Minutes of Spring 2005 Meeting of
Advisory Committee on Appellate Rules
April 18, 2005
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 18, 2005, at 9:15 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Robert D. McCallum, Jr., Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee, and his law clerk, Ms. Brook Coleman; Judge J. Garvan Murtha, liaison from the Standing Committee; Ms. Marcia M. Waldron, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

Judge Alito welcomed Justice Holland and Dean McAllister to the Committee. Judge Alito also said that the Committee was pleased to have Associate Attorney General McCallum representing the Solicitor General at this meeting.

II. Approval of Minutes of November 2004 Meeting

The minutes of the November 2004 meeting were approved.

III. Report on January 2005 Meeting of Standing Committee

The Reporter said that this Advisory Committee had not requested action on any items at the Standing Committee's January 2005 meeting.

The Reporter said that Judge Alito had described the intention of the Advisory Committee to take a "dynamic-conformity" approach to protecting the privacy of court filings, permitting the Bankruptcy, Civil, and Criminal Rules Committees to make the policy choices,

and incorporating those choices by reference in the Appellate Rules. The Reporter said that the Standing Committee expressed support for that approach.

The Reporter also said that Judge Alito had described the excellent study that the FJC had done on the proliferation of local rules regarding briefing. This provoked an animated discussion among members of the Standing Committee, with a couple of attorney members urging the Advisory Committee to aggressively pursue more uniformity, and a couple of judge members urging the Advisory Committee to instead exercise restraint and permit circuits leeway to reflect local conditions. It was clear that members of the Standing Committee were not of one mind on the question of whether substantially more uniformity in briefing rules would be either feasible or desirable.

IV. Action Items

A. Item No. 01-01 (new FRAP 32.1 — unpublished opinions)

Judge Alito introduced the following proposed amendment and Committee Note:

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

(b) Copies Required. If a party cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of unpublished opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as unpublished or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court — federal or state. In particular, it takes no position on whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional. *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). (Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), of course, a federal court sitting in a diversity case is required to respect state law concerning the precedential effect of state-court decisions on matters of state law.) Rule 32.1 addresses only the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an unpublished opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because a party hopes that it will influence the court as, say, the opinion of another court of appeals or a district court might. Some circuits have freely permitted the citation of unpublished opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances.

Parties seek to cite unpublished opinions in another context in which parties do not argue that the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an argument by pointing to the presence or absence of a substantial number of unpublished opinions on a particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most no-citation rules do not clearly address the citation of unpublished opinions in this context.

Rule 32.1(a) is intended to replace these inconsistent and unclear standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal or state court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of unpublished opinions. For example, a court may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. In an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither Rule 32.1 nor this Note takes any position — they cannot be justified as a policy matter.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize

unpublished opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of unpublished opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, unpublished opinions are as readily available as "published" opinions, and soon every court of appeals will be required to post all of its decisions — including unpublished decisions — on its website "in a text searchable format." *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.

As the original justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if all unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g.*, *Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). Unpublished opinions are often read and cited precisely because they can contain valuable information or insights. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about unpublished opinions.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues

imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions, because judges know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished decisions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. It is, of course, true that every court is different. But the federal courts of appeals are enough alike, and have enough in common with state supreme courts, that there should be *some* evidence that permitting citation of unpublished opinions results in, say, opinions being issued more slowly. No such evidence exists, though.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand. Because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about the impact on judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions,

attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which make unpublished opinions widely available at little or no cost.

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, Rule 32.1 abolishes such rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion must provide a copy of that opinion to the court and to the other parties, unless that opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the unpublished opinions cited in

> their briefs or other papers. Unpublished opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of unpublished opinions, requiring parties to file and serve copies of every unpublished opinion that they cite is unnecessary and burdensome and is an example of a restriction forbidden by Rule 32.1(a).

Judge Alito reminded the Committee that, after publishing Rule 32.1 for public comment, the Committee approved the proposed rule at its April 2004 meeting. But the Standing Committee returned Rule 32.1 to the Advisory Committee for further study. The Standing Committee noted that many of the claims of Rule 32.1's opponents were capable of being tested empirically, and the Standing Committee wanted to make certain that every reasonable effort was made to gather information before making a final decision about Rule 32.1.

