

**Minutes of Fall 2002 Meeting of
Advisory Committee on Appellate Rules
November 18, 2002
San Francisco, California**

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, November 18, 2002, at 8:30 a.m. at the Park Hyatt Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Carl E. Stewart, Judge Stanwood R. Duval, Jr., Chief Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge J. Garvan Murtha, the liaison from the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office; and Ms. Marie C. Leary from the Federal Judicial Center.

II. Approval of Minutes of April 2002 Meeting

The minutes of the April 2002 meeting were approved.

III. Report on June 2002 Meeting of Standing Committee

The Reporter stated that, at its last meeting, the Standing Committee had approved this Committee's request that Forms 1, 2, 3, and 5 in the Appendix to the Appellate Rules be amended to refer to "20__" instead of to "19__." The Standing Committee also agreed that these changes were technical in nature and did not need to be published for comment.

The Reporter further stated that Judge Alito had informed the Standing Committee that this Committee was likely to act on controversial proposals to amend Rule 35(a) regarding en banc voting and to add a new rule addressing the citation of non-precedential opinions.

IV. Action Items

A. Item No. 99-09 (FRAP 22(b) — COA procedures)

Item No. 99-09 arose out of a suggestion by Judge Scirica that this Committee study the manner in which the courts of appeals process requests for certificates of appealability ("COAs")

and consider whether the Appellate Rules should be amended to bring about more uniformity. After study, the Committee agreed that the variation in circuit procedures was not creating a problem for litigants and that the Committee would allow more time for circuit-by-circuit experimentation before considering whether to impose detailed rules. However, the Department of Justice asked the Committee not to remove Item No. 99-09 from its study agenda until the Department could decide whether to pursue a proposed amendment that would prevent a court from requiring the government to submit a brief until the court first decided whether to grant a COA.

Mr. Letter informed the Committee that the Department had decided not to pursue such a proposal. A member moved that Item No. 99-09 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — Washington's Birthday)

At its April 2002 meeting, the Committee approved amendments to Rules 26(a)(4) and 45(a)(2). Those amendments substituted the phrase "Washington's Birthday" for the phrase "Presidents' Day."

After the April 2002 meeting, the Reporter received a communication from Professor R. Joseph Kimble, a consultant to the Standing Committee's Subcommittee on Style. Prof. Kimble recommended that, instead of replacing "Presidents' Day" with "Washington's Birthday," this Committee should replace "Presidents' Day" with "Washington's Birthday (commonly known as 'Presidents' Day')."

The Reporter recommended that the Committee not revisit this matter. The Reporter pointed out that adopting Prof. Kimble's suggestion would create inconsistencies between the Appellate Rules, on the one hand, and 5 U.S.C. § 6103(a) and the newly restyled Criminal Rules, on the other hand. Both of the latter refer to "Washington's Birthday" without any parenthetical.

A couple of members agreed with the Reporter. A member moved that the amendments to Rules 26(a)(4) and 45(a)(2) remain unchanged. The motion was seconded. The motion carried (unanimously).

C. Item No. 00-08 (FRAP 4(a)(6) — clarify whether verbal communication provides "notice")

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives written notice of the entry, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and~~

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of “notice” of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of “notice” triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found “that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry.” The rule was clear that the “notice” to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive “*such* notice” — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive “*the* notice.” And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice

from “the *clerk* or any party,” both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from “the *district court* or any party.”

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal “within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed].” Courts had difficulty agreeing upon what type of “notice” was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep’t of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, “the quality of the communication [had to] rise to the functional equivalent of written notice.” *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that verbal communications could be deemed “the functional equivalent of written notice” if they were sufficiently “specific, reliable, and unequivocal.” *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only “actual notice,” which, presumably, could have included verbal notice that was not “the functional equivalent of written notice.” *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A)

restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received “from the district court or any party,” see *Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, see *Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only *written* notice of the entry of a judgment or order triggers the 7-day period. “[R]equir[ing] written notice will simplify future proceedings. As the familiar request to ‘put it in writing’ suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice.” *Scott-Harris v. City of Fall River*, 134 F.3d 427, 434 (1st Cir. 1997), *rev’d on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

All that is required to trigger the 7-day period under new subdivision (a)(6)(B) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). “Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)’s] seven-day window.” *Wilkins v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has received written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

The Reporter said that a draft amendment to Rule 4(a)(6) was discussed at length at the April 2002 meeting. Pursuant to the Committee’s instructions, the Reporter made several changes to that draft amendment:

1. The contents of former subdivision (B) were moved to new subdivision (A), and the contents of former subdivision (A) were moved to new subdivision (B). The subdivisions are now set forth in a more logical order. The rule first refers to the notice that must be missing

before a party is eligible to move to reopen (subdivision (A)), and then refers to the notice that triggers the 7-day period to bring such a motion (subdivision (B)).

2. New subdivision (A) was redrafted as the Committee directed. It makes clear that only notice served upon a party under Civil Rule 77(d) will act to preclude that party from later moving to reopen the time to appeal.

3. New subdivision (B) continues to require “written” notice to trigger the 7-day period to bring a motion to reopen, and the Committee Note continues to make an “eyes/ears” distinction in defining what type of notice is “written” for purposes of subdivision (B).

4. Finally, the Committee Note was rewritten to make the “tenses” clearer — that is, to make it easier to understand when the Note is referring to a past version of Rule 4(a)(6), when the Note is referring to the present version of Rule 4(a)(6), and when the Note is referring to the proposed amendment to Rule 4(a)(6).

A member commented about the “eyes/ears” distinction used in the final paragraph of the Note to define when notice is “written” for purposes of new subdivision (B). He pointed out that some types of “written” notice — such as viewing a website — are no more susceptible of proof than some types of “non-written” notice — such as a conversation with a clerk. However, the former triggers the 7-day period, while the latter does not. The Reporter agreed, but said that neither he nor the courts of appeals had been able to come up with a better dividing line. The member conceded that a better line might not be possible.

A couple of members said that they did not have a problem with using an “eyes/ears” distinction in defining “written” notice for purposes of new subdivision (B), but were concerned about the use of the word “receives” in the text of the rule. “Receives” connotes that someone affirmatively acted to provide notice to the recipient; it is awkward to state that one “receives written notice” by checking a docket or viewing a website. One member suggested that new subdivision (B) be amended to refer to a party who “receives written notice *from any source.*” Another suggested that the subdivision refer to a party who “receives written *or electronic* notice.” A third suggested that the subdivision refer to a party who “receives *or observes* written notice.”

A member moved that new subdivision (B) be amended to provide: “the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier.” The motion was seconded. The motion carried (unanimously).

A member complained about the length of the Note, and wondered in particular whether the Note to new subdivision (B) needs to elaborate upon what constitutes “written” notice. The Reporter responded that omitting such elaboration in the Note would guarantee a circuit split over the definition of “written,” meaning that the Committee would have to revisit this rule

within a couple of years. The Reporter said that the examples given in the Note are not fanciful; to the contrary, every example is taken from an actual case. The member responded that, if the Note was going to elaborate on the definition of “written,” it would be helpful to have that elaboration at the beginning of the Note to subdivision (B), rather than at the end. That would protect a busy practitioner from having to read the two paragraphs about the reasons for the change before getting to the third paragraph elaborating on the meaning of “written.” The Reporter said that it would be easy to redraft the Note as the member requested.

A member moved that the amendment to Rule 4(a)(6) drafted by the Reporter be approved, with the change to new subdivision (B) approved by the Committee, and with the understanding that the Note to new subdivision (B) would be reordered as a member had requested. The motion was seconded. The motion carried (unanimously).

D. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc, except that an appeal or other proceeding may be heard or reheard en banc only if a majority of the circuit judges who are in regular active service are not disqualified. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

- (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or
- (2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by “a majority of the circuit judges who are in regular active service.” Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner’s claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants “the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case.” *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, “to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.” *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by “a majority” in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the “absolute majority” approach. Marie Leary, *Defining the “Majority” Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals* 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the “case majority” approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit’s 12 active judges are disqualified, only 4

judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc.

Both approaches have substantial drawbacks. The main disadvantage of the absolute majority approach is that, as a practical matter, a disqualified judge is counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Another disadvantage of the absolute majority approach is that it can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., dissenting from denial of rehearing en banc).

The main disadvantages of the case majority approach are that it may make it too easy to hear cases en banc (en banc proceedings are “not favored” under Rule 35(a)), and it can permit a small minority of a circuit's active judges to overturn prior panel decisions and impose an en banc ruling. For example, in a case in which 7 of a circuit's 12 active judges are disqualified, 3 judges could vote to hear the case en banc and determine the merits of the case — perhaps overturning several prior panel opinions written or joined by the other 9 of the 12 active judges. *See Zahn v. International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in denial of rehearing en banc).

There is a third approach. The Third Circuit follows the case majority approach, except that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case. Under this “qualified case majority” approach, a case in which 5 of a circuit's 12 active judges are disqualified can be heard en banc upon the votes of 4 judges, but a case in which 6 of a circuit's 12 active judges are disqualified cannot be heard en banc under any circumstances.

Rule 35(a) has been amended to establish a uniform national interpretation of the phrase “majority of the circuit judges who are in regular active service.” The federal rules of practice and procedure exist to “maintain consistency,” which Congress has equated with “promot[ing] the interest of justice.” 28 U.S.C. § 2073(b). The courts of appeals should not follow three inconsistent approaches to deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that

use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The qualified case majority approach does not eliminate all of the problems associated with the absolute majority and case majority approaches, but it does help to minimize those problems. Under the qualified case majority approach, the disqualification of a judge does not automatically have the effect of counting as a vote against hearing a case en banc, as it does under the absolute majority approach. In addition, as compared to the absolute majority approach, the qualified case majority approach makes it more likely that the en banc court will be able to overturn a panel decision with which most of the circuit's active judges disagree. At the same time, unlike the case majority approach, the qualified case majority approach guarantees that no decision will be made on behalf of the en banc court without the participation of a majority of the circuit's active judges.

The Reporter said that, as he had been instructed by the Committee, he had drafted the amendment to Rule 35(a) to incorporate the Third Circuit's "qualified case majority" rule, rather than either the "absolute majority" rule or the "case majority" rule.

The Committee engaged in a lengthy discussion of the three options. The discussion focused on three issues:

1. At its April 2002 meeting, the Committee agreed that the qualified case majority approach represented the best approach on the merits. Several members of the Committee said that they continue to hold that view, but a couple of members said that they had changed their minds. One argued in favor of the case majority approach, pointing out that this approach would provide the most protection against a panel with only one active judge — perhaps in dissent — setting a precedent with which most of the circuit's judges disagree. The Reporter responded that, although the case majority approach provides the most protection against "outlier" *panel* precedents, it provides the least protection against "outlier" *en banc* opinions. If, for example, 9 of a circuit's 12 judges were disqualified, the case majority approach would permit 2 of the 3 non-disqualified judges to issue an en banc decision overturning years of panel decisions that had been joined at one time or another by all 10 of the other judges.

One member expressed concern that, no matter what the Committee decides, judges will try to undermine the new rule. The member said that he was concerned that, because of this opposition, an amendment to Rule 35(a) might have unanticipated consequences on such issues as the assignment of visiting or senior judges to panels. Another member said that she was not sure that an amendment to Rule 35(a) would meet with strong opposition. The focus of judges to date has been on what 28 U.S.C. § 46(c) and Rule 35(a) provide, and not on what is the best policy as an original matter.

2. A few members argued that bringing about uniformity was more important than the particular rule that was imposed, and thus that the Committee should adopt whichever of the three approaches is most likely to be supported by the Standing Committee and the Judicial Conference. These members argued that the absolute majority approach — which is now followed by eight circuits and which reflects the most natural reading of § 46(c) — is the most likely to be approved.

The Reporter predicted that, generally speaking, the more difficult it is to hear a case en banc under a rule, the more likely the rule will garner the support of circuit judges. A member agreed and said that she would not support the case majority rule because it was doomed to fail; she would support the qualified case majority approach instead. A member responded that the qualified case majority approach was unlikely to be more popular than the case majority approach as the “qualification” affected very few cases.

Other members resisted the notion that the Committee should make its decision based upon the perceived popularity of an option. These members argued that the Committee’s function is to propose the best solution, not the most popular solution. If the circuit judges successfully block the best solution, this Committee will still have done its job. Even an unsuccessful effort to amend Rule 35(a) will draw attention to the problem and perhaps help to spur Congressional action.

A member said that uniformity will not result without an amendment to Rule 35(a) or § 46(c). The judges in his circuit, for example, have dug in their heels on this issue, and will not be persuaded voluntarily to change their practices.

3. A couple of members argued that, the more that a proposed amendment to Rule 35(a) can be portrayed as a reasonable interpretation of § 46(c), the more that the amendment is likely to pass constitutional muster. These members conceded that the Rules Enabling Act provides that “[a]ll laws in conflict” with newly enacted procedural rules “shall be of no further force or effect after such rules have taken effect.” 28 U.S.C. § 2072(b). Thus, the Act, on its face, authorizes an amendment to Rule 35(a) that supersedes § 46(c). However, these members argued that the “supersession” provision of the Rules Enabling Act may be unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983). Thus, these members argued, while the Rules Enabling Act process might be used to implement a procedural rule that would impose a uniform *interpretation* of an ambiguity in a statute, that process cannot be used to *supersede* a statute.

These members — and others — argued that, of the three approaches taken by the courts of appeals, the absolute majority approach can most easily be defended as an interpretation of § 46(c). That section requires the vote of “a majority of the circuit judges of the circuit who are in regular active service”; a judge who is disqualified in a particular case is still a judge “in regular active service.” Some members argued that the case majority approach also represents a plausible interpretation of § 46(c); after all, four circuits now follow that approach, and others have followed it in the past. All members agreed, though, that the qualified case majority

approach was the least likely to be viewed as a simple interpretation of § 46(c), and the most likely to be viewed as superseding the statute.

Some members did not agree that the supersession provision of the Rules Enabling Act is unconstitutional under *Chadha*. These members argued that the Committee should amend Rule 35(a) to impose the best of the three options, regardless of whether that option “interprets” or “supersedes” § 46(c).

A member moved that the amendment to Rule 35(a) drafted by the Reporter be changed by eliminating the phrase “except that an appeal or other proceeding may be heard or reheard en banc only if a majority of the circuit judges who are in regular active service are not disqualified.” Thus, the first sentence of amended Rule 35(a) would provide, “A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.” The member explained that, if this amendment were approved, the Committee would be recommending adoption of the case majority approach, rather than the qualified case majority approach.

The motion was seconded. After further discussion, the motion carried (5-3, with one abstention).

After further discussion, a member moved that the amendment (as changed) be approved, with the understanding that the Reporter would redraft the Committee Note to reflect the change made by the Committee. The motion was seconded. The motion was approved (6-3).

E. Item No. 00-12 (FRAP 28, 31 & 32 — briefs in cross-appeals)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

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(c) **Reply Brief.** The appellant may file a brief in reply to the appellee’s brief.

