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## TEACHING THE POETRY OF THE QUESTION PRESENTED

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*Teachable Moments for Teachers ... is a regular feature of Perspectives designed to give teachers an opportunity to describe a special moment of epiphany that changed their approach to presenting a particular topic to their students. It is a companion to the Teachable Moments for Students column that provides quick and accessible answers to questions frequently asked by students and other researchers. Readers are invited to submit their own “teachable moment for teachers” to the editor of the column: Louis J. Sirico Jr., Villanova University School of Law, 299 N. Spring Mill Road, Villanova, PA 19085-1682, phone: (610) 519-7071; fax: (610) 519-6282, e-mail: [sirico@law.vill.edu](mailto:sirico@law.vill.edu).*

“How you come out here depends on how you came in.”

– Judge Abraham Freedman<sup>2</sup>

A teachable moment occurs when students are ready to learn and the teacher knows it. Two factors tend to create these opportunities in the legal writing context: 1) students needing to put theory into practice, usually with a deadline looming, and 2) the teacher recognizing that equilibrium point of interest and panic, and using it to develop new strategies for meeting students’ learning needs. Such is the genesis of educational epiphanies on both sides of the podium.

For my second-year Appellate Advocacy students, a teachable moment occurs when, within the first few weeks of “becoming” counsel to parties of a pending United States Supreme Court case, I require them to draft the Question Presented (QP). Although some legal writing

teachers view the QP as passé<sup>3</sup>, others have noted its continued vitality.<sup>4</sup> All legal writing texts recognize the QP’s role in persuasive writing and devote some measure of attention to teaching students how to compose it. One writing reference book describes the QP as “[t]he lens of the legal analyst’s camera.”<sup>5</sup> In his book on appellate advocacy, Judge Ruggero J. Aldisert remarks that “seeing a splendidly crafted statement is a real joy.”<sup>6</sup> Yet another experienced advocate admonishes brief writers to “[w]rite the questions presented so that they inspire the answers you want.”<sup>7</sup>

Clearly learning to frame an issue persuasively, so that it “inspires”<sup>8</sup> the desired outcome and even brings joy to the busy legal reader, benefits those learning the craft of legal writing. At a teaching threshold, having new brief writers draft a QP at the start of their briefing schedule<sup>9</sup> helps

<sup>3</sup> See, e.g., Peter Friedman, *The Question Presented, A Misbegotten Convention* (paper presented at LWI conference, Seattle, July 2000) (arguing the QP’s irrelevance in objective memos); two recent conversations with LWR colleagues, one who, as a judicial clerk, observed readers ignoring them, and another who found them inevitably tedious to read, given how much they try to include.

<sup>4</sup> See, e.g., Stewart A. Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 614 (1984) (“The questions presented are the first—and sometimes the only—parts of the petition the law clerks and Justices read.”); Aldisert, *supra* note 2, at 118 (“Appellate lawyers must understand what I have previously described as the environment of brief reading. Very seldom do appellate judges read one brief all the way through and then read the other. More often than not, I read the appellant [question presented], then immediately turn to the appellee’s response.”)

<sup>5</sup> Mary Bernard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* 289 (3rd ed. 2000).

<sup>6</sup> Aldisert, *supra* note 2, at 121.

<sup>7</sup> *Id.* at 123.

<sup>8</sup> “Everyone is familiar with the fact that experts who prepare public opinion polls have substantial control over the response they get by the questions they frame. A scientific pollster attempts to frame neutral questions in order to get honest answers. An able lawyer, on the other hand, tries to frame questions which, without misleading the court, inspire the answer his or her client desires.” *Id.*

<sup>9</sup> But see Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 367 (3rd ed. 1998) (noting two different approaches to drafting a brief, i.e., Model I, which instead begins with the point headings, argument, and statement of the case before turning to the QP and those other parts of the brief, and Model II, which begins with the QP and then progresses through the statement of the case, point headings, argument, and the rest of the brief [the model I use with my Appellate Advocacy students]). Professor Neumann highlights that the theory behind the Model II approach is that “other parts of the brief will be more focused if the issues are first precisely defined.” *Id.*

<sup>1</sup> The author wishes to thank Eric Shepard for his research assistance in preparing this article.

<sup>2</sup> Ruggero J. Aldisert, *Winning on Appeal* 138 (Revised 1st ed. 1996).

the professor to identify whether students have the “camera” trained on the right subject (as well as their dexterity in operating the manual focus). Moreover, because my Appellate Advocacy students must follow the Supreme Court’s rules,<sup>10</sup> the QP appears on the opening page of the brief and thus presents a singular opportunity to make a good first impression. As one attorney put it, “[T]his is the first place you can be sure of presenting your legal contentions to the court. You will nowhere else present them with such brevity. If the court’s attention and sympathy are not caught here, they may well never be caught at all.”<sup>11</sup>

Ruminating on these admirable qualities of an effective QP—precision of thought, persuasive structuring, economy of language—led to my teachable moment one day: Why not view the QP as a kind of poetry? Legal poetry, to be exact. If brevity is the soul of wit, then let the judges smile (with joy) as they digest these finely tuned sentences that capture the essence of the advocate’s case.

