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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

DATE: May 2, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jeffrey S. Sutton, Chair, Advisory Committee on Federal Rules of Appellate Procedure

RE: Report of the Appellate Rules Advisory Committee

I. Introduction

The Advisory Committee on Appellate Rules met on April 6 and 7, 2011, in San Francisco, California. The Committee approved for publication proposed amendments to Rules 28 and 28.1 and to Form 4, removed four items from its study agenda, and discussed a number of other items. On the second day of the meeting, the Committee met jointly with the Advisory Committee on Bankruptcy Rules.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 28 and 28.1 and Form 4. Part III covers other matters.

The Committee has scheduled its next meeting for October 13 and 14, 2011, in Atlanta, Georgia.

Detailed information about the Committee’s activities can be found in the Reporter’s draft of the minutes of the April meeting¹ and in the Committee’s study agenda, both of which are attached to this report.

II. Action Items

The Committee is seeking approval to publish for comment proposed amendments to Rules 28 and 28.1 and Form 4. The proposed amendments to Rule 28(a) revise and combine existing Rules 28(a)(6) and 28(a)(7) into a single requirement that briefs contain a statement of the case and the facts (roughly emulating the approach taken in Supreme Court Rule 24.1(g)). Conforming amendments are proposed to Rules 28(b) and 28.1. The proposed amendments to Form 4 (concerning applications to proceed in forma pauperis (“IFP”)) make some technical changes and remove the current Form’s requirement of detailed information concerning the IFP applicant’s expenditures for legal and other services in connection with the case.

A. Rule 28

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Rule 28 as set out in the enclosure to this report. The proposed amendment would revise Rule 28(a) to remove the requirement of separate statements of the case and of the facts.

Current Rule 28(a)(6) requires “a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below.” Current Rule 28(a)(7) requires that the brief include “a statement of facts.” Rule 28(a) requires these items to appear “in the order indicated.” These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires “[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12.”

The proposed amendment to Rule 28(a) would consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one “statement.” The proposed new Rule 28(a)(6) would allow the lawyer to present the factual and procedural history chronologically, but would also provide flexibility to depart from chronological ordering. Conforming changes would be made by

¹ These minutes have not yet been approved by the Committee.

renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), and by revising Rule 28(b)'s discussion of the appellee's brief.

B. Rule 28.1

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 28.1 as set out in the enclosure to this report. The proposed amendment complements the amendment to Rule 28 by making conforming changes to Rule 28.1 (concerning cross-appeals).

C. Form 4

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Form 4 as set out in the enclosure to this report. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators and those questions seek information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The proposed amendments would also make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference

in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

III. Information Items

The Committee's joint meeting with the Bankruptcy Rules Committee provided a beneficial opportunity for the two Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals) and related revisions to Appellate Rule 6. The Committees plan to continue their collaboration on these matters.

The Committee has continued to work jointly with the Civil Rules Committee, through the Civil / Appellate Subcommittee. At its spring meeting, the Appellate Rules Committee discussed the Subcommittee's work on a proposal to amend Appellate Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion, and also discussed the Subcommittee's work on a proposal to address the doctrine of "manufactured finality."

The Rule 4(a)(4) proposal arises from the observation that under Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, a time lag between entry of the order and entry of the judgment can raise questions concerning the restarted appeal time. At its fall 2010 meeting, the Appellate Rules Committee discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment. Difficulties with that proposal led the Committee to seek other options. The Committee now has before it a proposal to address the problem from another angle, by suggesting to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Further discussion in the Civil / Appellate Subcommittee and with the Civil Rules Committee will be needed in order to fully assess the costs and benefits of such a course. The main potential downside would appear to be the already troublesome degree of noncompliance with the existing separate document requirement.