~~An appellee who has cross-appealed may file a brief in reply to the appellant’s response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities

— cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

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~~(h) — **Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee’s cross-appeal and response to appellant’s brief, appellee’s brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant’s statement need not include a statement of the case or of the facts. [Reserved]~~

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Committee Note

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant’s response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Briefs in a Case Involving a Cross-Appeal

- (a) **Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a), 28(b), 28(c), 31(a)(1), and 32(a)(2) do not apply to such a case, except as otherwise provided in this rule.
- (b) **Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order.
- (c) **Briefs.** In a case involving a cross-appeal:
- (1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).
 - (2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.
 - (3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that

none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

- (A) the jurisdictional statement;
- (B) the statement of the issues;
- (C) the statement of the case;
- (D) the statement of the facts; and
- (E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the brief where they are cited.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; and the appellee's reply brief, gray. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) **Length.**

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the

appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-volume limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of compliance.** A brief submitted under Rule 28(e)(2) must comply with Rule 32(a)(7)(C)(i).

(f) **Time to Serve and File a Brief.** The appellant's principal brief must be served and filed within 40 days after the record is filed. The appellee's principal and response brief must be served and filed within 30 days after the appellant's principal brief is served. The appellant's response and

reply brief must be served and filed within 30 days after the appellee’s principal and response brief is served. The appellee’s reply brief must be served and filed within 14 days after the appellant’s response and reply brief is served, but the appellee’s reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

Committee Note

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), and 32(a)(2), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the “appellant” and who is the “appellee” in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant “for the purposes of this rule and Rules 30 and 34,” whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28(f), the cross-reference to Rule 31 is no longer necessary.

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

The first brief is the “appellant’s principal brief.” That brief — like the appellant’s principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).

The second brief is the “appellee’s principal and response brief.” Because this brief serves as the appellee’s principal brief on the merits of the cross-appeal, as well as the appellee’s response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.

The third brief is the “appellant’s response and reply brief.” Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant’s response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant’s response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the “appellee’s reply brief.” Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c).

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee’s principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant’s response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) Length.

* * * * *

(C) Certificate of Compliance.

- (i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:
 - ! the number of words in the brief; or
 - ! the number of lines of monospaced type in the brief.
- (ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6

must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

The Reporter said that, at its April 2002 meeting, the Committee had decided to proceed with the proposal of the Department of Justice to amend the Appellate Rules to more clearly address briefing in cross-appeals. The Committee tentatively decided to accomplish this goal by

amending existing rules rather than by creating a new rule. The Reporter agreed to review the Department's proposal and to prepare revised drafts of the amendments and Committee Notes.

The Reporter said that, after wrestling with this matter for several days, he had concluded that the Committee should address all issues regarding briefing in cross-appeals — including the number of briefs, the contents of briefs, the colors of the covers of briefs, the size of briefs, and the deadlines for serving briefs — in a new Rule 28.1. It is very difficult to amend the existing rules to address cross-appeals in a way that is consistent with the letter and spirit of the style rules. The existing rules become too long and too cumbersome. In addition, litigants are left flipping back and forth among several rules, worrying that they may have missed a provision regarding cross-appeals in a rule that they have not read.

Several members said that they agreed with the approach chosen by the Reporter and that the Reporter's draft was well done. One member said that his only suggestion was that the title of new Rule 28.1 be "Cross-Appeals" rather than "Briefs in a Case Involving a Cross-Appeal," because the new rule addresses topics in addition to briefing. By consensus, the Committee agreed to make the change.

One member said that he thought that new Rule 28.1(c)(4) should be amended so that the appellee's reply brief is limited to the issues raised in the cross-appeal; without such a limitation, the member said, the appellee could use its reply brief in the cross-appeal as a surreply in the appeal. After a brief discussion, the member moved that new Rule 28.1(c)(4) be amended by adding the following after the first sentence: "That brief must be limited to the issues presented by the cross-appeal." In addition, the member moved that the word "also" be inserted in the following sentence after "That brief must" and before "contain a table of contents." The motion was seconded. The motion carried (unanimously).

Mr. Letter said that the Department of Justice had some minor technical changes to suggest, such as fine-tuning a couple of the cross-references. The Committee agreed that Mr. Letter and the Reporter could discuss those suggestions outside of the presence of the Committee and that the Reporter could use his judgment in deciding whether any changes were necessary.

A member moved that the amendments drafted by the Reporter be approved, with the changes agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

The Committee took a brief break.

F. Item No. 01-01 (citation of non-precedential decisions)

The Reporter introduced the following proposed amendments and Committee Notes:

ALTERNATIVE A

Rule 32.1. Non-Precedential Opinions

(a) Authority to Issue Non-Precedential Opinions. A court of appeals may designate an opinion as non-precedential.

(b) Citation of Non-Precedential Opinions. An opinion designated as non-precedential may be cited for its persuasive value, as well 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, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Committee Note

Rule 32.1 is a new rule addressing the issuance and citation of non-precedential opinions (commonly but misleadingly referred to as “unpublished” opinions). Subdivision (a) confirms the authority of courts to issue such opinions, and subdivision (b) authorizes the citation of such opinions for their persuasive value, as well 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, or a similar claim.

Subdivision (a). Subdivision (a) confirms the authority that long has been recognized and exercised by every one of the thirteen federal courts of appeals — the authority to designate an opinion as non-precedential. The courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. 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 non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Only once has a panel of a court of appeals expressed doubts about the constitutionality of this practice. *See Anastasoff v. United States*, 223 F.3d 898, 899-905 (8th Cir. 2000). That panel decision was later vacated as moot by the en banc court, 235 F.3d 1054 (8th Cir. 2000), and its rationale was refuted by *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001). *See also Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002). Although there continues to be a great deal of debate about whether issuing non-precedential opinions is wise as a matter of policy, the “overwhelming consensus” of judicial and scholarly opinion is that issuing non-precedential opinions does not violate the constitution. *Hart*, 266 F.3d at 1163.

The ability to issue non-precedential opinions is a matter of survival for many of the courts of appeals, who have seen their workload increase dramatically faster than the number of judges available to handle that workload. Issuing non-precedential opinions takes less time than issuing precedential opinions, because judges can spend less time explaining their conclusions. Non-precedential opinions are written primarily to inform the parties of the reasons for the decision. The parties are already familiar with the case, and thus a detailed recitation of the facts and procedural history is unnecessary. More importantly, an opinion that simply informs parties of the reasons for a decision does not have to be written with the same degree of care and precision as an opinion that binds future panels of the court and district courts within the circuit. The Ninth Circuit made the point well:

A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.

Hart, 266 F.3d at 1176-77 (citation and footnote omitted). Permitting courts to issue non-precedential opinions enables courts to devote sufficient attention to drafting precedential opinions.

Non-precedential opinions have been the subject of much criticism — understandably, as they are not without disadvantages — but missing from the criticism has been any suggestion of a realistic alternative. There is no reason to

believe that the size of the federal courts of appeals will increase substantially in the foreseeable future. Thus, depriving the courts of appeals of the ability to issue non-precedential opinions would seem to leave them with three options. First, they could write hurried and inevitably mistake-prone precedential opinions in all cases — opinions that would bind future circuit panels and district courts within the circuit — creating substantial damage to the administration of justice. Second, they could write detailed and careful precedential opinions in all cases, adding months or (more likely) years to the time that it takes to dispose of appeals, dramatically inflating the already unwieldy body of binding precedent, and creating countless (often inadvertent) intra- and inter-circuit conflicts in the process. Finally, they could dispose of most cases with one-word judgment orders — “affirmed” or “reversed” — that leave parties completely in the dark as to the reasons for the dispositions. None of these options is preferable to the status quo.

