COUNCIL OF APPELLATE LAWYERS

ABA Judicial Division
Appellate Judges Conference
American Bar Association

COMMENTS ON PROPOSED AMENDMENTS TO FED. R. APP. P. 28 & 28.1: MERGING STATEMENTS OF THE CASE AND FACTS

(Advisory Committee on Appellate Rules Agenda Item No. 10-AP-B)

The Council of Appellate Lawyers supports the proposal to amend FED. R. APP. P. 28(a) (Appellant's Brief) by consolidating subdivisions (a)(6) and (a)(7) to require a single, combined statement of the case and facts, with conforming amendments of Rules 28(b) (Appellee's Brief) and 28.1(c) (Cross Appeals: Briefs), for the reasons summarized in the proposed Committee Note on the amendment of Rule 28(a).[1] As the Honorable Jeffrey S. Sutton observed when he initiated the study that led to these proposed amendments, the separation of the statement of the case from the statement of facts in the 1998 amendment of Rule 28(a) has confused appellate lawyers, and has unintentionally encouraged redundancy in briefs and unnecessary procedural details in descriptions of "the course of proceedings." This redundancy and excessive detail compound the potential for redundancy in other sections of the brief, especially the jurisdictional statement. All agree that redundancy and irrelevant matter in briefs disserves the courts, the parties, and the public.

The Council of Appellate Lawyers' broad survey of experienced appellate lawyers (reproduced in the appendix to these comments), our own experience and analysis, and published literature support Judge Sutton's diagnosis of the problems and the proposed solution. Recombining the statements of the case and facts, and giving lawyers flexibility in choosing the order of the elements that comprise the combined statement, should solve the unintended difficulties that followed the 1998 amendments.

However, we are concerned that the specific language of the proposed

[1] Appellate Rules Advisory Committee, Proposed Amendments to the Federal Rules of Appellate Procedure 4–5 (May 2, 2011; rev. June 2, 2011), *at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/AP_May_2011.pdf [hereinafter Proposed Amendments].

amendment of Rule 28(a) lends itself to misinterpretation. In our opinion, experience with widespread confusion and misinterpretation of the 1998 amendments indicates the need for greater specificity in this amendment's language to achieve the objectives summarized in the proposed Committee Note.

RECOMMENDATIONS

Before the 1998 amendments, FED. R. APP. P. 28(a)(3) required a single statement of the case with the content that the current subdivision (a)(6) prescribes, followed by a statement of facts as described in the current subdivision (a)(7).[2] Modest as the 1998 change was, dividing the pre-amendment statement in two led some lawyers to increase the procedural details in descriptions of "the course of proceedings" beyond what was pertinent to deciding the appeal. Further, separation of the statements coupled with requiring description of "the course of proceedings" to precede the statement of facts—which reverses the actual chronological sequence—led to repetition of some procedural details in the chronological statement of facts.

The consensus solution is to combine the contents of subdivisions (a)(6) and (a)(7) to create a statement of the case that includes the facts—which in substance would recreate the pre-1998 Rule 28(a)(3)—but *not* prescribe the order of the elements. That would permit, at counsel's option, "a statement of the case briefly indicating the nature of the case," followed by a chronological "statement of facts relevant to the issues submitted for review," followed by a concise chronological description of "the course of proceedings" to the extent relevant to the issues submitted for review, with a brief and purely factual summary of "the disposition below"—or, alternatively, "the

[2] As now in force, FED. R. APP. P. 28(a)(6)–(7) provides:

> (a) APPELLANT'S BRIEF. The appellant's brief must contain, under appropriate headings and in the order indicated: ….
>
> (6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
>
> (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e)); ….

rulings presented for review"[3]—as part of the chronological "course of proceedings."

According to the Committee Note, the proposed amendment of Rule 28(a) implements the consensus solution described in the preceding paragraph:

> 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.[4]

The Council of Appellate Lawyers supports amending Rule 28(a) as described in the Committee Note. In our opinion, it is the best solution to problems that are frequent in appellate practice under the current rule. It is also the solution favored by a substantial majority of experienced appellate lawyers who responded to our survey (see the appendix to these comments).