But how to phrase these pithy but persuasive queries—to move beyond a well-written QP to a brilliantly written one?<sup>12</sup> All legal writing texts outline the key pieces of an effective QP, namely “(1) the general rule of law governing the question, (2) the legal question to be answered in this situation, and (3) the legally significant facts necessary for the analysis.”<sup>13</sup> Professor Neumann

suggests a three-step approach to drafting that begins with a narrow statement of the question and a separate list of determinative facts that are later merged and edited for concision.<sup>14</sup> Frank Cooper supplies a helpful checklist for judging the effectiveness of a draft QP, including eliminating unnecessary detail, being readily comprehensible on the first reading, eschewing self-evident conclusions, stating in terms of the case’s facts deemed acceptably accurate by opposing counsel,<sup>15</sup> and persuading subtly.<sup>16</sup> Stewart Baker, a former Supreme Court law clerk, recommends that advocates “[a]sk someone who does not know the case to read your questions. If he has to read them twice, they need editing.”<sup>17</sup> Of course, requiring first drafts and redrafts as a part of a legal writing course helps students to understand that honing these skills takes time.<sup>18</sup>

Students also learn by seeing it done successfully by skilled attorneys. In class they can analyze selected QPs and deconstruct those elements that shape their reading of the competing issues at bar. One example I use are the QPs submitted on one issue in *United States v. Nixon*.<sup>19</sup> James D. St. Clair, arguing for petitioner President Nixon, wrote:

This internal dispute within co-equal branches does not present a justiciable case or controversy within the meaning of Article III, Section 2 of the Constitution.

In contrast, Special Prosecutor Leon Jaworski framed the respondent’s statement of this issue as:

This dispute between the United States, represented by the special prosecutor, and

“If brevity is the soul of wit, then let the judges smile (with joy) as they digest these finely tuned sentences that capture the essence of the advocate’s case.”

<sup>10</sup> See U.S. Sup. Ct. R. 24.1(a) (1991) (“A brief on the merits for a petitioner or an appellant shall ... contain in the order here indicated: (a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page.”); see also U.S. Sup. Ct. R. 14.1(a) (1991) (“A petition for a writ of certiorari shall contain, in the order indicated: (a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. ... The questions shall be set out on the first page following the cover, and no other information may appear on that page.”)

<sup>11</sup> Aldisert, *supra* note 2, at 123.

<sup>12</sup> “A well written question explains precisely the issues before the court. A brilliantly written question not only fairly describes the issue before the court but makes the court want to decide that issue in favor of the author’s client.” *Id.*

<sup>13</sup> Ray and Ramsfield, *supra* note 5, at 289. See also Neumann, *supra* note 9, at 333. (“Structurally, a Question Presented is an inquiry plus a list of the most determinative facts and an allusion to the body of law that would govern the result[.]”)

<sup>14</sup> Neumann, *supra* note 9, at 335.

<sup>15</sup> Frank E. Cooper, *Writing in Law Practice* 80 (1963), cited in Neumann, *supra* note 9, at 336.

<sup>16</sup> It’s important to emphasize with students the subtlety of persuasion in a QP. “The common wisdom is that each question should be stated so that the only possible answer is the one you want. Forget this advice. If the answer were so obviously in your favor, you would not have lost below. Besides, the Court does not sit to decide obvious cases. Trying to ‘load’ the questions too heavily starts you out on the wrong foot; it makes you look like someone who cannot even be trusted to state the issues in a fair and straightforward way.” Baker, *supra* note 4, at 614.

<sup>17</sup> *Id.*

<sup>18</sup> “Given the relatively few words involved, a persuasive Question Presented can be one of the most difficult drafting jobs in legal writing.” Neumann, *supra* note 9, at 335.

<sup>19</sup> 418 U.S. 683 (1974).

the President—two distinct parties—  
presents a live, concrete, justiciable  
controversy.<sup>20</sup>

My Appellate Advocacy students have noted the petitioner's use of the adjective "internal" and the phrase "within co-equal branches" and how it precisely contrasts with the respondent's declaration of a conflict between "two distinct parties," i.e., the special prosecutor representing the United States and the president. They are also struck by the respondent's description of the controversy as "live" and "concrete." After looking at a few more examples, the students detect consistent patterns in the poetry: precise and sometimes colorful word choice, and careful ordering of the legal claims and key facts. In this manner they learn that the legal poetry of QPs consists of two separate but important tasks: one of writing (or drafting) carefully chosen words and one of editing, to arrange the concepts as effectively as possible.

As Justice Frankfurter once observed, "[I]n law also the right answer usually depends on putting the right question."<sup>21</sup> Although short and sweet, the power of an effectively composed QP cannot be underestimated. By learning to frame the "right question" for a court, our students hone their analytical and wordsmithing<sup>22</sup> skills while developing their persuasive voice. In teaching them the power of each phrase, we legal writing teachers contribute to the poetry of law.

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<sup>20</sup> Aldisert, *supra* note 2, at 124.

<sup>21</sup> Estate of Rogers v. Commissioner, 320 U.S. 410, 413 (1943), cited in Aldisert, *supra* note 2, at 138.

<sup>22</sup> I like this phrase because it provides such a strong image of the writer forging phrases on the keyboard, like a blacksmith hammering out metal objects on an anvil.