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"MAKING COPIES": RECOVERING E-DISCOVERY COSTS IN THE THIRD CIRCUIT AFTER RACE TIRES

By Thomas S. Jones and Anderson T. Bailey, Jones Day

Practitioners are well aware of the high costs of discovery in the electronic age. Discovery comprises approximately half of all litigation costs and accounts for an incredible 90% of costs in the most expensive cases.[1] Requests for production might require a party to spend vast sums to gather, process, review, and disclose millions of pages, impacting overall case valuation and settlement discussions. Indeed, commentators have reported the average e-discovery costs for mid-size lawsuits to be approximately $3.5 million, with outliers in the tens of millions.[2]

In one of the first appellate decisions to address whether a prevailing party can recover such costs, the Third Circuit recently reversed the taxation of more than $335,000 in e-discovery costs against an unsuccessful plaintiff. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (2012), *petition for cert. filed* (U.S. June 14, 2012) (No. 11-1520). The Court's opinion clarifies several points—and raises several questions—that trial and appellate litigators should consider as this area of the law continues to develop.

I.

The so-called "American rule" avoids requiring the losing party to reimburse its adversary for all litigation expenses. Thus, although Federal Rule of Civil Procedure 54(d) provides that "costs … should be allowed to the prevailing party," victorious parties can attest that what seems like a broad allowance is actually much more narrow. As used in Rule 54, "costs" can mean only those expenditures that fit into one of six categories enumerated by statute in 28 U.S.C. § 1920. Subsection 4 of that provision defines "costs" to include "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case[.]"

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CHANGE TO APPELLATE BRIEF FORMAT CURRENTLY UNDER CONSIDERATION

By Jonathan D. Klein, Gibbons P.C.

The Judicial Conference will soon be considering proposed amendments to Federal Rule of Appellate Procedure 28 ("Briefs") that would combine an appellate brief's "statement of the case" and "statement of facts" into a unified statement.

Rule 28 currently requires a "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below," *see* Fed. R. App. P. 28(a)(6), followed by a separate "statement of facts," *see* Fed. R. App. P. 28(a)(7). The proposed amendment to Rule 28(a) would consolidate sub-paragraphs (a)(6) and (a)(7), and instead require that an appellant's brief contain:

> (6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e)).

The amendment was proposed because the separate statements now required by Rule 28(a)(6) and (7) can impede a logical presentation of the issues. As amended, the Rule would permit the drafter of a brief to "weave those two statements together and present the relevant events in chronological order."

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CHANGE TO APPELLATE BRIEF FORMAT…—continued from page 1

See Appellate Rules Advisory Committee, Proposed Amendments to the Federal Rules of Appellate Procedure 5 (May 2, 2011; rev. June 2, 2011), available **here**.

As the Committee recognized, many cases are most readily understandable if the events (whether deemed "procedural" or "factual") are interwoven in a chronological statement. In some cases, however, a statement that discusses factual and procedural matters separately may work best. Because the amended Rule "permits but does not require" an interwoven chronological narrative, either approach may be accommodated within the new, unified statement of the case.

The Rule 28 amendment process demonstrates well the value of the robust notice-and-comment process followed by the Judicial Conference. The Federal Rules have a "pervasive and substantial impact" on the practice of law in the federal courts, and therefore "exacting and meticulous care [is required] in drafting rule changes."[1] The opportunity to comment, and strategies to ensure that comments are effective, are of particular importance to practitioners.

From August 12, 2011, through February 15, 2012, the proposed amendment to Rule 28 was open for comment by the bench and bar, publishers, and the general public. See Lee H. Rosenthal, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States - Memorandum to Bench, Bar, and Public 1 (August 12, 2011), available **here**. Various members of the bench and bar submitted comments for review.

The American Bar Association's Council of Appellate Lawyers was particularly concerned that the deletion of current Rule 28(a)(6)'s references to the "nature of the case" and "the course of proceedings" might be interpreted to "banish all procedural history" rather than to merely encourage a procedural statement "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." See Steven Finnell, Council of Appellate Lawyers: Comments on Proposed Amendments to Fed. R. App. P. 28 & 28.1: Merging Statements of the Case and Facts 3-4 (February 2012), available **here**.

The National Association of Criminal Defense Lawyers submitted comments in support of the amendment, but proposed the following language to ensure clarity:

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

See Peter Goldberger, Comments of the National Association of Criminal Defense Lawyers 2 (February 14, 2012), available **here**.

The Hon. Jon O. Newman of the U.S. Court of Appeals for the Second Circuit opposed the amendment, fearing that critical matters of procedural history could be inconveniently buried in factual detail. A legal publisher also submitted comments in opposition, while a public defender's office and a civil defense bar organization expressed support.

It was "[i]n response to the[se] commenters' concerns" that the current draft was revised to insert an explicit reference to "relevant procedural history." *See* Committee on Rules of Practice and Procedure 565 (June 11-12, 2012), available **here**. In addition, the Committee Notes were revised to specify the components of the statement of the case, and to explicitly provide that subheadings may be used, e.g., to highlight for the court the rulings presented for review. The Standing Committee approved the amendment, as revised, on June 11, 2012.

The success of the rulemaking process depends on the participation of the bench and bar. As shown by the Rule 28 amendment process to date, a well-crafted comment can provide insight, help the Advisory Committee understand the practical implications of its proposal, and encourage necessary revisions to ensure clarity in the rules. Here, the comment process has helped the relevant committees to design a rule that will best accomplish their stated goal, which is to streamline information contained in appellate briefs and eliminate the artificial distinction between the "statement of the case" and the "statement of facts."

The Standing Committee will next submit the proposed amendment to the Judicial Conference. Assuming this amendment survives review by the Judicial Conference, the Supreme Court, and the Congress, its earliest effective date would be December 1, 2013.

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1. Because some readers may be unfamiliar with the process for amending the Rules and for submitting comments on proposed amendments, the steps are outlined here: (1) Initial Consideration by the Advisory Committee; (2) Publication and Public Comment; (3) Consideration of the Public Comments and Final Approval; (4) Approval by the Standing Committee; (5) Judicial Conference Approval; (6) Supreme Court Approval; and (7) Congressional Review. *See* Hon. Thomas F. Hogan, The Federal Rules of Practice and Procedure Administrative Office of the U.S. Courts 1-4 (October 2011), available **here**; *see also* Luther T. Munford, "The Practical Litigator," The American Law Institute - American Bar Association Continuing Professional Education 2 (July 1998), available **here** (helpful hints to remember when drafting a comment).

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