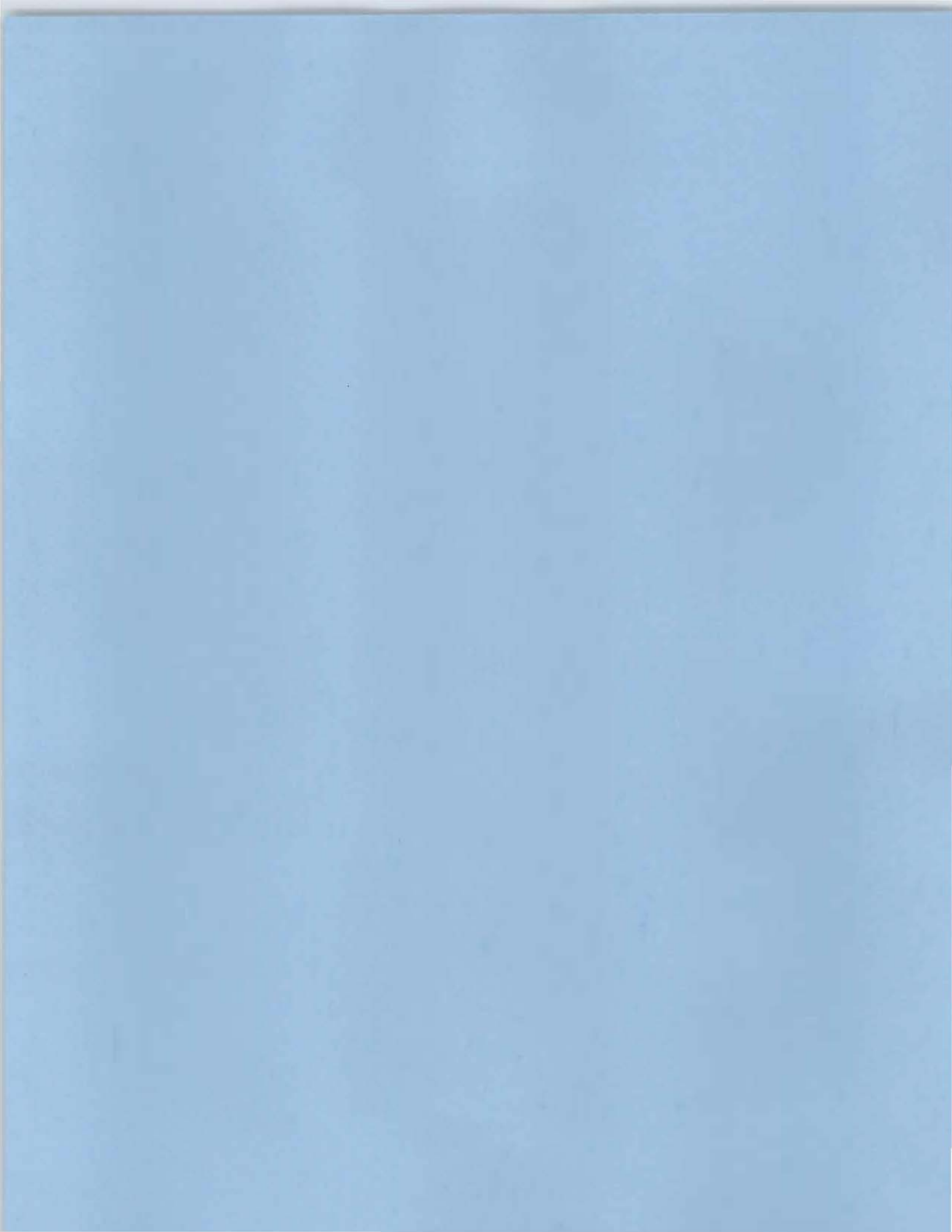
The manufactured finality project concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal when the district court has disposed of fewer than all claims in an action. At the Appellate Rules Committee's spring meeting, members of the Civil / Appellate Subcommittee updated the Committee on the Subcommittee's discussions of this topic. There is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality for appeal purposes. As to dismissals of the remaining claims without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not yet reached consensus is how to treat conditional-prejudice dismissals – i.e., situations in which the would-be appellant dismisses the remaining claims subject to a right to reassert them if, and only if, the court's dismissal of the other claims is reversed or vacated on appeal. The Appellate Rules Committee decided to ask

the Subcommittee to try to formulate a concrete proposal on the topic of manufactured finality for consideration in the fall.

