



January 27, 2011

VIA ELECTRONIC MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

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Re: Proposed modifications to Fed. R. App. P. 28(a)

Dear Mr. McCabe:

Horvitz & Levy is the largest law firm in the nation specializing exclusively in appellate litigation. We frequently handle appeals in the United States Courts of Appeals, and we take a keen interest in amendments to the rules governing federal procedure. The issues discussed in this letter concern the format and construction of appellate briefs, a subject of acute interest to every appellate lawyer, including us.

We understand that the Advisory Committee on Appellate Rules is presently considering whether to modify the requirement in Appellate Rule 28(a)(6) that briefs contain a separate statement of the case “indicating the nature of the case, the course of proceedings, and the disposition below.” We strongly support modifying that Rule.

Everyone agrees that an appellate brief must describe the procedural events leading up to appeal. The question is where to put that description in the brief to avoid duplicating the description across multiple sections of the brief. In considering this question, we ask the Committee to consider two aspects of the relationship between current Rule 28(a)(6) and other portions of Rule 28(a) that present difficulties. We describe those difficulties below and offer suggestions for corrective modifications.

The first difficulty is created by Rule 28(a)’s strict ordering requirement. Under Rule 28(a), the separate sections of briefs must appear “in the order indicated.” This means that a brief must present a statement of the case (item 6) before presenting the statement of facts (item 7). That order is seldom ideal, however. It is generally preferable to present matters in chronological order, but Rule 28(a) defeats that preference because the important procedural events of a case happen after the underlying events. Moreover, it is typically easier to describe and understand the procedural posture of an appeal after learning the key facts. For example, under the current Rule, in a complicated appeal with numerous parties playing different roles, it is necessary to begin the statement of the case by describing all parties, or else the procedural events will make no sense. If the statement of facts came first, however, this would be unnecessary because the factual recitation would already make clear the identities and roles of the various parties.

The best solution, we think, is to combine the requirements of Rules 28(a)(6) and (a)(7) into a single “statement of the case” that would embrace descriptions of both procedural and factual events. This modification would leave unchanged the requirement that a brief describe key procedural events, but it would allow lawyers to choose whether to present that information before, or after, reciting the facts, as befits their particular case.

A second difficulty is caused by the absence of any provision of Rule 28(a) addressing introductions to briefs. Nothing in Rule 28(a) expressly authorizes a brief to include an introduction, and the structure of the Rule defeats any argument by negative implication that one is permitted. The only logical place to house an introduction is before or after the jurisdictional statement, yet Rule 28(a) identifies *other* elements that must appear, “in the order indicated,” both before and after the jurisdictional statement. An introduction can be an important and helpful part of a brief—as a prelude to a long brief, or to caution that certain arguments are conditioned on others, or to explain that different arguments lead to different relief. Most appellate lawyers want to include introductions, and so they seek another venue for the information that would otherwise be placed in an introduction. The inevitable resting place is the statement of the case, probably because Rule 28(a)(6) gives license to “indicat[e] the nature of the case.” This marriage of convenience is often unhappy. The statement of the case has its own separate purpose—as Rule 28(a)(6) explains—and that purpose is not coextensive with a true introduction. Among other problems, an introduction ought to be the first, not the third, substantive component of a brief (after statements of jurisdiction and the issues).

We therefore suggest that the Committee revise Rule 28(a) to include a new subrule allowing a brief to include an introduction, and that the language from Rule 28(a)(6) concerning “the nature of the case” be relocated to that new subrule.

Sincerely,

HORVITZ & LEVY LLP

By: 
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