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OF THE
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MEMORANDUM

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

DATE: May 2, 2011 (Revised June 2, 2011)

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.

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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.

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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 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.

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

Rule 28. Briefs

- 1 **(a) Appellant’s Brief.** The appellant’s brief must contain,
2 under appropriate headings and in the order indicated:
- 3 (1) a corporate disclosure statement if required by
4 Rule 26.1;
- 5 (2) a table of contents, with page references;
- 6 (3) a table of authorities — cases (alphabetically
7 arranged), statutes, and other authorities — with
8 references to the pages of the brief where they are
9 cited;
- 10 (4) a jurisdictional statement, including:
- 11 (A) the basis for the district court’s or agency’s
12 subject-matter jurisdiction, with citations to
13 applicable statutory provisions and stating

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

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relevant facts establishing jurisdiction;

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(B) the basis for the court of appeals’

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jurisdiction, with citations to applicable

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statutory provisions and stating relevant facts

18

establishing jurisdiction;

19

(C) the filing dates establishing the timeliness of

20

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

24

of 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 indicating~~

27

~~the nature of the case, the course of proceedings,~~

28

~~and the disposition below;~~

29

~~(7) a statement of setting out the facts relevant to the~~

30

issues submitted for review and identifying the

31 rulings presented for review, with appropriate
32 references to the record (see Rule 28(e));

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

38 ~~(9)~~ (8) the argument, which must contain:

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

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

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48 ~~(10)~~ (9) a short conclusion stating the precise relief
49 sought; and
50 ~~(11)~~ (10) the certificate of compliance, if required by
51 Rule 32(a)(7).
52 **(b) Appellee’s Brief.** The appellee’s brief must conform to
53 the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10),
54 except that none of the following need appear unless the
55 appellee is dissatisfied with the appellant’s statement:
56 (1) the jurisdictional statement;
57 (2) the statement of the issues;
58 (3) the statement of the case;
59 ~~(4) the statement of the facts; and~~
60 ~~(5)~~ (4) the statement of the standard of review.

61 * * * * *

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

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

(1) **Appellant’s Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee’s Principal and Response Brief.** The appellee must file a principal brief in the

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cross-appeal and must, in the same brief, respond

9

to the principal brief in the appeal. That appellee's

10

brief must comply with Rule 28(a), except that the

11

brief need not include a statement of the case ~~or a~~

12

~~statement of the facts~~ unless the appellee is

13

dissatisfied with the appellant's statement.

14

(3) **Appellant's Response and Reply Brief.** The

15

appellant must file a brief that responds to the

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principal brief in the cross-appeal and may, in the

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same brief, reply to the response in the appeal.

18

That brief must comply with Rule 28(a)(2)-(9)

19

(8) and ~~(11)~~ (10), except that none of the following

20

need appear unless the appellant is dissatisfied

21

with the appellee's statement in 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 review.
27 (4) **Appellee’s Reply Brief.** The appellee may file a
28 brief in reply to the response in the cross-appeal.
29 That brief must comply with Rule 28(a)(2)-(3) and
30 ~~(11)~~ (10) and must be limited to the issues
31 presented by the cross-appeal.

32 * * * * *

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	\$ _____	\$ _____	\$ _____	\$ _____

24 Public-assistance (such
 25 as welfare) \$ _____ \$ _____ \$ _____ \$ _____

26 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.

* * * * *

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
 73 Yes No

74 *If yes, how much?* \$ _____

75 ~~12:~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees*
 76 *for your appeal.*
 77

78 ~~13:~~ 12. *State the city and state of your legal residence.*

79 _____

80 Your daytime phone number: (____) _____

81 Your age: _____ Your years of schooling: _____

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