The Committee considered the Federal Judicial Center's report on the amount of appellate costs awarded under Appellate Rule 39. The Committee had asked the FJC to investigate this topic in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The FJC study found that circuits differ in their approach to printing costs, and that this variation produces significant differences in the size of possible cost awards. The Committee plans to share the FJC report with the Chief Judges and Clerks of each Circuit. The Committee also discussed its ongoing review of the caselaw interpreting Appellate Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Recent caselaw developments have suggested that some existing circuit splits may be lessening. The Committee decided to continue work on a proposal to amend Rule 4(a)(2), while also monitoring the caselaw for further developments. The Committee took up a new agenda item relating to redactions in appellate briefs. An attorney with the Public Citizen Litigation Group has raised a concern that such redactions are often insufficiently justified and that they impede meaningful briefing by amici. The Committee plans to confer with the Civil Rules Committee concerning principles that should govern the treatment of sealed documents on appeal.

The Committee removed four items from its study agenda. One item related to concerns raised by Public.Resource.Org about the presence of alien registration numbers in federal appellate opinions. The Standing Committee's Privacy Subcommittee considered these concerns at length and concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. In the light of this conclusion, the Appellate Rules Committee decided to remove this item from its agenda. Another item arose from *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), which held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. Members were chiefly concerned about the possible effects of this ruling on situations in which a non-movant has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. Because no decision has applied *Vanderwerf* to an appeal by a non-movant, the Committee concluded that the decision did not warrant further consideration at this time. A third item concerned a suggestion that the Appellate Rules be amended to address intervention on appeal. No consensus emerged in favor of amending the Rules to address this issue. The fourth item removed from the Committee's agenda arose from a suggestion that Appellate Rule 32(a)(7)(B)(iii) be amended to exempt from the type-volume limitation for briefs the statement of interest required of amici by Appellate Rule 29(c)(4).

At its fall 2011 meeting, the Committee expects to continue its consideration of a number of other projects, including a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Another project concerns possible rulemaking responses to the Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine.





**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE****

RULE 28. BRIEFS

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

4 (1) a corporate disclosure statement if required by
5 Rule 26.1;

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

7 (3) a table of authorities – cases (alphabetically
8 arranged), statutes, and other authorities – with
9 references to the pages of the brief where they are cited;

10 (4) a jurisdictional statement, including:

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

15 (B) the basis for the court of appeals'
16 jurisdiction, with citations to applicable statutory

**New material is underlined; matter to be omitted is lined through.

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17 provisions and stating relevant facts establishing
18 jurisdiction;

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

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

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

26 (6) a concise statement of the case ~~briefly~~
27 ~~indicating the nature of the case, the course of~~
28 ~~proceedings, and the disposition below;~~

29 ~~———— (7) a statement of setting out the facts relevant to~~
30 ~~the issues submitted for review and identifying the~~
31 ~~rulings presented for review with appropriate references~~
32 ~~to the record (see Rule 28(e));~~

33 ~~(8) (7)~~ a summary of the argument, which must
34 contain a succinct, clear, and accurate statement of the
35 arguments made in the body of the brief, and which
36 must not merely repeat the argument headings;

37 ~~(9) (8)~~ the argument, which must contain:

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

41 (B) for each issue, a concise statement of the
42 applicable standard of review (which may appear
43 in the discussion of the issue or under a separate
44 heading placed before the discussion of the issues);
45 ~~(10)~~ (9) a short conclusion stating the precise relief
46 sought; and

47 ~~(11)~~ (10) the certificate of compliance, if required
48 by Rule 32(a)(7).

49 **(b) Appellee's Brief.** The appellee's brief must conform
50 to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10),
51 except that none of the following need appear unless the
52 appellee is dissatisfied with the appellant's statement:

53 (1) the jurisdictional statement;

54 (2) the statement of the issues;

55 (3) the statement of the case;

56 ~~(4) the statement of the facts; and~~

57 ~~(5)~~ (4) the statement of the standard of review.

58 * * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must “indicat[e] the nature of the case, the course of proceedings, and the disposition below,” and it precedes Rule 28(a)(7)’s requirement that the brief include “a statement of facts.” Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one “statement.” This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to “the statement of the case.” Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)’s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

RULE 28.1. CROSS-APPEALS

1

* * *

2

(c) Briefs. In a case involving a cross-appeal:

3

(1) Appellant's Principal Brief. The appellant

4

must file a principal brief in the appeal. That brief must

5

comply with Rule 28(a).

6

(2) Appellee's Principal and Response Brief. The

7

appellee must file a principal brief in the cross-appeal

8

and must, in the same brief, respond to the principal

9

brief in the appeal. That appellee's brief must comply

10 with Rule 28(a), except that the brief need not include a
11 statement of the case ~~or a statement of the facts~~ unless
12 the appellee is dissatisfied with the appellant's
13 statement.

