

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT



CHAMBERS OF
MICHAEL BOUDIN
CHIEF JUDGE

JOHN JOSEPH MOAKLEY
UNITED STATES COURTHOUSE
1 COURTHOUSE WAY, SUITE 7710
BOSTON, MA 02210
(617) 748-4431

January 21, 2004

03-AP-192

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the
United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Peter:

I am writing to bring the committee up to date on two changes in the Local Rules of the First Circuit that correspond in most but not in all respects to new Federal Rules of Appellate Procedure now under consideration.

Proposed FRAP 32.1. Citation of Judicial Dispositions. My court recently adopted a new local rule, a copy of which is attached, dealing with citations to unpublished opinions. Our own new rule disfavors but effectively permits the citation of unpublished opinions in any case where it is likely to matter. Our approach, including the requirement that there be no published opinion of the court that adequately addresses the issue, appeared to almost all of the court's judges to be a reasonable local limitation.

Proposed FRAP Rule 35(a). En Banc Determination. My court has also recently adopted a new local rule, a copy of which is attached, altering our practice. Our old rule required an absolute majority of active circuit judges for a grant of rehearing en banc; our new rule, like the one proposed by the committee, requires a majority only of active judges who are not disqualified. However, our new rule, unlike the committee version, specifies that the grant of en banc requires that the judges who are not disqualified constitute a majority of the judges who are in regular active service. Cf. 28 U.S.C. § 46(d). It would be helpful if the commentary made clear that the proposed FRAP rule is not intended to address or negate quorum requirements.

Sincerely yours,

Attachments
MB:DCD

Local Rule 32.3. Citation of Unpublished Opinions

- (a) *An unpublished opinion of this court may be cited in this court only in the following circumstances:*
- (1) *When the earlier opinion is relevant to establish a fact about the case. An unpublished opinion of this court may be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.*
 - (2) *Other circumstances. Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.*
 - (3) *Procedure. A party must note in its brief or other pleading that the opinion is unpublished, and a copy of the opinion or disposition must be included in an accompanying addendum or appendix.*
 - (4) *Definition. Almost all new opinions of this court are published in some form, whether in print or electronic medium. The phrase "unpublished opinion of this court" as used in this subsection and Local Rule 36(c) refers to an opinion (in the case of older opinions) that has not been published in the West Federal Reporter series, e.g., F, F.2d, and F.3d, or (in the case of recent opinions) bears the legend "not for publication" or some comparable phraseology indicating that citation is prohibited or limited.*
- (b) *Unpublished or non-precedential opinions of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (a)(1) above. Such opinions may also be cited in circumstances analogous to those set forth in subsection (a)(2) above, unless prohibited by the rules of the issuing court. If an unpublished or non-precedential opinion of another court is cited, the party must comply with the procedure set forth in subsection (a)(3) above.*

Local Rule 35. En Banc Determination

(a) Who May Vote; Composition of En Banc Court. The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service. A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).