Judge Alito said that, over the past year, Dr. Reagan and his colleagues at the FJC have conducted an exhaustive study. The study is mostly, but not entirely, concluded. The research that has been completed was summarized in a 134-page report entitled *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report.* That report was distributed to members of the Advisory Committee before the meeting. A complete report will be circulated to members of the Standing Committee before their meeting in June.

Judge Alito said that, before calling on Dr. Reagan to describe the results of the study, he wanted to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research. Judge Alito acknowledged that the study was a major undertaking, but said that it had proven to be worth the effort, as it had supplied much-needed data to help the Advisory and Standing Committees assess the validity of arguments for and against Rule 32.1 that relied largely on speculation.

Dr. Reagan said that the FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. The FJC is done compiling the results of the two surveys (although a few more attorney responses might trickle in), but the FJC is not yet done with its analysis of the briefs and opinions.

Dr. Reagan said that the judges did not receive identical surveys. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C.

Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. Attorneys, by contrast, received identical surveys. Dr. Reagan said that the response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule

32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that

view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1 have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed to explain this anomaly, Dr. Reagan responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1 point), "a little less burdensome" (2 points), "no appreciable impact" (3 points), "a little bit more burdensome" (4 points), and "substantially more burdensome" (5 points). The average "score" was 3.1. In short, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

Judge Alito said that the AO had also done research for the Advisory Committee. Judge Alito said that, before calling on Mr. Rabiej to describe the AO's findings, he wanted to thank everyone at the AO for their hard work.

Mr. Rabiej said that the AO had identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). Mr. Rabiej reported that the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of

summary dispositions. The data failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Committee discussed the FJC and AO studies at length. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, demonstrated that the arguments against Rule 32.1 were "not proven." Some Committee members — including one opponent of Rule 32.1 — went further and said that the studies in some respects actually refuted those arguments.

A few members cautioned that it was important not to overstate the results of the studies. The studies relied to a substantial extent on predictions, and predictions are inherently unreliable. One member said that the claims of Rule 32.1's opponents were not only "not proven," but "not provable." Other members pointed out, though, that the AO's work did not rely at all on predictions, and that a good part of the FJC's work involved asking judges and attorneys what *had happened*, not what *will happen.*

A member pointed out — and Mr. Rabiej agreed — that the AO's data were inherently limited. Over a one- or two-year period, there could be many reasons why case disposition times might increase or decrease. The AO's study makes it fairly clear that liberalizing or abolishing no-citation rules does not cause an immediate and substantial increase in disposition times or in summary dispositions, but it does not show much more than that.

A member said that, in his view, one shortcoming of the FJC study is that it was not precise about the different *types* of unpublished opinions. Unpublished opinions vary dramatically, from one short paragraph that says little more than "we affirm for the reasons given by the district court" to 20 or more pages of detailed factual and legal analysis. The member said that simply asking judges about "unpublished opinions" — without differentiating among types of unpublished opinions — might fail to capture some shifts in judicial behavior that would be occasioned by Rule 32.1. For example, the member thought it likely that judges would issue the same number of unpublished opinions, but that more of those opinions would be of the one-paragraph variety.

Dr. Reagan responded that, in designing its study, the FJC had to sacrifice some precision for brevity. In general, the longer the survey, the lower the response rate. The FJC tried to design a survey that was long enough to be helpful but short enough to be answered. Asking about "long" unpublished opinions and "medium" unpublished opinions and "short" unpublished opinions would have added a lot of length and complexity to the survey and likely reduced the response rate.

Dr. Reagan and a couple of members also pointed out that the FJC had asked judges about the impact of liberalizing citation rules on the *length* of unpublished opinions. For example, the FJC asked the judges in the four restrictive circuits and in the six discouraging

circuits whether approval of Rule 32.1 would result in changes to the length of unpublished opinions. That question would seem to get at the point that concerned the member.

