue like this:

> Robert Wills was injured when somebody drove by him and fired shots that hit his car, causing him to swerve into a tree. The shots from the unidentified car actually hit his car as they were both moving. To recover uninsured-motorist benefits under

9. Garner, *supra* note 3, at 1.

10. Kreager v. State Farm Mutual Auto. Ins. Co., 496 N.W.2d 346 (Mich. Ct. App. 1992).

his policy, Wills must show that the unidentified car "struck" his car. Can Wills make that showing?

Finally, how might you state the issue in an office memo—that is, when you are in objective, not persuasive, mode? In the *Wills* case, the differences are not as substantial as they would be in a more complicated case, with messier, conflicting facts and more arguable rules and policies. So this will sound familiar:

> Robert Wills was injured when somebody drove by him and fired shots that hit his car, causing him to swerve into a tree. To recover uninsured-motorist benefits under his policy, Wills must show that the unidentified car "struck" his car. Can Wills make that showing?

A Brief Answer, which should follow directly, will complete the summary and send the reader down a marked path toward a clear destination. I'll spare you this last example, though. You have the idea by now.

SUMMARIES IN OTHER LEGAL DOCUMENTS

So far we have considered the kind of précis that should appear up front in analytical writing. But when it comes to the field that we call drafting—contracts, wills, trusts, statutes, rules, and the like—the summary will not capsulize the analysis because there is no analysis. Rather, the summary will take the form of an introduction or overview.

In a contract, for instance, the first paragraph (which is typically unnumbered), will identify the parties and the nature of the contract:

> This is a lease between McKinley Morganfield (Landlord) and Chester Burnett (Tenant) for the property at 123 Red Rooster Street. The parties agree as follows:

In addition, long contracts should have an informative table of contents. For that matter, any legal document that's longer than five or six pages will benefit from a table of contents.

In statutes, ordinances, and rules, the summary will take the form of a purpose clause. Reed Dickerson, the father of legal drafting in the United States, was skeptical about purpose clauses. He thought that most of them "wind up as pious incantations of little practical value because what little information they contain is usually inferable from the working text."[11] But plain-language experts disagree, believing as they do that most laws and legal documents should be drafted for an ordinary literate reader, and not just for judges and other lawyers. Here are two main reasons why: focusing on legal readers perversely ignores the very subjects of the law, the administrators and citizens it applies to; and by aiming to make the law clear to ordinary readers, skilled drafters will usually sharpen its meaning.[12]

One plain-language expert, Martin Cutts, has actually tested the value of purpose clauses. He rewrote an act of Parliament and included the following in his "Introduction":

> **1.1** The main purposes of this Act are to give a customer:
>
> (a) the right to cancel a timeshare agreement or timeshare credit agreement; and
>
> (b) the right to receive information about the terms of the agreement.
>
> The rest of this Act explains how and when these rights apply.
>
> **1.2** This Act applies to a timeshare agreement or timeshare credit agreement if, when the agreement is being entered into, the customer, seller, or lender is in the United Kingdom or the agreement is to some extent governed by the law of the United Kingdom or a part of the United Kingdom.[13]

From his testing on law students, Cutts concluded that "an introductory section, giving an overview of the main purpose of the Act, is a great asset to readers (40% cited it as a source of main points)."[14]

And that's not all. Cutts also included, at the end, a so-called "Citizen's Summary" of the act's main substantive points. This summary was labeled as not part of the act and not to be used by judges who interpret it. In the testing, 97% of participants said that a Citizen's Summary should be provided in every act of Parliament.[15]

That will be the day—when legislators and legislative drafters, without fretting or finding reasons to avoid change, take extra steps to make law clear to the people whose lives it governs.

FINAL THOUGHTS ON OPINIONS

In judicial opinions with several issues, it may be difficult to summarize each one in the opening paragraphs. But with two

11. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 286 (2d ed. 1986).
12. *See* BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 91 (2001) (setting out five reasons why it is wrongheaded to write only for legal experts); LAW REFORM COMM'N OF VICTORIA, PLAIN ENGLISH AND THE LAW 50 (1987; repr. 1990) ("The law should be drafted in such a way as to be intelligible, above all, to those directly affected by it. If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it."); Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. LEGAL WRITING 51, 53-60 (1994-1995) (arguing that, most of the time, clarity and precision are complementary goals); Joseph Kimble, *The Great Myth That Plain Language Is Not Precise*, 7 SCRIBES J. LEGAL WRITING 109, 112-15 (1998-2000) (showing, through one example, why plain language is often *more* precise than legalese).
13. MARTIN CUTTS, LUCID LAW, Clearer Timeshare Act at 3 (2d ed. 2000).
14. *Id.* at 25.
15. *Id.* at 27.

or even three solid issues, you should be able to summarize in no more than four tight paragraphs, allowing one for the facts if you need it. The paragraphs do have to be tight, though. (Notice that my revised and meatier summaries of those Michigan opinions were shorter or only a mite longer than the originals.) At the very least, you can usually state all the deep issues, even if you can't answer each one except to say, for instance, that "we find no reversible error." At times, you can summarize selectively: "Penniman raises four issues on appeal, two of which require careful review." And in any event, most cases do not involve more than a couple of weighty issues.

As you realize by now, I don't buy the notion that the summary must be only one or two paragraphs. Typically, it will be. But I don't object to several short paragraphs. Beyond that, though, the summary starts to become self-defeating. Garner says that, ideally, a deep issue should not exceed 75 words. He must mean 75 words for *each issue*, especially when you include the answer.

I would not hesitate to call the summary just that, despite the traditional lack of a heading to begin opinions. Before I tested the revised *Wills* opinion, a colleague urged me to drop the heading, "Summary." Too radical, he said. Well, maybe. But if business memos can have a heading, like "Executive Summary," why can't opinions have one too? Calling the opener a summary might even encourage writers to really summarize.

That leads to my last point—the value of summaries not just for the reader, but for the writer as well. They help test the opinion. Although they appear first, they should be written last. More accurately, they should be completed and polished last. Start with the issue part of the summary, but hold off on writing the answer part until the end. For how can you summarize your answer until you have worked through your analysis? You may eventually decide that your issue, too, needs refining—or deepening.

The summary, then, both shapes and reflects the analysis. The quality of the one affects the quality of the other. Of all the Michigan opinions cited earlier, the one that seemed to me the most slippery was *People v. Daoud.*[16] And I had the hardest time summarizing the answer. I'm not suggesting that summarizing is easy. But it's bound to be easier with a clear opinion. Bad summaries are a bad sign.

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16 614 N.W.2d 152 (Mich. 2000)