Unfortunately, the proposed amendment does not conform to the amendment's description in the Committee Note. The proposed amendment's language differs materially from a consolidation of subdivisions (a)(6) and (a)(7).

- The proposed amendment would eliminate current subdivision (a)(6)'s brief indication of "the nature of the case." In the many discussions and commentaries on Rule 28(a) that we have read, we do not recall any that recommended eliminating this very useful introduction to the case that sets the stage for the rest of the brief. We believe it helps the court to know at the outset that the case is, for example, an action for patent infringement, or a medical malpractice case arising under diversity jurisdiction, or a civil antitrust action for price fixing. Since the preamble of Rule 28(a) states that a "brief must contain" the contents prescribed by the numbered subdivisions "in the order indicated," any contents not prescribed are, at least arguably, forbidden.

- The proposed amendment would eliminate entirely current

[3] Proposed Amendments at 2.

[4] Proposed Amendments at 5.

subdivision (a)(6)'s "course of proceedings." While we recognize the problem caused by inclusion of *irrelevant* procedural details, the solution is not to banish *all* procedural history. The solution is to make clear that procedural history should be limited to that which is necessary to inform the court of the posture of the case and give context to the issues presented for review. Some issues on appeal, and some appeals, may be based entirely on the procedural course in the lower court.

- Current subdivision (a)(7) prescribes "a statement of facts relevant to the issues submitted for review." The proposed amendment would change "a statement of facts" to "setting out the facts." While this does not alter meaning, the change is inconsistent with the carefully crafted styling of the rest of Rule 28(a), which consistently uses nouns to define a brief's elements (e.g., "a table," "a statement," "the basis," "an assertion," "a summary," "the argument").[5] The proposed language is a verb construction that describes what the statement of facts *does*, rather than a noun construction that defines what it *is*.

- The proposed amendment would replace current subdivision (a)(6)'s "the disposition below" with "identifying the rulings presented for review." In our opinion, "identifying" is vague and will lead to unnecessary confusion, especially for those with less appellate experience—that is, those most in need of clear guidance. The proposed language could mean any of the following, *none* of which is what the rule intends: (a) citation to the pages in the appendix or record where the rulings appear; (b) the district court's docket numbers for the rulings; or (c) the titles and dates of the documents that contain the rulings. On the other hand, the proposed "rulings presented for review" is more accurate than, and therefore preferable to, the current

[5] The restyling of the Federal Rules of Appellate Procedure effective December 1, 1998, was the first product of the Judicial Conference's multi-year project that restyled all the federal rules of practice and procedure. Based on innovative principles developed by Bryan Garner, the restyling project modernized the rules' language, eliminated jargon, shortened sentences, improved clarity, and brought consistency to the federal rules, among other benefits. *See generally* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996).

> "disposition below." For example, "the rulings presented for review" might include evidentiary rulings, jury instructions, and interlocutory orders that *resulted* in the disposition below.

Considering the specific problems to be solved and to reduce the likelihood of confusion, such as that which followed from the 1998 amendment, we propose the following reformulation of Rule 28(a)(6) to implement the solution described in the proposed Committee Note:[6]

> (6) a statement of the case, which must contain:
>
> (A) a brief statement of the general nature of the case;
>
> (B) a concise statement of facts relevant to the issues submitted for review;
>
> (C) a concise statement, without discussion or argument, of those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and
>
> (D) a concise statement, without discussion or argument, of the rulings presented for review.

We also propose amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief.[7] Like all prior versions, the current version of Rule 28 and the proposed amendment require record citations only in the statement of facts. While experienced appellate counsel

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[6] The structure of this proposed amendment is modeled on current Rule 28(a)(8).

[7] *See* 11TH CIR. R. 28-1(i) (emphasis added): "In the statement of the case, *as in all other sections of the brief*, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found."

should know better, this leads some lawyers to believe that record references are unnecessary elsewhere in the brief. Statements in briefs that lack citations to the appendix or record waste the time of court personnel, especially law clerks.

Finally, to reduce redundancy, we recommend amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument.

