

April 14, 2017

By Federal Express

Hon. Michael A. Chagares
Appellate Rules Advisory Committee
U.S. Court of Appeals for the Third
Circuit Frank R. Lautenberg Courthouse
2 Federal Square, Room 357
Newark, NJ 07102

Re: Proposal to Amend Fed. R. App. P. 28 to Require “Deep Issue” Statements

Dear Judge Chagares:

I write in support of Professor Bryan A. Garner’s proposal, dated January 12, 2017, to amend Federal Rule of Appellate Procedure 28. The proposed amendment would require the “statement of issues presented for review” to appear on a separate page at the beginning of all principal briefs filed in the Courts of Appeals (as it now does in the Supreme Court) and would require that the statement take the form of a “deep issue”—a multi-sentence statement, limited to 75 words, couched usually as a syllogism, whose final sentence ends in a question mark.

The deep-issue approach would supplant the traditional “whether-sentence” approach, which typically results in a convoluted one-sentence issue statement that is hard to understand. Professor Garner’s proposed amendment also would require the appellee to provide his or her own deep issues, “presumably with premises differing from” the appellant’s. This would make the appellee’s efforts to favorably reframe the issues on appeal far more explicit than they have ever been.

To illustrate why the proposed amendment is a good idea, I decided to treat Professor Garner’s proposal as though it were, *itself*, the subject of an “appellate” brief containing a statement of the issue presented for review. Then I came up with a traditional “whether-sentence” version of that issue and a “deep issue” version.

The Traditional Issue Statement

Whether, instead of requiring that an appellant's brief contain a "statement of the issues" that—like this one—traditionally consists of one lengthy sentence that begins with "whether" and then packs in all the facts essential to presenting the issue, FRAP 28 should be amended to require that principal appellate briefs begin with a multi-sentence issue statement limited to 75 words, usually couched as a syllogism, whose final sentence ends in a question mark.

(74 words)

The Proposed "Deep Issue" Statement

FRAP 28 requires that the appellant's brief contain a "statement of the issues." That statement traditionally consists of one lengthy sentence that begins with "whether" and then packs in all the facts essential to presenting the issue. Should Rule 28 be amended to require that principal appellate briefs begin—like this one—with a multi-sentence issue statement limited to 75 words, usually couched as a syllogism, whose final sentence ends in a question mark?

(74 words)

I think that the choice between these two approaches is pretty clear. Note, however, that I have bent over backwards to be nice to the "traditional" version by holding it to 74 words and by ensuring that it says nothing that is not also said in the "deep issue" version. In real life, however, the traditional version probably would look more like this:

Whether, instead of requiring as the fifth item in an appellant's brief (following the corporate-disclosure statement, the tables of contents and authorities, and the jurisdictional statement) a "statement of the issue" that—like this one—typically consists of one lengthy sentence that begins with "whether" and then packs in all the facts essential to presenting the issue, Federal Rule of

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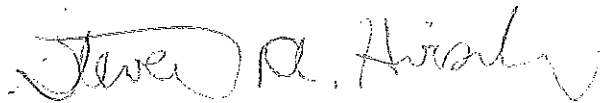
Appellate Procedure 28 should be amended to require that the Brief of Appellant and the Appellee's Answering Brief both begin, on a separate page containing no other information, with a multi-sentence statement of the issue, limited to 75 words, usually couched as a syllogism, whose final sentence ends in a question mark.

(112 words)

This more realistic example makes the choice between the two approaches not just clear, but starkly so.

Sincerely,

KEKER, VAN NEST & PETERS LLP

A handwritten signature in black ink, appearing to read "Steven A. Hirsch". The signature is written in a cursive style with a large initial "S" and a long horizontal stroke extending to the right.

Steven A. Hirsch

cc: Rebecca Womeldorf, Esq.
Standing Committee on Rules of Practice and Procedure

The Honorable Neil M. Gorsuch
Supreme Court of the United States