14 **(3) Appellant's Response and Reply Brief.** The
15 appellant must file a brief that responds to the principal
16 brief in the cross-appeal and may, in the same brief,
17 reply to the response in the appeal. That brief must
18 comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), except
19 that none of the following need appear unless the
20 appellant is dissatisfied with the appellee's statement in
21 the cross-appeal:

- 22 (A) the jurisdictional statement;
- 23 (B) the statement of the issues;
- 24 (C) the statement of the case;
- 25 ~~(D) the statement of the facts; and~~
- 26 ~~(E)~~ (D) the statement of the standard of
27 review.

28 **(4) Appellee's Reply Brief.** The appellee may file
29 a brief in reply to the response in the cross-appeal. That
30 brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~ (10)

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31 and must be limited to the issues presented by the

32 cross-appeal.

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one “statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review....” Rule 28.1(c) is amended to refer to that consolidated “statement of the case,” and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

	Average monthly amount during the past 12 months		Amount expected next month	
	You	<u>Spouse</u>	You	<u>Spouse</u>
Employment	\$ _____	\$ _____	\$ _____	\$ _____
Self-employment	\$ _____	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ _____	\$ _____	\$ _____	\$ _____
Interest and dividends	\$ _____	\$ _____	\$ _____	\$ _____
Gifts	\$ _____	\$ _____	\$ _____	\$ _____
Alimony	\$ _____	\$ _____	\$ _____	\$ _____
Child support	\$ _____	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ _____	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ _____	\$ _____	\$ _____	\$ _____
Unemployment payments	\$ _____	\$ _____	\$ _____	\$ _____
Public-assistance (such as welfare)	\$ _____	\$ _____	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____	\$ _____	\$ _____

27 Total monthly income: \$ _____ \$ _____ \$ _____ \$ _____

28 2. List your employment history for the past two years, most recent employer first. (Gross monthly
29 pay is before taxes or other deductions.)

30	Employer	Address	Dates of employment	Gross monthly pay
31	_____	_____	_____	_____
32	_____	_____	_____	_____
33	_____	_____	_____	_____

34 3. List your spouse's employment history for the past two years, most recent employer first.
35 (Gross monthly pay is before taxes or other deductions.)

36	Employer	Address	Dates of employment	Gross monthly pay
37	_____	_____	_____	_____
38	_____	_____	_____	_____
39	_____	_____	_____	_____

40
41 4. How much cash do you and your spouse have? \$ _____

42 Below, state any money you or your spouse have in bank accounts or in any other financial
43 institution.

44	Financial institution	Type of account	Amount you have	Amount your spouse has
45	_____	_____	\$ _____	\$ _____
46	_____	_____	\$ _____	\$ _____
47	_____	_____	\$ _____	\$ _____

48 If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must
49 attach a statement certified by the appropriate institutional officer showing all receipts,
50 expenditures, and balances during the last six months in your institutional accounts. If you have

51 multiple accounts, perhaps because you have been in multiple institutions, attach one certified
52 statement of each account.

53 * * * * *

54 ~~10. Have you paid – or will you be paying – an attorney any money for services in connection with~~
55 ~~this case, including the completion of this form? Yes No~~

56 ~~— If yes, how much? \$ _____~~

57 ~~— If yes, state the attorney's name, address, and telephone number:~~

58 _____

59 _____

60 _____

61 ~~11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal~~
62 ~~or a typist) any money for services in connection with this case, including the completion of~~
63 ~~this form?~~

64 ~~— Yes No~~

65 ~~— If yes, how much? \$ _____~~

66 ~~— If yes, state the person's name, address, and telephone number:~~

67 _____

68 _____

69 _____

70 10. Have you spent – or will you be spending – any money for expenses or attorney fees in
71 connection with this lawsuit?

72 Yes No

73 If yes, how much? \$ _____

74 ~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees*
75 *for your appeal.*

76 ~~13.~~ 12. *State the city and state of your legal residence.*

77 _____

78 Your daytime phone number: (____) _____

79 Your age: _____ Your years of schooling: _____

80 Last four digits of your social-security number: _____