One member who had voted against Rule 32.1 in the past said that he had changed his mind in light of the FJC and AO studies and in light of his own further reflections. Although he was not yet prepared to support a permissive rule such as Rule 32.1, he was prepared to support a discouraging rule, such as the rule that had originally been proposed by the Solicitor General. He proposed that Rule 32.1 be amended to provide:

> (a) Citation of a written decision or disposition by the court that it determines is "not for publication" or "non-precedential" or the like is disfavored, and permitted only when: (a) it has persuasive value on a material issue [that has not been (adequately) addressed in a published decision] [and no published decision would serve as well], (b) it demonstrates the existence of a [conflict] [lack of consistency] among the court's decisions, (c) relevant to establish res judicata, collateral estoppel or law of the case, and (d) relevant for factual purposes to show double jeopardy, notice, abuse of the writ, entitlement to attorneys' fees, sanctionable conduct, related cases, or the like.

The member said that imposing a discouraging rule on the circuits would adopt the approach now taken by six circuits — a near majority — rather than the approach taken by only three circuits. Moreover, the approach would reflect what the member said he took to be the bottom line of the FJC study: that citation of unpublished opinions is generally not very useful, but there are some unpublished opinions that should be citable. The member said that, although this approach raised the possibility of satellite litigation over whether the citation of a particular unpublished opinion was proper, he thought that much of that satellite litigation could be prevented if the Committee Note would state clearly that a party who objected to the citation of an unpublished opinion should just state the objection in the party's brief and not file a motion to strike.

A second member said that he, too, had voted against Rule 32.1, but that he, too, was willing to support a version of a discouraging citation rule. He does not believe that circuits should be free to altogether prohibit the citation of unpublished opinions in unrelated cases. He believes that unpublished opinions are sometimes useful. Moreover, he believes that opinions are sometimes designated as unpublished for reasons that are improper or mistaken, and that allowing parties to cite unpublished opinions would provide a check on this practice. At the same time, he does not support Rule 32.1 because he believes that circuits should be free to require parties to provide a good reason for citing an unpublished opinion.

The second member said that he cannot support the proposal by the first member because it would force the permissive circuits to become discouraging circuits. In the second member's view, if a circuit wants to freely permit the citation of unpublished opinions, it should be able to

do so. Judge Levi asked whether the goals of the second member might be accomplished by removing the words "or restrict" from proposed Rule 32.1(a), so that the rule would read:

> **(a)** **Citation Permitted.** A court may not prohibit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

A couple of members pointed out that such a rule would not require a single circuit to change its current practice. No circuit altogether prohibits the citation of unpublished opinions; for example, every circuit allows unpublished opinions to be cited to establish res judicata. To accomplish the member's goals, Rule 32.1 would have to do more than bar circuits from "prohibiting" the citation of unpublished opinions.

After further discussion, the second member suggested that the first member's proposal be changed to provide as follows:

> (a) Citation of a written decision or disposition by the court that it determines is "not for publication" or "non-precedential" or the like shall not be prohibited, except that courts may, by local rule, permit the citation of such opinions only when: (a) it has persuasive value on a material issue [that has not been (adequately) addressed in a published decision] [and no published decision would serve as well], (b) it demonstrates the existence of a [conflict] [lack of consistency] among the court's decisions, (c) relevant to establish res judicata, collateral estoppel or law of the case, and (d) relevant for factual purposes to show double jeopardy, notice, abuse of the writ, entitlement to attorneys' fees, sanctionable conduct, related cases, or the like.

The other members of the Committee said that they would not support a discouraging version of Rule 32.1, regardless of how it was worded. These members said that a discouraging version would be inconsistent with almost all of the reasons that the Committee has given for proposing Rule 32.1, such as disagreement with the proposition that courts can dictate when their official public actions may be cited. These members gave additional reasons for not supporting a discouraging version of Rule 32.1, including:

— The version proposed by the first member would force the permissive circuits to restrict the citation of unpublished opinions. Judge Levi stressed that, although the Standing Committee has not yet voted on Rule 32.1, it is clear that there are several members who strongly support the rule, and who would strongly oppose any rule that seemed to endorse restrictions on the citation of unpublished opinions, such as the discouraging versions proposed by the two members.

— The restrictions in a discouraging version are likely to be ignored. For years, Rule 35(b) has instructed parties not to petition for rehearing unless an opinion conflicts with another opinion or addresses a question of "exceptional importance." And yet parties routinely petition for rehearing in cases that do not come close to meeting those criteria. A discouraging version would accomplish little, while at the same time putting the Committee in the position of endorsing the view that unpublished opinions may be treated as "second-class precedent" — a question on which the Committee has been careful to take no position.

— A discouraging version would do little to ease the concerns of the judges who have opposed Rule 32.1. Those judges have said that, if their unpublished opinions can be cited, they will spend much more time preparing those opinions. Under a discouraging citation rule, a judge will not know whether his or her opinion will be cited in the future. Thus, he or she will have to behave no differently than he or she would under a permissive rule.

Justice Holland said that his court — the Delaware Supreme Court — had adopted a rule similar to Rule 32.1 about 15 years ago, and the court's experience has been entirely positive. He said that unpublished opinions are not cited much, and citation of unpublished opinions is not often helpful, but he and his colleagues nevertheless *want* to know if their court has addressed an issue in the past.

Judge Stewart said that he disagrees with those who dismiss the FJC and AO studies as involving mere predictions. The fact is that three of the circuits — including his own, the Fifth Circuit — have real-world experience with rules similar to Rule 32.1, and these circuits have experienced none of the problems predicted by Rule 32.1's opponents. The Fifth Circuit is one of the largest circuits, and its per-judge caseload is always the highest or second-highest in the nation. It has a huge prisoner population, and it confronts a huge amount of pro se litigation. And yet it has had absolutely no problem living under a rule similar to Rule 32.1.

Several other members agreed with Justice Holland and Judge Stewart that Rule 32.1 should be approved.

At Judge Levi's request, the Committee moved on to the question of retroactivity: Should Rule 32.1 apply only to unpublished opinions issued after the effective date of the rule? Although one member said that he would support a prospective-only rule, other members disagreed. They pointed out that a rule that applied only prospectively would be inconsistent with almost all of the reasons why the Committee had approved Rule 32.1. How can the Committee argue, for example, that Article III courts should not be able to bar citation of their own opinions, and then approve a rule that allows Article III courts to bar citation of tens of thousands of their own opinions?

In addition, a prospective-only rule would appear to endorse the argument that judges will have to spend much more time drafting unpublished opinions — or would draft unpublished opinions much differently — if those opinions were citable. The Committee has consistently rejected this argument, and the argument now seems even weaker in light of the FJC and AO studies.

Members also expressed concern that a prospective-only rule would create a patchwork of rules and make the disuniformity problem even worse. A single court such as the D.C. Circuit might end up with one rule that governs the citation of one group of unpublished opinions, a second rule that governs the citation of another group, and a third rule (Rule 32.1) that governs the citation of yet another group.

After further discussion, the Committee agreed that, if Rule 32.1 is approved, it should be applied to all unpublished opinions — past and future. If either the Standing Committee or the Judicial Conference were to defeat Rule 32.1, and if it were to appear that a prospective-only version would pick up the necessary votes, the Committee would consider a change. For now, though, the Committee will stick with Rule 32.1 as written.

The final issue addressed by the Committee was the question of Rule 32.1's applicability to the unpublished opinions of state courts. At its June 2004 meeting, the Standing Committee asked the Advisory Committee to give thought to a concern that was raised by Chief Justice Charles Wells of the Florida Supreme Court (a member of the Standing Committee). Chief Justice Wells said that some state judges are concerned about the impact that Rule 32.1 would have on state law.

Members were of two minds. On the one hand, members did not think that the concerns of the state judges were well founded. The unpublished opinions of state courts already can be cited in most federal appellate courts, as state judges do not have the power to tell litigants what they may or may not cite in federal court. There is no evidence that such citation has caused any problems. Moreover, it is clear that under *Erie R.R. Co. v. Tompkins* a federal court sitting in a diversity case must respect a state court's determination that its unpublished opinions are not binding precedent on issues of state law. It is therefore difficult to know why state judges would be concerned about Rule 32.1.

On the other hand, the focus of the Committee from the beginning has been on federal opinions. Most federal appellate courts do not now restrict the citation of state court opinions, and it is highly unlikely that federal courts will do so if Rule 32.1 is approved. Removing state court opinions from the scope of Rule 32.1 would thus be a costless way of providing assurance to state court judges and eliminating one more objection to Rule 32.1.

A member moved that Rule 32.1 be amended by inserting the word "federal" in front of "judicial opinions" in subdivision (a) and in front of "judicial opinion" in subdivision (b), and

that the Reporter be instructed to make conforming changes to the Committee Note. The motion was seconded. The motion carried (8-0, with one abstention).

A member moved that Rule 32.1 be approved as amended. The motion was seconded. The motion carried (7-2).

A member asked that the Reporter insert into the Committee Note a citation to the FJC study. The Reporter said that he would do so.

B. Item No. 03-10 (new FRAP 25(a)(5) — electronic filing/privacy protections)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. All other proceedings are governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

* * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security

> concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.
>
> Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order or the review of a decision of the tax court — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

The Reporter reminded the Committee that the E-Government Act requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, Judge Levi appointed an E-Government Subcommittee to work with the advisory committees to develop a privacy-rule template that all of the advisory committees could then adopt with minor changes. That template has been through two rounds of review by the advisory committees, and several issues still need to be resolved.

At its November 2004 meeting, this Committee decided that, rather than try to pattern an Appellate Rule after the template, the Committee would instead amend the Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions can be left to the Committee on Court Administration and Case Management ("CACM") and to the other advisory committees — all of whom have far more of a stake in the privacy issues than this Committee — and the Appellate Rules will not have to be amended continually to keep up with changes to the other rules of practice and procedure. The Committee instructed the Reporter to draft a rule reflecting this "dynamic-conformity" approach.

The Reporter said that drafting such a rule proved more difficult than he had anticipated, in part because of complications caused by bankruptcy cases. But with the assistance of the other reporters — particularly Prof. Ed Cooper (Civil) and Prof. Jeff Morris (Bankruptcy) — he was able to draft a rule. That rule has been circulated to the other reporters, and all agree that it should work nicely.

Several members said that they continue to believe that the Appellate Rules should adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. They believe that the rule drafted by the Reporter should work well.

A member asked how trial exhibits will be treated under the proposed rule, given that they are not filed in the district court, but often filed in the court of appeals. The Reporter said that it depended on what rule governed the case in the district court. For example, if the case was governed by Civil Rule 5.2 in the district court, then Civil Rule 5.2 will apply to the exhibits filed in the court of appeals.

Another member asked why the second sentence was necessary. The Reporter said that the first sentence applies to "[a]n appeal." Although the first sentence will cover most of the business of the courts of appeals, it will not cover some things, such as original proceedings commenced by the filing of a petition for extraordinary relief under Appellate Rule 21.

A member suggested that the second sentence of the second paragraph of the Committee Note be amended by adding an explicit reference to petitions for extraordinary relief. By consensus, the Committee asked the Reporter to make the change.

A member moved that proposed Rule 25(a)(5) be approved for publication. The motion was seconded. The motion carried (unanimously).

C. Item No. 04-04 (FRAP 25(a) — authorize courts to mandate electronic filing)

Judge Alito introduced the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with technical

standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 25(a)(2)(D).

Judge Alito said that the proposed amendment to Appellate Rule 25(a)(2)(D) would authorize the courts of appeals to enact local rules that would require all papers to be filed electronically. At its last meeting, the Committee approved the proposed amendment for publication on an expedited basis. The Bankruptcy Rules Committee approved for publication an identical amendment to Bankruptcy Rule 5005(a)(2), and the Civil Rules Committee approved for publication an identical amendment to Civil Rule 5(e) (which is incorporated by reference into the Criminal Rules). The three proposed amendments were published in November 2004 and accompanied by virtually identical Committee Notes. The question now before this Committee is whether to give final approval to the proposed amendment to Appellate Rule 25(a)(2)(D).

A member said that, although the comments on the proposed amendment were not many, most of those comments made the same argument: that the national rule should either include a hardship exception or require that local rules include a hardship exception. The member said that he thought the concerns raised by the commentators were legitimate. Judge Levi responded that the advisory committees initially thought that it would be sufficient to caution in the Committee Notes that exceptions should be made to accommodate those for whom electronic filing would be impossible or difficult. However, a number of thoughtful commentators disagreed, and their arguments persuaded the Bankruptcy and Civil Rules Committees. At their recent meetings, both Committees agreed that the national rules should require that local rules mandating electronic

filing include a hardship exception. Both Committees agreed that the national rules should not spell out the scope of the hardship exception, but merely require that *a* hardship exception be included in local rules mandating electronic filing.