HISTORICAL CONTEXT

As originally adopted effective July 1, 1968, FED. R. APP. P. 28(a) provided as follows:

> BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
>
> (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.
>
> (2) A statement of the issues presented for review.
>
> (3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).
>
> (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.
>
> (5) A short conclusion stating the precise relief sought. [8]

Rule 28(a) remained unchanged for 28 years. Subsequent history has been one of accretion, often to nationalize additional contents prescribed by some circuit rules.

- The first amendment, in 1991, added the jurisdictional statement.
- A 1993 amendment required the argument to include a statement of the standard of review for each issue on appeal. The Committee Note explains that this addition was based on favorable

[8] According to the Committee Note, FED. R. APP. P. 28 was modeled on SUP. CT. R. 40, which corresponds to current SUP. CT. R. 24.

experience in five circuits that had imposed this requirement by local rule.

- Amendments to subdivisions (a) and (b) in 1994 added the requirement that main briefs include a summary of the argument, to precede the argument itself. Again, this addition was based on rules in several circuits. Before this amendment, including a summary of the argument was optional.
- Finally, the amendments effective December 1, 1998, the year of restyling, made four additions to subdivision (a): the corporate disclosure statement, subdivision (1); separating the table of contents, subdivision (2), and table of authorities, subdivision (3), which many lawyers did before the amendment; the certificate of compliance with the length limitation, where required, subdivision (11); and, most pertinent here, separating the statement of the case, subdivision (6), and statement of facts, subdivision (7).

ANALYSIS OF THE PROBLEM

So far as we recall, the original 1968 formulation of the combined statement of the case and facts in FED. R. APP. P. 28(a)(3) was unproblematic throughout the 30 years it was in force. The 1998 amendment to that formulation was remarkably modest: all it did was add a separate heading for the statement of facts. The amendment did not change the contents that the original rule required or their prescribed order. Logically, the amended version should have been as unproblematic as the original. But experience under the amendment defies that logic.

One can only speculate why. Perhaps some lawyers believed that the amendment's isolation of the statement of the case signaled a greater emphasis on, and therefore devoting more pages to, the contents described in subdivision (a)(6). Perhaps this led some lawyers, especially those with limited training and experience in appellate practice, to puzzle over the undefined "nature of the case" and to suppose that that stating "the course of proceedings" required listing each pleading, motion, discovery demand, and stipulation extending time. When they moved to the separate statement of facts, they felt obliged to repeat some of the same procedural facts as part of the

factual chronology. Combining this with other elements of the brief—the relatively new jurisdictional statement, the newly required summary of argument, and the argument itself—some procedural facts might be stated five times, instead of twice or thrice. This multi-redundancy, even if confined to a minority of briefs, disserves the courts.

Many knowledgeable observers are dissatisfied with the current formulation. The Council of Appellate Lawyers shares the concerns that led the Appellate Rules Advisory Committee to re-examine Rule 28(a)(6) and (7). Indeed, on invitation by the Advisory Committee's Chair in 2002, the Council proposed recombining the statements of case and facts based on concerns similar to those that led to the current proposed amendment.[9] The Advisory Committee took up our recommendation in 2003 and again in 2004. On those occasions, several members expressed their dissatisfaction and observed widespread confusion among practitioners about what the statement of the case should include. However, the Advisory Committee reached no consensus to amend the rule and dropped the item from its working agenda.[10]

Several circuits have adopted local rules that elaborate or conflict with FED. R. APP. P. 28(a)(6)–(7).[11] According to two experts in federal appellate practice, one of whom is a member of the Advisory Committee, "The language of Rule 28 is somewhat murky on the relationship between the Statement of the Case and the Statement of the Facts, which is a separate, required section."[12]

In 2010, at Judge Sutton's suggestion, the Advisory Committee on Appellate Rules launched a study (Agenda Item No. 10-AP-B) of

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[9] Letter from Robert A. Vort to Honorable Samuel A. Alito, Jr., 5 (September 17, 2002) (considered as Item No. 02-12 on the Advisory Committee's agenda).

[10] Catherine T. Struve, Memorandum on Item No. 10-AP-B, 2–6 (March 13, 2010).

[11] Catherine T. Struve, Memorandum on Item No. 10-AP-B, 13–15 (March 11, 2011), reproduced in the agenda materials for the Advisory Committee's April 2011 meeting at 185–99, in Tab V-A-2 (Item No. 10-AP-B).