Rule 32.1(a) does not require any court to issue any non-precedential opinion. It also does not dictate the circumstances under which a court may choose to designate an opinion as non-precedential, the procedure that a court must follow in making that decision, or what effect a court must give to one of its non-precedential opinions. Because non-precedential opinions are a response to caseloads, and because caseloads differ substantially from circuit to circuit, these are matters that should be left to each court to decide for itself.

Subdivision (b). Subdivision (b) confirms that a non-precedential opinion may be cited 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 a non-precedential opinion under these circumstances. In part, then, subdivision (b) simply codifies and clarifies existing practice.

Although all of the circuits appear to have permitted the citation of non-precedential opinions in these circumstances, the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential 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 the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

Some circuits have permitted such citation without restriction, some circuits have disfavored such citation but permitted it in limited circumstances,

and some circuits have not permitted such citation under any circumstances. These rules have created a hardship for practitioners, especially those who practice in more than one circuit. Subdivision (b) is intended to replace these conflicting practices with one uniform rule.

Parties may cite to the courts of appeals an infinite variety of non-precedential sources, including the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these non-precedential sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat non-precedential opinions differently. It is difficult to justify a system under which the non-precedential opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the non-precedential opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). It is equally difficult to justify a system under which a litigant can cite a court of appeals to a law review article's or district court's discussion of one of its non-precedential opinions, but cannot cite the court to the opinion itself. And, most broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own non-precedential opinions.

Some have argued that permitting citation of non-precedential opinions would lead judges to spend more time on them, defeating their purpose. However, non-precedential opinions are already commonly cited in other fora, widely read and discussed, and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of non-precedential opinions, it is difficult to believe that permitting a court's non-precedential opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own non-precedential opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential 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 non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, subdivision (b) does not provide that citing non-precedential opinions is “disfavored” or limited to particular circumstances (such as when no precedential opinion adequately addresses an issue). Again, it is difficult to understand why non-precedential opinions should be subject to restrictions that do not apply to other non-precedential sources. Moreover, given that citing a non-precedential opinion is usually tantamount to admitting that no binding authority supports a contention, parties already have an incentive not to cite non-precedential opinions. Not surprisingly, those courts that have liberally permitted the citation of non-precedential opinions have not been overwhelmed with such citations. *See, e.g.,* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 195 (1999). Finally, restricting the citation of non-precedential opinions may spawn satellite litigation over whether a party’s citation of a particular opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Imposing a uniform rule cannot harm the administration of justice; to the contrary, it will expand the sources of insight and information that can be brought to the attention of judges and make the entire process more transparent to attorneys, parties, and the general public. At the same time, a uniform rule will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing a non-precedential opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-386R (1995) (“It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions].”). In addition, attorneys will no longer be barred from bringing to the court’s attention information that might help their client’s cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted

to find a way to hint to a court that it has addressed an issue in a non-precedential opinion can now directly bring non-precedential opinions to the court's attention. As is true with any non-binding source, the court can do with that information whatever it wishes.

ALTERNATIVE B

Rule 32.1. Citation of Non-Precedential Opinions

An opinion designated as non-precedential may be cited for its persuasive value, as well 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, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Committee Note

Rule 32.1 is a new rule addressing the citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). This is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. 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 non-precedential opinions, they generally agree that a non-precedential 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 takes no position on whether designating opinions as non-precedential is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue a non-precedential 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 non-precedential 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 non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential.

Rule 32.1 confirms that a non-precedential opinion may be cited 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 a non-precedential opinion under these circumstances. In part, then, Rule 32.1 simply codifies and clarifies existing practice.

Although all of the circuits appear to have permitted the citation of non-precedential opinions in these circumstances, the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential 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 the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

Some circuits have permitted such citation without restriction, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1 is intended to replace these conflicting practices with one uniform rule.

Parties may cite to the courts of appeals an infinite variety of non-precedential sources, including the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these non-precedential sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat non-precedential opinions differently. It is difficult to justify a system under which the non-precedential opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the non-

precedential opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). It is equally difficult to justify a system under which a litigant can cite a court of appeals to a law review article's or district court's discussion of one of its non-precedential opinions, but cannot cite the court to the opinion itself. And, most broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own non-precedential opinions.

Some have argued that permitting citation of non-precedential opinions would lead judges to spend more time on them, defeating their purpose. However, non-precedential opinions are already commonly cited in other fora, widely read and discussed, and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of non-precedential opinions, it is difficult to believe that permitting a court's non-precedential opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own non-precedential opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential 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 non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1 does not provide that citing non-precedential opinions is "disfavored" or limited to particular circumstances (such as when no precedential opinion adequately addresses an issue). Again, it is difficult to understand why non-precedential opinions should be subject to restrictions that do not apply to other non-precedential sources. Moreover, given that citing a non-precedential opinion is usually tantamount to admitting that no binding authority supports a contention, parties already have an incentive not to cite non-precedential opinions. Not

surprisingly, those courts that have liberally permitted the citation of non-precedential opinions have not been overwhelmed with such citations. *See, e.g.,* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 195 (1999). Finally, restricting the citation of non-precedential opinions may spawn satellite litigation over whether a party's citation of a particular opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Imposing a uniform rule cannot harm the administration of justice; to the contrary, it will expand the sources of insight and information that can be brought to the attention of judges and make the entire process more transparent to attorneys, parties, and the general public. At the same time, a uniform rule will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing a non-precedential opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in a non-precedential opinion can now directly bring non-precedential opinions to the court's attention. As is true with any non-binding source, the court can do with that information whatever it wishes.

ALTERNATIVE C

Rule 32.1. Citation of Non-Precedential Opinions

(a) Related Cases. An opinion designated as non-precedential may be cited 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, or a similar claim.

(b) Persuasive Value. An opinion designated as non-precedential may be cited for its persuasive value regarding a material issue, but only if no precedential opinion of the forum court adequately addresses that issue. Citing non-precedential opinions for their persuasive value is disfavored.

Committee Note

Rule 32.1 is a new rule addressing the citation of non-precedential opinions (commonly but misleadingly referred to as “unpublished” opinions). This is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. 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 non-precedential opinions, they generally agree that a non-precedential 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 takes no position on whether designating opinions as non-precedential is constitutional. See *Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue a non-precedential 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 non-precedential 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 non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential.

Subdivision (a). Subdivision (a) confirms that a non-precedential opinion may be cited 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 a non-precedential opinion under these

circumstances. For the most part, then, subdivision (a) simply codifies and clarifies existing practice.

Subdivision (b). Although all of the circuits appear to have permitted the citation of non-precedential opinions in the circumstances identified in subdivision (a), the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential 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 the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

Some circuits have permitted such citation without restriction, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These rules have created a hardship for practitioners, especially those who practice in more than one circuit. Subdivision (b) is intended to replace these conflicting practices with one uniform rule.

Subdivision (b) does not altogether bar the citation of non-precedential opinions for their persuasive value. Parties may cite to the courts of appeals an infinite variety of non-precedential sources, including the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction upon the citation of these non-precedential sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded. There is no compelling reason to completely bar the citation of non-precedential opinions.

Some have argued that permitting citation of non-precedential opinions would lead judges to spend more time on them, defeating their purpose. However, non-precedential opinions are already commonly cited in other fora, widely read and discussed, and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of non-precedential opinions, it is difficult to believe that permitting a court’s non-precedential opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own non-precedential opinions to be cited in at least some circumstances for their

persuasive value, and “the sky has not fallen in those circuits.” Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential 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 non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

Although subdivision (b) does not altogether bar the citation of non-precedential opinions, it also does not give parties an unqualified right to cite such opinions for their persuasive value. Rather, subdivision (b) expressly disfavors such citation and permits it “only if no precedential opinion of the forum court adequately addresses [a material] issue.” These limitations reflect the practice of a majority of the courts of appeals. Few courts permit the unqualified citation of non-precedential opinions for their persuasive value. Rather, the majority either bar such citation altogether or limit it to the circumstances described in subdivision (b).

