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17-AP-B

12 January 2017

Hon. Neil M. Gorsuch
Chair, Appellate Rules Advisory Committee
1823 Stout Street
Denver, CO 80257

Proposed Revision of Appellate Rule 28

Dear Judge Gorsuch:

I write to propose an important revision to Federal Rule of Appellate Procedure 28. It has to do with the placement and the phrasing of the issues or questions presented—which are properly seen as a crucial part of a brief, but in fact are often overlooked or slighted by counsel and judges alike.

As you may know, I've written a great deal about the subject of "deep issues" over the years. Justice Scalia and I wrote jointly about them in *Making Your Case: The Art of Persuading Judges* 85–88 (2008), where we strongly endorsed the type of question presented that I'm recommending here. In fact, in our final appearance together, last February, Justice Scalia called the deep issue the greatest single development in legal advocacy in his lifetime.

My most thorough exposition of the subject appears in *The Winning Brief* 77–131 (3d ed. 2014). The idea is to abolish the one-sentence *Whether*-issue and to replace it with a multisentence issue with a strict limit of 75 words.[1]

There is nothing newfangled about the idea: I developed it 25 years ago, I've taught it for a quarter-century (so have many others now), and I've coached thousands of lawyers in writing issue statements this way. I've provided hundreds of examples of deep issues in print.

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[1] *See Black's Law Dictionary* 959 (10th ed. 2014) (defining *deep issue* as "the fundamental issue to be decided by a court in ruling on a point of law," adding that it "is usu. briefly phrased in separated sentences, with facts interwoven (in chronological order) to show precisely what problem is to be addressed").

The advantages of deep issues are several: (1) they consist of shorter, more readable sentences (typically three); (2) they allow the salient facts to unfold chronologically, so that judges will more readily comprehend them in a single reading; and (3) they come to the question mark briskly, within 75 words (a number I arrived at after much experimentation with judicial readers and have used now for more than two decades).

Here's the example that Justice Scalia and I give on pages 87 and 88 of *Making Your Case*:

Conventional Issue	Deep Issue
Whether there was a violation of the OSHA rule requiring every incident-investigation report to contain a list of factors that contributed to the incident, when the investigation report on the June 2002 explosion at the Vespante plant listed the contributing factors in an attachment to the report entitled "Contributing Factors," as opposed to including them in the body of the report?	OSHA rules require every incident-investigation report to contain a list of factors that contributed to the incident. The report on the June 2002 explosion at the Vespante plant listed the contributing factors not in the body of the report but in an attachment entitled "Contributing Factors." Did the report thereby violate OSHA rules?

The facile (and even worse) way of presenting the conventional issue is to omit all facts and to say, simply, "Whether the Vespante report violated OSHA Rule 281.4(c)(1)(B)?" I've fictionalized the number, but you get the idea because you and your colleagues so often see this type of unhelpful issue statement.

So if deep issues help the judge far more than the conventional *Whether*-issue, can they be encouraged or mandated by rule? Absolutely. Deep issues quite predictably take this format: Major Premise, then Minor Premise, then Conclusion followed by a question mark. They should be written dispassionately and nonargumentatively, highlighting just the logic that underlies the particular point.

As you know, conventional appellate issues, as they've developed over the years, load everything into a single sentence, are stated ungrammatically as a sentence fragment beginning with *Whether*, and frame the problem in the most abstract way possible. They require intense concentration, which is rewarded only by an understanding that the statement is going to remain incomprehensible until the reader plows much more deeply into the brief. In short, they're the hallmark of poor exposition.

Attached as Annex A is my proposed amendment. It mimics the eminently sensible Supreme Court Rules (14.1(A), 24(1)(A)) requiring the questions presented to be the first thing the reader sees. And it gives examples, which are a crucial part of the rule. The rule will simply confuse people if they don't see model examples. The Illinois appellate rules give examples—a great idea if you want to help brief-writers—but they unfortunately give useless *Whether*-issues.

Attached as Annex B is a fuller explanation of the deep-issue technique, with answers to the most common questions about it. If the Advisory Committee for any reason wishes to replace one of the proposed examples in Proposed Rule 28(a)(1)(G), there are dozens of others to choose from in these materials. The amplitude of examples is purposeful: it demonstrates the workability of the technique in a wide variety of legal contexts.

The purpose of the amendment is to contribute to the improvement of brief-writing, the ease of judicial brief-reading, and the quality of justice administered by our federal appellate courts. I hope the Advisory Committee will consider it favorably. Thank you.

Sincerely,

Bryan A. Garner

Copies to: Professor Gregory E. Maggs
Rebecca Womeldorf, Esq.

Annex A

Proposed Rule 28 Change

Rule 28. Briefs

(a) **Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a statement of the issues presented for review, with no other information on the page, expressed in this form:

(A) each issue must include dispassionately phrased legal and factual premises in separate sentences, leading up to the final sentence ending with a question mark;

(B) no citations should appear within the issues presented;

(C) the facts included in the issue must be concise and chronological;

(D) no single issue presented may exceed 75 words;

(E) no issue may begin with *whether* or be phrased in a single sentence; and

(F) if two or more issues are presented, each should be prefaced with a concise, neutral heading, which does not count toward the 75-word limit;

(G) the issues presented should be modeled on these examples:

- Federal circuit courts may hear and rule on final orders only. Summary-judgment orders granting foreclosure are not considered final orders. Wilson has appealed the trial court's grant of summary judgment on First Bank's foreclosure count. Is that appeal properly before this court?
- For a criminal-sentencing enhancement to be constitutional, the enhancement must be either found by the jury or admitted by the defendant. At Smith's sentencing, the Government conceded that Smith's three-level-organizer sentencing enhancement was neither found by the jury nor

admitted by Smith—yet the Court imposed it anyway. Is Smith entitled to resentencing without the enhancement?

- At trial, the chief prosecutor mentioned in closing that Jeffries had decided to represent himself at trial—a statement that Jeffries did not object to at the time or in his motion for new trial. On appeal, Jeffries raises the objection for the first time. Did he properly preserve this complaint for appellate review?

~~(1)~~ (2) a corporate disclosure statement if required by Rule 26.1;

~~(2)~~ (3) a table of contents, with page references;

~~(3)~~ (4) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

~~(4)~~ (5) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

~~(5) a statement of the issues presented for review;~~

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(g)(1).

(b) **Appellee's Brief.**

(1) The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(A) the jurisdictional statement;

~~(B) the statement of the issues;~~

(B) the statement of the case; and

(C) the statement of the standard of review.

(2) The appellee's brief must contain its own statement of issues presented on appeal, presumably with premises differing from those in the appellant's brief. Otherwise, the appellee's issues presented should comply with Rule 28(a).

(c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—

cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) **References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) **References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) **[Reserved]**

(h) **[Reserved]**

(i) **Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The

letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.