[12] Douglas N. Letter & Mark B. Stern, *Substantive Statements and Summary of Argument*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY 225, 226 (Anne Marie Lofaso et al. eds., 2010).

whether to repeal or amend the current requirement that the appellant's brief include "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below," FED. R. APP. P. 28(a)(6), followed by a statement of the facts relevant to the issues on appeal, FED. R. APP. P. 28(a)(7), under separate headings.[13] As was the case in 2003 and 2004, some members of the Advisory Committee have expressed concern that subdivision (6) confuses some lawyers and has unintentionally encouraged redundancy in briefs.

In considering this issue, we spoke informally with many experienced appellate lawyers and some appellate judges. We also invited comments from the Council of Appellate Lawyers' membership. All the written comments we received are included in the appendix to this report. Many of those comments reflect widespread confusion about what to include in the statement of the case or how to differentiate it from the statement of facts—either by the commentators themselves (including a teacher of appellate practice) or observed by the commentators in other lawyers.[14] Likewise, many of the comments observe that the separate statements of the case, facts, and jurisdiction lead to repetition and excessive procedural history beyond what will aid the court in deciding the appeal. Close reading of the comments reveals that appellate specialists who profess to understand the current rule do not all understand it the same way.

Even comments that oppose amending the rule do not do so on the ground that practice under the current rule is satisfactory. Rather, they propose other solutions to the acknowledged problems, including better education of appellate advocates, restricting appellate practice to certified specialists, and local circuit rules that override FED. R. APP. P. 28(a)(6)–(7). One comment despairs, "I don't know that changing the

[13] "The appellant's brief must contain, under appropriate headings and in the order indicated," the items listed in FED. R. APP. P. 28(a). The appellee's brief must contain the same elements in the same order, except for the "short conclusion stating the precise relief sought," FED. R. APP. P. 28(a)(10), and with appellee having the option to omit several of the elements, including the statements of the case and the facts, "unless the appellee is dissatisfied with the appellant's statement ...." FED. R. APP. P. 28(b).

[14] *Accord* Letter & Stern, *supra* p. 8 note 12, quoted *supra* p. 8.

rule will necessarily solve the problem of attorneys including irrelevant information."

Similarly, two recent writings in the same publication differ on how to frame the statement of the case. One, after stressing the importance of a powerful statement of facts in chronological order, teaches the following approach under the subheading "Adhere to a chronological structure even if you have to include a separate Statement of the Case":

> In many appellate courts, you are required to have a separate "Statement of the Case" that must precede the "Statement of Facts." If so, my recommendation is not to abandon a chronological structure. Rather, you can draft a pointed one- or two-paragraph statement that relays the critical procedural events of the case but does not attempt to address them in detail. Leave the detail for the procedural history section of your Statement of Facts….[15]

The other advocates a different treatment:

> From this [the language of FED. R. APP. P. 28(a)(6)–(7)], one might (wrongly) infer that the Statement of the Case should contain relevant procedural history and the Statement of Facts should contain only a discussion of record evidence. That impression is heightened by reference to the Advisory Committee's statement that the rule provides for two statements, "one procedural, called the statement of the case; and one factual, called the statement of facts."
>
> In practice, however, it is probably more accurate to view the Statement of the Case as providing a brief introduction to and summary of the Statement of Facts. The Statement of Facts will then not only set out the relevant evidence but also will present a full account of prior proceedings. In that sense, the Statement of the Case bears approximately the same relation to the Statement of Facts as the Summary of Argument to the Argument.[16]

Both of these writings counsel lawyers to ignore the explicit distinction between subdivisions (6) and (7), a distinction that is reinforced in the authoritative Advisory Committee Note that accompanied the 1998 amendment.

Widespread dissatisfaction with the current rule among appellate

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[15] Lawrence D. Rosenberg, *The Appellate Brief*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY, *supra* p. 8 note 12, at 181, 199.

[16] Letter & Stern, *supra* p. 8 note 12, at 227 (footnote omitted).

specialists, lingering confusion about what the statement of the case should contain, and the counterproductive practices by a minority of practitioners are pivotal factors that warrant amendment of the rule.