Subdivision (b) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, with mistakes possibly subjecting them to sanctions or accusations of unethical conduct. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-386R (1995) (“It is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions].”). In addition, attorneys will no longer be barred from bringing to the court’s attention information that might help their client’s cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys.

The Reporter said that, at its April 2002 meeting, the Committee had decided to move forward on the Justice Department’s proposal that a new Rule 32.1 be added to the Appellate Rules to impose a uniform rule regarding the citation of non-precedential opinions. Although the Committee supported this proposal in principle, members had raised a number of concerns about

the specifics of the Department's draft rule. The Reporter agreed to take a look at this issue and prepare a revised draft.

The Reporter said that he was presenting to the Committee three alternative drafts of a proposed Rule 32.1. The first — Alternative A — was the broadest. It specifically authorizes courts to issue non-precedential opinions and permits their citation without qualification. The second — Alternative B — takes a middle position. Unlike Alternative A, it addresses only the citation of non-precedential opinions. However, unlike Alternative C, it permits the citation of such opinions without qualification. The third — Alternative C — is the narrowest. It addresses only the citation of non-precedential opinions, and it permits such citation only in limited circumstances.

The Reporter said that he had prepared these alternative drafts for a couple of reasons. First, the issue of non-precedential opinions has been a recurring one during the recent history of the Committee. It may be helpful to get all issues — and all alternatives — on the table, so that this issue might be put to rest for at least a few years. Second, the Committee may want to publish a broader proposal than it anticipates approving. This would allow for a full public airing of all of the issues, and it would give the Committee room to compromise down the road. Publishing Alternative A might also give comfort to those judges who could be persuaded to support a rule regarding citation (Alternative B or C) if they could be assured that such a rule is not a first step toward abolishing non-precedential opinions altogether.

After a brief discussion, the Committee agreed by consensus not to proceed with Alternative A. Members expressed concern about using a procedural rule to embrace one side of the debate over the constitutionality of non-precedential opinions. Members were unanimous in wanting to limit the involvement of the Committee to the issue of citation.

Most members who addressed the issue expressed a preference for Alternative B over Alternative C, largely for the reasons given in the draft Committee Note. Mr. Letter said that the Justice Department had originally asked the Committee to approve a citation rule and continues to favor such a rule. However, the Solicitor General received a phone call from Judge Alex Kozinski of the Ninth Circuit and other opponents of the rule, and he is troubled by some of the concerns that they raised. The Solicitor General believes it essential that this Committee fully consult with the Ninth Circuit regarding its concerns.

Mr. Letter said that if the Committee decides to go forward with a proposed rule, the Department would favor Alternative B over Alternative C. Although the Department originally proposed a qualified citation rule similar to Alternative C, it did so only because it thought that a qualified rule had the best chance of being approved by the Standing Committee and Judicial Conference. Mr. Letter said that, upon reflection, the Department had decided that it was preferable to “lead” with the better rule — Alternative B — and “retreat” to Alternative C if Alternative B fails to attract the necessary support.

One member argued strongly against approving any rule regarding the citation of non-precedential opinions. He said that, although he had previously favored such a rule, he had been persuaded by discussions with Judge Kozinski and others from the Ninth Circuit that no such rule should be approved. He said that non-precedential opinions are a response to circumstances (particularly caseloads) that differ from circuit to circuit, and thus each circuit should be free to adopt its own rules on the matter. He also pointed out that opinions designated as “non-precedential” or the like vary dramatically — from one-paragraph, per-curiam orders to 20-page, signed opinions containing exhaustive legal analysis. The variation in practices among circuits argued against trying to impose a single national standard.

In addition, the member said, it is logical for circuits to bar the citation of their non-precedential opinions for their persuasive value. If the rationale of a non-precedential opinion is persuasive, there is nothing that prevents a litigant from repeating that rationale in its brief. The reason that litigants want so badly to cite non-precedential opinions is not for the persuasiveness of their rationales, but because litigants want the court to be influenced by the fact that three judges agreed with a rationale. But this is a misleading use of non-precedential opinions. The practice in the Ninth Circuit and elsewhere is that a judge will join a non-precedential opinion as long as he agrees with its result, even if he does not agree with its reasoning. No-citation rules thus prevent parties from using non-precedential opinions in an unfair manner.

Several members disagreed. They pointed out that courts already know all of this and can take it into account when deciding what weight to give to non-precedential opinions. All judges have written non-precedential opinions, and all judges have joined them. Judges are not going to be misled into thinking that these opinions have more force than they do. Moreover, it is strange to regulate the force of an authority by forbidding lawyers to talk about it. Lawyers should be free to cite any non-binding source of authority they want, and judges should be free to give that authority as much or as little weight as they deem appropriate. Judges do not need to be protected from having their own non-precedential opinions drawn to their attention.

A member said that, as a judge, he frequently confronts issues that have not been addressed directly by a precedential opinion of his circuit. As far as he is concerned, the more illumination — from whatever source — the better. He is confident in his ability to decide how much weight to give a non-precedential opinion; after all, he decides every day how much weight to give to law review articles, decisions of state courts, and the other non-binding sources of authority that are cited to him.

The member who opposed a national rule said that the unique circumstances of the Ninth Circuit account for the Ninth Circuit’s strong opposition to a citation rule. The Ninth Circuit must dispose of a huge number of cases. The practice in the Ninth Circuit is for judges to give their full attention to both the reasoning and result of precedential opinions. However, judges will join non-precedential opinions even if they do not agree with the reasoning, as long as they agree with the result. They do this precisely because they know that the opinions will not be binding precedent and will not be cited to the Ninth Circuit. If the Ninth Circuit was forced to

permit citation of its non-precedential opinions, the court would likely issue many fewer such opinions and many more one-word orders.

A member responded that she thinks that such a development would be a good thing. In her view, if three judges agree on a result, but not on reasoning, they should issue only a result — that is, a one-word order. She believes this practice would be better than issuing hundreds of non-precedential opinions that have been joined by judges who may or may not agree with what the opinions say. The member who opposed a citation rule disagreed, stating that the use of one-word dispositions is unfair to the parties, who should receive some explanation of a result.

The Committee also revisited the question of whether parties who cite non-precedential opinions should be required to attach copies of those opinions to their briefs, motions, or other papers. At its April 2002 meeting, the Committee decided not to include such a requirement. Non-precedential opinions are widely available today — for all practical purposes, they are as available as precedential opinions — and thus a general requirement to attach copies would result in the needless copying, serving, and filing of hundreds of thousands of pages of non-precedential opinions.

Although no member of the Committee argued in favor of a general requirement to attach copies of non-precedential opinions, a couple of members did express concerns about citations to the non-precedential opinions of the Fifth and Eleventh Circuits. Those circuits do not release their non-precedential opinions to West for publishing in the Federal Appendix, do not release their non-precedential opinions to Westlaw and LEXIS for inclusion in their electronic databases, and do not post their non-precedential opinions to their websites. The only way to get a non-precedential opinion of the Fifth or Eleventh Circuit is to call the clerk's office and request a copy.

Others discounted concerns about the Fifth and Eleventh Circuits. Because their non-precedential opinions are so difficult to get, those opinions will rarely be cited. When they are cited by a party, the other parties can pick up the phone and get a copy — either from the party that cited the opinion or from the clerk's office. To amend the Appellate Rules to address a minor problem existing (for now) in only two circuits would be overkill.

A member asked whether the Appellate Rules should be amended to *force* all circuits to make their non-precedential opinions available on-line or to Westlaw and LEXIS. The Reporter said that the former chair of the Committee, Judge Will Garwood, had appointed a subcommittee to look into this very issue a few years ago, but nothing had come of that.¹ The Reporter also

¹The minutes of the April 1998 meeting of the Committee state (on page 29):

“Judge Garwood said that he was prepared to entertain the following motion: Item No. 91-17 would be removed from the Committee's study agenda, without prejudice to any specific
(continued...)

said that, although his recollection is vague, he believes that the reason nothing came of the subcommittee is that someone had concluded that the issue was more properly within the jurisdiction of the Committee on Court Administration and Case Management (“CACM”). Mr. Rabiej said that his recollection was similar.

Several concerns were raised about the wording of Alternative B.

A couple of members asked whether both sentences were necessary. One member suggested that the second sentence — “[a] court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources” — might be deleted. The Reporter responded that he feared that, without that sentence, the courts of appeals that are hostile to the citation of non-precedential opinions would impose so many conditions on such citation as to defeat the purpose of the rule.

Another member suggested that the first sentence could be deleted, and that the second sentence, standing alone, would accomplish all that the rule is intended to do. He said, though, that he would prefer that the sentence be written passively (“no restriction may be imposed”) rather than actively (“a court must not impose”), as the former sounds less confrontational. A member expressed concern that the second sentence might prevent a court from requiring parties to serve a copy of a non-precedential opinion of the Fifth or Eleventh Circuit.

A couple of members raised concerns about the use of the term “non-precedential.” One member said that he thought the term was misleading, as these opinions *are* precedent (although not necessarily *binding* precedent). The Reporter pointed out that the rule refers to opinions being *designated* as non-precedential; it does not take a position on whether or to what extent any particular opinion is in fact “non-precedential.”

Another member expressed concern that the term might not be broad enough to reach all of the opinions that the Committee wanted to reach. For example, could a court argue that the rule does not force it to permit citation of its non-precedential opinions because those opinions are labeled “unpublished” instead of “non-precedential”? One member suggested substituting

¹(...continued)

proposals regarding unpublished opinions that might be made in the future. At the same time, Judge Garwood would appoint a subcommittee to discuss whether and how the Third, Fifth, and Eleventh Circuits might be encouraged to provide their unpublished opinions to LEXIS and Westlaw. A member made the motion suggested by Judge Garwood. The motion was seconded. The motion carried (unanimously).

“Judge Garwood appointed a subcommittee consisting of Judge Alito, Judge Motz, and Mr. Meehan, asked Judge Motz to chair the subcommittee, and asked Judge Kravitch if she would work with the subcommittee in her capacity as liaison from the Standing Committee.”

the phrase “not officially reported,” but another member responded that *no* opinion of a federal court of appeals is “officially” reported. A member suggested substituting a phrase such as “non-precedential, not-for-publication, or the like.”

A member said that he was also concerned about the use of the word “opinions” for similar reasons. He fears that a hostile court will argue that the rule does not apply to its non-precedential opinions, because those opinions are “orders” or “memorandum dispositions” instead of “opinions.”

Finally, a member suggested that the title of new Rule 32.1 should refer to “Citation of Opinions *Designated* As Non-Precedential” rather than “Citation of Non-Precedential Opinions.” Picking up on the Reporter’s point, she was concerned that the latter title might imply a view about the jurisprudential impact of these opinions.

A member moved that the Committee approve Alternative B in substance, except that the Reporter be directed to draft a revised version of Alternative B incorporating the following changes:

1. New Rule 32.1 should be a single sentence, modeled after the second sentence of the current draft, but stated passively. The member suggested something like: “No restriction may be imposed upon the citation of opinions designated as non-precedential, unpublished, or the like that is not generally imposed upon the citation of other sources.” Members conceded that the Reporter would have to tinker with the language of the rule to improve its clarity, make it consistent with the style rules, and make certain that it covers all of the judicial dispositions that the Committee wishes to reach.

2. The title of new Rule 32.1 should refer to judicial dispositions that are *designated* as non-precedential, unpublished, or the like.

3. Finally, a sentence should be added to the rule to require a party to serve copies of non-precedential opinions that the party has cited and that are not readily available, such as the non-precedential opinions of the Fifth and Eleventh Circuits.

The motion was seconded. The motion carried (7-1, with one abstention). The Reporter said that he would present a revised draft of Alternative B at the Committee’s spring 2003 meeting.

G. Item No. 02-01 (FRAP 27(d) — apply typeface and type-style limitations to motions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

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(d) Form of Papers; Page Limits; and Number of Copies.

(1) Format.

- (A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.
- (B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.
- (C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.
- (D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all

four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

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Committee Note

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

The Reporter said that Charles R. “Fritz” Fulbruge III, the former liaison to the Committee from the appellate clerks, brought to the Committee’s attention the fact that nothing in the Appellate Rules restricts the typeface and type styles that are used in motion papers. At its April 2002 meeting, the Committee asked the Reporter to draft an amendment and Committee Note that would address this omission. The Reporter said that his draft would add a new subdivision (E) to Rule 27(d)(1). Pursuant to that new subdivision, the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) would apply to motion papers.

The Committee briefly discussed whether, under new subdivision (E), a litigant would have an incentive to use proportionally spaced typeface in motion papers. A member moved that the amendment and Committee Note drafted by the Reporter be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)

At the request of Judge Duval, this Committee placed on its study agenda the question whether an appeal from an order granting or denying an application for attorney’s fees under the

Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) should be governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). The circuits have split over this question.

During a discussion of this issue at its April 2001 meeting, Committee members described similar issues over which the circuits have disagreed. The Justice Department offered to try to identify all instances in which there are disagreements over which deadline should be applied to an appeal from a particular type of order. The Department also offered to try to draft an amendment to address the problem.

Mr. Letter gave a status report on the Department's efforts and presented a draft Rule 3.1, which would specifically identify several types of appeals that would be defined as "appeals in a criminal case," and several other types of appeals that would be defined as "appeals in a civil case." (The draft rule appears under tab V-A in the agenda book.) Mr. Letter said that the Department needed to give more thought to the specifics of the draft rule; he pointed out, for example, that an appeal from an order regarding restitution entered in a criminal case, which the draft rule defines as a "criminal" appeal, should probably be a "civil" appeal.

The Reporter said that he had several concerns about the draft rule. The Reporter pointed out that, if the draft rule was enacted in its current form, it would represent a highly unusual rule of appellate procedure. No other Appellate Rule attempts to so thoroughly catalog a list of specific orders or appeals; rather, the Appellate Rules typically embrace general principles, which the courts of appeals are left to apply to the infinite variety of orders and appeals that they confront. The Reporter said that going the "catalog" route would guarantee that this Committee would be faced with endless requests to amend the rule, as new statutes were enacted, as common law continued to evolve, as gaps or errors were found in the "catalog," and as interest groups lobbied to have a particular type of appeal reclassified from civil to criminal or vice-versa. The Reporter warned the Committee that it might regret going down this road.

The Reporter also pointed out that neither he nor the Justice Department had been able to identify more than a handful of circuit splits regarding whether an appeal from a particular type of order was an appeal in a civil or criminal case. One of those splits — involving appeals from orders granting or denying applications for a writ of error *coram nobis* — had already been fixed by the recent addition of Rule 4(a)(1)(C). The Reporter expressed skepticism that the remaining splits were creating a serious enough problem to justify the type of sweeping, unprecedented rule proposed by the Department. The Reporter urged the Committee not to use the Appellate Rules to resolve every circuit split that is brought to the Committee's attention.

The Reporter continued that, even if the Committee disagreed and wanted to address these circuit splits in the Appellate Rules, he would urge the Committee to forgo the "catalog" approach and instead try to adopt a general principle. For example, Rule 4 could be amended to

provide something like, “All appeals are appeals in a civil case, except appeals from a judgment of conviction or sentence.”

The ensuing discussion focused on a few specific provisions of the rule proposed by the Department of Justice. For example, members pointed out that draft Rule 3.1(a) sets forth a laundry list of appeals and then states that those appeals are “governed by Rule 4(b).” Rule 4(b), in turn, gives defendants 10 days and the government 30 days to appeal. The Department’s proposal would thus change existing law with respect to some of the orders in its laundry list by giving the government longer to appeal than defendants. Mr. Letter said that the Department did not intend such a change and would have to tinker with the wording of the rule.

For the most part, though, the Committee’s discussion focused on trying to come up with a more general approach that would solve the circuit splits — and prevent future circuit splits. Among options that the Committee discussed were the following:

- Giving all parties 30 days to appeal all orders in all cases — civil and criminal. This would render irrelevant the distinction between an “appeal in a civil case” and an “appeal in a criminal case.” The Committee concluded that this approach would not work as it would provide too little time for the government to decide whether to appeal — and that, in turn, would result in the government filing numerous protective appeals.
- Giving all parties 60 days to appeal all orders in all cases. The Committee rejected this approach as giving too much time to defendants in criminal cases.
- Giving all parties 30 days to appeal in cases in which the government was not a party, and 60 days to appeal in cases in which the government was a party. The Committee rejected this approach, again because it would give too much time to defendants in criminal cases.
- Giving all parties 30 days to appeal all orders in all cases — except that the government (and the government alone) would get 60 days to appeal all orders in all cases. The Committee concluded that this approach was promising, even though it would lengthen the time for defendants in criminal cases to appeal from 10 days to 30 days, and shorten the time for parties in civil cases involving the government to appeal from 60 days to 30 days.

The Committee also discussed the suggestion of the Reporter that, if a civil-criminal distinction was to be retained, the rule provide simply that a direct appeal from a criminal conviction or sentence is an appeal in a criminal case, and all other appeals are appeals in civil cases.

The Committee broke for lunch at 12:15 p.m. and reconvened at 2:00 p.m. Following further discussion, the Committee requested that the Department of Justice give further consideration to four options:

1. Retaining the status quo.
2. Amending Rule 4 to provide that all parties get 30 days to appeal all orders in all cases, except that the government gets 60 days to appeal all orders in all cases.
3. Amending Rule 4 to provide that all appeals are appeals in a civil case for purposes of Rule 4, with the exception of direct appeals from judgments of conviction entered under Fed. R. Crim. P. 32(d).
4. Adding a new Rule 3.1 that would take the “catalog” approach.

Mr. Letter said that the Department would study these four options and report back at a future Committee meeting.

B. Items Awaiting Initial Discussion

1. Item No. 02-02 (CA11 local rules)

Veronica Nunley, a pro se litigant in the Eleventh Circuit, recently wrote to Judge Alito and enclosed a copy of a lengthy petition for a writ of certiorari that she had filed with the United States Supreme Court. In her cert petition, Ms. Nunley complained about various rules of the Eleventh Circuit. She argued that these rules were inconsistent with the Appellate Rules, exceeded the Eleventh Circuit’s authority under 28 U.S.C. § 2071, and violated the U.S. Constitution.

Following a brief discussion, a member moved that Item No. 02-02 be removed from the Committee’s study agenda. The motion was seconded. The motion carried (unanimously).

2. **Item No. 02-03 (uniform case information sheet)**
3. **Item No. 02-04 (uniform notice of appearance)**
4. **Item No. 02-05 (uniform certificate of interested persons)**
5. **Item No. 02-06 (uniform corporate disclosure statement)**
6. **Item No. 02-07 (uniform transcript request form)**

Judge Alito said that he had asked the Council of Appellate Lawyers of the American Bar Association (“Council”) to share with this Committee any suggestions that it might have for improving the Appellate Rules. The Council responded by making almost two dozen suggestions in a letter dated September 17, 2002. Judge Alito expressed gratitude for the considerable time and effort that the Council had devoted to his request.

The first five of the Council’s suggestions were that the Appendix to the Appellate Rules be amended to provide a uniform case information sheet, uniform notice of appearance, uniform certificate of interested persons, uniform corporate disclosure statement, and uniform transcript request form. The Committee discussed the proposals at some length. Most members opposed moving forward on these suggestions. As this Committee has often demonstrated, it is concerned about differences in the local rules of the circuits when such differences impose hardships upon attorneys who practice in more than one circuit. However, the Committee must also “pick its spots” in deciding when to use the Appellate Rules to impose uniform procedures on the circuits. The Committee would create a considerable amount of resentment if it were perceived as micro-managing the internal operations of the circuits.

Members said that, while there were differences among the forms that the circuits require litigants to file, those differences were minor, and the forms were readily available on line and from clerks’ offices. Members did not think that the hardships imposed on litigants justified the Committee using the Appellate Rules to impose uniform forms on all circuits.

A member moved that Item Nos. 02-03 through 02-07 be removed from the Committee’s study agenda. The motion was seconded. The motion carried (unanimously).

- 7. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices)**
- 8. Item No. 02-09 (FRAP 11(e) — require courts to accept entire record)**

The Council complained that there is substantial variation in the local rules of the circuits regarding filing the appendix and transmitting the record. The Council requested that the Appellate Rules be amended to more specifically address these issues and to “pre-empt” the conflicting local rules.

The Committee discussed the Council’s suggestion at length. Some members agreed that action was needed on the issue of appendices. Indeed, a couple of members stated that with respect to no issue are local rules more inconsistent or do local rules impose more of a hardship. Members discussed the conflicting practices of various circuits on matters both large (when an argument is deemed waived because of the inadequacy of an appendix) and small (how an appendix must be paginated and tabbed).

Other members expressed skepticism about whether amendments to the Appellate Rules were warranted — or, even if warranted, would solve the problem. Members pointed out that Rule 30 is already quite specific in discussing appendices; how much more specificity was possible? One member responded that the main problem is Rule 30(f), which judges have interpreted as giving them a “local option” to replace Rule 30 with a detailed set of local rules. Members also worried that amending the Appellate Rules to more specifically dictate how appendices must be assembled would be perceived as micro-managing and create resentment among circuit judges. Other members responded that the Appellate Rules already impose specific rules for briefs, and it was no less important to impose similar rules for appendices.

Following further discussion, the Committee agreed by consensus that Item No. 02-08 would remain on the study agenda. Mr. Letter agreed that the Department of Justice would give the matter further study and make a recommendation to the Committee.

The Committee also agreed by consensus to remove Item No. 02-09 from its study agenda. No member of the Committee agreed with the Council’s suggestion that Rule 11(e) be amended so as to force the circuit courts to accept the entire record from district courts in every case. Members pointed out that this was a matter of internal court operations that had little or no impact on litigants. Members also pointed out that we are rapidly moving toward the day when court records will be electronic and this issue will be moot.

9. Item No. 02-10 (FRAP 27 — briefs supporting or responding to motions)

10. Item No. 02-11 (FRAP 27 — filing proposed orders with motions)

The Council complained that, although Rule 27(a)(2)(C)(i) specifically provides that a separate brief supporting or opposing a motion “must not be filed,” the Second Circuit requires separate briefs to be filed in connection with all motions, and the First and Tenth Circuits require separate briefs to be filed in connection with motions for summary disposition. The Council also complains that different circuits require different numbers of copies of motions to be filed. Rule 27(d)(3) requires that an original and 3 copies be filed “unless the court requires a different number by local rule,” and several circuits have enacted local rules requiring a different number. Finally, the Council complains that, although Rule 27(a)(2)(C)(iii) states that filing a proposed order “is not required,” the Federal Circuit requires such filing.

The Committee agreed by consensus to remove these items from its study agenda. Some members questioned whether the ABA’s understanding of the Second Circuit’s practice was correct, and one member pointed out that the Federal Circuit only requires proposed orders in one category of cases. More to the point, members said that, if the Appellate Rules clearly prohibit a local rule that requires parties to file something, and a circuit ignores that prohibition and requires the “something” to be filed, it is doubtful whether amending the Appellate Rules is the

best means available for addressing the problem. Members also expressed the view that circuits should have the flexibility to decide how many copies of a document they wish to receive.

11. Item No. 02-12 (FRAP 28 — clarify statement of case, statement of facts, etc.)

The Council stated that, in drafting briefs, practitioners are often confused about the difference between the “statement of the case” required by Rule 28(a)(6) and the “statement of facts” required by Rule 28(a)(7). The Council also argued that practitioners are confused about the difference between, on the one hand, the “statement of the case” and the “statement of facts,” and, on the other hand, the “summary of the argument” and “argument.”

Several members expressed disagreement with the Council about the latter matter. However, a couple of members agreed that there seems to be confusion about what is supposed to appear in the “statement of the case.” Many litigants file briefs that contain *no* such statement, indicating that they are not even aware that it is required. Other litigants file a statement that is several pages long. Still other litigants file the type of short summary that seems to be envisioned by Rule 28(a)(6). Confusion does exist.

Some members expressed doubts about whether the Appellate Rules should be amended to address this confusion. They pointed out that Rule 28(a)(6) already instructs practitioners that the statement of the case should “briefly indicat[e] the nature of the case, the course of proceedings, and the disposition below.” They also pointed out that, because the statement of the case counts toward the page limits applicable to briefs, it really does not matter if some litigants draft short statements and others draft long statements.

The practitioner members of the Committee said that, as far as they were concerned, this was not a problem for attorneys. They said that they would favor amending Rule 28(a)(6) only if the judge members thought that there was a serious problem with statements of the case. The judge members responded that they did not. By consensus, Item No. 02-12 was removed from the Committee’s study agenda.

12. Item No. 02-13 (FRAP 32 — briefs filed in cross-appeals)

The Council complained that the Appellate Rules provide little guidance about briefing in cases involving cross-appeals. Members agreed with the Council, but pointed out that the Committee has been working on the problem. Because this concern already appears on the Committee’s study agenda as Item No. 00-12, the Committee agreed by consensus to remove Item No. 02-13 from its study agenda.

13. Item No. 02-14 (FRAP 25(e) & 31(b) — number of copies of briefs)

Rule 31(b) requires that 25 copies of each brief be filed with the clerk, but permits the court to require the filing of a different number. The Council recommended that this local option be removed so that the same number of briefs can be filed in every case in every circuit.

Members of the Committee disagreed with the Council. These members said that the conflicting local rules do not place much of a burden on counsel and that circuit courts should be free to decide how many copies of briefs they want. By consensus, Item No. 02-14 was removed from the Committee's study agenda.

14. Item No. 02-15 (FRAP 32(a)(5) & 32(d) — typeface variations)

Rule 32(a)(5) requires that the typeface used in briefs must be at least 14 points (for proportionally spaced typeface) or 10-1/2 characters per inch (for monospaced typeface). The Council complained that, although all circuits will accept briefs that meet the requirements of Rule 32(a)(5) (as they must, under Rule 32(d)), some circuits will also accept briefs using typeface smaller than 14 points or closer together than 10-1/2 characters per inch.

Members said that this variation in circuit procedures did not create a hardship for counsel, as counsel could always be assured that, if their briefs met the requirements of Rule 32(a)(5), they would be accepted. By consensus, the Committee removed Item No. 02-15 from its study agenda.

15. Item No. 02-16 (FRAP 28 — contents of briefs)

16. Item No. 02-17 (FRAP 32 — content of covers of briefs)

Rule 28 lists those items that must be included in a brief. The Council complained that some circuits, by local rule, have added items to the list in Rule 28. Rule 32(a)(2) specifies the contents of the covers of briefs. The Council complained that some circuits have imposed additional requirements by local rule. The Council argued that these conflicting local rules create a hardship for attorneys who practice in more than one circuit.

A couple of Committee members agreed with the Council. On behalf of the Justice Department, Mr. Letter offered to look into these conflicting local rules and prepare a recommendation for the Committee. By consensus, the Committee agreed to retain Item Nos. 02-16 and 02-17 on its study agenda and await a recommendation from the Department.

17. Item No. 02-18 (FRAP 25 — CD-ROM briefs)

The Appellate Rules now *permit* the courts of appeals to accept briefs on CD-ROM; the Council urged that the rules be amended to *require* parties to file and courts to accept such briefs.

Members of the Committee opposed this proposal. Nothing prohibits a court that wants to receive CD-ROM briefs from requiring them. It is difficult to understand what would be accomplished by forcing courts to receive briefs that they do not want.

Moreover, the Standing Committee is insistent that the provisions of the rules of practice and procedure regarding electronic filing and service be as identical as possible, and that all five advisory committees work together on any changes to those provisions. Having only recently amended the rules to permit electronic filing and service — and having given assurances to courts and attorneys that they would not be *forced* to accept electronic filing or service against their will — the Standing Committee is highly unlikely to amend the rules of practice and procedure to force courts to accept CD-ROM briefs.

By consensus, the Committee removed Item No. 02-18 from its study agenda.

18. Item No. 02-19 (FRAP 12(a) — captioning)

Rule 12(a) requires appeals to be docketed “under the title of the district-court action.” The Council suggested that there is some variation in the way that circuits docket cases. Members said that they were unaware of such variation and that they were not certain what, if anything, the Council was proposing that the Committee do. By consensus, the Committee removed Item No. 02-19 from its study agenda.

19. Item No. 02-20 (FRAP 25 — require acceptance of electronically filed papers)

The Council complained that some circuits do not permit any papers to be filed electronically and that, although some circuits permit papers to be filed by fax, no circuit permits papers to be filed by e-mail or on disk. The Council urged that the Appellate Rules be amended to *require* courts to accept electronically filed papers. By consensus, the Committee removed Item No. 02-20 from its study agenda, largely for the reasons that it removed Item No. 02-18.

20. Item No. 02-21 (final judgment rule)

21. Item No. 02-22 (collateral order exception)

22. Item No. 02-23 (interlocutory appeals)

The Council proposed that the Committee use its authority to amend the Appellate Rules to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291 (*see* 28 U.S.C. § 2072(c)) and to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292 (*see* 28 U.S.C. § 1292(e)). Specifically, the Council encouraged the Committee to attempt to accomplish a general codification and clarification of the final judgment

rule — or at least the collateral order exception to that rule — and a general codification and expansion of the rules governing interlocutory appeals.

Members noted that similar proposals have been rejected by the Committee in the recent past. This type of general codification would be almost impossible to accomplish and would likely create many more problems than it would solve. The Committee remains open to amending the rules to define a *specific* type of ruling as final or to provide for a *specific* type of interlocutory appeal. However, the Committee will not attempt any general codification of the final judgment rule, the collateral order exception, or the rules governing interlocutory appeals.

By consensus, the Committee removed Item Nos. 02-21, 02-22, and 02-23 from its study agenda.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2003 Meeting

The Committee will meet next spring in Washington, D.C. Before a date is chosen, the Administrative Office will survey Committee members about their availability.

VIII. Adjournment

By consensus, the Committee adjourned at 3:45 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter