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11-AP-003

February 14, 2012  
via e-mail

Peter G. McCabe, Secretary  
Standing Committee on Rules of Prac. and Proc.  
Judicial Conference of the United States  
Administrative Office of the U.S. Courts  
Thurgood Marshall Federal Judiciary Bldg.  
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**COMMENTS OF THE  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
Concerning Proposed Amendments to the Federal Rules  
of Appellate Procedure  
Published for Comment in August 2011**

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Appellate Procedure. NACDL's comments on the proposed amendments to the Evidence and Criminal Rules are being submitted separately. Our organization has more than 12,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of about 35,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

*FRAP 28.* The proposed amendment to Rules 28(a)(6) and (b)(4) would eliminate the prior, artificial distinction between the "statement of the case" and the "statement of facts." (Conforming amendments to Rule 28.1 are also proposed.) As amended, Rule 28 would require only the appellant's brief contain, "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review ...." NACDL agrees that the prior requirement to separate these two "statements" has sometimes proven confusing and

unhelpful to either counsel or the court. The “facts” underlying an issue that arose in the courtroom are often indistinguishable from the details of the procedural history of the case. The new requirement that the now-consolidated Statement of the Case include a specific reference to any ruling of the lower court which the appellant seeks to have reviewed is also bound to be helpful.

At the same time, we note that the wording of the new rule could lead to new forms of confusion. Practitioners may think, from the use of the term “relevant,” that all the facts pertinent an argument must be in this new Statement. We assume this would not be a correct reading of the words, “setting out the facts relevant to the issues submitted for review,” particularly since the statement is required to be “concise.” Accordingly, NACDL suggests that the Advisory Committee Note concerning this change be expanded somewhat to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument for reversal (or affirmance, in the case of the appellee's brief) arises out of the factual history of the case.

Conversely, we assume that the Committee does not mean to suggest that a brief statement of “the nature of the case, the course of proceedings, and the disposition below” is *not* expected to be found in every appellant’s brief, despite the deletion of those words. As presently worded, the committee’s proposal, as we read it, could suggest that these basic “facts” are not appropriate for inclusion in an appellate brief. If those words are not restored to the Rule, then at least the Note should be amended to make the expectation clear, since their pointed elimination is potentially misleading. We suggest language such as the following: “a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review ....”

*Form 4 - IFP.* The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoners seeks to appeal “a judgment in a civil action or proceeding.” NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding “(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255).” Such proceedings, while generally treated as “civil” for purposes of appeal, are not governed by the PLRA. See, *e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these proposals. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,  
*s/Peter Goldberger*

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