ANALYSIS OF POSSIBLE SOLUTIONS

Because FED. R. APP. P. 28(a) has a long history, an amendment cannot be written on a clean slate. Practitioners will not look merely at the rule as amended. They will compare it to the current version of the rule, and possibly prior versions, to divine the amendment's intent. In view of the unanticipated misunderstanding of the 1998 amendments, the amended rule should provide an extra measure of clarity.

Our proposed reformulation of Rule 28(a)(6), *supra* pp. 2–6, increases specificity by adding subdivisions devoted to each element of the combined statement. We also recommend more explanation in the text of the amended rule. We believe this is important to avoid misunderstanding and to educate lawyers who are not appellate specialists. Not all lawyers read Committee Notes with the same care as they read the rules; some do not read the notes at all, and some are not aware that they exist. Indeed, some of the lawyers who are most in need of explanation may be among the least likely to read Committee Notes.

Some commentators suggest reversing the prescribed order of the separate statements of case and facts, to correspond to the usual chronological order: (1) plaintiff patents invention (fact); (2) plaintiff sues for infringement (case). In many appeals, perhaps most, this sequence would be optimal. However, in appeals that primarily concern procedure in the lower court, it may be preferable to begin with the pertinent procedural facts upon which the appeal turns. This may be true, for example, where a district court enters final judgment on a motion for summary judgment and the losing party's main argument is that the trial court erred in granting summary judgment without first allowing reasonable discovery. Therefore, we favor allowing counsel flexibility to order the elements as counsel believes most appropriate for the particular appeal.

Another possible solution, suggested in one or two comments we received, is to eliminate altogether "the course of proceedings." In our opinion, this is an overreaction to the present problems; a larger number of the comments we received share our opinion. Some

procedural history is necessary to inform the court of the posture of the appeal and give context to the issues presented for review. And, as explained above, aspects of the procedural history will be dispositive of some appeals. Therefore, that is one of our disagreements with the proposed amendment that was published for comment.

CONCLUSION

We respectfully offer these comments for consideration by the Advisory Committee on Appellate Rules, and recommend adoption of the amendments proposed *supra* pp. 2–6.

February 2012

Respectfully submitted,

Steven Finell
Chair, Rules Committee
StevFinell@aol.com

About the Council

The Council of Appellate Lawyers is a part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only nationwide Bench-Bar organization devoted to appellate practice. The views expressed here are solely those of the Council, and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

APPENDIX

COMMENTS BY MEMBERS OF THE COUNCIL OF APPELLATE LAWYERS

QUESTION

-----Original Message-----
From: for the Council of Appellate Lawyers, part of the Appellate Judges Conference/JD [mailto:AJCCAL@MAIL.ABANET.ORG] on Behalf of Steven Finell
Sent: Tuesday, January 25, 2011 10:03 PM
To: AJCCAL@MAIL.ABANET.ORG

Subject: Requests for Comments on Fed. R. App. P. 28(a)(6) - Statement of the Case

Judge Jeffrey S. Sutton, Chair of the Appellate Rules Advisory Committee, has asked the Council of Appellate Lawyers to comment on a proposal to repeal or amend Fed. R. App. P. 28(a)(6), which requires the appellant's brief to include a "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." This requirement was added in 1998. Before that, rule 28 required a statement of the case that included both the procedural history and the relevant facts.

Judge Sutton is concerned that some lawyers unnecessarily repeat some of the same material in the statement of the case, the jurisdictional statement, and the statement of facts. He is also concerned that some lawyers include unnecessary procedural details that have no bearing on the appeal.

If you have any comments on this proposal, please email them to me. Thank you.

Steven Finell
Chair, Council of Appellate Lawyers Rules Committee

RESPONSES

When I read your email, the first thought that came to mind is a law school legal writing class. The majority of what is taught is to teach students how to write but the methods and requirements are generally forgotten by the student the first time a partner gives the summer associate an assignment. At that point all that matters is the style the

boss prefers. However, one part of the law school legal writing experience that carries over to the real world is the repetitive and structured nature of the writing. I did a quick search and found the quote below my text. I would personally suggest removing the requirement, however, like the partner referenced in the quote a busy judge may find the section a necessary evil for his/her quick initial review of a brief. That being said, I would turn the question back to Judge Sutton and ask if he and his colleagues find it a useful exercise.