After a brief discussion, the Committee agreed that the national rule should include a hardship exception. The Reporter noted that the hardship exception approved by the Civil Rules Committee differed from the hardship exception approved by the Bankruptcy Rules Committee, and thus that the chairs and reporters of the advisory committees would have to get together to work out common language. The Reporter asked Judge Levi whether, given that fact, it would be sufficient for the Appellate Rules Committee simply to agree that a hardship exception should be incorporated, but leave the drafting of the exception to the advisory committee chairs and reporters — and, ultimately, to the Standing Committee. Judge Levi said that he thought it made sense to proceed in that manner.

A member asked about a concern raised by Judge Sandra L. Lynch of the First Circuit. Judge Lynch believes that many of the courts of appeals are likely to enact local rules that require parties to file their briefs electronically, but that also require parties to file one or more paper copies of their briefs. On her circuit, for example, no judge wants to receive *only* an electronic copy of a brief, although there are some who would like to receive an electronic copy *in addition to* a paper copy. The First Circuit's local rules are thus likely to require a "written" copy or "paper" copy, in addition to an electronic copy. But the last sentence of Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Judge Lynch's concern is that Rule 25(a)(2)(D) has defined both "written" and "paper" to mean "electronic," leaving the courts of appeals without an adjective to describe "real" paper. Judge Lynch would like to add a sentence to the Committee Note clarifying that nothing in Rule 25(a)(2)(D) should be read to prohibit a court from requiring a "real" paper copy of a filing — a sentence such as the following: "A local rule may require that both electronic and 'hard' copies of a paper be filed; nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise."

A couple of members, as well as Judge Levi, said that they would like to accommodate Judge Lynch. A member asked whether Judge Lynch's concern should be addressed in the text of the rule. The Reporter said that addressing the concern in the text of Rule 25(a)(2)(D) would likely result in differences between the Appellate Rule and the corresponding Bankruptcy and Civil Rules. Those rules are now virtually identical, and the Standing Committee would like to keep them as close as possible. The Reporter also said that a sentence in the Committee Note is highly likely to solve the problem — and, if it does not, the Committee always has the option of amending the rule again.

A member moved that the proposed amendment to Rule 25(a)(2)(D) be approved, with the understanding that a hardship exception will be added to the rule and a sentence addressing Judge Lynch's concern will be added to the Committee Note. The motion was seconded. The motion carried (unanimously).

Before leaving the topic of electronic filing, members of the Committee provided comments on *Draft Model Local Appellate Rules for Electronic Filing*, which Mr. Rabiej had distributed to the Committee, and which will be considered by CACM at its next meeting. Mr. Rabiej said he would communicate the Committee's comments to CACM.

V. Discussion Items

A. Item Nos. 02-16 & 02-17 (FRAP 28 & 32 — inconsistent local rules on briefs and covers of briefs)

Judge Alito reminded the Committee that Item Nos. 02-16 and 02-17 arose out of complaints about variations in local circuit rules regarding briefing. The Committee discussed the problem at its November 2003 meeting and decided to ask the FJC to collect further information. After an exhaustive study, Ms. Leary and the FJC produced a comprehensive report entitled *Analysis of Briefing Requirements in the United States Courts of Appeals*. That report was discussed at length by the Committee at its November 2004 meeting. The Committee determined that it would not undertake a major effort to bring about uniformity or near-uniformity in briefing requirements. Members disagreed about the importance of uniformity in this area, but agreed that, desirable or not, uniformity is simply not achievable. At the same time, the Committee agreed that Judge Alito should mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the rules identified by Ms. Leary and, where possible, to repeal them. The letter should also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local requirements relating to briefing.

At the Committee's request, the Reporter had prepared a draft letter, with the assistance of Judge Alito, Mr. Letter, and Mr. Rabiej. That draft letter appeared under Tab V-A in the Committee's agenda book.