"I tried everything I could think of in an effort to persuade them to accept the theory behind the CRAC format but they just wouldn't buy it. Regardless of the philosophical rationalization proffered in support of the CRAC format, it was met with shaking heads and looks of disdain. And then, way in the back, a young woman raised her hand in obvious annoyance. 'I was an English major,' she said. 'I know how to write. Why should I write like that when it seems so stilted and repetitive?' she asked. And that's when, with nothing left in my arsenal, I blurted out the only answer I could think of: 'Because your boss is billing the client $400 an hour and your client won't pay him to spend 20 minutes poring over your memo just to find out what your conclusion is.' " (http://west.thomson.com/pdf/perspec/Spring%202003/Spr033.pdf)

I agree with. Judge Sutton

I agree with the proposal. At the very least, it will cut unnecessary verbiage from a brief.

I'd support an amendment. As the rules are written, it's hard to avoid duplication over those three sections. I've only been practicing since 2002, but the 1998 version of the rule makes a lot of sense to me. One statement of the case setting out the factual background, the procedural posture, and the basis for appellate jurisdiction ought to do the trick, and it would be a whole lot easier to write.

Steven, I appreciate Judge Sutton's concern. I have taught Appellate Advocacy at … and both in teaching and in my own practice, I have found the same, often necessary repetition in the jurisdictional statement, statement of the case, and statement of facts.

The jurisdictional statement seems to me to stand on its own, but the statements of case and facts overlap in almost all cases, although more in procedurally driven appeals than otherwise. For a teacher, differentiating the two types of statements is difficult. I would suggest keeping the jurisdictional statement requirement but substituting a combined statement of case/facts.

I'm sure that's true, but I don't know that changing the rule will necessarily solve the problem of attorneys including irrelevant information. That may be a problem with the attorneys, not the rule.

When properly used, the rule serves a very useful function. It allows judges to know whether this is a commercial dispute, personal-injury action, or civil-rights claim. It allows the judges to know whether it is an appeal from a jury or bench trial, and whether judgment was entered on a verdict or notwithstanding a verdict. It also allows the judges to learn the name of the trial judgment, and the size of any judgment.

Judge Sutton's complaint seems to be that a lot of lawyers don't know how to write a good brief, in that they include unnecessary information or repeat things needlessly. That can't be legislated against. A better solution would be to adopt something akin to the British barrister system and require special certification before one can appear in an appellate court.

I'm against a change to the rule.

I think the statement of the case can serve a valuable purpose, so I would not want to see it eliminated. I know how I use that statement – as an overview of the case that gives me a context for what I am about to read. If that was the legislative intent behind the rule, perhaps the

rule needs to be rewritten, not removed:

> (6) a one-paragraph summary of the relevant facts of the case and issues on appeal, suitable for inclusion in the court's website description of the docket;

What do you think?

Personally, I have used the brief statement of the case in lieu of an introduction, and have never had more than one page. As for course of proceedings, I have written things like "Plaintiff filed her Complaint in early 2007, and following extended discovery Defendant filed a Motion for Summary Judgment which was granted by the District Court on December 17, 2010."

I think whether you have this rule or not, there are folks who will (as I did in the first few appellate briefs I did back when I started) include each and every pleading and date. The distinction for me came with experience. Perhaps if the rule were amended to state "the course of relevant proceedings" it might send the message to less experienced appellate practitioners that they should leave out those things that are not relevant to the appeal.

I agree with the proposal. My experience has been the same as Judge Sutton's with duplication between the statement of facts and statement of the case, and unnecessarily detailed discussions of the immaterial procedural history.

My preference would be elimination of the requirement to include a statement of the case in the briefs. I agree that the statement of the case is duplicative of other parts of the brief.

But I do see some purpose in having the appellant provide "the nature of the case, the course of the proceedings, and the disposition below" earlier in the appeal -- particularly in cases with inexperienced appellate counsel or pro se appellants. Such information could be provided in a "docketing statement," such as that used by the Texas appellate courts under Texas Rule of Appellate Procedure 32. Having a

“docketing statement” in the early stages of an appeal would expedite the identification of jurisdictional or procedural problems and would provide additional information for judges in their self-recusal decisions.

Steve, thanks for your email about modifying FRAP 28(a)(6). Judge Sutton’s concerns are well-taken. My firm has long disliked the way Rule 28(a)(6) interacts with other components of Rule 28(a), so we’ve submitted a letter addressing our particular concerns. (A PDF copy is attached.) Our points are separate from the concerns Judge Sutton identified, but please feel free to weigh in on them as you see fit when preparing CAL’s response.

NOTE: The attached PDF was the letter from Peder K. Batalden to Peter G. McCabe dated January 27, 2011

FYI from a legal writing professor:

I looked at several other similar rules and thought this might be a good starting point. I believe the items I’ve incorporated are important to the Court’s complaints and for the sake of brevity, but that it could be better written.

Proposal to Amend Fed. R. App. P. 28 (a)(6)

“The Statement of the Case shall contain a brief summary of the state of the case, to include: (1) a description of the form (nature) of the action, (2) a brief procedural history and (3) a brief synopsis of any prior determination(s) issued by any court or governmental agency. Matters provided in the Statement of the Case should not be repeated; matters that have no bearing on the appeal should not be included, and; the Statement of the Case should not contain any argument. “

Whether the “form of the action” or the “nature of the action” is used, is a matter of choice.

I believe the jurisdictional statement and the statement of facts should be separately discussed under separate headings.

I appreciate this opportunity to comment.

I am opposed to eliminating this from FRAP 28 because I think it can be handled by local rule. For example, the D.C. Circuit's local rules say that a statement of the case is not required. This gives counsel a choice, and many counsel omit the section from D.C. Circuit briefs. A local rule can also advise counsel to avoid repeating information that has already been presented in the jurisdictional statement, such as procedural information about the filing and timeliness of the notice of appeal.

There are times when a statement of the case is warranted. For example, when an appeal arises from earlier protracted proceedings--such as a previous appeal and remand--it is helpful to give the court the procedural history of the case--and to give it up front rather than waiting until the end of the statement of facts to end with a factual statement of litigation history. (Lately I've had a number of appeals that have previously been on appeal.) If a case has gone to the Supreme Court and has been sent back to the circuit court, the statement of the case is the place to give that information at the outset.

Another example is when there are multiple claims and parties, but not all of those claims or parties are involved in the appeal. This occurs not only in the context of a Rule 54(b) certification, but also when the case below has been processed through multiple stages--e.g., a previously unappeased 12(b)(6) ruling knocking out some claims or parties, followed by summary judgment ruling on some other issues, followed by trial. It's helpful to clarify separately and at the outset--in the statement of the case--what the case was when it began, what it is now, and why (in terms of claims and parties).

I also like that the statement of the case is an opportunity for counsel to present a thematic statement of what the case is about, an opportunity that doesn't exist in other pre-argument sections. (Of course, many lawyers alternatively insert an introduction before the jurisdictional statement.)

Steven - in my experience, the Statement of the Case seldom contains anything that is not already in the Statement of Facts.

In the Kansas state courts, the appellant is required to indicate the "Nature of the Case." Despite the fact that the judges have repeatedly urged that this not be used for argument, it often is. I think the problem (if you want to call it that) is even more pronounced in the federal appellate courts where rule 28(a)(6) requires more than just the "nature" of the case. I recently received an appellant's brief in which the Statement of the Case extended 7 pages and was probably 80% argument. Under the circumstances, I could not say I was satisfied with the appellant's statement and had to do my own in the appellee's brief.

I think that if the Statement of the Case requirement were eliminated, the Court would receive all the information that is needed about the nature of the case and the proceedings below from the Jurisdictional Statement and the Factual Statement.

As an aside, it seems to me that the Jurisdictional Statement is also superfluous in most instances. The docketing statement usually provides all that is needed in this regard. I also find it cumbersome to have to provide a Summary of the Argument, before the argument itself. Of course, the judges are in a better position to determine what information they really need in the briefs.

Thank you for providing the opportunity for input.