The Committee discussed the draft letter at length, focusing on three issues:

First, several members suggested that the letter would be more effective if it included an "executive summary" for each circuit — pointing out, in the text of the letter, exactly which of the circuit's local rules concerned the Committee. A letter that was specific in pointing chief judges to problem rules is more likely to spur action than a letter that simply asks chief judges to read an attached report, most of which addresses the rules of other circuits. The Committee agreed, by consensus, that the letter should be revised in this manner.

Second, the draft letter asserted that "[t]he FJC confirms that many of these local rules are inconsistent with FRAP." The impression of members — confirmed by Ms. Leary — is that the local rules identified by the FJC do not directly conflict with any of the national rules, in the sense of requiring x when the national rules require *not* x. Instead, the problem was that the local

rules imposed requirements that are not imposed by the Appellate Rules. Judge Levi and the Reporter said that the two major Local Rules Projects conducted by the Standing Committee had defined "conflict" very narrowly, being careful not to characterize a local rule as "conflicting" with a national rule unless the conflict was direct. Members agreed that this Committee should follow the lead of the Local Rules Projects and that the letter should be revised so that it does not imply that any local rules on briefing are in conflict with or inconsistent with any of the Appellate Rules.

Finally, members discussed whether the letter should be stronger. For example, should the letter not only ask the chief judges to review the problematic local rules, but, if they choose to retain those rules, to justify that decision? Or should the letter ask the chief judges to let the Committee know whether the circuit decides to repeal any of the problematic local rules?

Some members expressed the fear that being too aggressive might create resentment, which, in turn, might make progress less likely. Members said that, if the letter did nothing more than cause circuits to clearly identify all local variations in one place on their websites, that would be a major accomplishment. It is hard to imagine that the circuits will object to the request that all local variations be clearly identified, unless the letter goes too far and creates a backlash. Other members agreed, but said that they believe that most chief judges will appreciate having these local rules called to their attention and appreciate the fact that the Committee is trying to use collaboration rather than coercion to address the problem.

By consensus, the Committee agreed that the letter was fine as drafted, except that it should be revised so that it does not imply that any local rules are in conflict with the Appellate Rules, and it should include a circuit-specific "executive summary" when it is mailed. Judge Alito said that, as previously agreed, he or his successor will mail the letter after the controversy over Rule 32.1 subsides.

B. Items Awaiting Initial Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) — conform to Justice for All Act)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that the "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. Section 102 of the Act creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that is of particular concern to this Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a

victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least three things about this are troubling:

First, § 3771(d)(3) provides that a single judge may issue a writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue a writ "pursuant to circuit rule or the [Appellate Rules]."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. It is difficult to imagine that a court can review a petition, order the respondent to file an answer, await the answer, read the answer, make a decision, and draft a written opinion — all within 72 hours.

Finally, the fact that the deadline is stated in hours rather than days raises interesting time-computation issues. For example, if the victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? It is not clear how the time-computation rules of Rule 26(a) will apply.

The Reporter said that, at this point, the Committee has at least three options for addressing the problems created by the Act:

One option for the Committee is to propose systematic changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus, or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting an answer, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the Committee is to add a new subdivision (e) to Rule 21 — a subdivision that would specifically address mandamus petitions filed under § 3771(d)(3). That subdivision would supersede the other rules and set up a "fast-track" system that would apply just to § 3771(d)(3) petitions.

A third option for the Committee is to do nothing for the time being. That would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be only a handful every year) and to get a better understanding of the problems that the courts of appeals will encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

Mr. Letter said that the Department of Justice believes that the Appellate Rules should not be amended at this time. He said that the Department hopes there will be very few proceedings under the Act and that the Department believes that the Committee should wait to see whether and what problems actually develop before amending the rules.

Mr. Rabiej said that the Criminal Rules Committee has decided to take a wait-and-see approach, for the reasons given by Mr. Letter and the Reporter.

A member said that he, too, favors doing nothing for the time being. He predicted, though, that victims will seek relief from the appellate courts in two situations. First, victims will assert the right to be protected from defendants, and victims will be unhappy with the level of protection that can practically be afforded. Second, victims will assert the right to full and timely restitution, but soon will grow frustrated at the inability to collect restitution from largely judgment-proof defendants.

A member said that he was not convinced that the Committee should do nothing. What would be the harm in amending the Appellate Rules to authorize a single judge to issue a writ of mandamus? Or to create a fast-track procedure for § 3771(d)(3) petitions?

Members responded that, while there would likely be no harm in the first amendment, there could be harm in the second. Members said that putting a fast-track procedure in the Appellate Rules would encourage Congress to add additional types of cases to the fast track. Before long, the courts of appeals will have an array of cases that require fast-track consideration. One member said that fast-track provisions raise substantial separation-of-powers concerns when they do not give federal judges adequate time to exercise "judicial Power" under Article III.

The member responded that, while he understood those concerns, he thought the Committee could move forward on a more modest set of amendments, such as amendments to permit a single judge to issue a writ of mandamus, to specify how deadlines stated in hours should be calculated, and perhaps to authorize the courts of appeals to use their local rules to establish a fast-track procedure for § 3771(d)(3) petitions.

After further discussion, the Committee agreed to ask the Department of Justice to study this matter further and present a recommendation to the Committee at a future meeting.

2. Item No. 05-02 (FRAP 35 and 40 — replace page limits with word limits)

Attorney Roy H. Wepner has proposed that the page limitations of Appellate Rules 35(b)(2) (petitions for hearing or rehearing en banc) and 40(b) (petitions for panel rehearing) be replaced with word limitations. An identical proposal was discussed at length by the Committee at its last meeting and rejected by vote of 2 to 5. By consensus, the Committee agreed to remove Item No. 05-02 from its study agenda.

3. Item No. 05-03 (FRAP 5 — reflect bankruptcy reform legislation)

The Reporter said that Judge Alito had asked him to investigate whether the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 will require any changes in the Appellate Rules.

The Reporter said that, as far as he can determine, only one section of the Act has a direct impact on the Appellate Rules. Under current law — found in 28 U.S.C. § 158 — an appeal cannot be taken directly from a bankruptcy court to a court of appeals. Instead, the appeal must first be decided by a district court or bankruptcy appellate panel ("BAP"). Section 1233 of the Bankruptcy Act would change that. It would amend § 158 to permit appeals *by permission* — both of final orders and of interlocutory orders — directly from a bankruptcy court to a court of appeals. Such appeals would be permitted only under certain circumstances (e.g., when an order of a bankruptcy court "involves a matter of public importance") and only pursuant to certain procedures (e.g., the circumstances — such as "public importance" — would have to be certified either by order of a lower court or by agreement of the parties). Most importantly, in all cases, a direct appeal would have to be authorized by the court of appeals.

When Rule 5 was restyled in 1998, the Committee intentionally wrote the rule broadly so that it could accommodate new permissive appeals authorized by Congress or the Rules Enabling Act process. In this instance, that strategy appears to have worked, as Rule 5 seems broad enough to handle the new permissive appeals authorized by § 1233. Indeed, § 1233 specifically provides that "an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28 . . . shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure." Section 1233 clarifies that references in Rule 5 to "district court" should be deemed to include a bankruptcy court or BAP and that references to "district clerk" should be deemed to include a clerk of a bankruptcy court or BAP.

The Reporter said that neither he nor Prof. Morris (the Reporter to the Bankruptcy Rules Committee) believes that anything in § 1233 requires this Committee to amend Rule 5. With the clarifications made by § 1233 itself, Rule 5 should suffice to handle the new permissive appeals.

The Committee discussed § 1233, with Mr. McCabe and Ms. Waldron describing some of the background to the provision. Several members agreed with the Reporter that no action

was necessary. Mr. Letter reported that he had spoken with the Justice Department's representative on the Bankruptcy Rules Committee, and he concurred that there was no need to amend the Appellate Rules.

By consensus, the Committee agreed to remove Item No. 05-03 from its study agenda.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Date and Location of Fall 2005 Meeting

The Committee will next meet in Santa Fe, New Mexico. The date will be set by Judge Alito after Mr. Rabiej canvasses the members of the Committee about their availability in October and November.

VIII. Adjournment

The Committee adjourned at 12:45 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter