ADVISORY COMMITTEE
ON
APPELLATE RULES

San Francisco, California
November 18-19, 2002

Agenda for Fall 2002 Meeting of
Advisory Committee on Appellate Rules
November 18-19, 2002
San Francisco, California

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III. Report on June 2002 Meeting of Standing Committee

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

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

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

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

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4. Item No. 02-05 (uniform certificate of interested persons)

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6. Item No. 02-07 (uniform transcript request form)

7. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices)

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

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

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

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

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VI. Additional Old Business and New Business (If Any)

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised October 2002

FRAP Item	Proposal	Source	Current Status
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
			Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
			Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Further minor revisions approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-06	Amend FRAP 4(b)(5) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02

FRAP Item	Proposal	Source	Current Status
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-01	Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to

FRAP Item	Proposal	Source	Current Status
			Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Alternative draft approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02

FRAP Item	Proposal	Source	Current Status
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice Discussed and retained on agenda 04/02
00-08	Amend FRAP 4(a)(6)(A) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals. (Related to No. 02-13.)	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion Draft approved 04/02 for submission to Standing Committee in 06/02
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02

FRAP Item	Proposal	Source	Current Status
02-02	Force CA11 to repeal local rules that are inconsistent with FRAP	Veronica Nunley	Awaiting initial discussion
02-03	Add to the Appendix of Forms a uniform case information sheet and amend FRAP to require courts to use it.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-04	Add to the Appendix of Forms a uniform notice of appearance and amend FRAP to require courts to use it.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-05	Add to the Appendix of Forms a uniform certificate of interested persons and amend FRAP to require courts to use it.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-06	Add to the Appendix of Forms a uniform corporate disclosure statement and amend FRAP to require courts to use it.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-07	Add to the Appendix of Forms a uniform transcript request form and amend FRAP to require courts to use it.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-08	Amend FRAP 10, 11, & 30 to eliminate local rule variations regarding transmitting records and filing appendices.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-09	Amend FRAP 11(e) to require courts to accept entire record in all cases.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-10	Amend FRAP 27 to eliminate local rule variations regarding the filing of briefs supporting or responding to motions.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-11	Amend FRAP 27 to eliminate local rule variations regarding the filing of proposed orders with motions.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-12	Amend FRAP 28 to clarify difference between statement of case, statement of facts, summary of argument, and argument.	ABA Council of Appellate Lawyers	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
02-13	Amend FRAP 32 to clarify cover colors and page limits of briefs filed in cross-appeals. (Related to No. 00-12.)	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-14	Amend FRAP 25(e) & 31(b) to eliminate local rule variations regarding the number of briefs that must be filed.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-15	Amend FRAP 32(a)(5) & 32(d) to eliminate local rule variations regarding typeface.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-17	Amend FRAP 32 to eliminate local rule variations regarding content of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-18	Amend FRAP 25 to require all courts to accept CD-ROM briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-19	Amend FRAP 12(a) to eliminate local rule variations regarding captioning.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-20	Amend FRAP 25 to require all courts to accept electronically filed papers.	ABA Council of Appellate Lawyer	Awaiting initial discussion
02-21	Amend FRAP to codify, clarify, and expand the final judgment rule of 28 U.S.C. § 1291.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-22	Amend FRAP to codify, clarify, and expand the collateral order exception to the final judgment rule.	ABA Council of Appellate Lawyers	Awaiting initial discussion
02-23	Amend FRAP to permit interlocutory appeals by permission in circumstances not identified in 28 U.S.C. § 1292(b).	ABA Council of Appellate Lawyers	Awaiting initial discussion

DRAFT

Minutes of Spring 2002 Meeting of
Advisory Committee on Appellate Rules
April 22, 2002
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2002, at 8:30 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. 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; Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Charles R. "Fritz" Fulbruge III, the former liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and Mr. Christopher Jennings, law clerk to Judge Anthony J. Scirica (Chair of the Standing Committee).

Judge Alito introduced Judge Stewart, who replaced Judge Will Garwood as a member of the Committee. Judge Alito also introduced Ms. Waldron, who replaced Mr. Fulbruge as the liaison from the appellate clerks. Judge Alito thanked Mr. Fulbruge for his excellent service to the Committee.

II. Approval of Minutes of April 2001 Meeting

The minutes of the April 2001 meeting were approved by consensus.

III. Report on June 2001 and January 2002 Meetings of Standing Committee

Judge Alito asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2001 meeting, the Standing Committee approved for submission to the Judicial Conference all of the proposed amendments forwarded by this Committee. Only the proposed abrogation of Rule 1(b) occasioned substantial discussion and a

dissenting vote; all other proposed amendments were approved unanimously and with little or no discussion.

This Committee did not meet during the fall of 2001, and thus it had nothing to report at the January 2002 meeting of the Standing Committee.

IV. Action Items

A. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — names of legal holidays)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

Committee Note

Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as

"Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

The Reporter reminded the Committee that, at its April 2001 meeting, it had agreed to amend the Appellate Rules so that they referred to the third Monday in February as "Washington's Birthday" rather than as "Presidents' Day." The Reporter said that the draft amendment would implement this Committee's decision and would ensure that the Appellate Rules would be consistent not only with 5 U.S.C. § 6103(a), but also with the Criminal Rules, which have recently been restylized and retain references to "Washington's Birthday."

A member moved that the proposed amendments to Rules 26(a)(4) and 45(a)(2) be approved. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-08 (FRAP 4(a)(6)(A) — 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 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~~ such 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) permits a district court to reopen the time to appeal a judgment or order if the district court finds that four conditions have been satisfied. First, the district court must 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 must 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 must 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 must find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period under subdivision (a)(6)(A) and about what kind of "notice" must be found lacking under subdivision (a)(6)(B) before the time to appeal may be reopened.

Subdivision (a)(6)(A). Subdivision (a)(6)(A) requires 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 have had difficulty agreeing upon what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that have addressed the question hold that only *written* notice is sufficient, although nothing in the text of the rule suggests 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 holds that while subdivision (a)(6)(A) does not require written notice, "the quality of the communication must rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appears that verbal communications can be deemed "the functional equivalent of written notice" if they are sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits have suggested in dicta that subdivision (a)(6)(A) requires only "actual notice," which, presumably, could

include verbal notice that is 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 have read into subdivision (a)(6)(A) restrictions that have appeared only in 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 currently appear in neither subdivisions (a)(6)(A) nor (a)(6)(B) (such as a 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)).

Subdivision (a)(6)(A) has been amended to resolve this circuit split. Under amended subdivision (a)(6)(A), only *written* notice of the entry of a judgment or order will trigger 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 amended subdivision (a)(6)(A) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in subdivision (a)(6)(A) requires that the written notice be received from any particular source, and nothing requires that the written notice have been 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 subpart (A)'s seven-day window." *Wilkens 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, a verbal communication is not written notice for purposes of subdivision (a)(6)(A), no matter how specific, reliable, or unequivocal.

Subdivision (a)(6)(B). Prior to 1998, 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 be served by a party

pursuant to that same rule. In other words, 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 move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, 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, 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 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, 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 precludes a party from moving to reopen the appeal was no longer limited to Civil Rule 77(d) notice; under the amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, would preclude a party. But the text of the amended rule did not make clear what kind of notice would qualify. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, subdivision (a)(6)(B) has been amended to restore its pre-1998 simplicity. Under amended subdivision (a)(6)(B), if the court finds that the moving party was entitled under Civil Rule 77(d) to notice of the entry of the judgment or order sought to be appealed and further finds that the party did not receive "such notice"within 21 days — that is, the notice described in Civil Rule 77(d) — 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 be formally served under Civil Rule 5(b), any notice that has not been so served will not operate to preclude the reopening of the time to appeal under subdivision (a)(6)(B).

The Reporter said that Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. Under the rule, the concept of "notice" is important in two different respects. First, under subdivision (B), a party seeking to move to reopen the time to appeal a judgment must show that he or she did not receive "notice" of that judgment within 21 days after its entry. Second, under subdivision (A), a party must bring a motion to reopen the time to appeal a judgment no later than 7 days after receiving "notice" of its entry.

When Rule 4(a)(6) was adopted in 1991, it was clear that "subdivision (B) notice" was intended to be different from "subdivision (A) notice." Subdivision (B) notice was limited to notice formally served under Civil Rule 77(d), while Subdivision (A) notice encompassed any kind of notice from any source.

Two difficulties have arisen in interpreting Rule 4(a)(6) — one the fault of the courts and one the fault of this Committee.

The problem with Subdivision (A) notice is the fault of the courts. Although neither the text of the rule nor the Committee Note imposes any restrictions on the type of notice that suffices to trigger the seven-day window, a four-way circuit split has developed over the meaning of "notice" in Subdivision (A). At one extreme are courts that read the rule literally and hold that any kind of notice from any source suffices to trigger the seven-day window. At the other extreme are courts that hold that only formal notice served upon a party under Civil Rule 77(d) suffices. In the middle are courts that hold that the notice must be in writing, but need not be formally served. The Ninth Circuit takes the unique position that, although the notice need not be in writing, it needs to be in a form that is the "functional equivalent" of writing.

The Reporter said that the amendment that he had drafted to Subdivision (A) was intended to require written notice, but to define "written" broadly to include, in essence, anything that can be read, such as a website, e-mail message, or docket sheet. The Reporter also said that the amendment was intended to make clear that such written notice can come from any source and does not have to be formally served under Civil Rule 77(d).

The problem with Subdivision (B) notice is the fault of this Committee and results from a 1998 amendment to Rule 4(a)(6). Prior to 1998, it was clear that, if a party was entitled to notice of entry of judgment *under Civil Rule 77(d)* and the party did not receive notice *under Civil Rule 77(d)*, then the party could bring a motion to extend the time to appeal. After 1998, it is no longer clear what kind of notice must be lacking. The amendment to Rule 4(a)(6) broadened the type of "disqualifying" notice beyond notice served under Civil Rule 77(d) to include *any* kind of notice, and broadened the source of such notice from those authorized to serve notice under Civil Rule 77(d) (the *clerk* or a party) to others (the *court* or a party). Thus, under amended Subdivision (B), if a party is entitled to notice of entry of a judgment under Civil Rule 77(d), and the party does not receive either that notice or some other kind of (unspecified) notice from someone acting on behalf of the district court or another party, then the party is eligible to move to extend the time to appeal.

The Reporter said that this ambiguity in Subdivision (B) would almost surely lead to confusion and conflict in the circuits. He also said that, as far as he could tell, Subdivision (B) worked well before being amended in 1998. The Reporter said that the amendment was intended to restore Subdivision (B) to its pre-1998 simplicity: A party would be barred from bringing a motion to reopen the time to appeal only if that party received notice under Civil Rule 77(d) within 21 days. Any other kind of notice would not preclude a motion to reopen.

The Committee discussed the proposed amendment at length, focusing on four issues:

1. The Committee discussed whether to require that Subdivision (A) notice be in writing, as the Reporter had proposed. A couple of members argued that, for example, a phone call from the clerk of court should suffice to trigger the seven-day window. Other members responded that written communications are more susceptible of proof than oral communications and that we should try to avoid creating a situation where, for example, the clerk of court is called as a witness to testify about when he or she engaged in a phone conversation with an attorney. A member moved that Subdivision (A) be amended to require written notice. The motion was seconded. The motion carried (unanimously).

2. The Committee also discussed the definition of "written." Some members were uncomfortable with the Committee Note, which essentially made an "eyes/ears" distinction: Notice that is read is deemed "written," while notice that is heard is not. One member pointed out that a claim that a party learned of the entry of a judgment by visiting a website on a particular date is no more susceptible of proof than a claim that a party learned of the entry of a judgment in an oral conversation. However, after further discussion, the Committee concluded that a narrower definition of "written" would likely create more problems than it would solve.

3. As to Subdivision (B) notice, members agreed that the subdivision should be amended to eliminate the ambiguity identified by the Reporter. However, one member pointed out that the amendment was itself ambiguous. Under the amendment, Subdivision (B) would require that the court find "that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive such notice within 21 days after entry." The problem is with the words "entitled" and "such." Under Civil Rule 77(d), a party is "entitled" to notice of entry of the judgment only from the *clerk*. Thus, in referring to "such notice" — that is, the notice to which "the moving party was *entitled*" — amended Subdivision (B) must be referring to notice served by a *clerk*. But the Committee Note goes on to refer to receiving notice from *either* the clerk *or* any party. Since there is no entitlement to notice from a party, it is impossible for a party to provide "such" notice.

The Committee agreed that it wanted any kind of Civil Rule 77(d) notice — that is, either the notice that the clerk is obligated to serve or the notice that a party is authorized to serve — to suffice to cut off the right to bring a motion to reopen. The Committee struggled with trying to redraft the amendment to Subdivision (B) to say that. The Committee eventually agreed that Subdivision (B) should be redrafted to provide: "the court finds that the moving party did not receive notice under Civil Rule 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry."

4. A member moved that Subdivision (A) be redesignated as Subdivision (B) and that Subdivision (B) be redesignated as Subdivision (A). She argued that the rule would read more clearly if it first described the formal notice of entry of judgment whose absence entitles a party to move to reopen the time to appeal and then described the informal notice that triggers the

seven-day deadline to bring the motion. The motion was seconded. The motion carried (unanimously).

The Reporter agreed to present a redrafted amendment to Rule 4(a)(6) at the next Committee meeting. One member asked that the Committee Note be shortened. He complained generally of the burden that long Notes impose on practitioners who, while in court, rely upon the popular soft-covered West compilations. Other members disagreed, pointing out that Notes are also intended to serve judges and lawyers who are doing research in their offices and trying to understand the reasons why a rule was amended. When an amendment seeks to address a complicated problem — or when the Committee can anticipate future difficulties that will arise in interpreting an amendment — longer Notes can be helpful and can save courts and attorneys work in the long run.

A member said that she had trouble with the "tenses" when reading the Note — that is, she had to concentrate to figure out when the Note was describing a past version of Rule 4(a)(6), when the Note was describing the present version, and when the Note was describing the amended version. The Reporter said that he would try to make the "tenses" clearer when redrafting the Note.

C. Item No. 00-12 (FRAP 28, 31 & 32 — cover colors in cross-appeals)

Mr. Letter introduced alternative sets of proposed amendments and Committee Notes regarding briefing in cross-appeals. The first set would amend Rules 28(c), 28(h), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B) — that is, it would address the issue through amendments to several existing rules. The second set would address the issue primarily through a new Rule 28A, although a couple of existing rules (e.g., Rule 32(a)(2) regarding the covers of briefs) would also be amended. (The draft amendments and Committee Notes are found under Tab IV-C in the agenda book.)

Mr. Letter said that the rules on cross-appeals vary from circuit to circuit, sometimes in significant ways. For example, in one circuit the parties to a cross-appeal are permitted to serve a total of three briefs, while in most circuits they are permitted a total of four. Among the circuits that permit four briefs, there are differing rules regarding the length of those briefs and the colors of their covers. As a result, the Justice Department and other litigants with national practices frequently have to get extensive guidance from clerks' offices.

The Committee discussed this issue at its April 2001 meeting and asked the Department to prepare three alternative proposals:

- a proposal that would address these issues through amendments to several existing rules;

- a proposal that would combine all provisions applicable to briefs filed in cross-appeals into one new rule; and

- a proposal that would treat cross-appeals as two separate consolidated cases.

Mr. Letter said that the Department had considered and rejected the last proposal (treating cross-appeals as two separate cases). Under that proposal, instead of the appellee/cross-appellant filing a single brief that acts both as a principal brief on the merits of the cross-appeal and as a response to the brief of the appellant/cross-appellee on the appeal, the appellee/cross-appellant would file two separate briefs — a response in the first appeal and a principal brief in the second appeal. And instead of the appellant/cross-appellee filing a single brief that acts both as a response brief in the cross-appeal and a reply brief in the appeal, the appellant/cross-appellee would file a reply brief in the first appeal and a response brief in the second appeal. This would significantly increase the number of pages that would have to be drafted by parties and considered by courts and create problems regarding cross-references and other matters.

Mr. Letter said that the Department had drafted a new Rule 28A that would consolidate *most* provisions regarding cross-appeals into one rule. Mr. Letter said that it was probably not advisable to consolidate *all* such provisions into one rule; for example, the colors of the covers of briefs would most logically be addressed in Rule 32(a)(2). Mr. Letter said that the Department was indifferent as between adopting a new Rule 28A or amending several existing rules.

Judge Alito identified the following issues for the Committee: (1) Should there be more extensive national rules on briefing in cross-appeals? (2) Should cross-appeals be treated like two separate consolidated appeals with separate briefing in each case? (3) If cross-appeals are to be treated differently than consolidated appeals, how many briefs should the parties serve in a cross-appeal? (4) What should the length of each of those briefs be? (5) What color should the covers of those briefs be?

The Committee quickly reached a consensus that FRAP should be amended to provide national rules governing briefing in cross-appeals and that cross-appeals should not be treated like separate, consolidated appeals. The Committee also quickly reached consensus that a total of four briefs should be permitted in cross-appeals:

Brief One: The appellant/cross-appellee's principal brief on the merits of the appeal.

Brief Two: The appellee/cross-appellant's response to Brief One and principal brief on the merits of the cross-appeal.

Brief Three: The appellant/cross-appellee's response to Brief Two on the cross-appeal and reply to Brief Two on the appeal.

Brief Four: The appellee/cross-appellant's reply to Brief Three on the cross-appeal.

The Committee had a lengthy discussion regarding word limitations. At the April 2001 meeting, the Justice Department had proposed that Brief One be limited to 14,000 words, Brief Two to 16,500 words, Brief Three to 14,000 words, and Brief Four to 7000 words. This would give the appellant/cross-appellee a total of 28,000 words, and the appellee/cross-appellant a total of 23,500 words. The proposal of the Department was consistent with the local rules adopted by the majority of the circuits, except that most circuits limit Brief Two to 14,000 words. At the April 2001 meeting, the Committee decided, over the objection of the Department, that Brief Two should be limited to 14,000 words. Mr. Letter asked the Committee to reconsider its decision.

A member asked whether two separate word limits could apply to Brief Three. The cross-appeal may raise only a minor issue, one that the appellant/cross-appellee could easily address in 1000 words. In this situation, the appellant/cross-appellee is essentially allowed to file a 13,000-word reply brief. Other members thought it impracticable to try to assign word limits to portions of Brief Three, as it is often difficult to distinguish which part of Brief Three is responding to the cross-appeal and which part is replying to Brief Two's response to the appeal. Mr. Fulbruge said that the clerks would have difficulty enforcing such a rule.

The Committee debated at length whether to approve the word limitations recommended by the Department of Justice or whether instead to limit Brief Two to 14,000 words. Those in favor of the Department's proposal cited the fact that, even under the proposal, the appellant/cross-appellee gets 4,500 more words than the appellee/cross-appellant. Limiting Brief Two to 14,000 words would increase that disparity to 7,000 words, which would be unfair to the appellee/cross-appellant, especially in cases in which both parties are equally aggrieved and the denomination of one as the "appellant" simply reflects who got to the courthouse first. Although clerks have the discretion to allow longer briefs, clerks can be unpredictable in their exercise of that discretion.

Other members argued against the Department's proposal, and argued that Brief Two should be limited to 14,000 words, as it is in most circuits. One member even expressed support for limiting Brief One and Brief Two to 14,000 words, and Brief Three and Brief Four to 7,000 words. These members argued that, generally speaking, appellate courts do not suffer from too little briefing. To the contrary, judges are plagued by overly long briefs. In rare cases in which the appellee/cross-appellant needs more than 14,000 words in Brief Two, it can seek permission from the clerk. The main effect of raising the general limit on Brief Two to 16,500 words will be that hundreds of appellees/cross-appellants will lard their briefs with 2,500 needless words. As to the disparity between the overall words allotted to the appellant/cross-appellee and the appellee/cross-appellant, these members argued that there is little correlation between the size of the brief and its effectiveness. Moreover, the appellant is generally the more aggrieved party — and generally has more work to do in its briefs — and thus some disparity is justified.

A member moved that the Department's proposal be approved. The motion was seconded. The motion carried (5-4).

The Committee agreed by consensus with the Department's proposal that the cover on Brief One be blue, on Brief Two red, on Brief Three yellow, and on Brief Four gray. The Committee also agreed by consensus that, rather than attempt to address the issue of briefing in cross-appeals in a separate rule, several of the existing rules should be amended. The Reporter agreed that he would carefully review the draft amendments and Committee Notes presented by the Department, edit them as necessary, and present them at the next meeting of the Committee.

D. Item No. 00-13 (FRAP 29 — preclusion of amicus briefs)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 29. Brief of an Amicus Curiae

(a) When Permitted.

(1) **Government Briefs.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.

(2) **Other Briefs.** Any other amicus curiae may file a brief only:

(A) by leave of court or

(B) if the brief states that all parties have consented to its filing.

(3) **Rejection of Briefs.** A court may reject a brief filed under Rule 29(a)(2)(B) if consideration of that brief would result in the disqualification of a judge.

Committee Note

Subdivision (a). Rule 29(a) gives the government the right to file an amicus-curiae brief without seeking the leave of the court or the consent of the parties. As to all others, Rule 29(a) permits the filing of an amicus-curiae brief only "by leave of court or if the brief states that all parties have consented to its filing."

> Rule 29(a) may be understood to provide that, when all parties consent to the filing of a private amicus-curiae brief, the court has no alternative but to consider the brief. That, in turn, may open the door to the strategic use of amicus-curiae briefs to force the disqualification of particular judges. For example, someone might hire the sibling of a judge to file an amicus-curiae brief, knowing that such a filing will likely result in the disqualification of the judge under 28 U.S.C. § 455 or the Code of Conduct for United States Judges. Even when an amicus-curiae brief has not been filed for the purpose of disqualifying a judge — but nevertheless has that effect — the benefit to the court of maintaining the original panel or the full en-banc court may outweigh the benefit to the court of receiving the amicus-curiae brief.
>
> Rule 29(a) has been amended to make clear that, even when all parties have consented to the filing of a private amicus-curiae brief, the court may act on its own initiative to reject that brief if its consideration would result in the disqualification of a judge. After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). If the court does not want to consider a private amicus brief, Rule 29(a) should not force it to do so.

The Reporter said that the judges of the First Circuit were concerned about the fact that, under Rule 29(a), leave of court is not necessary to file a "private" amicus brief if "all parties have consented to its filing." The particular concern of the First Circuit is with the strategic use of amicus briefs to force the disqualification of particular judges. For example, if someone hired the sibling of a judge to prepare and file an amicus brief, that judge would likely feel obligated to disqualify himself or herself.

The Reporter recommended that this suggestion be removed from the study agenda. The Reporter said that it was hard for him to imagine that the situation feared by the First Circuit occurs often. The situation would arise only if all of the parties affirmatively consented to the filing of an amicus brief and if that brief resulted in the disqualification of one of the members of the panel assigned to hear the case (or one of the members of the en banc court). Presumably, it would be a rare brief that would both receive the consent of all parties and cause such a disqualification. The Reporter said that he could not find a single instance in which anyone tried such a tactic, much less succeeded. Moreover, with one exception, he could not find anything that addressed this tactic in the local rules of the courts of appeals, which also suggests that it has not been a problem. Given that Rule 29(a) has remained unchanged in relevant part since the adoption of the Federal Rules of Appellate Procedure in 1967, and given that there is no evidence that the problem feared by the First Circuit has actually arisen, the Reporter said that he recommended that the Committee decline to amend Rule 29(a).

The Reporter continued that, if the Committee disagreed, it could proceed in one of two ways. First, the Committee could simply delete the provision that permits amicus briefs to be filed without leave of court. That would allow the court to ascertain before ruling on the motion whether permitting the brief to be filed would result in the disqualification of any judge. However, it would also increase the workload of the court, as motion practice would be necessary whenever a private party sought to file an amicus brief. Second, the Committee could amend Rule 29(a) so that the rule continued to permit a brief to be "filed" without leave of the court if all parties consent, but also provided explicitly that the court may "reject" such a brief if its consideration would result in the disqualification of a judge. The amendment and Committee Note drafted by the Reporter take the latter approach.

A couple of members spoke in favor of amending the rule. One expressed the concern that, as judges are required to disclose more and more detailed information about their investments, the strategic use of amicus briefs could increase. Another pointed out that, in many cases, the parties consent to the filing of amicus briefs without giving it much thought, opening the door to the strategic use of such briefs. He said that the judges of the D.C. Circuit shared the concern of the judges of the First Circuit. He said that the concern went beyond parties intentionally using amicus briefs to disqualify judges; amicus briefs filed in good faith that trigger judicial disqualifications can also be problematic.

Other members spoke against amending the rule. A member said that the Appellate Rules should not be amended to address problems that occur rarely if ever. Another member agreed and said that, given that amici are not parties, the ability to use amicus briefs strategically is quite limited.

A member pointed out the practical difficulties of trying to bring about the result desired by the First Circuit. In all cases, the attorneys would have to do the work of preparing the brief, and the court would have to do the work of reading the brief. Under the first option described by the Reporter, attorneys would always have to ask permission to file the completed brief, and courts could say "no." Under the second option, courts could always reject the completed brief after it was filed. Under both options, then, a brief that an amicus had spent time and money to prepare could be rejected even though every party to the case had consented to its filing.

After further discussion, a member moved that Item No. 00-13 be removed from the Committee's study agenda. The motion was seconded. The motion carried (8-1).

E. Item No. 01-05 (change references to "19__" in forms)

The Reporter pointed out that four of the five forms attached to the Appellate Rules refer to "the ___ day of _____, 19__" (Forms 1 and 2), "entered on _____, 19___" (Form 3), or "entered in this case on _____, 19___" (Form 5). He recommended that the Committee change the forms to refer to "20___" instead of to "19___."

A member moved that the change be made. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 95-03 (new FRAP 15(f) — prematurely filed petitions to review)

Judge Alito said that Item No. 95-03 arose out of a suggestion by Judge Stephen Williams of the D.C. Circuit, a former member of this Committee. In 1995, Judge Williams recommended that a new Rule 15(f) be added to the Appellate Rules to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such review-blocking petition. Judge Williams's suggestion was inspired by Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions.

The Committee approved a proposal to add such a Rule 15(f), and the proposal was published for comment in August 2000. In response, Judge A. Raymond Randolph, the Chief Judge of the D.C. Circuit, wrote to the Committee and expressed the "unanimous" and "strong" opposition of the Circuit's judges and its Advisory Committee on Procedures to proposed Rule 15(f). In light of that opposition, this Committee deferred further action on Rule 15(f).

Judge Alito said that he had talked to Judge Williams, and that Judge Williams confirmed that his colleagues were strongly opposed to new Rule 15(f). Judge Alito said that, given that the problem that Rule 15(f) is intended to solve is a problem affecting mainly the D.C. Circuit, and given the strong opposition of that circuit to the proposed rule, the proposed rule had little chance of clearing the Standing Committee or the Judicial Conference. For that reason, Judge Alito asked the Committee to remove Item No. 95-03 from the study agenda.

A couple of members affirmed that they continued to believe that proposed Rule 15(f) makes sense on the merits. There is a "trap" in the D.C. Circuit, and, unless the Appellate Rules are amended to fix that trap, it will continue to be easy for litigants unknowingly to forfeit their right to appellate review of agency action. However, these members also acknowledged the political realities of the situation and the fact that Item No. 95-03 had now been pending on the study agenda for seven years.

A member moved that Item No. 95-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

B. Item No. 97-31 (FRAP 47(a)(1) — uniform effective date for local rule changes) and Item No. 98-01 (FRAP 47(a) — conditioning effectiveness of local rules on filing with Administrative Office)

The Reporter reminded the Committee that, at its April 1998 meeting, it approved an amendment to Rule 47(a) that would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The Committee later decided not to submit this amendment to the Standing Committee because of several concerns. First, members of the Standing Committee and this Committee have expressed concern that prescribing a uniform effective date for changes to local rules would violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Second, the A.O. has expressed concern that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Finally, the rules of practice and procedure should not differ on these points. If there is to be a uniform effective date for changes to local rules, or if there is to be a requirement that local rules be filed with the A.O., then those provisions should appear in all of the rules of practice and procedure, and not just in the Appellate Rules.

The Reporter suggested that it might be time to remove Item Nos. 97-31 and 98-01 from the study agenda. At its January 2002 meeting, the Standing Committee engaged in a lengthy discussion of the proliferation of local rules, in the context of a review of the progress of the new Local Rules Project. In the course of that discussion, several members of the Standing Committee expressed reservations about these two proposals. Moreover, the other advisory committees reported either that their members had objections to the proposals or that working on similar proposals was not a high priority for them.

The Reporter also said that it seems clear that no action regarding local rules is going to be taken by the Standing Committee until the Local Rules Project completes its work and submits its recommendations. The recommendations that relate to all of the rules of practice and procedure are likely to be considered by a joint working group, consisting of members of all of the advisory committees. Prof. Coquillette agreed. He said that the Local Rules Project will likely present a tentative report to the Standing Committee in June 2002 and a final report in January 2003. Prof. Coquillette also suggested that, in light of the issue regarding 28 U.S.C. § 2071(b), the Standing Committee may deem it prudent to work with Congress on a legislative solution to the local rules problem.

A member moved that Item Nos. 97-31 and 98-01 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

C. Item No. 99-05 (FRAP 3(c) — failure explicitly to name court to which appeal taken)

The Reporter reminded the Committee that, at its April 2000 meeting, it removed from its study agenda a proposal that Rule 3 be amended to prevent the dismissal of an appeal when a notice of appeal does not explicitly name the court to which the appeal is taken, but only one court of appeals has jurisdiction over the appeal. The proposal had been placed on the study agenda after a panel decision of the Sixth Circuit created a circuit conflict on this issue. *See United States v. Webb*, 157 F.3d 451 (6th Cir. 1998). The proposal was removed from the study agenda after the en banc Sixth Circuit eliminated the circuit conflict by overturning the decision of the panel. *See Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc).

Public Citizen Litigation Group has asked that this proposal be restored to the Committee's study agenda. The Reporter said that, in his opinion, there is no reason to do so. The circuits that have addressed the issue continue to be unanimous that dismissal of an appeal is not necessary under these circumstances. And, in the wake of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it is extremely unlikely that a future circuit split will develop. The Supreme Court specifically stated in *Becker* that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, *to which appellate court*." *Id.* at 767 (emphasis added).

A couple of members agreed with the Reporter. A member moved that Item No. 99-05 not be restored to the study agenda. The motion was seconded. The motion carried (unanimously).

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

The Reporter said that Item No. 99-09 arose out of a suggestion by Judge Scirica that this Committee study the way that the circuit courts process requests for certificates of appealability ("COAs") and consider whether the Appellate Rules should be amended to bring about more uniformity. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

The Department reported back to the Committee at its April 2001 meeting. The Department argued, and the Committee agreed, that the variation in circuit procedure was not creating a problem for litigants and that this Committee should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The Committee concluded that this matter should be removed from its study agenda, with one exception.

The Department complained that, in some circuits, the government is required to file a brief on the merits before the court decides whether to grant a COA. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department proposed that this

Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether to grant a COA.

Members of this Committee expressed opposition to the Department's proposal for various reasons, which are described in the minutes of the April 2001 meeting. The Committee did not vote on the Department's proposal, but suggested to the Department that it reconsider whether it wanted to pursue its proposal, given the opposition of several Committee members.

The Reporter said that Mr. Letter had informed him that the Department had decided to withdraw its proposed amendment, and thus that Item No. 99-09 could be removed from the Committee's study agenda. Mr. Letter responded that, subsequent to talking with the Reporter, he had learned that the United States Attorneys were interested in presenting a more limited version of the proposal to which this Committee had reacted negatively in April 2001. By consensus, the Committee agreed to leave this item on the study agenda so that the Department can pursue this matter further.

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal filed on behalf of a corporation is signed only by one of the corporation's officers, and not by an attorney. Judge Motz feared that the Fourth Circuit might create a conflict over this issue with the Ninth Circuit. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999).

Judge Motz said that this item can be removed from the study agenda. The Fourth Circuit issued its decision and agreed with the Ninth Circuit. *See Amzura Enters., Inc. v. Ratcher*, 18 Fed.Appx. 95 (4th Cir. 2001). Also, in light of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it is highly unlikely that any circuit will disagree with the Fourth and the Ninth in the future.

A member moved that Item No. 00-05 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

F. Item No. 00-07 (FRAP 4 — specify time for appeal of Hyde Amendment order)

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 appellate deadline should be applied to an order disposing of a "civil-type" motion brought in connection with a criminal proceeding. 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. He said, in essence, that the problem had turned out to be very complicated, and that the Department had not yet settled upon a solution. He said that he would have more to report at the next meeting of the Committee.

One member asked the Department to consider a rule that would state simply that Rule 4(b) would apply to appeals from judgments of conviction or sentence, and that Rule 4(a) would apply to all other appeals. Under this approach, Rule 4(a) would govern all post-judgment motions in criminal cases. A member responded that such an approach would change existing law as to some appeals and would probably not be as easy to administer as it sounds. For example, would Rule 4(a) or 4(b) apply to appeals of orders denying FRCrP 35(c) motions (motions to correct a sentence "imposed as a result of arithmetical, technical, or other clear error")? If the answer is Rule 4(a), do we really want defendants to have 60 days to appeal an order denying a FRCrP 35(c) motion?

Ms. Waldron stated that most post-judgment motions in criminal proceedings are made pro se — often by movants who are imprisoned in a jurisdiction that is not the same as the jurisdiction in which the motion must be made — and thus a universal 60-day deadline for such motions might be fairer. Ms. Waldron also pointed out that there is uncertainty over the deadline that applies to orders disposing of motions made under 18 U.S.C. § 3582(c)(2) (which authorizes a prisoner to move to reduce his sentence if a favorable change is made to the sentencing guidelines).

A member suggested that the Committee consider abolishing the distinction between civil and criminal appeals and give litigants against the United States 60 days to appeal all judgments or orders, regardless of the type of case in which they are entered. He said that giving defendants 60 days to appeal instead of 10 days would not create much delay or cause much harm to parties. Any defendant who wants to do so can file an appeal in one day; thus, a longer appellate deadline would not hurt defendants. The only party who might be prejudiced is the government, which might have to wait longer to get a conviction affirmed. That is not a compelling objection.

A member asked whether defendants need a longer period of time in which to appeal in criminal cases in order to secure counsel for the appeal. A member responded that they did not. In a typical case, after a defendant is convicted, the last act of his trial attorney will be to file a notice of appeal. Filing a notice of appeal is quick and easy.

A couple of members said that they would be more comfortable with a rule that addresses specifically — on a category-by-category basis — which deadlines apply to which orders. To date, the Justice Department has identified only a handful of orders whose appellate deadlines are in doubt. Rather than crafting a sweeping general rule, which could have unanticipated consequences and eventually create as many problems as it solves, these members would rather try to address each problem as it arises.

A member moved that the Justice Department be asked to draft an amendment that would specifically address each order whose appellate deadline is in dispute. The motion was seconded. The motion carried (unanimously).

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

At its April 2001 meeting, this Committee asked the Federal Judicial Center ("FJC") to study the way that the courts of appeals have implemented 28 U.S.C. § 46(c) and Rule 35(a), both of which require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc. In particular, the Committee asked the FJC to describe how the circuits have addressed the question of whether judges who are disqualified are counted in calculating what constitutes a "majority."

Ms. Leary reported that the FJC had surveyed all 13 circuits on this question, and that three different approaches appear to be in use:

> Eight circuits use the **"absolute majority" approach**. In these circuits, judges who are disqualified 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 judges must vote to hear a case en banc. If 5 of the 12 judges are disqualified, all 7 of the non-disqualified judges would have to vote to take a case en banc.
>
> Four circuits use the **"case majority" approach**. In these circuits, judges who are disqualified 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 non-disqualified judges) would have to vote to take a case en banc.
>
> One circuit — the Third — uses the **"modified case majority" approach**. This approach works the same as the case majority approach, except that a case cannot be taken en banc unless a majority of all judges — disqualified and non-disqualified — are eligible to vote on the question. Thus, a case in which 5 of the circuit's 12 active judges are disqualified can be heard en banc upon the votes of 4 judges; a majority of all judges would be eligible to vote, and a majority of those eligible to vote would have voted in favor of taking the case en banc. But a case in which 6 of the circuit's 12 active judges

were disqualified cannot be taken en banc, even if all 6 non-disqualified judges vote in favor.

Ms. Leary reported that, in all 13 circuits, a judge who is temporarily unavailable because of travel, illness, or another reason is counted in the base — that is, is considered an active, non-disqualified judge. Ms. Leary also reported that only minor differences existed among the circuits in the treatment of senior judges.

Prof. Mooney said that when Judge Kenneth Ripple chaired this Committee, and she served as the Committee's Reporter, the Committee had approved a uniform rule on this issue. The Committee's proposal caused a firestorm of protest among the chief judges, who were nearly unanimous in their belief that this is a matter of court administration that should be left to each circuit to decide for itself. Prof. Mooney said that she disagreed with the chief judges. There is both a national statute (28 U.S.C. § 46(c)) and a national rule (Rule 35(a)) addressing this issue, and there is no reason why three different interpretations of these national standards should exist in the circuits. That said, Prof. Mooney warned that the chief judges were quite adamant that this Committee should not try to bring about uniformity.

A member said that he would favor amending Rule 35(a) to impose a consistent national standard. He also objected to the absolute majority approach on the ground that it essentially permits a disqualified judge to count as a "no" vote. The disqualification of a judge should not result in the equivalent of a vote either for or against rehearing en banc; it should, as much as possible, be a neutral. The member said that he would favor the case majority rule.

Another member agreed. He pointed out that disqualifications seem to be more common. He also pointed out that, under the absolute majority rule, one judge can effectively control the law of a circuit. Suppose, for example, that a circuit has 12 active judges and that, in a particular case, 5 of those 12 judges are disqualified. Even if 6 of the 7 non-disqualified judges wish to take a case en banc, the case cannot be heard en banc, because 6 is not a majority of 12. This permits just one active judge — perhaps sitting on a panel with a visiting judge and a senior judge — effectively to control circuit precedent, even over the objections of all 6 of his non-disqualified colleagues.

A member pointed out that an even worse result is possible: If, on such a panel, the one active judge is in dissent, and the visiting judge and senior judge are in the majority, the law of a circuit could be set by *zero* active judges over the objections of all 7 of the non-disqualified active judges.

Prof. Coquillette said that, although he did not disagree with these members on the merits, he concurred with Prof. Mooney's statements about the likely views of the chief judges. Any attempt by this Committee to impose a uniform standard on the circuits will be met with fierce resistence. A member agreed. He said that the opposition will take two forms: (1) Some chief judges will oppose any uniform national standard, on the grounds that each circuit should

be free to set its own rules; and (2) Some chief judges will accept a national standard, as long as it imposes their circuit's rule on all of the other circuits.

A couple of members expressed their frustration at the likely opposition of the chief judges. They reiterated that there already *are* national standards that address this question; the conflict arises because circuits interpret 28 U.S.C. § 46(c) and Rule 35(a) differently. They also pointed out that there is no good reason for this practice to vary among circuits; this is not a situation in which varying local conditions need to be accommodated through different rules. Prof. Coquillette pointed out that, according to the Rules Enabling Act, the purpose of the rules of practice and procedure is "to maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073(b). In other words, Congress equated maintaining consistency with promoting justice.

One member said that the root of the problem is *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), in which the Supreme Court essentially indicated that it was up to each circuit to interpret 28 U.S.C. § 46(c) for itself.

A member said that, while she did not disagree that there should be a uniform national standard, she was not convinced that the absolute majority approach was wrong. The absolute majority rule has the advantage of discouraging en banc hearings and making certain that circuit law binding on all future panels is not set by a minority of the circuit's active judges. If the absolute majority rule insulates a bad decision from en banc review, then the Supreme Court can fix the error, or the en banc court can overturn the panel decision when the issue arises in another case.

A member argued that this Committee should propose a national rule. Even if that proposal is defeated by the Standing Committee or the Judicial Conference, it might call Congress's attention to the problem and result in statutory reform.

The Committee adjourned at 12:00 noon for lunch and reconvened at 1:20 p.m.

A member moved that this Committee propose amending Rule 35(a) to resolve the conflict over the treatment of disqualified judges. The motion was seconded. The motion carried (unanimously).

The Committee continued to discuss *how* the conflict should be resolved. Several members spoke in favor of the modified case majority approach of the Third Circuit. That approach requires a majority of those judges who are eligible to vote, and thus does not count every recusal as a "no" vote. At the same time, that approach requires that a majority of active judges be eligible to vote, which guards against en banc decisions being issued by a minority of judges.

A member said that horror stories are still possible under the Third Circuit approach. For example, if 6 of 12 active judges are disqualified, a 2-1 panel with a visitor and senior in the majority can still set circuit precedent that no active member of the circuit supports. Other members agreed that such horror stories are possible, but horror stories are possible under any of the three approaches. The Third Circuit approach seems to do the best job of minimizing them.

A member moved that Rule 35(a) be amended to adopt the modified case majority approach of the Third Circuit. The motion was seconded. The motion carried (unanimously). The Reporter said that he would prepare an implementing amendment and Committee Note and present it at the next meeting.

H. Item No. 01-01 (citation of unpublished decisions)

Judge Alito said that he had surveyed the chief judges of the circuits about the Justice Department's proposal that the Appellate Rules be amended explicitly to permit the citation of non-precedential decisions. He received a decidedly mixed response. The chief judges of the Third, Tenth, and Eleventh Circuits expressed support for the proposal; the chief judges of the First, Fourth, Eighth, Ninth, and Federal Circuits expressed opposition; the chief judge of the Sixth Circuit said that he would support a national rule, so long as it was similar to the Sixth Circuit's rule; and the chief judge of the Fifth Circuit said that the judges of her circuit were divided. No response was received from the chief judges of the Second, Seventh, or D.C. Circuits.

Mr. Letter pointed out that recent actions of several circuits suggest more openness to the Department's proposal. Among other things, the D.C. Circuit, which used to have a very restrictive rule, now permits the citation of all of its non-precedential decisions.

The Committee debated at some length whether it should propose *a* national rule on this topic. Those speaking in favor of a national rule pointed out the following:

- Currently, non-precedential decisions are the only sources that parties are explicitly forbidden to cite. In some circuits, a party can cite an infinite variety of non-binding sources of authority — including everything from decisions of the courts of Great Britain to law review articles to op-ed pieces — but cannot cite a court to its own non-precedential opinions.

- Non-precedential opinions are widely cited in district courts and in state courts; although they are not binding, they sometimes can be persuasive. It is odd to have the non-precedential opinions of a court of appeals used to persuade district courts and state courts, but not used to persuade the very court that authored them. This is particularly odd when a district court relies heavily on a non-precedential opinion in issuing a ruling, that ruling is appealed to the court of appeals, and the

parties are not permitted to cite or discuss the non-precedential opinion on which the district court so heavily relied in deciding the case.

- The no-citation rule borders on raising civil liberties concerns. This is the one place where a court rule specifically forbids an attorney from making an argument that the attorney believes will help her client.

- Non-precedential decisions are widely available today — on the Internet and now in the Federal Appendix — and thus permitting citation of such decisions would no longer give a substantial advantage to the Justice Department, insurance companies, and other large, national litigators.

- Prohibitions on the citation of unpublished opinions give parties an incentive to play games to find ways of hinting to the court that it has issued non-precedential opinions on a point.

- Liberalizing the rule will not "open the floodgates." Practitioners will continue to have an incentive not to cite non-precedential decisions as to do so is tantamount to admitting that no precedential decision supports one's position.

- The Department's proposal addresses only the citation of non-precedential opinions. It does not in any way purport to tell courts whether or in what circumstances they can designate opinions as non-precedential.

Those speaking against a national rule pointed out the following:

- There continues to be substantial opposition to such a rule among the chief judges of the circuits. Those chief judges make up half of the membership of the Judicial Conference, and the district court judges who make up the other half are likely to defer to the circuits on this proposal.

- Many circuit judges will view this as the first step on a path that will eventually lead to the abolition of non-precedential opinions, which are unpopular among practitioners but essential for the survival of the federal appellate courts.

- The caseloads of appellate judges do not permit them to devote substantial time to writing careful opinions in every case. Judges are able to get non-precedential opinions out quickly precisely because they know that the opinions will not be cited. Forcing all circuits to permit citation of non-precedential opinions will ensure either that decisions are rendered much more slowly or that more cases are disposed of without *any* opinion. Both options would be worse for parties and counsel than the current situation.

- The no-citation rule does not deprive the courts and litigants of anything of value. Because non-precedential opinions are not written with as much care, and particularly because they usually say little about the facts, the opinions are of almost no value to anyone but the parties.

- The amount of published case law has grown exponentially, and it is getting more and more difficult for judges and practitioners to keep up with precedential decisions. They should not also be burdened with having to keep up with the huge number of non-precedential decisions.

- Circuits forced to allow citation to their non-precedential opinions will simply make their opinions so cryptic as to be useless to anyone but the parties.

Following the discussion, a member moved that the Appellate Rules should be amended to include *a* national rule permitting the citation of non-precedential decisions. The motion was seconded. The motion carried (6-3).

The Committee then discussed the specifics of the draft Rule 32.1 proposed by the Justice Department. Several members argued that subdivision (a)(2) of the proposed rule was unnecessary. That subdivision states that "[a]n unpublished or non-precedential decision may be cited if a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue." Members pointed out that it would be odd for a litigant to cite a non-precedential opinion if the litigant did not "believe[] that it persuasively addresses a material issue." In addition, the subdivision makes the propriety of citing a non-precedential decision turn upon the subjective intent of a litigant, which is an unusual and potentially troublesome way of framing a rule about citing cases. Mr. Letter responded that (a)(2) was meant to be exhortatory — to encourage attorneys to think carefully before citing non-precedential decisions.

The Reporter argued that, in putting so many conditions upon the citation of non-precedential decisions, the rule was undermining the arguments of its proponents. Proponents of the rule argue, persuasively in the Reporter's view, that non-precedential decisions should not be treated any differently than other types of non-precedential authority, such as the decisions of state or foreign courts or law review articles. No rule regulates the citation of these sources; for example, no rule provides that these sources can only be cited in "support [of] a claim of res judicata" or "if a party believes that [the authority] persuasively addresses a material issue in the appeal." By imposing such restrictions on the citation of non-precedential decisions, the draft rule seems to buy into the notion that there is something "wrong" with non-precedential opinions that is not "wrong" with law review articles or other non-precedential authorities.

A member agreed with the Reporter and pointed out that, by restricting the citation of non-precedential opinions, the draft rule would give rise to a cottage industry of litigation over whether a particular non-precedential opinion was or was not cited in violation of the rule. It

would be better for everyone if the rule stated simply that non-precedential opinions could be cited, period. Nothing forces courts to read those opinions or be persuaded by them.

Other members, while not contesting the force of these arguments on the merits, argued that the restrictions on the citation of non-published opinions were politically expedient in that they would increase the chances that the rule would be approved by the Standing Committee and Judicial Conference.

The Committee also discussed whether subdivision (b) of the proposed rule was necessary. That subdivision requires a party to provide copies to the court and to the other parties of all non-precedential decisions that the party cites. The Reporter argued that the effect of this rule would be to force parties cumulatively to serve hundreds of thousands of pages of photocopied opinions, when, in most circumstances, hard copies are not necessary given that judges and parties can easily find non-precedential opinions on-line or in the Federal Appendix. Members generally agreed with the Reporter and discussed two possible alternatives: first, requiring parties to serve copies of non-precedential opinions only "upon request," and second, requiring parties to serve copies of non-precedential opinions only if they are not "available on line."

A member of the Committee said that references in the proposed rule to "unpublished or non-precedential decisions" should be changed to refer just to "non-precedential decisions." The word "unpublished" has become a misnomer, especially given that many "unpublished" opinions are now being published in the Federal Appendix.

A member moved that the proposal of the Justice Department be approved, except that the rule should refer only to "non-precedential" decisions, and subdivision (b) of the rule should be changed so that parties are not required to serve copies of all non-precedential decisions that they cite. The motion was seconded. The motion carried (6-3). The Reporter agreed to prepare a cleaned-up draft of the proposed rule for the Committee to consider at its next meeting.

I. Item No. 01-02 (replace all page limits with word limits)

The Reporter stated that, at the last meeting of the Committee, members had discussed a proposal that all of the page limits in the Appellate Rules — including those in Rules 5(c), 21(d), 27(d)(2), 35(b)(2), and 40(b) — be replaced with word limits. Although several members had spoken in opposition to the proposal, the Committee had not taken any formal action. The Reporter recommended that this item be removed from the study agenda, largely for the reasons given at the April 2002 meeting.

A member moved that Item 01-02 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

J. Item No. 01-03 (FRAP 26(a)(2) — interaction with "3-day rule" of FRAP 26(c))

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." As of December 1, 2002, Rule 26(a)(2) will provide that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 11 days, and included when the period of time is 11 days or more. The ambiguity is this: In deciding whether a deadline is "less than 11 days," should the court count the 3 days that are added to the deadline under Rule 26(c)?

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail. If the 3 days *are* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline is *not* "less than 11 days," intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline *is* "less than 11 days" for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

The Reporter said that, while he agreed with Mr. Wepner that this problem should be addressed, he recommended that the Civil Rules Committee be asked to take the lead on proposing a solution. The problem is one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees.

It makes sense for the Civil Rules Committee to take the lead on this matter. The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions. By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

A member moved that this Committee formally request that the Civil Rules Committee take the lead in proposing a solution to this problem. The motion was seconded. The motion carried (unanimously).

K. Item No. 01-04 (FRAP 4(b)(1)(A) — give criminal defendants 30 days to appeal)

Under Rule 4(b), a defendant generally has 10 days to bring an appeal in a criminal case, whereas the government generally has 30 days. At the April 2001 meeting of the Committee, the Justice Department was asked to make a recommendation on a proposal that Rule 4(b) be amended to give both the defendant and the government 30 days to appeal in criminal cases.

Mr. Letter said that the Department opposed the proposal. He said that the Justice Department prosecutors have not noticed a problem with the current rule nor heard complaints from criminal defense attorneys about the 10-day deadline. Filing a notice of appeal is a simple thing, and those convicted of crimes are generally anxious to get their appeals started as soon as possible. In a typical case involving appointed trial counsel, the attorney files a notice of appeal as a matter of course. The 30-day deadline for the government is justified by the fact that the government, unlike the typical criminal defendant, is a large organization, and it takes time for the government to decide whether to pursue an appeal. If time for the government to appeal were shortened, the government would have to respond by filing protective notices of appeal in almost all cases.

A member agreed with Mr. Letter that filing a notice of appeal in a criminal case is a routine matter for the defendant and should not take more than 10 days. It is common for appointed trial counsel to file a notice of appeal as her last act, often on the same day that the judgment of conviction is entered.

A member said that, if the issue were viewed in isolation, he would be inclined not to change the rule. But the member said that he was concerned about the difficulty that courts are having distinguishing "civil" motions from "criminal"motions when trying to decide whether the time limitations of Rule 4(a) or 4(b) apply to an appeal of an order disposing of a motion. Giving all parties 30 or 60 days in all cases — or giving the government 60 days in all cases, and all other parties 30 days in all cases — would obviate the need to make that distinction, while not really harming the judicial system or any party.

Other members expressed the view that the current system does not appear to be "broke," and thus they are disinclined to "fix" it, especially in an area that is a focus of as much litigation as appellate deadlines.

A member moved that Item No. 01-04 be removed from the study agenda. The motion was seconded. The motion carried (8-1).

L. Items Awaiting Initial Discussion

1. Item No. 02-01 (FRAP 27(d) — apply typeface and type-style limitations of FRAP 32(a)(5)&(6) to motions)

Item No. 02-01 was added to the Committee's study agenda by Mr. Fulbruge, who pointed out that, apparently because of an oversight, the restylized Appellate Rules do not prescribe limitations on typeface or type style for motions. The Reporter said that it would be easy to amend Rule 27(d)(1) to add a subsection (E) that would incorporate by reference the typeface limitations of Rule 32(a)(5) and type style limitations of Rule 32(a)(6). By consensus, the Committee decided to ask the Reporter to prepare such an amendment for the next meeting of the Committee.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Fall 2002 Meeting

The Committee will next meet on November 18 and 19, 2002, in San Francisco.

VIII. Adjournment

By consensus, the Committee adjourned at 3:30 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

The minutes of the June 10-11, 2002, Standing Committee meeting are being prepared, and on completion will be posted on the Rulemaking web site.

IV-A

MEMORANDUM

DATE: October 10, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-09

Item No. 99-09 arose out of a suggestion by Judge Anthony Scirica that this Committee study the way that the circuit courts process requests for certificates of appealability ("COAs") and consider whether the Appellate Rules should be amended to bring about more uniformity. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

The Department reported back to the Committee at its April 2001 meeting. The Department argued, and the Committee agreed, that the variation in circuit procedure was not creating a problem for litigants and that this Committee should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The Committee concluded that this matter should be removed from its study agenda, with one exception.

The Department complained that, in some circuits, the government is required to file a brief on the merits before the court decides whether to grant a COA. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department proposed that this Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether to grant a COA.

Members of this Committee expressed opposition to the Department's proposal for various reasons, which are described in the minutes of the April 2001 meeting. The Committee did not vote on the Department's proposal, but suggested to the Department that it reconsider whether it wanted to pursue its proposal, given the opposition of several Committee members.

Prior to the April 2002 meeting, Douglas Letter informed me that the Department had decided to withdraw its proposed amendment. However, after our conversation, but before the April 2002 meeting, the United States Attorneys asked for an opportunity to give this matter more consideration.

Mr. Letter now informs me that, following further consideration, the Department has not changed its mind and still wishes to withdraw its proposal. Thus, Item No. 99-09 can be removed from the Committee's study agenda.

MEMORANDUM

DATE: October 10, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-03

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

After the April 2002 meeting, I received a communication from Professor R. Joseph Kimble on behalf of the Subcommittee on Style. The Subcommittee recommends 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 Subcommittee also objects to the use of the phrase "mistakenly" in the Committee Notes.

Professor Kimble explained the recommendation as follows:

> I don't think the change was "a mistake." I think it acknowledged common usage. If you look at your February 2002 calendar, "Presidents' Day" and "Washington's Birthday" are two different days. I know — the calendar day for Washington's Birthday is not the official (federal) holiday. But who knows that? Thus the dilemma — be accurate or functional? I think you can resolve this if you want to.

I have not drafted new amendments or Committee Notes, but I can easily do so if this Committee agrees with the changes suggested by the Subcommittee on Style.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

Subdivision (a)(4). Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 1 through 60.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2002, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

Rule 45. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period.

(2) ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

(3) ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make

the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) ***"Legal Holiday" Defined.*** As used in this rule, "legal holiday" means:

(A) the day set aside by statute for observing:

(i) New Year's Day;

(ii) Martin Luther King, Jr.'s Birthday;

(iii) Washington's Birthday;

(iv) Memorial Day;

(v) Independence Day;

(vi) Labor Day;

(vii) Columbus Day;

(viii) Veterans' Day;

MEMORANDUM

DATE: October 12, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-08

Attached is a second try at a draft amendment to Rule 4(a)(6). Also attached is my research memorandum of March 24, 2002, which describes the reasons for the amendment.

The Committee's discussion of the first draft of the amendment can be found at pages 4 to 10 of the minutes of the April 2002 meeting. The second draft attempts to incorporate the directions of the Committee and to respond to concerns expressed by some members.

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 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." *Wilkens 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.

MEMORANDUM

DATE: March 24, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-08

Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. Although Rule 4(a)(6) dates only to 1991, it has already created confusion and conflict among the circuits.

Rule 4(a)(6) provides:

> (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 motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives 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.

In sum, Rule 4(a)(6) permits a district court to reopen the time to appeal a judgment if it finds that four conditions have been satisfied. First, the district court must find that the appellant did not receive notice of the entry of the judgment from the district court or any party within 21 days after the judgment was entered. Second, the district court must 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. Third, the district court must find that the appellant moved to reopen the time to appeal within 180 days after the judgment was entered. Finally, the district court must find that no party would be prejudiced by the reopening of the time to appeal.

The problems that have arisen in interpreting Rule 4(a)(6) center on the meaning of the word "notice." The circuits have been split for some time over the meaning of "notice" in subdivision (A), while subdivision (B) was amended in 1998 to give the word "notice" two different meanings within the same sentence. All of this has created a great deal of confusion about a rule that should be relatively simple to apply. I will address these two subdivisions in reverse order.

"Notice" in Subdivision (B)

The confusion regarding the meaning of "notice" in subdivision (B) arises out of a 1998 amendment to Rule 4(a)(6).

Prior to 1998, Rule 4(a)(6) 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." Courts had no difficulty agreeing on what "notice" meant. As the Committee Note to Rule 4(a)(6) made quite clear, the notice to which the party was "entitled" was the notice described in Civil Rule 77(d).[1] That rule requires the clerk to serve notice of the entry of a judgment upon the parties, and to do so in the manner

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[1]Civil Rule 77(d) provides in part:

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party . . . . Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

prescribed by Civil Rule 5(b). It also permits any party to serve notice of the entry of the judgment upon the other parties, again in the manner prescribed by Civil Rule 5(b). The meaning of Rule 4(a)(6) was thus clear: A district court could reopen the time to appeal upon a finding "that a party entitled to notice of the entry of a judgment or order [under Civil Rule 77(d)] did not receive such notice [that is, Civil Rule 77(d) notice] from the clerk or any party [both of whom are mentioned in Civil Rule 77(d)] within 21 days of its entry."

In 1998, the Advisory Committee amended Rule 4(b)(6), both to restyle it and to make a substantive change. As amended, the rule permits a district court to reopen the time to appeal if it 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." Two changes are significant: the substitution of "the notice" for "such notice" and the substitution of "district court" for "clerk." The Committee Note said only this about the intent of the change:

> This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Here's the problem: Nothing in amended Rule 4(a)(6) creates an entitlement to notice of entry of a judgment. That entitlement is still found in Civil Rule 77(d). Thus, when amended subdivision (B) refers to a "moving party" being "entitled to notice of the entry of the judgment or order sought to be appealed," it must continue to be referring to the notice that Civil Rule 77(d) authorizes the "clerk" and "part[ies]" to serve.

But subdivision (B) then goes on to refer not to the failure to receive "*such* notice" — that is, Civil Rule 77(d) notice — but rather to the failure to receive "*the* notice." And subdivision (B) refers not to the failure to receive notice from "the clerk or any party" (i.e., the two people mentioned in Civil Rule 77(d)), but rather to the failure to receive notice from "the *district court* or any party." Subdivision (B) therefore provides that the type of notice that precludes a party from moving to reopen an appeal is no longer limited to Civil Rule 77(d) notice. In other words, amended subdivision (B) must mean that *some* kind of notice, in addition to Civil Rule77(d) notice, precludes a party. But neither the text nor the Committee Note gives any clue as to what type of notice will suffice. A phone call from the clerk? Or from another party? An off-hand remark by the judge? Or by the judge's law clerk? No one knows.

Again, the prior rule was clear: If a party entitled to Civil Rule 77(d) notice did not get that Civil Rule 77(d) notice within 21 days, that party could move to reopen. The new rule is not clear: If a party entitled to Civil Rule 77(d) notice does not get *either* Civil Rule 77(d) notice *or* some other kind of (unspecified) notice from the district court or another party within 21 days, that party can move to reopen.

I do not know what problem the 1998 amendment was intended to solve. The Note does not address the matter, and I can find no evidence in the case law that the prior rule was creating a significant problem. I can understand why the Committee might have wanted to expand the rule, so that if a party received *any* kind of notice of entry of a judgment from *any* source within 21 days, the party would not be permitted later to move to reopen the judgment. But the choice made by the Committee was broadly to expand the *type* of "disqualifying" notice to include any kind of notice (verbal or written), but then to expand the *source* of this "disqualifying" notice

only modestly to include the district court. The bottom line is that this change — which results in the same term ("notice") having very different meanings in the same sentence — seems to create a lot of confusion with little corresponding benefit.

I recommend that the Committee remedy this situation by restoring Rule 4(a)(6)(B) to its pre-1998 simplicity and clarity. Specifically, I recommend that Rule 4(a)(6)(B) be amended to provide, in essence, that a motion to reopen can be brought when a party entitled to notice of the entry of a judgment under Civil Rule 77(d) does not receive *that* notice — i.e., Civil Rule 77(d) notice — within 21 days. Other kinds of notice (e.g., a phone call from a party) would not suffice to preclude a litigant from later moving to reopen the time to appeal.

I do not believe that such an amendment will open the floodgates to tardy appeals. First, any party who wishes to protect against a later motion to reopen need only serve notice of the entry of the judgment upon the other parties, as Civil Rule 77(d) explicitly authorizes. And second, Rule 4(a)(6) will continue to bar all motions to reopen that are filed more than 180 days after entry of the judgment or order, no matter what the circumstances.

"Notice" in Subdivision (A)

As I just described, the problem with the meaning of the word "notice" in subdivision (B) dates only to December 1, 1998 — and thus, not surprisingly, it has not yet been the subject of much litigation. However, the problem with the meaning of the word "notice" in subdivision (A) dates back to the 1991 enactment of Rule 4(a)(6) and has been the subject of considerable litigation.

Subdivision (A) requires 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]."

It has been clear to (almost) all courts that the "notice" that triggers the 7-day period under subdivision (A) is broader than the "notice" that precludes moving to reopen under subdivision (B). As I have explained, it was clear until 1998 that the "notice" referred to in subdivision (B) was Civil Rule 77(d) notice — that is, notice formally served in the manner required by Civil Rule 5(b). Although the 1998 amendment to subdivision (B) broadened the meaning of "notice" beyond Civil Rule 77(d) notice, subdivision (B) nevertheless requires that such notice be received from "the district court or any party."

No such restrictions pertain to subdivision (A) notice — that is, to the notice that triggers the 7-day period to bring a motion to reopen. Subdivision (A) notice has never been limited to Civil Rule 77(d) notice, and the source of such notice has never been limited to the district court, the clerk, or the other parties. Rather, as one court pointed out:

> There's nothing [in subdivision (A)] about the physical attributes of the notice (oral or written; electrostatic, carbon, or certified copy, etc.); nothing about who must furnish the notice (the court, the clerk, the party opposite, an interested or disinterested third party, etc.); nothing whatsoever about delivery of the notice, much less specification of a particular method of delivery (service of process, ordinary mail, registered mail, certified mail, e-mail, hand delivery, facsimile delivery, etc.); and nothing about who other than the moving party is authorized to receive the notice (counsel for moving party, responsible party in home or office, etc.).

Wilkens v. Johnson, 238 F.3d 328, 332 (5th Cir. 2001), *cert. denied*, 121 S. Ct. 2605 (2001). Read literally, then, subdivision (A) suggests that *any* type of notice of the entry of a judgment from *any* source — including, for example, a phone call from a friend of one of the other parties — triggers the 7-day period.

To date, courts have taken four approaches in interpreting the word "notice" in subdivision (A):

1. The D.C. Circuit and the Eighth Circuit have suggested in dicta that "actual notice" — including verbal notice — suffices to trigger the 7-day period. *See Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214-15 (D.C. Cir. 1996); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir.), *cert. denied*, 531 U.S. 929 (2000).

2. The D.C. Circuit and the Second Circuit have mistakenly read into subdivision (A) the limitations on notice presently or formerly contained in subdivision (B). Thus, the D.C. Circuit held that only notice from "the clerk or any party" will suffice to trigger the 7-day period — a requirement that is clearly not part of subdivision (A). *Benavides*, 79 F.3d at 1214. Similarly, the Second Circuit held that only notice that was served in the manner prescribed by Civil Rule 5(b) would suffice. *Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999). Although it was clear before 1998 that subdivision (B) was referring only to notice served pursuant to Civil Rule 5(b), subdivision (A) has never been so limited.

3. The majority of courts that have addressed the issue read into subdivision (A) a requirement that only *written* notice is sufficient to trigger the 7-day period. Some of these courts have reasoned that, because the notice referred to in subdivision (B) must be written (something that was true only before the 1998 amendment), and because subdivision (A) should be read *in pari materia* with subdivision (B), the notice referred to in subdivision (A) must also be written. (Somewhat inconsistently, these courts do *not* then go on to require that subdivision (A) notice be served pursuant to Civil Rule 5(b), as was also required of subdivision (B) notice prior to 1998.) Other courts require that the notice be in writing for policy reasons. As one explained,

> Policy concerns point us in the same direction. Reading Rule 4(a)(6) to require 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. Such a scheme not only takes much of the guesswork out of the equation, but also, because Rule 77(d) specifically provides that parties who do not wish to rely upon the clerk to transmit the requisite written notice may do so themselves, the scheme confers certitude without leaving a victorious litigant at the mercy of a slipshod clerk.

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); *see also Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000).

4. The Ninth Circuit holds that while subdivision (A) does not require written notice, "the quality of the communication must rise to the functional equivalent of written notice . . . . This means that the notice must be specific, reliable, and unequivocal." *Nguyen v. Southwest Leasing & Rental, Inc.*, 2002 WL 372927, at *4 (9th Cir. Feb. 5, 2002). It appears that, in the Ninth Circuit, verbal notice could in some circumstances be deemed "the functional equivalent of written notice."

To resolve this circuit split, I recommend that the Committee amend subdivision (A) to require written notice (which is something more than "the functional equivalent of written notice"). I also recommend that, through language in the Note, the Committee make clear that subdivision (A) notice is considerably broader than subdivision (B) notice. That discussion will hopefully prevent courts from following the lead of the D.C. Circuit and Second Circuit in confusing subdivision (B) notice (i.e., notice served under Civil Rule 5(b)) with subdivision (A) notice (i.e., any kind of written notice).

MEMORANDUM

DATE: October 14, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-11

At its April 2002 meeting, the Committee decided to move forward on the suggestion of Judge Edward E. Carnes that the Appellate Rules be amended to resolve the three-way circuit split over the treatment of disqualified judges in determining whether "a majority of the circuit judges who are in regular active service" have ordered an en banc hearing under 28 U.S.C. § 46(c) and Rule 35(a). Specifically, the Committee tentatively decided to amend Rule 35(a) to impose the "qualified case majority" approach (currently followed by the Third Circuit) upon all of the circuits.

Attached is a draft amendment and Committee Note that would implement the Committee's decision. Also attached is a copy of Marie Leary's report on this issue.

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.

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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.

Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals

Report to the Judicial Conference
Advisory Committee on Appellate Rules

Marie Leary

Federal Judicial Center

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Contents

I. Introduction

A. Background

Federal Rule of Appellate Procedure 35(a) and section 46(c) of Title 28 of the United States Code both require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc.[1] However, neither Rule 35(a), section 46(c), nor any other provision defines whether judges who are disqualified,[2] recused,[3] or otherwise unavailable (e.g., because of illness or personal circumstances) are to be included when calculating the majority of circuit judges needed to hear a case en banc.

Furthermore, it appears that neither Congress nor the U.S. Supreme Court have provided definitive guidance on the appropriate interpretation of the majority requirement of section 46(c).[4] Congress did not define the word "majority" when it enacted section 46(c) in 1948:[5] "There is no indication that the use of the word 'majority' in 46(c) is anything more than a general prescription of the means by which judges may order en banc hearings."[6] In 1973, the Judicial Conference pro-

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1. Fed. R. App. P. 35(a) provides in part: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." Fed. R. App. P. 35(a). Section 46(c) provides in part: "Cases and controversies shall be heard and determined by a court or panel of not more than three judges. . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46(c) (1982).

2. All federal judges, including justices of the U.S. Supreme Court, are disqualified from sitting in cases where their impartiality reasonably may be questioned, including situations where the judge has a personal or family financial interest in the proceeding, has personal knowledge of evidentiary facts, or has acted as counsel or a witness in the matter. 28 U.S.C. § 455(b) (1988).

3. Recusal differs from disqualification in that recusal is a voluntary abstention.

4. *See* James J. Wheaton, Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L. Rev. 1505 (1984); Thomas J. Waters, Note, *The En Banc Requirements of 28 U.S.C. § 46(c): What Constitutes a Majority in the Event of a Recusal or Disqualification?*, 11 J. Legis. 373 (1984).

5. The House Report generally referred to preserving the Supreme Court's holding in Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941), as the limited purpose for the new section. H.R. Rep. No. 306, 80th Cong., 1st Sess. A6–A7 (1947). The Court in *Textile Mills* held that notwithstanding the three-judge panel limitation, a court of appeals sitting en banc could properly consist of a greater number of judges. 314 U.S. at 333.

6. Wheaton, *supra* note 4, at 1513. *See also* Waters, *supra* note 4, at 383 ("The House Report to the 1948 amendment clearly demonstrates that Congress did not intend to consider how a majority was to be determined in the event of a recusal or disqualification.").

posed an amendment to section 46(c) that would have "[made] clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case," and would have excluded recused judges when determining what constitutes the majority of circuit judges necessary to convene en banc.[7] A bill including the Conference proposal died without hearings or other action.[8] In September 1984, the Judicial Conference rescinded its 1973 proposal and suggested that each court of appeals clearly describe its en banc voting procedures by formulating a standard that would make litigants aware of the definition of "majority" that applied in that court.[9]

Only three Supreme Court cases[10] have addressed the procedural requirements of 28 U.S.C. § 46(c), and of these only one, in 1963, came close to deciding the section 46(c) majority requirement issue. In *Shenker v. Baltimore & Ohio Railroad Co.*, after a three-judge panel of the Third Circuit reversed the district court, the full court of appeals denied a petition for a rehearing en banc pursuant to a poll that yielded four votes to rehear the case en banc, two votes to deny, and two abstentions.[11] The Supreme Court upheld the court of appeal's decision to deny rehearing en banc even though four of the six circuit judges *voting* favored en banc rehearing.[12] The Court concluded that it was clearly within the court of appeal's discretion to require a ma-

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7. Administrative Office of the U.S. Courts, 1973, Reports of the Proceedings of the Judicial Conference of the United States (1974).

8. *See* Wheaton, *supra* note 4, at 1516–17 & n.68 ("[T]he inaction of Congress with regard to the 1973 Judicial Conference proposal renders its legislative history inconclusive; although Congress took no action to reject the absolute majority interpretation, neither did it endorse that reading of the statute."). Congress amended Section 46 twice, once in 1978 (*see* Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.)), and again in1982 (*see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.)). In both instances the majority requirement issue of section 46(c) was not addressed, but since the amendments focused on different topics (i.e., creating additional judgeships to ease the growing caseload of federal courts and clarifying the appropriate role for senior circuit judges in rehearings en banc), it does not support a conclusion that Congress was satisfied with the status quo. *See* Waters, *supra* note 4, at 385–88.

9. *Judicial Conference Moves a Wide-Ranging Agenda at Fall Meeting*, Third Branch (Administrative Office of the U.S. Courts), Nov. 1984, at 3.

10. Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941) (Court held that circuit courts of appeals are not limited to sitting in three-judge panels where the court is sitting en banc); Western Pacific R.R. Case, 345 U.S. 247 (1953) (Court held that while a circuit court could not restrict a litigant's access to the en banc procedure, no applicant had the right to compel a circuit judge to consider such an en banc petition formally); Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963).

11. *Shenker*, 374 U.S. at 4.

12. *Id.* at 5 ("For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals.").

jority of all the active judges of the court to grant rehearing en banc.[13] Thus, five of the eight active judges would have had to vote in favor of rehearing the case en banc. In refusing to adopt a particular definition of "majority" in *Shenker* and by denying certiorari in another appellate court case that would have required the Court to decide whether recused judges must be counted when calculating a majority,[14] it seems that the Supreme Court has allowed each court of appeals to choose for itself which rule it will follow.[15] Thus, this lack of controlling Supreme Court authority or congressional action or legislation has left the definition of the majority requirement up to the individual courts of appeals, which have adopted inconsistent rules and procedures as to how they determine whether to hear a case en banc.[16]

Recently, an opinion by Judge Carnes of the Eleventh Circuit in *Gulf Power Co. v. Federal Communications Commission*,[17] examined the important intercircuit variations in the proper definition of the majority requirement. At the time the court voted whether to rehear *Gulf Power Co.*, five of the twelve judges in active status were disqualified, and thus only seven judges voted.[18] The court of appeals uses an absolute majority interpretation of Federal Rule of Appellate Procedure 35(a). That is to say, an en banc rehearing requires the votes of a majority of all active circuit judges on the court at the time of the poll, including disqualified judges. The en banc rehearing was denied, even though six of the seven judges voting voted for the rehearing. Judge Carnes thought that *Gulf Power Co.* was a "good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court . . ." because even if six of the seven

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13. *Id.*

14. Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984) (Fourth Circuit concluded that the majority requirement of section 46(c) did not oblige the court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing; with one of the circuit's ten active judges disqualified, the court ordered rehearing based on the affirmative votes of five of the court's nine remaining active judges).

15. *See* Waters, *supra* note 4, at 379; Wheaton, *supra* note 4, at 1520.

16. *See* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 854 (1993) (Citing the Supreme Court's deference in the Western Pacific R.R. Case, 345 U.S. 247 (1953), to the administrative powers vested in the circuit courts, Stein concluded that "the individual circuits may promulgate rules and internal operating procedures that would allow modification in the way en banc votes are tallied."). *See also* Wheaton, *supra* note 4, at 1506, 1524 ("[I]nterpretation of the majority requirement remains within the authority of each circuit." "The rules and statutes do not require the circuits to adopt identical procedures . . . the several circuits have adopted significantly different rules.").

17. 226 F.3d 1220 (11th Cir. 2000) (opinion concerning per curiam denial of rehearing en banc).

18. 226 F.3d at 1222.

nonrecused judges in active service wanted to hear the case en banc, it would not be possible because six is not a majority of twelve.[19] "The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven nondisqualified judges of this court in active service," but instead by the vote of one judge.[20] Further, Judge Carnes argued that "there is no good reason why a uniform rule should not be followed in all the circuits."[21]

In April 2001, the Judicial Conference Advisory Committee on Appellate Rules decided to study Judge Carnes' request to amend Federal Rule of Appellate Procedure 35(a) and requested assistance from the Federal Judicial Center. Specifically, the Center was asked to provide information on the following:[22]

> (1) How do each of the thirteen federal courts of appeals interpret Rule 35(a) and 28 U.S.C. § 46(c)? How many apply the "absolute majority" rule adopted by the Eleventh Circuit? How many apply some other rule?
> (2) What arguments have been made to justify the "absolute majority "rule? What arguments have been made against the rule?
> (3) Are there any other intercircuit disagreements concerning either how courts decide whether to hear a case en banc or how courts decide cases that have been "en banced"? For example, do the circuits disagree about the participation of senior judges (i.e., judges who became senior after the panel decision) either in the decision whether to hear a case en banc or in the decision of the case on the merits?[23]

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19. *Id.* at 1221, 1222–23.

20. *Id.* at 1223. In *Gulf Power Co.*, although six of the seven judges qualified to vote voted in favor of hearing the case en banc, the author of the panel majority opinion (the one vote against rehearing en banc) was able to prevent the case from being heard en banc because of the absolute majority rule (i.e., since the Eleventh Circuit court of appeals had twelve judges in regular active service at the time, all seven nondisqualified judges needed to vote in favor of rehearing in order to vote the case en banc). *Id.* at 1222.

21. *Id.* at 1225.

22. Letter from Judge Will Garwood, Fifth Circuit Court of Appeals, to Marie Leary, FJC research associate (May 14, 2001) (on file with author).

23. Section 46(c) of Title 28 of the U.S. Code makes it clear that senior judges cannot participate in the vote to hear a case en banc. We did not find any rule or any procedures in the courts of appeals to the contrary. Section 46(c) does define two circumstances in which a judge can elect to participate in an en banc hearing after taking senior status. In addition to rules and practices incorporating one or both of these exceptions, we did find several rules or practices that permit judges to continue to participate in the final resolution of an en banc case after taking senior status in circumstances not covered under the statute. *See infra* Section III.

B. Methods for Collecting Information

In order to provide the Appellate Rules Committee with information on each appellate court's current interpretation of Federal Rule of Appellate Procedure 35(a), we sent a questionnaire to the chief judge and the clerk of each court of appeals. The questionnaires were tailored for each court and consisted of two parts. In the first part, we asked how a "majority" was calculated under Rule 35(a). If we were able to locate a relevant local rule or internal operating procedure, chief judges and clerks were asked to verify that this rule or operating procedure was still in effect. If the rule was no longer in effect, or if no formal rule was located, chief judges and clerks were asked to describe their courts' current practice. We asked about policies (if any) concerning temporary absences, why the courts of appeals adopted their current interpretation of Rule 35(a) and about any problems or expressions of dissatisfaction with their current approach.

Part two of the questionnaires sought to verify any rules or internal operating procedures we had located concerning the participation of senior judges in rehearings en banc.[24] In addition, we asked the chief judges and clerks to describe their courts' policies (if any) concerning the participation in the rehearing vote of judges who took senior status after the panel decision, and the participation in the en banc rehearing itself of judges who took senior status after the vote on whether to hear the case en banc.

We received responses to the questionnaires from all thirteen courts of appeals, either directly from the chief judge or from the clerk with the chief judge's approval. Follow up phone calls were made to several circuits to clarify ambiguous responses or to obtain additional information.

In order to describe arguments that have been made to justify the absolute majority approach and any arguments made in opposition to the rule, we conducted a search of case law and secondary sources. With the exception of Judge Carnes' opinion in *Gulf Power Co.*, most of these articles and cases are well over a decade old, suggesting that the debate over the interpretation of the majority requirement in 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a) has been dormant for a while. The articles that were most insightful and on point were written after the Fourth Circuit's opinion in *Arnold v. Eastern Airlines,*[25] which was a rare examination of the importance of the question of whether 28 U.S.C. § 46(c) and Rule 35(a) *require* a court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing. In

24. *Id.*

25. 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).

Arnold, the Fourth Circuit concluded that the majority requirement of section 46(c) did not require a court of appeals to count recused judges.[26]

C. Overview of the Report

The following sections of the report present the findings from the research described above. Specifically, Section II describes the responses from part one of the questionnaires concerning each court of appeal's current interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a). Section III presents responses to inquiries about the treatment of senior judges in en banc hearings from part two of the questionnaires. Section IV discusses the arguments found in case law and secondary sources for and against the absolute majority approach. Finally, Section V lays out several proposals that commentators have suggested for clarifying the definition of majority in 28 U.S.C. § 46(c) and Rule 35(a) to make the procedures uniform across the courts of appeals.

26. *Id.*

II. Interpretation of the "Majority" Vote Requirement by the Courts of Appeals

A. Three Approaches

The courts of appeals use one of three different approaches to define their en banc voting procedures.[27]

Eight[28] use the absolute majority approach in that they interpret "circuit judges who are in regular active service" to mean all of the active judges on the court of appeals in the circuit when the vote is taken, including all judges who have recused themselves or are disqualified from participating in the case or unable to vote for some other reason. For example, if a court of appeals has twelve judges in regular active service then a majority of all those judges (seven of the twelve judges, an "absolute majority") must vote to hear a case en banc, even though one or more of the twelve active judges may not be eligible to vote.

Four courts of appeals[29] have adopted the case majority approach.[30] They define a majority of the active circuit judges as a majority of the active judges eligible to participate in the case at issue. For example, on a court of appeals with twelve judges in regular active service and five judges disqualified from participating in a case, the case will be heard en banc if four of the remaining seven judges vote in favor of en banc review.

The U.S. Court of Appeals for the Third Circuit has adopted a modified case majority approach:[31] It requires a "majority" of circuit judges in regular active service who are not disqualified, but in addition requires that the voting judges constitute a majority of circuit judges who are in regular active service. The court has twelve judges in regular active service, and thus an en banc vote cannot occur if six or more judges are disqualified in the case because at least seven judges must vote to hear a case en banc.

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27. We borrowed the terms used to describe the three approaches (i.e., absolute majority, case majority, modified case majority) from a report prepared by members of the Civil Practice and Procedure Committee of the American Bar Association Section of Antitrust Law recommending that the ABA propose an amendment to Fed. R. App. P. 35(a). Janet L. McDavid & Henry T. Reath, *Report to the House of Delegates on Procedures for Rehearing En Banc*, 55 Antitrust L. J. 665 (1987) [hereinafter ABA Report].

28. First Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Eleventh Circuit, District of Columbia Circuit, and Federal Circuit. *See infra* Table 1.

29. Second Circuit, Seventh Circuit, Ninth Circuit, and Tenth Circuit. *See infra* Table 1.

30. *See supra* note 27.

31. *Id.*

Table 1 indicates which approach each court of appeals used at the time of our survey and whether the court has formally defined its voting procedures for en banc hearings in its local rules, internal operating procedures, or by some other means.

Table 1. Current Interpretation of Federal Rule of Appellate Procedure 35(a) by the Courts of Appeals

Circuit	Description of approach	Source of procedures
First	Absolute majority	"For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term 'majority' means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified." Local Rule 35.
Second	Case majority	"Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in regular active service' shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc." Local Rule 35.
Third	Modified case majority	"[R]ehearing 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." App. I, Internal Operating Procedure 9.5.3.
Fourth	Absolute majority	"A majority of the circuit judges who are in regular active service may grant a hearing or rehearing en banc. For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified." Local Rule 35(b).
Fifth	Absolute majority	"For purposes of en banc voting under 28 U.S.C. § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." Local Rule 35.6.
Sixth	Absolute majority	Although there is no current local rule or operating procedure defining a majority for the purpose of en banc voting, the practice in the U.S. Court of Appeals for the Sixth Circuit continues to reflect the explicit definition embodied in former Internal Operating Procedure 20.7, which was eliminated by the court in December 1997 ("Only judges of the court in regular active service at the time of the filing of the petition are eligible to vote on the request for a poll. . . . A majority is determined by calculating the majority vote of all active judges on the court, not the number qualified to hear the case.").
Seventh	Case majority	"A simple majority of the voting active judges is required to grant a rehearing en banc." Seventh Circuit Operating Procedure 5(d).

Table 1 (cont'd)

Circuit	Description of approach	Source of procedures
Eighth	Absolute majority	Although not embodied in its local rules or internal operating procedures, the U.S. Court of Appeals for the Eighth Circuit requires an affirmative vote by an absolute majority of all the judges in active service in order to grant a petition for rehearing en banc, regardless of disqualifications or other temporary reasons. *See* Ahlers v. Norwest Bank Worthington, 794 F.2d 388 (8th Cir. 1986) (petition for rehearing en banc denied even though five of the nine participating judges voted to grant it; since the court had ten judges in active service, six affirmative votes were required to grant the petition).
Ninth	Case majority	"Any active judge who is not recused or disqualified and who entered upon active service before the request for an en banc vote is eligible to vote." Local Rule 35-3, Advisory Committee Notes.
Tenth	Case majority	"A majority of the active judges who are not disqualified may order rehearing en banc." Local Rule 35.5.
Eleventh	Absolute majority	Although not embodied in its local rules or operating procedures, the U.S. Court of Appeals for the Eleventh circuit defines majority for purposes of a vote granting a rehearing en banc as a majority of all active judges, both qualified and disqualified.[32]
District of Columbia	Absolute majority	"[O]nly active judges of the Court may vote [on the question of whether there should be a rehearing *en banc*], and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing *en banc* in order for it to be granted." Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit, Part XIII.B.2.
Federal	Absolute majority	"A case will be reviewed en banc if a majority of the judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service." Local Rule 35(a)(1).

B. Courts' Rationales for Adopting Current Approaches

We asked each chief judge to explain why his or her court adopted its particular interpretation of Federal Rule of Appellate Procedure 35(a). Only four responded to this inquiry. The other nine said they either did not recall or could not locate the rulemaking history that would explain the reasons their court adopted one approach over another.

Absolute majority rule. Chief Judge Wilkinson of the U.S. Court of Appeals for the Fourth Circuit, which follows an absolute majority approach, explained that this

32. A proposed amendment to the Eleventh Circuit's local rules to reflect the current practice has been approved for distribution for public comment and is presently being considered by the Eleventh Circuit's Lawyers Advisory Committee.

approach "spares us the resource drain of too many en banc hearings and, more importantly, safeguards the circuit against the imposition of an en banc ruling which does not actually reflect the views of a majority of judges on the circuit. . . [I]t would be altogether unwise to adopt a high-visibility rule in an en banc case with a large number of recusals which would only have to be changed at a later date, and to which a majority of a court decidedly does not subscribe." Chief Judge Wilkinson is not in favor of a uniform rule, and supports a continuation of the current variation in practice among the courts of appeals.

Similarly, Chief Judge Mayer of the U.S. Court of Appeals for the Federal Circuit explained that the Federal Circuit adopted the absolute majority approach "to ensure that the decision to grant rehearing en banc and the court's en banc decision would reflect the views of a majority of judges. Otherwise, the decision to grant and the ultimate resolution of the en banc issue could turn on the vagaries of recusal and unavailability. If an en banc case were decided by a majority of the participating judges, which is the only situation in which the choice of rule would make a difference, it would set the stage for a possible reversal of the en banc decision in a later case in which all of the active judges could participate, thus defeating the purpose of en banc to settle circuit law for the foreseeable future."

Case majority. In 1984, the Ninth Circuit Court of Appeals approved a change in the definition of majority for en banc purposes. The court departed from the absolute majority approach under which a recusal or abstention was counted as a no vote, and adopted a case majority approach because it believed that under the absolute majority rule, a recusal was in essence a negative vote.

Modified case majority. Chief Judge Becker of the U.S. Court of Appeals for the Third Circuit, which is unique in following a modified case majority approach (i.e., a majority of the circuit judges permitted to participate in a case have the power to grant en banc review, as long as the participating judges constitute a majority of the circuit judges in regular active service), explained that the change from an absolute majority approach was proposed and adopted because the absolute majority rule "made it too difficult to get rehearing in deserving cases" such as cases against a local university or large corporation where three or four active judges may be recused. Further, the additional requirement that the base constitute a majority of judges in active service provides a "'brake' so that an en banc decision could not be made by just a few judges on a large court."

C. Vacancies and Temporary Absences

Although most courts of appeals did not address whether unfilled vacancies should affect the calculation of a "majority" required under section 46(c),[33] we assume based

33. *See contra* Second Circuit Local Rule 35 ("Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in

on additional language in some rules[34] and the plain meaning of 28 U.S.C. §§ 43–46[35] that all courts of appeals interpret "circuit judges of the circuit who are in regular active service" to refer to the number of judges actually appointed to the court, not the number of positions potentially available (i.e., the number of authorized judgeships). Thus, under all three approaches the majority is calculated with reference to the number of active judges presently on the appellate court excluding any vacancies not currently filled.

Chief judges were asked how temporary absences such as extended illness, travel, or other personal circumstances rendering a judge unavailable are treated when determining the base for calculating a section 46(c) majority. Four chief judges said that this issue had never arisen and thus they do not have a policy for temporary absences. The Third Circuit Court of Appeals (which follows a modified case majority approach) reported that temporary absences are not treated like disqualified judges when calculating a majority (i.e., judges who are temporarily unavailable are included in the base from which a majority of judges in regular active service is calculated; judges who are recused or disqualified are not included). The Second Circuit Court of Appeals (which follows a case majority approach) does count temporary absences in the base from which a majority is calculated. Likewise, the Ninth Circuit Court of Appeals (which follows the case majority approach) reported that temporary absences are not treated like disqualified or recused judges (i.e., temporary absences are counted for purposes of calculating a majority). The clerk of the Ninth Circuit Court of Appeals explained that every judge must respond to a request to hear a case en

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regular active service' shall be calculated, pursuant to 28 U.S.C. Section 46(c), for purposes of ordering a hearing or rehearing in banc.")

34. *See, e.g.,* Fourth Circuit Local Rule 35(b) ("For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving . . . ."); Fifth Circuit Local Rule 35.6 ("For purposes of en banc voting under 28 U.S.C. § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office . . . .").

35. In a memo to all circuit judges in the Ninth Circuit regarding the calculation of a majority for en banc purposes, a staff attorney pointed out that including vacant judgeships in the count of active judges presently on a court would "wreak havoc" with 28 U.S.C. §§ 43–46. He cites section 43(b), which states that "[e]ach court of appeals shall consist of the circuit judges of the circuit in regular active service. . . " and concludes that "[i]f 'judges. . . in regular active service' meant the same thing as authorized judgeships, the court would, by definition, cease to exist whenever a vacancy occurred." Memo from Bob Lohn, Office of Staff Attorneys for the Ninth Circuit Court of Appeals, to All Judges Re: Calculation of a Majority for En Banc Purposes 5 & n.2 (Sept. 24, 1984). *See also* United States v. Leichter, 167 F.3d 667 (1st Cir. 1999) (Although 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) require an absolute majority of the court's active judges to vote in favor of the petition, vacant judgeships are to be excluded from the count.); Arnold v. Eastern Air Lines, 712 F.2d 899, 910 n.2 (4th Cir. 1983) (en banc) (Widener, J., concurring and dissenting), *cert. denied,* 464 U.S. 1040 (1984).

banc by either voting in favor of an en banc hearing, or informing the court that he or she has recused himself or herself or is disqualified from participating in that particular case. If a judge fails to respond to an en banc poll, his or her nonresponse is treated as a negative vote for rehearing en banc.

Although the Sixth Circuit (which follows an absolute majority approach) does not have a formal policy regarding temporary absences, their informal practice allows the judge who will be temporarily unavailable to request an extension of the voting deadline to ensure that all judges who desire to cast a vote in an en banc poll may do so regardless of temporary absences. The clerk of the Fifth Circuit (which follows the absolute majority approach) stated that they had never addressed the issue, but assume that if a judge was unavailable, he or she would be treated as a recused judge (i.e., counted for purposes of calculating a majority). Likewise, the Sixth, Eighth, Eleventh, District of Columbia,[36] and Federal Circuits (which all follow the absolute majority approach) treat temporary absences identically to recused judges (i.e., they are counted in the base for purposes of calculating a majority).

D. Satisfaction with Current Approach

We asked the chief judges and clerks about problems or expressions of dissatisfaction with the court's current interpretation of Federal Rule of Appellate Procedure 35(a). Almost all responded that they had not experienced any problems nor were they aware of dissatisfaction with their current approach. The chief judge of the Fourth Circuit Court of Appeals (which follows the absolute majority approach) explained that the rule in their court has met with satisfaction because it safeguards the coherence and stability of circuit law. The chief judge of the First Circuit Court of Appeals (which follows the absolute majority approach) reported that the only real problem that the circuit encountered with the rule was when a majority of the circuit judges were recused and en banc review was unavailable. Similarly, the clerk of the Fifth Circuit (which follows the absolute majority approach) reported that there have been instances where a majority of the judges were recused so that rehearing was not possible. Finally, the clerk of the Eleventh Circuit referred us to Judge Carnes' criticism of its absolute majority approach in his *Gulf Power Co.* opinion.[37]

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36. U.S. Court of Appeals for the District of Columbia Circuit, *Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit*, Part XIII.B.2, explicitly states that "only active judges of the Court may vote [on the question of whether there should be a rehearing en banc], and a majority of all active judges, regardless of recusals *or temporary absences*, must approve rehearing en banc in order for it to be granted" (emphasis added).

37. 226 F.3d 1220 (11th Cir. 2000).

III. Participation of Senior Judges in En Banc Hearings

Although normally an en banc court comprises only circuit judges in regular active service, 28 U.S.C. § 46(c) defines two circumstances in which senior judges are eligible to participate in an en banc hearing: (1) if the senior judge sat on the original panel that heard the case that is now under en banc review, the senior judge can elect to participate as a member of the en banc court; or (2) if the judge was in regular active service when a case was heard or reheard by the court en banc and then took senior status, the judge can continue to participate in the decision of the case after taking senior status.[38]

Inquiries were included in the questionnaire to identify whether one or both of the above statutory exceptions reflect the current practice in each court of appeals, and whether there were additional practices or rules in a particular court regarding the participation of senior judges in en banc hearings. Table 2 shows that in practice all courts of appeals permit senior judge participation in en banc hearings pursuant to the two circumstances defined in section 46(c). In addition, some appellate courts restated one or both of the exceptions defined in 28 U.S.C. § 46(c) in their local rules or internal operating procedures.

Besides the two circumstances defined in section 46(c), four courts of appeals have additional rules or practices permitting senior judges to participate in en banc hearings. The courts of appeals for the Third, Fifth, and Seventh Circuits permit a senior judge to participate in the final resolution of a case after taking senior status, if the senior judge only participated in the en banc poll for the case while in regular active service and then took senior status. Thus, the senior judge need not have sat on the en banc court that heard or reheard the case while in regular active service in order to participate in the resolution of the case as required by 28 U.S.C. § 46(c). Further, in the court of appeals for the Sixth Circuit a senior judge need only be in regular active service when a poll was requested on a petition for rehearing en banc in order to sit on an en banc court. It is not required for the judge to have participated in the vote before taking senior status.[39]

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38. 28 U.S.C. § 46(c) (1982).

39. Concerned that its current rule is inconsistent with 28 U.S.C. § 46(c) because it allows senior judge participation on an en banc court in a circumstance not provided for under section 46(c), the court of appeals for the Sixth Circuit is currently undertaking an internal review of its en banc practice regarding the participation of senior judges.

Table 2. Current Local Rules or Practices Re: the Participation of Senior Judges in En Banc Hearings in the Courts of Appeals

Circuit	Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)?	Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)?	Circuit has additional practices or rules re: participation of senior judges in en banc hearings?
First	Yes. Provision referenced in U.S. Court of Appeals for the First Circuit, Local Rule 35(a).	Yes. Provision referenced in U.S. Court of Appeals for the First Circuit, Local Rule 35(a).	No.
Second	Yes.	Yes.	No.
Third	Yes. Provision restated in U.S. Court of Appeals for the Third Circuit, Internal Operating Procedure 9.6.4.	Yes. Provision restated in U.S. Court of Appeals for the Third Circuit, Internal Operating Procedure 9.6.4.	Yes. Third Circuit Internal Operating Procedure 9.6.4 also allows a judge to continue to participate in the final resolution of a case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service.
Fourth	Yes. Provision restated in U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c).[40]	Yes. Provision restated in U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c).	Yes. In addition to Local Rule 35 setting forth the court's en banc procedures, there is a standing order signed by former Chief Judge Sam J. Ervin III, making participation of senior circuit judges en banc consideration of a case in which a senior judge sat on the original panel mandatory instead of voluntary upon the senior judge's election.[41]

40. U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c), also provides that "A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case."

41. Chief Circuit Judge (Fourth Circuit), Order Regarding Performance of Judicial Duties, *reprinted in* Federal Civil Judicial Procedure and Rules (West 2001) following 28 U.S.C. § 46.

Table 2 (cont'd)

Circuit	Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)?	Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)?	Circuit has additional practices or rules re: participation of senior judges in en banc hearings?
Fifth	Yes. Provision restated in U.S. Court of Appeals for the Fifth Circuit, Local Rule 35.6.	Yes. Provision restated in U.S. Court of Appeals for the Fifth Circuit, Local Rule 35.6.	Yes. Fifth Circuit Local Rule 35.6 also allows a judge to continue to participate in the final resolution of a case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service.
Sixth	Yes. Provision restated in U.S. Court of Appeals for the Sixth Circuit, Internal Operating Procedure 35(a).	Yes.	Yes. Sixth Circuit Internal Operating Procedure 35(a) allows a senior judge to sit on an en banc court if the judge "was in regular active service at the time a poll was requested on the petition, for rehearing en banc."[42]
Seventh	Yes. Provision restated in U.S. Court of Appeals for the Seventh Circuit, Internal Operating Procedure 5(f).	Yes.	Yes. Although not specifically provided for by local rule or internal operating procedure, the Seventh Circuit indicated that it would permit a judge to continue to participate in the resolution of an en banc case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service.
Eighth	Yes.	Yes.	No.[43]

42. The Sixth Circuit is currently undertaking an internal review of its en banc practice vis-à-vis the participation of senior judges. This issue will be discussed at the fall meeting of the Sixth Circuit's Rules Committee.

43. Note that the Eighth Circuit specifically refuses to allow a judge to participate in a rehearing en banc if the judge was active at the time of the vote granting the petition for rehearing en banc, but became a senior judge before the case was heard and submitted for en banc decision.

Table 2 (cont'd)

Circuit	Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)?	Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)?	Circuit has additional practices or rules re: participation of senior judges in en banc hearings?
Ninth	Yes. Provision restated in U.S. Court of Appeals for the Ninth Circuit, Local Rule 35-3 Advisory Committee Notes (2).	Yes. Provision restated in U.S. Court of Appeals for the Ninth Circuit, Local Rule 35-3 Advisory Committee Notes (2).	No.
Tenth	Yes. Provision restated in U.S. Court of Appeals for the Tenth Circuit, Local Rule 35.5.	Yes.	No.
Eleventh	Yes. Provision restated in U.S. Court of Appeals for the Eleventh Circuit, Local Rule 35-9.	Yes. Provision restated in U.S. Court of Appeals for the Eleventh Circuit, Local Rule 35-9.	No.
District of Columbia	Yes. Provision restated in U.S. Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures, Part XIII.B.2.	Yes.	No.
Federal Circuit	Yes. Provision restated in U.S. Court of Appeals for the Federal Circuit, Local Rule 35 Historical Notes.	Yes.	No.

IV. The Arguments For and Against the Absolute Majority Approach

A majority of appellate cases that have considered the issue have interpreted section 46(c) and Federal Rule of Appellate Procedure 35(a) as requiring the vote of an absolute majority of circuit judges in order to convene an en banc hearing or rehearing (i.e., requiring recused judges to be counted in the base from which a majority is calculated).[44] The various points of contention about the rule are summarized below.

A. Minority Control of the Law of the Circuit

Defenders of the absolute majority rule argue that it prevents a minority of the court from determining the law of the circuit and thus effectuates what they see as the goal of section 46(c) and Rule 35(a): intracircuit uniformity by assuring that courts of appeals establish the law of the circuit on questions of exceptional importance by the vote of a majority of the full court rather than by a three-judge panel.[45] Judge Walter Mansfield, Second Circuit Court of Appeals, argued in 1972 that under the case majority approach, if four members of a nine-member court were disqualified, three of the five voting members could take a case en banc and determine the law of the circuit.[46]

Opponents of the absolute majority rule respond that votes to rehear a case do not necessarily predict votes to reverse.[47] In addition, in the great majority of cases,

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44. *See, e.g.,* Lewis v. University of Pittsburgh, 725 F.2d 910, 928 (3d Cir. 1983) (en banc) (order denying en banc rehearing), *cert. denied,* 105 S. Ct. 266 (1984); Clark v. American Broad. Cos., 684 F.2d 1208, 1226 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040, *mandamus denied sub nom. In re* American Broad. Cos., 104 S. Ct. 538 (1983); Copper & Brass Fabricators Council v. Department of Treasury, 679 F.2d 951 (D.C. Cir. 1982), reh'g en banc denied by unpublished order No. 81-2091 (D.C. Cir. Aug. 3, 1982); Curtis-Wright Corp. v. General Elec. Co., 599 F.2d 1259 (3d Cir. 1979), *cert. denied,* 449 U.S. 1022 (1980); Porter City Chapter of Izaak Walton League v. Atomic Energy Comm'n, 515 F.2d 513 (7th Cir. 1975); Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972) (order denying en banc rehearing), *aff'd on other grounds,* 424 U.S. 291 (1973).

45. *See* Waters, *supra* note 4, at 374, 380; Wheaton, *supra* note 4, at 1529, 1529–35 (quoting United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960) ("The principal claimed purpose of the en banc procedure is to make it possible for a 'majority of [a circuit's] judges always to control and thereby to secure uniformity and consistency in its decisions.'")). *See also* Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in denial of en banc rehearing), *aff'd on other grounds,* 414 U.S. 291 (1973); Lewis v. University of Pittsburgh, 725 F.2d 910, 928–29 (3d Cir. 1983) (opinion of Adams, J., on the petition for rehearing).

46. *Zahn,* 469 F.2d at 1041.

47. Waters, *supra* note 4, at 381 (The absolute majority approach does not guarantee that the majority will control the law of the circuit because even if "four judges of a nine-member circuit recuse themselves from a case, each of the remaining five judges could vote in favor of en bancing the

three-judge panels establish the law of the circuit without en banc rehearings. In fact, said one opponent, "[b]y insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of judges in active service."[48] Finally, opponents argue, the examples cited of large numbers of disqualifications in fact occur rarely.[49]

B. Overuse of the En Banc Procedure

Supporters of the absolute majority approach contend that it limits en banc review to the most important cases, thereby avoiding overuse of the en banc procedure and resulting judicial inefficiency.[50]

Opponents respond that under the absolute majority approach, en banc review is limited to those cases in which the absolute majority would grant review and not necessarily to the most important cases.[51] These opponents also make the distinction that the purpose of the en banc vote is to decide whether or not to convene an en banc hearing or rehearing based on an evaluation of the relative importance of a given case, and is not a vote on the merits of that case nor is it a vote to decide whether to limit en banc hearings to questions of exceptional importance.[52] Responding to the claim that not adopting the absolute majority approach will encourage en banc hearings in every case where a minority of the court may desire a decision by the full court, Judge Carnes pointed out that "[e]n banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having

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case and yet split on the merits."); ABA Report, *supra* note 27, at 668; Wheaton, *supra* note 4, at 1531–32 ("If a vote for or against rehearing is truly a vote distinct from the merits of the case, a 3-2 split on the en banc panel is as likely under an absolute majority rule, where all five available judges might vote for rehearing but divide on the merits, as it is under a standard that makes a majority of eligible judges sufficient to order rehearing.")

48. Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000) (Carnes, J., opinion concerning the denial of rehearing en banc).

49. Waters, *supra* note 4, at 381.

50. *Zahn,* 469 F.2d at 1041 (Judge Mansfield, in his concurring opinion denying en banc rehearing, suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court."). *See also* Lewis v. University of Pittsburgh, 725 F.2d 910, 928–29 (3d Cir. 1983) (opinion of Adams, J., on the petition for rehearing); ABA Report, *supra* note 27, at 667 (citing Waters, *supra* note 4, at 379–80 and Note, *En Banc hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. Rev. 563, 574–77 (1965)).

51. ABA Report, *supra* note 27, at 668.

52. Waters, *supra* note 4, at 389; Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000) (Carnes, J., opinion concerning the denial of rehearing en banc).

too many of them" regardless of how a circuit interprets the majority requirement of Rule 35(a).[53]

C. Frustrates the Will of the Majority of Voting Judges

Opponents contend that requiring an absolute majority to en banc a case in which there are recusals or disqualifications often frustrates the will of the majority that wants to en banc an important case.[54] For example, on a court with nine active judges, if three judges are recused and thus excluded from voting, the absolute majority rule requires five of the six nondisqualified judges to en banc the case, thus permitting only two judges to block a rehearing.[55] In such cases where the absolute majority approach requires the concurrence of a supermajority of judges eligible to vote, opponents further allege that recusals may disable a court from rehearing an issue en banc.[56]

D. Contradicts the Language of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a) and the Purpose of Judicial Disqualification

Opponents of the absolute majority approach contend that the language of 28 U.S.C. § 46(c) and Rule 35(a) permits en banc hearings based on the affirmative votes of less than an absolute majority of the circuit's active judges.[57] Judge Murnaghan of the U.S. Court of Appeals for the Fourth Circuit argued in his concurring opinion that the court had properly granted the request for an en banc rehearing by a vote of five to four even though the court consisted of ten judges at the time with

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53. *Gulf Power Co.*, 226 F.3d at 1224.

54. *See* ABA Report, *supra* note 27, at 668; Waters, *supra* note 4, at 374; Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220 (11th Cir. 2000) (opinion concerning per curiam denial of rehearing en banc).

55. *See also* Boraas v. Village of Belle Terre, 476 F.2d 806, 828 (2d Cir. 1973) (Timbers, J., dissenting from denial of rehearing en banc), *rev'd on other grounds*, 416 U.S. 1 (1974).

56. For a period of time the District of Columbia Circuit was prevented from hearing some telecommunications issues en banc because of the negative votes of only three judges. Douglas H. Ginsberg & Donald Falk, *The Court En Banc: 1981–1990*, 59 Geo. Wash. L. Rev. 1008, 1048 n.37 (1991) (citing New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. Nov. 2, 1988) (denying rehearing en banc of decision at 826 F.2d 1101 (D.C. Cir. 1987) where two of the eleven active judges then serving recused themselves, requiring six of the remaining nine votes for the court to grant en banc rehearing)). *See also* Wheaton, *supra* note 4, at 667 ("This problem could also arise in a circuit that is the home of a major university, where so many judges on that circuit are likely to have to disqualify themselves because they teach at or are otherwise affiliated with the university that no case involving the university could be heard en banc.").

57. Waters, *supra* note 4, at 376 (discussing Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); Wheaton, *supra* note 4, at 1514.

one disqualified judge.[58] Judge Murnaghan concluded that in order to give substance to the phrase "judges in regular active service" in 28 U.S.C. § 46(c) a disqualified judge is not in regular active service and, therefore, should not be included in the group from which the requisite majority is determined.[59]

Further, opponents argue that interpreting section 46(c) to include disqualified judges in the calculation of the necessary majority would contradict the purpose of the statutes and ethics rules that control judicial disqualifications because it would treat a disqualified judge as if he or she were not disqualified at all:[60] "Considering the presence of the recused judge for the purpose of determining the appropriate majority, but not allowing him to cast a vote, is in effect counting the judge as a no vote. Although this may not directly violate [28 U.S.C.] section 455—which only requires the judge to withdraw from the case—the policy of the disqualification statute is not given effect when the recused judge has this negative impact on the vote for rehearing."[61] Further, since the absolute majority rule counts a recused judge as a no vote, it causes potential interference with the ethical goal of ensuring the neutrality of a disqualified judge because an order to deny rehearing assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel.[62]

E. Potential for U.S. Supreme Court Review Negates Any Unfairness

Advocates of the absolute majority approach contend that it does not result in any particular injustice of unfairness to individual litigants in cases where a judge's abstention or disqualification has the effect of a vote against rehearing en banc because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue."[63]

Opponents criticize this claim because access to the Supreme Court is never guaranteed, even in important cases.[64] Further, "[s]uggesting that the Supreme Court's authority to correct any error in the lower courts somehow diminishes the

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58. Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 902 (4th Cir. 1983) (en banc) (Murnaghan, J., concurring), *cert. denied*, 464 U.S. 1040 (1984).

59. 712 F.2d at 903–04.

60. Wheaton, *supra* note 4, at 1539. *See also Arnold*, 712 F.2d at 904.

61. Wheaton, *supra* note 4, at 1540–41.

62. *Id.*

63. Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in the denial of rehearing en banc), *aff'd on other grounds*, 414 U.S. 291 (1973).

64. Waters, *supra* note 4, at 382.

need for en banc hearings denies the Supreme Court the benefit of full en banc opinions."[65]

65. *Id.*

V. Suggested Remedies to the Intercircuit Conflict over the Interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a)

Despite the apparent willingness of Congress, the U.S. Supreme Court, and the Judicial Conference to leave it up to the individual circuits to formulate a standard for calculating a "majority of judges in regular active service" in order to en banc a case,[66] some argue in favor of a single, nationally applicable interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a).

In his opinion concerning the denial of rehearing en banc in *Gulf Power Co. v. Federal Communications Commission*, Judge Carnes clearly expressed his view that the current circuit split over the interpretation of 28 U.S.C. § 46(c) and Rule 35(a) should be addressed by code and rule amendments because "there is no good reason why a uniform rule should not be followed in all circuits . . . a litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit."[67]

In 1986, the American Bar Association Section of Antitrust considered the arguments for and against the absolute majority rule and the case majority rule, and consistent with the policy that a uniform rule should govern procedures used by the circuits for granting or denying motions for rehearing en banc, recommended that the ABA propose an amendment to Federal Rule of Appellate Procedure 35(a) that adopts a modified case majority approach.[68] In 1987, the ABA House of Delegates approved a resolution to amend Rule 35(a) to provide that a majority of court of appeals judges in a circuit permitted to participate in a case have the power to grant en banc review, provided that the participating judges constitute a majority of the judges

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66. *See supra* section I.A.

67. *Gulf Power Co.*, 226 F.3d at 1225. *But see* Wheaton, *supra* note 4, at 1522 (The Supreme Court should not resolve the confusion caused by competing definitions of majority because "[n]onuniformity is the precise result contemplated by the permissive grant of authority to make any rules 'not inconsistent' with the binding standards of federal law and the federal appellate rules. The possibility that one court will impose a more stringent definition of majority than another is not more offensive than the likelihood that judges of one circuit will be more willing to grant an en banc rehearing than those of a second court. . . [T]he en banc power is simply a tool of judicial administration—it is not intended to serve litigants. Litigants can demand little more than a prospectively announced rule.") (citing 28 U.S.C. § 2071 (1982) (federal courts can make rules consistent with acts of Congress and the rules prescribed by the Supreme Court) and Fed. R. App. P. 47 (courts of appeals may adopt practice rules "not inconsistent" with the Federal Rules of Appellate Procedure)).

68. ABA Report, *supra* note 27, at 668.

in regular active service.[69] The Antitrust Section explained that "[t]his amendment will permit the court to hear all cases that at least a substantial minority believe are important, while also insuring that en banc decisions are not rendered by a panel that includes only a minority of the judges in the circuit."[70] This policy remained in effect until August 1999 at which time it was archived and thus is no longer active ABA policy. At this time we are unaware of any current section activity in this area.

After examining the arguments in support of both positions, one commentator suggested that "the time has long since come for Congress to clarify 28 U.S.C. § 46(c). In acting, Congress must realize that it need not adopt either the majority position or the minority position. Compromise is possible. Any proposed solution must recognize two facts: 1) no proposal can completely neutralize the effect of a disqualification or recusal; and 2) both the current majority and minority positions have raised important issues that must be considered."[71] As an alternative to the majority and minority approaches, he suggested the adoption of the minority position with a quorum requirement:

> This compromise would require that a definite number of judges be available to sit before any en banc court could be convened. Thereafter, the majority would be determined from the number of circuit judges qualified to participate in a case. Thus, only a majority of the judges qualified to vote would be required to convene an en banc hearing. But at the same time, the quorum requirement would protect against the undesirable possibility that a minority of judges could decide the law of the circuit in an important case. . . .
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> Whatever quorum is selected, it must strike a balance between maintaining uniformity in the circuit and encouraging circuit courts to en banc difficult or important cases. It would not be unreasonable to set the quorum requirement at a somewhat high level in light of the fact that, most frequently, only one or two judges are disqualified from any given case. Additionally, an exception from the quorum requirement could be made for cases in which an absolute majority of judges have voted in favor of en bancing a case. In any event, the number of judges which would be required to hear a case must be determined according to the number of judges in each of the circuit courts of appeals. Alternatively, Congress could allow

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69. *Id.* at 669. *See also* U.S. Court of Appeals for the Third Circuit, App. I, Internal Operating Procedure 9.5.3, which describes a very similar approach.

70. ABA Report, *supra* note 27, at 669. The ABA Report pointed out that the approach taken in its proposed amendment to Fed. R. App. P. 35(a) was generally consistent with the 1973 recommendation of the Judicial Conference that section 46(c) be amended to "make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case." 1973 Rep. of the Proc. of the Jud. Conf. of the U.S. 47. *See supra* section I.A.

71. Waters, *supra* note 4, at 390.

> each circuit to set its own quorum requirement while strongly encouraging them to hear cases in which relatively few judges are disqualified. Should Congress choose not to adopt either alternative, it should simply adopt the minority rule. But, Congress must act.[72]

One commentator explained that although two possible definitions of majority fit within the meaning of the current language of 28 U.S.C. § 46(c) (i.e., an absolute majority of the judges of the circuit or a majority of the judges of the circuit eligible to vote in the rehearing decision), the definition of majority should depend in each case on the number of judges eligible to participate because the absolute majority definition uniquely weakens the effectiveness of disqualification guidelines.[73] Further, the concerns for circuit workload and for majority control of circuit precedents that are implicated by a rule that focuses on a majority of the judges eligible to vote are insufficient to outweigh the danger to judicial integrity that would accompany a definition that considers a disqualified judge, as explained by the following commentary:[74]

> Counting a recused judge as a no vote affects the final outcome of a case in a way that counting the recusal as a yes vote does not. If by treating a disqualification as a yes vote the outcome of the voting decision is altered, the merits of the case remain unaffected by the changed outcome; granting a rehearing does not, a priori, represent a choice between competing position[s] on the merits of a controversy. If the disqualification is equivalent to a no vote, on the other hand, the disqualified judge's presence may indeed determine the final outcome of a case. Although a denial of rehearing is primarily tied only to interests in judicial administration, the order to deny rehearing also assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel. Because the no vote has then affected the disposition of the case by allowing a particular resolution of the underlying merits, an absolute majority rule cannot avoid potential interference with the ethical goal of ensuring the neutrality of a disqualified judge.[75]

This commentator concludes that the responsibility for adopting the appropriate definition of majority rests with each individual circuit for now[76] in light of: (1) Congress's failure to select or impose a particular meaning of majority in 28 U.S.C. § 46(c); (2) the Supreme Court's consistent choice not to examine current circuit constructions of the en banc statute despite the intracircuit conflict over the

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72. *Id.* at 390–92.

73. Wheaton, *supra* note 4, at 1540.

74. *Id.* at 1542.

75. Id. at 1540–41.

76. Wheaton, *supra* note 4, at 1542.

definitional question;[77] and (3) the Judicial Conference's decision not to resurrect its 1973 proposal that Congress rewrite the en banc statute and its suggestion that circuits adopt en banc voting rules that will provide notice to litigants of the definition of majority applied by each circuit. This commentator further believes that each court of appeals should reexamine its en banc voting procedures and reconcile its chosen definition with the traditional importance of intracircuit uniformity of law and the importance of effective judicial disqualification statutes.[78]

77. *See, e.g.,* Lewis v. University of Pittsburgh, 105 S. Ct. 266 (1984), *denying cert. to* 725 F.2d 910 (3d Cir. 1983); Adams v. Proctor & Gamble Mfg. Co., 104 S. Ct. 1318 (1984), *denying cert. to* 697 F.2d 582 (4th Cir. 1983); Arnold v. Eastern Air Lines, 464 U.S. 1040 (1984), *denying cert. to* 712 F.2d 899 (4th Cir. 1983); *In re* American Broadcasting Cos., 104 S. Ct. 538 (1983), *denying mandamus to* Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040 (1983); American Broadcasting Cos. v. Clark, 460 U.S. 1040 (1983), *denying cert. to* 684 F.2d 1288 (6th Cir. 1982).

78. *Id.* at 1529.

IV-E

MEMORANDUM

DATE: October 23, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-12

At its April 2002 meeting, the Committee 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. I agreed to review the Department's proposal and to prepare revised drafts of the amendments and Committee Notes.

After wrestling with this issue on-and-off for several days, I have concluded that we should address briefing in cross-appeals by adopting a new, separate, comprehensive rule. 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, and worrying that they may have missed a provision regarding cross-appeals in a rule that they have not read.

I think that there are other advantages to adopting a new rule. It will make it easier to "fine tune" the rules regarding cross-appeals in the future. Also, by setting out the rules regarding cross-appeals in one place, we minimize the chances that a change to a general rule will inadvertently cause problems with cross-appeals.

Attached are draft amendments and Committee Notes.

Rule 28. Briefs

* * * * *

(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.

* * * * *

~~**(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]

* * * * *

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.

MEMORANDUM

DATE: October 12, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-01

At its April 2002 meeting, the Committee 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 raised a number of concerns about the specifics of the Department's draft rule. I agreed to take a look at this issue and prepare a revised draft.

Attached please find three alternative drafts of a proposed Rule 32.1:

Alternative A is the most sweeping. It specifically authorizes courts to issue non-precedential opinions and permits their citation without qualification.

Alternative B is the second most sweeping. 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.

Alternative C is the least sweeping. It addresses only the citation of non-precedential opinions, and it permits such citation only in limited circumstances. (Alternative C is, in essence, the Justice Department's original proposal.)

I have 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 on citation (Alternative B or C), but for their fears that such a rule is a first step toward abolishing non-precedential opinions altogether.

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 misleading 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 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 misleading 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 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 misleading 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 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.

EXCERPT FROM TRANSCRIPT OF CONGRESSIONAL HEARING CONTAINING STATEMENTS OF JUDGE SAMUEL ALITO AND ALEX KOZINSKI ON "UNPUBLISHED JUDICIAL OPINIONS"

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2002
UNPUBLISHED JUDICIAL OPINIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY

OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

JUNE 27, 2002

Serial No. 82

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APPENDIX

Material Submitted for the Hearing Record

Letter and Attachments from Lawrence A. Salibra, II, Senior Counsel and Elisa P. Pizzino, Counsel, Alcan Aluminum Corporation

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Attachments from Alex Kozinski and Stephen Reinhardt

Article from David Greenwald and Frederick A. O. Schwarz, Jr.

Article from Stephen R. Barnett

Letter from Jonathan Lewin

UNPUBLISHED JUDICIAL OPINIONS

THURSDAY, JUNE 27, 2002

House of Representatives,
Subcommittee on Courts, the Internet,
and Intellectual Property,
Committee on the Judiciary,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:20 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. **COBLE.** The Subcommittee will come to order.

Ladies and gentlemen, pardon my immodesty, but this Subcommittee has an enviable record for punctuality, today notwithstanding. We had votes on the floor. In fact, one vote is just now being finalized, and that is why we are belated. My good friend, the Ranking Member, Mr. Berman, just joined us, so we will get underway. I thank you all for your patience in waiting for us to return.

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Today we will examine an issue which has long been the subject of debate; that is, unpublished judicial opinions. Permit me, if you will, to begin by echoing my sentiments from a previous hearing on the operations of the Federal judicial misconduct statutes.

Overall, I believe that the Federal judiciary functions very well. At the same time, however, no branch of the government, including the third branch, is immune from evaluation. So that is one reason why we are assembled here today, to determine if there is in fact a problem with regard to the administration of

justice in our country and, if so, to explore how we should fix or repair the problem.

More specifically, we are trying to determine if the administrative practices of limited publication and noncitation of opinions among the circuits are fair, both to litigants who want to know what a court was thinking when it rendered a decision, as well as to attorneys attempting to scour the law for precedential authority when advising their clients.

In conclusion, I want to extend my gratitude to everyone on the panel for your patience in working around the evolving Subcommittee schedule in preparation for this hearing. You will recall it was previously scheduled, and we had to reschedule for today. I hope that did not unduly inconvenience you. You have been very tolerant in this regard, and I appreciate your flexibility.

I am now pleased to recognize my good friend, the distinguished gentleman from California and Ranking Member of this Subcommittee, Mr. Berman, for his opening statement.

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[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Good morning. The Subcommittee will come to order.

Today we will examine an issue which has long been the subject of debate: unpublished judicial opinions. Allow me to begin by echoing my sentiments from a previous hearing on the operations of the federal judicial misconduct statutes: Overall, I believe that the federal judiciary functions very well. At the same time, however, no branch of the government (including the Third Branch) is immune from evaluation. So that is why we are assembled today—to determine if there is a problem with regard to the administration of justice in our country; and if so, to explore how we should fix the problem.

More specifically, we are trying to determine if the administrative practices of limited publication and non-citation of opinions among the circuits are fair, both to litigants who want to know what a court was thinking when it rendered a decision, as well as to attorneys attempting to scour the law for precedential authority when advising their clients.

In conclusion, I want to extend my gratitude to everyone on the panel for his patience in working around the evolving Subcommittee schedule in preparation for this hearing. You have all been very tolerant in this regard, and I very much appreciate your flexibility.

I now recognize my good friend, the Ranking Member from California, Mr. Berman, for an opening statement.

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Mr. **BERMAN.** Thank you very much, Mr. Chairman. Thank you for calling the hearing. This is obviously an issue, the issue of unpublished judicial decisions, which has many in the judicial-legal communities quite exercised, and I think you are to be commended for your diligent efforts throughout this Congress to conduct oversight of those matters that fall into this Committee's jurisdiction.

I couldn't help but notice your comment about it is appropriate to evaluate the role of the third branch. I think probably as we talk, the House of Representatives, on the floor, is evaluating the role of the third branch, or at least a decision of the third branch; but then the third branch constantly evaluates our work as well, and they actually might be able to do it with more effectiveness than we can evaluate theirs.

But the issue before us today, that is, unpublished judicial decisions, poses important questions relating to the U.S. Constitution, the framers' intent, judicial efficiency, and the fairness of our judicial system. While we certainly will not resolve these questions here now, I expect our learned witnesses will provide us with strong insights on these issues.

I particularly want to thank Judge Kozinski from the Ninth Circuit for shuffling his schedule and traveling across the country to be with us today. I have long respected his thinking on many issues and know that his presence here indicates the importance he attaches to the issues before us.

I am interested in the ancillary issue that is raised by Judge Kozinski in his testimony. Specifically, without regard to what we might think about the pros and cons of unpublished judicial decisions, what is there that we can really do beyond being providing a forum for discussion?

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The independence of the judiciary is an integral aspect of our form of Government. Having sat on the Subcommittee for nearly 20 years, I have developed a healthy respect for the need to ensure that the legislative branch not interfere with the independence of the judiciary. Even where I have strongly disagreed with the direction of the judiciary, and in the administrative as opposed to the court decision context, for instance, on the judicial privacy issue, I still try to pursue solutions that leave it up to the judiciary to manage itself.

It appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves. Whether the judicial resolution comes through court decisions interpreting the U.S. Constitution or new administrative rules, the judiciary is capable of grappling with this issue itself. In fact, it may be an issue that under the U.S. Constitution only the courts can resolve.

Anyway, Mr. Chairman, I look forward to hearing our witnesses, and I yield back the balance of my time.

Mr. **COBLE.** I thank the gentleman from California. Thank you.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

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I am pleased to join you today for this oversight hearing on "Unpublished Judicial Decisions." This is obviously an issue that has many in the judicial and legal communities quite exercised. You have shown significant foresight in bringing the issue to the attention of myself and other Subcommittee Members. In fact, you are to be commended for your diligent efforts throughout this Congress to conduct oversight of

those matters that fall into our Courts jurisdiction.

The issue before us today—unpublished judicial decisions—poses important questions related to the U.S. Constitution, the Framers' intent, judicial efficiency, and the fairness of our judicial system. While we certainly won't resolve these questions here and now, I expect that our learned witnesses will provide us with strong insights on these issues.

I particularly want to thank Judge Kozinski from the Ninth Circuit for shuffling his schedule and traveling across the country to be with us today. I have long respected his thinking on many issues, and know that his presence here indicates the importance he attaches to the issues before us.

While I am certainly interested in our witnesses' analyses of the pros and cons of unpublished judicial decisions, I am also interested in an ancillary issue that was raised by Judge Kozinski in his testimony. Specifically, what, if anything, can or should Congress do—besides providing a forum for discussion?

The independence of the Judiciary is an integral aspect of our form of government. Having sat on this Subcommittee for nearly twenty years, I have developed a healthy respect for the need to ensure that the Legislative Branch not interfere with the independence of the Judiciary. Even where I have strongly disagreed with the direction of the Judiciary, as with the judicial privacy issue, I still pursue solutions that leave it up to the Judiciary to manage itself.

It appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves. Whether the judicial resolution comes through court decisions interpreting the U.S. Constitution or new administrative rules, the Judiciary is capable of grappling with this issue itself. In fact, it may be an issue that, under the U.S. Constitution, only the courts can resolve.

Anyway, Mr. Chairman, I look forward to hearing our witnesses go at it.

I yield back the balance of my time.

Mr. **COBLE.** Again I say to the panelists, good to have you all with us. Not necessarily in order of appearance, but I will introduce our first witness, an old friend and frequent visitor, whom I have not seen in a good while. Professor Arthur Hellman is Professor of Law at the University of Pittsburgh, where he teaches courses in Federal court, civil procedure and constitutional law. Earlier this year, Professor Hellman received the Chancellor's Distinguished Research Award as a faculty member who has an outstanding and continuing record of research and scholarly activity. Professor Hellman received his B.A. Magna cum laude from Harvard University and his J.D. From the Yale Law School, and has been a member of the faculty at the Pittsburgh School of Law since 1975.

Our next witness is Judge Alex Kozinski, who was appointed United States Circuit Judge for the Ninth Circuit about 15, 16, 17 years ago, I guess, Your Honor; 1985, I think. Prior to his appointment to the appellate bench, Judge Kozinski served as the Chief Judge of the United States Claims Court, worked in the Reagan administration, practiced law, and was a clerk to former Chief Justice Warren Burger. The judge received his B.A. And his J.D. Degree from UCLA.

Our next witness is Mr. Kenneth Schmier. Although she is not a Member of our Committee,

Congresswoman Lee, the gentlewoman from California, has requested permission to introduce Mr. Schmier.

Ms. **LEE.** Thank you very much, Mr. Chairman. Let me just thank you for this privilege to be able to be with you today to make this introduction of my constituent, Mr. Kenneth Schmier. Let me just mention a couple of things about his background so you really can get a sense, the body, of who he is.

He is Chairman of the Board and Founder of NextBus Information Systems, Inc. This information system actually operates in over 20 cities nationwide, including here in Washington, D.C., back in Oakland, California, San Francisco, and many other parts of the Bay area.

Mr. Schmier is here today to testify on an issue to which he has really devoted considerable time and energy: the publication of appellate court decisions. He is chairman of the Committee of the Rule of Law, an ad hoc group which includes on its advisory board the district attorney of the City and County of San Francisco, the Dean of the Golden Gate School of Law, and the former D.A. Of San Francisco, and many other distinguished attorneys and Government leaders.

So it is my pleasure to welcome Mr. Schmier to Washington, D.C., to introduce him to the distinguished Members of this Subcommittee. I would like to say in closing that Mr. Schmier has a J.D. Degree from Hastings Law School.

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Thank you, Mr. Chairman.

Mr. **COBLE.** Thank you. Mr. Schmier, my able counsel advises me that I badly butchered the pronunciation of your name, so I will correct it now. Mr. Schmier.

Our final witness is the Honorable Samuel Alito, who is a judge for the U.S. Court of Appeals for the Third Circuit. Judge Alito was nominated by President Bush and confirmed by the Senate on June 15, 1990. He was awarded his B.A. From Princeton and his J.D. From Yale. Judge Alito was admitted to the New Jersey Bar and the U.S. District Court of New Jersey.

Good to have all of you with us. We have written statements from each of you. I ask unanimous consent that these statements be submitted into the record in their entirety.

Gentleman, as you will recall, we have previously requested that you limit your oral testimony to 5 minutes. I don't like to muzzle witnesses, but in the interest of time, we have votes that are ongoing on the floor, your statements have been read and will be reread, so don't think that we are hustling you in and hustling you out. But when you see the red light appear in your face at the panel on the desk, that will be your signal that you have exhausted your time limit. You won't be keelhauled if you take another second or two, but try to wrap up at that point.

Mr. **COBLE.** Judge Alito, why don't we start off with you, Sir?

STATEMENT OF HONONORABLE SAMUEL A. ALITO, JR., JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND CHAIR, ADVISORY COMMITTEE ON THE FEDERAL RULES OF APPELLATE PROCEDURE

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Judge **ALITO.** Thank you very much, Mr. Chairman. It is a pleasure for me to be here this afternoon to try to explain the ways in which——

Mr. **COBLE.** I am not sure you have that mike activated.

Judge **ALITO.** There it is. I apologize. It is a pleasure for me to be here this afternoon to explain the ways in which the Federal judiciary is attempting to address this important subject through the rules process.

The term that is used customarily in this area—unpublished opinions—is, of course, familiar to all of us, and I think the people who are familiar with the area know what it means. But I believe it is worth a minute at the outset to make sure that nobody is misled, because as a result of some recent developments and, in particular, technological changes, the term can be very misleading.

The fact of the matter is that today the vast majority of opinions, even if they are not printed in the traditional source, the Federal Reporter, are published in any sense of the word. They are available to subscribers to services such as LEXIS and WESLAW. They are now printed in a separate series of case reports called the Federal Appendix, which is available in most law libraries. All of the courts of appeals now have web sites, and most of them now post all of their opinions on those web sites so that anybody with access to the Internet can have easy and cheap access to all of those opinions.

So the term "unpublished opinion" has really become somewhat misleading. But whatever we call these opinions, they are vitally important to the work of the courts of appeals. The courts of appeals issue thousands of them each year, and I don't think it is an exaggeration to say that if the courts of appeals were required tomorrow to decide every case with the kind of opinion that is published in the Federal Reporter, either the courts would shut down or their work would be radically transformed in undesirable ways.

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The issue of these unpublished or "non-precedential" opinions, as some of us now call them, seems to raise three major questions. They are related, but I think it is worth trying to keep them separate.

The first is the question of public access. Are these opinions readily available to members of the public and to the bar?

The second is the question of citation. Should lawyers be restricted in their ability to cite those opinions in their briefs?

The third is the question of precedential value. Should these opinions, should the decisions that are memorialized in these opinions, be binding in future cases?

The first issue, the issue of public access, has, I believe, been solved to a large degree by the advances that I mentioned first. As I said, I think these opinions are now, in the main, very broadly available to the public at little cost.

The third issue, the question of precedential value, of course, implicates the doctrine of stare decisis, which has traditionally been developed by the courts in the course of deciding cases. This is an area in which there have been some very interesting developments in recent years. There has been a renewal of

academic interest in the area, there have been some very interesting and provocative judicial decisions in the area, and I think it is the overwhelming sentiment of the judiciary that this development should continue in this manner in the common law tradition and should not be regulated by the national rules process.

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That leaves the second question, the question of citation, and that is the one with which I am most directly concerned. At this time, the issue is left to each court of appeals and the courts of appeals have different approaches. Some allow free citation of all opinions. The rest restrict citation to various degrees.

The Justice Department has recommended that the Federal Rules of Appellate Procedure be amended so that there would be a national uniform rule on this question that would allow the citation of all opinions for certain purposes, including, most importantly in this connection, in an instance in which an opinion that is not printed in the Federal Reporter has persuasive value that is greater than any other opinion that is available in a traditional printed form.

This proposal has been debated and discussed by the committee that I chair, the Advisory Committee on Appellate Rules, at several meetings. We surveyed the chief judges of the circuits on the proposal and, not surprisingly, they were sharply divided. Some were in favor, others were opposed. Others had mixed views on the question.

We are scheduled to take this question up again at our next meeting in November, and I expect that at that time we will vote either in favor of recommending the adoption of the Department of Justice proposal or some alternative, or perhaps the vote will be against any change in the current practice.

But the point I want to make is that we are very actively engaged in the process of considering and debating this issue, and we welcome your oversight on the question and the new information that this will bring to light.

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Thank you.

Mr. **COBLE.** Thank you, Your Honor.

[The prepared statement of Judge Alito follows:]

PREPARED STATEMENT OF SAMUEL A. ALITO, JR.

Mr. Chairman and members of the subcommittee, I am Samuel A. Alito, Jr., judge of the United States Court of Appeals for the Third Circuit. I appear today on behalf of the Judicial Conference of the United States, which is the policy-making arm of the federal courts. I chair the Advisory Committee on the Federal Rules of Appellate Procedure. Thank you for the opportunity to share the views of the federal judiciary on "unpublished" courts of appeals opinions.

Court of appeals decisions are and always have been public. But not all opinions have been reported and included in printed volumes issued by the major legal publishers. Traditionally, major legal printers published only opinions that were submitted for that purpose by the judges authoring them. About forty years ago, the federal judiciary instituted a policy discouraging the publication of all "non-precedential"

opinions in order to cope with the exponentially expanding volume of litigation. This policy was adopted for a variety of reasons, including to conserve opinion-writing time for precedent-setting decisions, to preserve the consistency and quality of precedential opinions, and to save time and money for attorneys, who would otherwise find it necessary to research a hugely increased body of case law and to pay for a great many additional volumes of case reports. Presently, most final decisions of the courts of appeals are "unpublished"—that is, they are not printed in the *Federal Reporter*.

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Soon after the "unpublished-opinions" policy took effect, courts of appeals developed local procedural rules to restrict the citation of "unpublished" opinions. This was done in large part for the purpose of dispelling any suspicion that institutional litigants and others who might have ready access to collections of unpublished opinions had an advantage over other litigants without such access. Thus, lawyers were prevented from citing "unpublished" opinions in their briefs primarily as a matter of fairness. With the advent of computer assisted legal research, however, the reference to "unpublished" opinions is now something of a misnomer since the overwhelming majority of opinions are now readily available to the public, often at minimal or no cost because they are posted on court web sites and are now printed in a new series of casebooks called the *Federal Appendix* that is available in most law libraries.

Although the justification for prohibiting citation to "unpublished" opinions as a matter of fairness may no longer be viable because most opinions are available electronically, several courts of appeals continue for other reasons to prohibit or otherwise limit citation to "unpublished" opinions. They remain concerned that the problems that prompted the adoption of the Judicial Conference's "unpublished-opinions" policy may be exacerbated by a policy permitting universal citation. The debate engendered over the appropriate use and precedential value of "unpublished" opinions implicates important competing interests, and the federal judiciary continues to study this subject carefully and to confer with the bar. The effort has now focused on a draft rule amendment governing "unpublished" opinions that has been proposed by the Department of Justice and will be considered by the Advisory Committee on the Federal Rules of Appellate Procedure at its November 2002 meeting.

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HISTORY OF JUDICIARY ACTIONS REGARDING "UNPUBLISHED" OPINIONS

The federal courts of appeals have a longstanding practice of designating certain decisions as "unpublished opinions." Faced with an overwhelming and growing volume of reported court decisions, the Judicial Conference in 1964 began to encourage judges to report only opinions that were of general precedential value. In 1972, the Conference asked each court to develop a formal publication plan restricting the number of opinions being reported. The Federal Judicial Center surveyed the courts and recommended criteria to help them designate which opinions should be forwarded to be published. By 1974, each court of appeals had a plan in operation.

By the 1980's and 1990's, one of the justifications for limited publication no longer applied, because new technologies facilitated electronic storage and easy retrieval of immense quantities of data. In 1990, the Federal Courts Study Committee recommended that the Judicial Conference establish an ad hoc committee to study whether technological advances gave reason to reexamine the policy on "unpublished" opinions. The committee did not endorse a universal publication policy, but it noted that "non-publication policies and non-citation rules present many problems." The Conference did not act on that recommendation.

During the past decade, amendments to the rules have been periodically proposed to the Advisory Committee on the Federal Rules of Appellate Procedure to establish uniform procedures governing "unpublished" opinions. In 1998, the former chair of the advisory committee surveyed the chief circuit judges and received a virtually unanimous response that uniform rules were unnecessary. In January 2001, the Solicitor General, on behalf of the Department of Justice, proposed specific language amending the Federal Rules of Appellate Procedure to provide for uniform procedures governing the citation of unpublished opinions. The committee is now studying the Justice Department proposal.

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LIMITING PUBLICATION OF OPINIONS

"(A)ppellate opinions serve essentially two functions: to resolve particular disputes between litigants and to clarify or redefine the law in some manner."(see footnote 1) Up until the 1960's, the volume of appellate opinions was sufficiently manageable to allow careful writing for virtually all decisions. The well-documented explosion in the appellate workload since then has been thought by the judiciary to present compelling doctrinal and practical reasons to limit the "publication"—that is, the public dissemination—of opinions.

First, the judiciary has been concerned that important precedential opinions will be obscured by the thousands of opinions that are issued each year by the courts of appeals to decide cases that do not present any questions of significant precedential value. Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity. A brief written opinion is all that is necessary to inform the litigants of the outcome and the reasons for it.

Second, the judiciary has been concerned that the universal publication of opinions would either produce a deterioration in the quality of opinions or impose intolerable burdens on judges in researching and drafting opinions. Drafting an opinion that is to be applied as a precedent in future cases is a time-consuming task. All of the relevant facts and all of the relevant aspects of the procedural history of the case must be set out. In addition, the discussion of all pertinent legal authorities and the holding must be phrased so that the opinion will not be misunderstood. The opinion must be crafted with the recognition that some future litigants may seize on any ambiguity in order to achieve an unwarranted benefit or escape the opinion's force. It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce such an opinion in every case. Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand). This is not to say, of course, that the decision in the latter type of case is unimportant or that *the decision* may be made with less care. But because the primary function of *the opinion* in such a case is to inform the parties of the basis for decision, not to serve as a guide for future litigation, the opinion need not be as detailed or formal.

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Most of the courts of appeals have a local rule governing the citation of "unpublished" or "non-precedential" opinions. Many of the courts initially prohibited citation of such opinions because, as mentioned, they were largely unavailable to the public. Although technology has mooted the "fairness" justification for prohibiting citation to "unpublished" opinions, some courts believe that limiting citation is useful for other reasons. Three of the circuits generally forbid citation, except under very limited circumstances (First, Seventh, and Ninth circuits). Others either generally permit citation or allow citation for limited purposes, such as to establish res judicata or collateral estoppel (D.C., Third, Fourth, Fifth,

Sixth, Eighth, Tenth, and Eleventh Circuits). Although permitting citation, some of these local rules explicitly state that "unpublished" opinions lack precedential value. Still others recognize that unpublished opinions may have persuasive value (Fifth, Eighth, Tenth, and Eleventh Circuits). All courts of appeals agree that unpublished opinions are not binding precedent. A few courts of appeals have rules permitting counsel to recommend to the court that it "publish" a particular opinion.

A variety of recent developments have led courts of appeals to reexamine and in some instances alter their rules and practices regarding "unpublished" or non-precedential opinions. As noted, the vast majority of non-precedential opinions issued by the courts of appeals are now readily available to attorneys and the public. In the past few years, judicial decisions and scholarly articles have begun to explore the question whether the Constitution limits the authority of the federal courts to issue non-precedential opinions.(see footnote 2) The judiciary is also acutely aware that past practices regarding non-precedential opinions have led to misperceptions and that some scholars, practitioners, and others have voiced strong arguments against the continuation of some of those practices.

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PRESENT WORK OF THE APPELLATE RULES COMMITTEE

The Department of Justice proposal to which I referred emerged from this backdrop. As noted, the Department of Justice has proposed an amendment to the Federal Rules of Appellate Procedure governing unpublished opinions. It is deliberately narrow and permits citation to an "unpublished" opinion only if: (1) it directly affects a related case, e.g., by supporting a claim of res judicata or collateral estoppel, or (2) "a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue." The proposal also requires that a copy of the "unpublished" opinion be attached to any document in which it is cited. The proposal takes no position on the precedential value of an "unpublished" opinion and does not dictate whether or to what extent a court should designate opinions as "unpublished." The Department of Justice continues to endorse the proposal. As a litigant in all the circuits, it believes that a uniform national rule would be beneficial.

In response to the Justice Department proposal, the advisory committee undertook a review of the extensive number of articles and surveys on the subject and found that these express conflicting views. In accordance with its past practices, the committee surveyed the various courts of appeals. The responses from the courts of appeals manifested no consensus on the proposal advocated by the Justice Department. Unlike earlier surveys, however, several courts expressed no objection to implementing a rule on the citation of unpublished opinions. Others continued to express strong reservations. The complexity and competing interests were summed up in one response, which concluded that "the difficulty is that the decisions as to whether and when to publish, what kind of explanation to give, and what force should be given to a limited or no citation opinion are bound up together and are substantially affected by conditions that may vary from one circuit to another." The concern is shared by others who fear that permitting citation to "unpublished" or "non-precedential" opinions will inexorably cause judges to try to draft those opinions in the same manner as precedential opinions and that this will substantially disrupt the efficient functioning of the courts.

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The Advisory Committee on Appellate Rules discussed the Justice Department proposal at its last meeting in April 2002 and will again consider the Department of Justice proposal at its November 2002 meeting.

CONCLUSIONS

The subject of unpublished opinions raises many difficult issues that must be addressed on several different levels. At the same time, the practices governing "unpublished" opinions continue to evolve in the respective courts of appeals, with a majority permitting citation under certain circumstances. For example, the D.C. Circuit very recently amended its local rules to eliminate a former prohibition against citing unpublished opinions. It now permits citation "as precedent" of any decision issued by the court after January 1, 2002.

The doctrine of precedent *(stare decisis)* was established as part of the common law, and the development of this doctrine has long been committed primarily to the stewardship of the Third Branch. As part of its "unpublished-opinions" policy, the Judicial Conference has deliberately promoted experimentation by giving the respective courts of appeals local discretion in this area. Whether the benefits of uniform procedures governing citation of opinions outweigh the flexibility of local procedures is subject to no easy answer. The federal judiciary is actively engaged in studying the experiences of the courts and all the implications regarding the appropriate use of "unpublished" opinions.

We welcome the oversight of Congress and look forward to any new information that it may gather on this important issue. Thank you again for the opportunity to express the judiciary's views.

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Mr. **COBLE.** Judge Kozinski.

STATEMENT OF HONORABLE ALEX KOZINSKI, JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Judge **KOZINSKI.** Good afternoon, Mr. Chairman. Thank you so much for inviting me. I feel privileged to be able to speak on the topic.

I do want to say a word on behalf of the Committee staff that was so helpful to me: Melissa McDonald, Eunice Goldring, Alec French. I came all the way from California and had logistical problems. They couldn't have been more helpful or courteous. I really appreciate it.

Mr. **COBLE.** Is that the way they told you to tell us that, Judge?

Judge **KOZINSKI.** Their mother called me.

Mr. **COBLE.** Judge, we are very high on the staff on both sides. Thank you for mentioning that.

Judge **KOZINSKI.** We deal with the public as well, of course, and we believe that how staff deals with members of the public reflects on us, and I think it really reflects well with the Committee how well your staff did. I don't want to belabor the point.

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May I also introduce two gentlemen in the audience, Judge William Bryson from the Court of Appeals of the Federal Circuit, who spent many years in the Justice Department, including 8 years in the Solicitor General's Office. The Federal Circuit is another large circuit and has problems maybe somewhat different

from ours. I asked Judge Bryson to be here, and conceivably with the permission of the Committee, if I get a question that bears on something, I may consult with him.

I also want to acknowledge Thomas Healy, a lawyer in town, a former law clerk of the Ninth Circuit, who wrote I think—and I have made copies of this as an exhibit—a Law Review article that goes into the very question of precedent, which is at the very heart of what these hearings are about. And it is such a scholarly piece that I believe the subject should be started by reading and understanding what Mr. Healy has said. Again, I may call on him if I get in too deeply.

I want to echo what Judge Alito said. Unpublished dispositions don't mean secret law. They never have meant secret law. Published has a specific meaning in the Federal courts, and what it means is it is those opinions through which the courts of appeals speak to the other judges of our circuit—of the circuit, by which we give guidance as to what the law is.

We decide many cases. In our circuit, we decide 4,500 cases or more a year, and we have a complement of about two dozen judges, with some help from senior judges, and we have to decide those cases, and we look at all of them very closely in deciding them. But some cases are such that they require an elucidation of the law and require guidance to other judges, to the judges of the district courts, the judges of bankruptcy courts, magistrate judges, and also notice to the public of how the law is developed. Those are the published opinions.

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Quite simply, deciding some cases by unpublished disposition, which is simply a letter to the parties telling them who won and who lost, and why, frees us up to spend the time that needs to be spent on published opinions, the ones that actually shape the law.

Those are very difficult indeed. If one has not worked on a judicial opinion, one might think you write it down and it all comes out of the pen, but in fact it is a very time-consuming process, because you are thinking not only about the case before you, but you are thinking of all the cases in the future that will be governed by this principle. You have to put in not too much, not too little. You have to put in a principle that will apply to this case, but also correctly predict the result in other cases.

I have been doing it for 20 years. I clerked on the Ninth Circuit, as the Chairman pointed out. I have been 17 years on the Ninth Circuit. I was a judge before that on the Court of Federal Claims. And there is an incredibly difficult and time-consuming task involved in writing opinions. We all do these things. We write in our chambers; 30, 40, 50, 60, 80 drafts of an opinion are not at all unusual.

Now, that kind of effort simply cannot be spent on 150 cases that each judge has to dispose of a year, and an additional 300 cases that each judge has to—is on a panel with two other judges and has to review and approve.

In my view, requiring that all of those dispositions be published would result in simply chaos in the law. It would not allow us to spend the time needed to write opinions of that matter whereby we speak to our lower court judges and explain what the law is, and it would become a hunting ground for lawyers to find spurious distinctions, small changes in wording, that make no difference at all to the outcome, but give them a chance to try to say a case that otherwise is clear winds up being unclear, leading to more litigation, more expense, more delay for the litigants.

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This is not a new process. As Mr. Healy points out in his article, this has been going on since the early days of the common law. Lord Coke complained there were too many cases cluttering up the law, making it difficult to figure out what the law is, not easier. In fact, appended to my statement are the practices in the State courts. As you will see, 38 States have some form of strict noncitation, nonpublication rule. There is much wisdom in the States. They decide far more cases than the Federal courts. They believe this is a tool that is necessary for the management of the case law. I believe this is something that speaks to the legitimacy of the practice.

Thank you very much.

Mr. **COBLE.** Thank you, Your Honor. The Subcommittee will welcome your companions as well, and your former law clerk. Good to have you all with us as well.

[The prepared statement of Judge Kozinski follows:]

PREPARED STATEMENT OF ALEX KOZINSKI

Mr. Chairman and Members of the Subcommittee. My name is Alex Kozinski and I am a judge of the Court of Appeals for the Ninth Circuit, where I have served since 1985. Prior to that time I served for three years as Chief Judge of the United States Claims Court, now called the United States Court of Federal Claims. Immediately after law school, I clerked for then-Judge (now Justice) Anthony M. Kennedy on the Ninth Circuit. I have thus spent over two decades working for courts that issue both published and unpublished rulings, which are the subject of these oversight hearings.

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I thank the subcommittee for giving me the opportunity to state my views. I was invited to speak as an individual and not on behalf of my court or the federal judiciary. The views I express are therefore my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues and many other federal appellate judges as well.

WHAT ARE UNPUBLISHED DISPOSITIONS?

As Judge Alito points out in his testimony, the term "unpublished" is an anachronism, dating back to the days when failing to designate a disposition for inclusion in a national reporter meant that it would not be published at all, and therefore unavailable to most members of the bar. Even at that time, unpublished did not mean secret. Like all court records, unpublished dispositions are available to the parties and the public from the clerk of the court. Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West's Federal Appendix.

Unpublished dispositions differ from published ones in only one respect—albeit an important one: They may not be cited by or to the courts of our circuit. Ninth Circuit R. 36–3. (As Judge Alito explains, the rule operates somewhat differently in other circuits.) With minor exceptions dealing with subjects like res judicata and double jeopardy, none of the judges of our circuit—district judges, magistrate judges, bankruptcy judges, even circuit judges—may rely on these unpublished dispositions in making their decisions. And, in order to help them avoid the temptation to do so, we prohibit the lawyers from citing them in their briefs. The rule only applies to practice in the courts of our circuit; lawyers are free to cite our

unpublished dispositions to other courts, who may give them whatever weight they deem appropriate; they may write about them in law review articles or post them on websites. There is no general prohibition against citing, discussing, criticizing or deconstructing unpublished dispositions. The prohibition is narrow: It prohibits citation to or reliance on unpublished dispositions where this would influence the decision-making process of a judge of one of the courts of our circuit. In that context, and that context alone, the unpublished disposition may not be considered.

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WHY THE PROHIBITION AGAINST CITATION?

The answer to this question is fairly straightforward: Prohibiting citation to, and reliance on, unpublished dispositions helps our court to maintain consistency and clarity in the law of the circuit—the law applied by lower-court judges in their courtrooms, by our panels in later cases, and by lawyers advising clients about the likely consequences of various courses of action. Maintaining a consistent, internally coherent and predictable body of circuit law is a significant challenge for a collegial court consisting of a dozen or more judges (more than two dozen in our case) who sit in ever-changing panels of three. Appellate courts nevertheless have to speak with a consistent voice. If they fail to do so—if they leave the law uncertain or in disarray—they will make it very difficult for lawyers to advise their clients and for lower-court judges to decide cases correctly. The ripple effect of uncertain or unclear caselaw is felt acutely by those caught up in legal disputes, who must litigate their case all the way to the court of appeals if they want to know how the dispute would be decided.

In order to maintain a clear and consistent body of caselaw, appellate judges spend much of their time working on published opinions—those that announce and calibrate the circuit's decisional law. To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

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While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents or concurrences. (Attached as an exhibit is an article titled *How To Write It Right* by Fred Bernstein, one of my former law clerks. Fred discusses how it's not unusual to go through 70–80 drafts of an opinion over a span of several months.)

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions or additions. Judges frequently exchange lengthy inter-chambers memoranda about a proposed opinion. Sometimes, differences can't be ironed out,

precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of an unpublished disposition is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about half the published cases. Off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999, there were 44 en banc calls in our court, 21 of which were successful.

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Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda in support or opposition. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing and the response. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than for a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4500 cases on the merits, approximately 700 by opinion and 3800 by unpublished disposition. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 unpublished dispositions—per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom we sat.

Writing twenty opinions a year is like writing a law review article every two and a half weeks; joining forty opinions is like commenting on an article written by someone else nearly once every week. It's obvious just from the numbers that unpublished dispositions get written a lot faster—about one every other day. It's also obvious that explaining to the parties who wins, who loses and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. We seldom review unpublished dispositions of other panels or take them en banc. Not worrying about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.

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If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case

before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels—at the rate of ten per day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% of the cases already and may well have to reduce that number. Or, we could write opinions that are less carefully reasoned. Or, spend less time keeping the law of the circuit consistent through the en banc process. Or, reduce our unpublished dispositions to one-word judgment orders, as have other circuits. None of these is a palatable alternative, yet something would have to give.

DO WE GIVE SHORT SHRIFT TO CASES DECIDED BY UNPUBLISHED DISPOSITIONS?

The answer to this question is no. Much of the time spent in deciding a case is not reflected in the length or complexity of the disposition: we read briefs, review the record, read the applicable authorities. All this behind-the-scenes work goes into every case and necessarily takes a substantial amount of time. How much? There is no set amount. Some cases have a large record, yet have a dispositive issue—such as a jurisdictional defect—right near the surface. Others require a deeper examination before a dispositive issue is identified, although in the end, the resolution may be quite straightforward. The written dispositions in both cases may be short, they may look quite similar in structure and detail, yet they reflect very different time commitments.

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Writing up an unpublished disposition is infinitely easier than writing a published opinion. To begin with, the facts need not be recited in detail because the parties to the dispute—the only ones for whom the disposition is intended—already know them. Nor is it important to be terribly precise in phrasing the legal standard announced, or providing the rationale for the decision. Most importantly, the judge drafting the disposition need not ponder how the disposition will be applied and interpreted in future cases presenting slightly different facts and considerations. The time—often a huge amount of time—that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone. Is this time taken away from the case? Is this an illegitimate shortcut? Not at all, because when judges do write opinions, much of the time they spend in the drafting process doesn't go toward actually deciding the case, but rather to making the reasoning consistent with the existing body of circuit caselaw and useful for other decisions in the future.

Lawyers sometimes darkly suggest that unpublished dispositions make up a secret body of law wholly at odds with our published decisions—that unpublished dispositions mark out a zone where no law prevails, but only the predilections and preferences of the judges. We have discussed this among the judges of my court and are, frankly, baffled by the claim because none of us perceives that this is what we are doing. These claims are always made with reference to some unnamed earlier case; lawyers seldom, if ever, present concrete evidence of lawlessness in unpublished dispositions to back up their claims. This is surprising because if the practice were happening with any frequency, the losing lawyers would have every incentive to make a fuss about it.

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Nevertheless, we have worried about claims like these, and so in recent years we have taken two initiatives to help discover whether unpublished dispositions are, in fact, in wholesale, lawless conflict with published precedents. First, in February and March 2000 we distributed a memorandum to all district

judges, bankruptcy judges, magistrate judges, lawyer representatives, senior advisory board members, and law school deans within the Ninth Circuit, as well as other members of the academic community, seeking information on unpublished dispositions that conflicted with other published or unpublished decisions. The memorandum was also posted on the court's website. Responses were collected by e-mail, fax, and a response form at the website. Only six responses were received. Of these, we found two to be meritorious and, despite our instructions, both responses identified conflicts between two *published* Ninth Circuit decisions—conflicts of which we were already aware. No one identified an unpublished disposition that conflicted with a published opinion or with another unpublished disposition.

Second, for a 30-month period beginning July 2000, we relaxed the court's rules barring citation of unpublished dispositions to allow their citation in requests for publication and in petitions for rehearing. For the first nine months, court staff examined all requests for publication filed. Only fifteen requests for publication were received, and none of these identified a legitimate conflict among unpublished dispositions or published opinions.

We are certainly not infallible, and I will not try to persuade this subcommittee that we never make a mistake when we decide 4500 cases a year. But I can state with some confidence that the sinister suggestion that our unpublished dispositions conceal a multitude of injustices and inconsistencies is simply not borne out by the evidence. I feel so confident of this point, having participated in rendering thousands of these dispositions myself, that I would welcome an audit or evaluation by an independent source.

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How About That Claim of Unconstitutionality?

Two years ago, in *Anastasoff* v. *United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), Judge Richard Arnold of the Eighth Circuit set this area of law ablaze by holding that stare decisis in the strict form—an obligation to follow earlier opinions of the court, published or not—was part and parcel of the Article III judge's obligation to apply the law. If Judge Arnold were correct, this would mean that every one of our 3800 yearly unpublished dispositions is binding on every federal judge in our circuit. Lawyers would have a field day digging for superficial inconsistencies or imprecisions in wording, and we'd do little but hear cases en banc to settle claimed conflicts of authority.

Fortunately, *Anastasoff* turned out to be a false alarm. Judge Arnold is one of the ornaments of the federal judiciary, a judge widely respected for his erudition and wisdom. But even Homer nods, and Judge Arnold took a big nod on this one. While his argument in *Anastasoff* has superficial appeal, closer examination exposes its flaws. I reached the opposite conclusion in an opinion I wrote by the name of *Hart* v. *Massanari*, 266 F.3d 1155 (9th Cir. 2001), a copy of which is attached as an exhibit. More recently, attorney Thomas Healy thoroughly examined Judge Arnold's constitutional claim in an article titled *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43 (2001). Mr. Healy concluded, as I had, that the historical record comes nowhere near supporting Judge Arnold's thesis, and in fact refutes it. Mr. Healy's article is also attached as an exhibit.

Finally, some legal scholars have suggested that there may be First Amendment problems with a citation ban. No case of which I am aware has addressed this claim, but it seems implausible on its face. As noted, our rule doesn't prevent people from talking about unpublished cases. Its prohibition is limited to what lawyers may say in their briefs and arguments in court. There are a multitude of restrictions on what lawyers may say in court, none of which raises First Amendment concerns. Lawyers may not, for example, knowingly leave the "nos" and "nots" out of the quotations in their briefs, or cite to evidence that's not in the record, or fail to cite applicable binding authority of which they are aware. A knowing violation of any

of these rules may result in sanctions. Attempting to defraud the court in one's pleadings is the kind of conduct that may be punished, even if similar out-of-court conduct may not be. The prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance. As the Massachusetts Appeals Court noted in *Lyons* v. *Labor Relations Commission*, 476 N.E.2d 243 (Mass. App. 1985), unpublished dispositions can be quite misleading to those other than the parties to the case: "[T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decisions. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record." *Id.* at 246 n.7.

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ARE FEDERAL COURTS UNIQUE IN PROHIBITING CITATION TO UNPUBLISHED DECISIONS?

The answer is emphatically no. The vast majority of state court systems restrict citation to unpublished decisions. Last year, an article in the Journal of Appellate Practice and Process provided a thorough catalogue of these rules at both the federal and state levels. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001). (A copy of this article is attached as an exhibit, and a summary of its findings appears at the end of my statement.)

Their findings are very revealing. Thirty-eight states (plus the District of Columbia) restrict citation to unpublished opinions to some degree; by far the largest number (35) have a mandatory prohibition that is phrased much like the Ninth Circuit's rule. (Like the Ninth Circuit, some of these states permit citation for purposes of establishing res judicata or law of the case.) A typical rule, that of Alaska, reads as follows: "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state." Alaska R. App. P. 214(d). Only nine states have rules explicitly authorizing citation of unpublished cases as precedent, and only five have no rules at all on the matter. (The total comes out to fifty-two, plus the District of Columbia, because two states explicitly authorize citation of unpublished opinions as to some courts and explicitly deny it as to unpublished opinions of others.) Two states, California and Tennessee, have provisions that authorize the state's highest court to "de-publish" opinions of the lower courts, thereby depriving them of precedential authority and making them non-citeable.

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The state courts, of course, hear vastly more cases in the aggregate than do the federal courts. That the overwhelming majority of states have adopted a prohibition against citation of, or reliance on, a large number of appellate decisions is significant in two respects. First, it shows that this is a legitimate and widely accepted practice in the legal community nationwide. Second, it discloses that many court systems in addition to the federal courts have found the non-publication/non-citation practice to be an important tool in managing the development of a coherent body of caselaw.

Are There Separation of Powers Concerns?

While I welcome this subcommittee's interest in the matter and the opportunity to address the issue, I do want to raise a red flag about the appropriateness and wisdom of congressional intervention. What lies at the heart of this controversy is the ability of appellate courts to perform one of their core functions, namely, overseeing the development of the law within their jurisdiction. The fact that so many state and federal courts have nonpublication rules and related prohibitions against citation suggests that this is an

area of uniquely judicial concern.

There is not much recent authority on point, but almost 140 years ago the new state of California tried to impose, by statute, a requirement that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court." California Supreme Court Justice Stephen Field—the very same Justice Field who later sat on the United States Supreme Court and wrote that case we all remember so well from law school, *Pennoyer* v. *Neff*, 95 U.S. 714 (1877)—would have none of it. Speaking for a unanimous court, he held the law unconstitutional:

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[The statute] is but one of many provisions embodied in different statutes by which control over the Judiciary Department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations.

The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand.

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In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*; and this is also worthy for learned and grave men to imitate."

The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the Court, and should guide litigants; and right-minded Judges, in important cases—when the pressure of other business will permit—will give such opinions. It is not every case, however, which will justify the expenditure of time

necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. The legislative department is incompetent to touch it.

Houston v. *Williams*, 13 Cal. 24, 25–26 (1859) (citations omitted). Does this state the law today? I can offer no advisory opinion, but I do believe that Justice Field's observations are worthy of careful consideration. Perhaps the best approach is not to test the issue by staying far clear of a confrontation between the judicial and legislative branches.

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WHAT ABOUT THE LAW OF UNINTENDED CONSEQUENCES?

It is the sad experience of mankind that often, in trying to make things better, we do something that has exactly the opposite effect. Unpublished, unciteable appellate decisions play an important role in the management of our dual responsibilities of deciding a multitude of cases, while keeping the law clear and consistent. Would it make things better if this tool were removed from the judicial arsenal?

To answer this question, I ask you to imagine a different kind of rule Congress might pass. Let's say Congress decided that we simply didn't have enough uniformity in the application of the law, and the reason was that the United States Supreme Court wasn't issuing enough opinions. So, in order to improve things, Congress passed a law that required the Supreme Court to grant review to, and decide, 1600 cases a year, rather than the 80 or so it decided this past Term. This would be only 178 case dispositions per Justice per year, less than half the number of the average Court of Appeals judge.

Assuming the Justices disagreed with Justice Field and did not see the law as an unconstitutional encroachment on their authority, what would be the consequences? It's unlikely that this enactment would cause the Justices to work twenty times harder to come up with twenty times the number of published opinions equal in caliber to their current opinions. My guess is that they'd write something in 1600 cases, but in the vast majority, it would not be something that was very good or very useful. In order to avoid having an avalanche of insignificant cases creating unintended conflicts and uncertainties, they would write "published" opinions that have very little useful content—akin to very abbreviated dispositions or judgment orders—that contain little more than the word "Affirmed."

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Something like this will, I suspect, happen if courts of appeals are forced to accord precedential value to their unpublished dispositions: We would have a tendency to say much less in our unpublished dispositions, in order to avoid having them interfere with our principal mechanism for setting circuit law, namely, the published opinions.

And this would be too bad for the parties to those appeals. Under the current system, they at least get a reasoned disposition of some sort, a statement of their facts, however brief, and a genuine effort at explaining to them why they won or lost. If those words, now directed to the parties who know a lot about the case, must also be made usable by the multitudes who do not, we will simply say less, in order to protect the integrity and stability of our circuit law from those who would misconstrue or twist it.

CONCLUSION

The topic the subcommittee has chosen for its oversight hearings is certainly a timely one. As Judge Alito has suggested, we in the judiciary are in the process of reevaluating our rules. I hope, in the end, we will leave well enough alone, and allow each court to decide this issue according to its own customs and needs. However, whatever happens will be the action of the judiciary, taken after careful reflection and with full knowledge of the institutional constraints under which we operate. I hope that whatever rule we adopt—whether to stay with the current local option or to adopt a national rule—the political branches of government will accept and respect it.Citation Rules in State Courts

Source: Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001).

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Notes:

No entry may indicate that state requires its Supreme Court to publish all opinions and/or orders

**

No entry may indicate that state has no intermediate appellate court

Exceptions for res judicata, collateral estoppel, law of the case, etc.

Exceptions for publication requests and petitions for rehearing.

All appellate opinions are published. Citation of unpublished out-of-state opinions is allowed.

Court of Criminal Appeals is citeable; Court of Civil Appeals is not.

Sample Language:

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Shall Not Be Cited:
"Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."
Alaska R. App. P. 214(d).

Should Not Be Cited:
"Cases affirmed without opinion by the Court of Appeals should not be cited as authority."
Or. R. App. P. 5.20(5).

May Be Cited:
"Unreported opinions or orders may be cited, but a copy must be provided."

4 JAPPPR 1
(Cite as: 4 J. App. Prac. & Process 1)

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Essay

*1 FROM ANASTASOFF TO HART TO WEST'S FEDERAL APPENDIX: THE **GROUND SHIFTS** UNDER **NO-CITATION** RULES

Stephen R. Barnett [FN1]

I. INTRODUCTION: A FAST-PACED YEAR

Last year's mini-symposium on unpublished opinions [FN1] seems to have unleashed a wave of further developments. The fast-breaking events include these:

1. Judge Richard S. Arnold's opinion for the Eighth Circuit in Anastasoff v. United States, [FN2] holding--until vacated as moot--that the circuit's rule denying precedential effect to unpublished opinions exceeded the Article III judicial power, *2 has been ringingly answered by Judge Alex Kozinski's opinion for the Ninth Circuit in Hart v. Massanari. [FN3]

2. The American Bar Association's House of Delegates has declared that the practice of some federal circuits in "prohibiting citation to or reliance upon their unpublished opinions" is "contrary to the best interests of the public and the legal profession." [FN4] The ABA urges the federal appellate courts to "make their unpublished opinions available through print or electronic publications [and] publicly accessible media sites," as well as to "permit citation to relevant unpublished opinions."

3. In a startling action that drains the meaning from the term "unpublished" opinion, the West Group in September 2001 launched its Federal Appendix. [FN5] This is a new case-reporter series in West's National Reporter System that consists entirely of "unpublished" opinions from the federal circuit courts of appeals (except, currently, the Fifth and Eleventh Circuits). [FN6] By late April 2002, West had published twenty-seven volumes of the Federal Appendix, averaging some 400 cases per volume, and was expecting to report some 12,000 cases per *3 year. [FN8] The cases in the Federal Appendix are supplied with headnotes, indexed to West's Key Number system, garnished with the other "editorial enhancements" of West's reporting system, and christened with their own citation form: "___ Fed. Appx. ___." Except for its citation restrictions, [FN9] the Federal Appendix looks, reads, and quacks like a book of "published" case reports. If nothing else, West's action is requiring that definitions of "unpublished" be radically revised. [FN10]

4. The most significant move by the federal courts has come from the District of Columbia Circuit. Effective January 1, 2002, that court abandoned its no- citation rule and declared that all unpublished opinions issued on or after that date "may be cited as precedent." [FN11] Meanwhile, the Third Circuit has become *4 the eleventh of the thirteen federal circuits to post its unpublished opinions online and make them available to legal publishers. [FN12]

5. The action by the D.C. Circuit tips the balance in the federal courts against no-citation rules. Of the thirteen circuits, there remain only five--the First, [FN13] Second, [FN14] Seventh, [FN15] Ninth, [FN16] *5 and Federal [FN17]--that ban citation of unpublished opinions (except, of course, for related-case uses such as res judicata). The other eight circuits discourage citation of unpublished opinions, typically calling it "disfavored," but grudgingly

allow it. They do this generally under one of two formulas--(1) that the opinions may be cited as "precedent" or for "precedential value" (the Fourth, [illegible] Sixth, [illegible] and D.C. [FN20] Circuits), or (2) that they are "not precedent" but may be cited for their "persuasive" value (the Fifth, [FN21] Eighth, [FN22] Tenth, [FN23] and Eleventh [FN24] Circuits). The Third Circuit, a loner, uses no formula but allows citation. [FN25]

***6** The balance tips toward citability in numbers of cases as well. The citable unpublished cases from the eight territorial circuits that allow citation total some 15,000 per year, while the noncitable cases from the four territorial circuits that ban citation total about half that. It should be noted, however, that the Fifth and Eleventh Circuits, which each put out more than 3,000 unpublished opinions per year, withhold those opinions from online distribution (or West's Federal Appendix), while schizophrenically allowing them to be cited. [FN27] It appears, nonetheless, that these opinions are not effectively suppressed and in fact are cited. [FN28]

6. While this essay focuses on the federal courts, there is noteworthy movement in the state courts as well. In what would be a seismic shift, the Texas Supreme Court has tentatively decided to lift the "Do Not Publish" stamp now affixed to some eighty-five percent of the opinions of the Texas court of appeals and to "remove prospectively any prohibition against the citation of opinions as authority." [illegible] Meanwhile, California's ***7** court of appeal, which brands some ninety-four percent of its opinions "unpublished," [FN30] has begun posting all its unpublished opinions on the court's website. [illegible] Citation is still prohibited, but the technological (and psychological) infrastructure is in place for possible pressure to follow a Texas lead.

Against the backdrop of these developments, I shall in this Essay first appraise the face-off between Judge Arnold and Judge Kozinski in Anastasoff and Hart, setting their disagreement about "precedent" against the spectrum of meanings which that word may convey. I will argue that Judge Kozinski's opinion in Hart, for all its scholarly brilliance, demonstrates, in part, something different from what he may have intended. I will then consider Judge Kozinski's arguments against no-citation rules, finding them inadequate, and will conclude by considering the degree of "precedential" force that unpublished opinions should be accorded in the federal courts.

***8** II. ANASTASOFF, HART, AND THE SPECTRUM OF PRECEDENT

A. Anastasoff and Hart

Amid the continued controversy over unpublished opinions and the uses of precedent, the debate between Judge Arnold in Anastasoff and Judge Kozinski in Hart focuses, perhaps surprisingly, on one facet of this subject. These two intellectual heavyweights go to the mat over whether Article III requires that all decisions of the federal courts of appeals be regarded as "binding precedents." Judge Arnold finds from his examination of eighteenth- century sources that "[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases." [illegible] He thus concludes--given the "law-of-the-circuit" rule, under which a panel's decision cannot be overruled by another panel, but only by the court en banc [FN33]--that his panel was required to follow an unpublished Eighth Circuit decision. [illegible] Judge Arnold further concludes that the Eighth Circuit's Rule 28A(i), stating that unpublished opinions "are not precedent," purports to "expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." [illegible]

In Hart, Judge Kozinski--who, like Judge Arnold, had previously written extra-judicially on this subject [FN36] --seized on the opportunity presented by a lawyer who cited an unpublished Ninth Circuit opinion and then defended his violation of the court's no-citation rule by arguing that the rule was unconstitutional under Anastasoff. Meeting Judge Arnold on his chosen ground of eighteenth-century history, Judge Kozinski offers a scholarly account that refutes Anastasoff's claim of a ***9** historically-based constitutional requirement of binding precedent. The modern concept of binding precedent required two conditions, reliable case reports and a settled hierarchy of courts, that were not in place until at least the mid-nineteenth century, Judge Kozinski points out. [FN37] When the Constitution was drafted, then, it was "emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected." [FN38] Judge Kozinski's panel thus declines to follow Anastasoff and holds the Ninth Circuit's no-citation rule constitutional. [FN39]

Fascinating as this historical duel is, the opinions by Judge Arnold and Judge Kozinski deal with only one variety of precedent. That word can mean many things; "binding" precedent is only one of those things, and arguably not the most important for the current debate. Although the categories overlap and the lines blur, one can identify at least five species of precedent that may be relevant to this discussion.

B. The Spectrum of Precedent

1. Binding precedent. "Binding" precedent is what the shouting is about in Anastasoff and Hart. It is the rule, as stated by Judge Kozinski, that a court's decision "must be followed by courts at the same level and lower within a pyramidal judicial hierarchy." [FN55] By virtue of the words "at the same level," this formulation incorporates in the concept of binding precedent the law-of-the-circuit rules, existing in all circuits, which mandate that only the en banc court can overrule a panel decision. ***10** Accordingly, an unpublishedopinion recognized under a particular circuit's rules as "precedent"--which can happen in the D.C. Circuit [FN57]--and possibly one recognized as having "precedential value"--which can happen in the Fourth and Sixth Circuits [FN58]--may become binding precedent for other panels in that circuit.

2. Overrulable precedent. "Overrulable" precedents are decisions the court ordinarily will follow under stare decisis, but may overrule if sufficient reasons present themselves. The category typically includes earlier decisions of the same court. Some kinds of precedents, even from the same court, can be overruled more readily than others. The Supreme Court's summary dispositions, for example, receive "less deference" from the Court than its decisions made "after briefing, argument, and a written opinion." Under the law-of- the-circuit rule, on the other hand, overruling is restricted; one circuit panel cannot overrule another panel's decision.

3. "Precedent," or "precedential value." In the third category are simply "precedents," or cases having "precedential value." These are omnibus terms whose meaning can run the ***11** gamut from binding precedent to mere citable precedent (discussed shortly). Of the eight circuits that allow citation of unpublished opinions, one--the D.C. Circuit--permits their citation "as precedent," while two--the Fourth and Sixth Circuits--allow that unpublished opinions may have "precedential value" (which may or may not be the same thing). [FN59]

4. Persuasive value. A fourth category comprises cases citable for their "persuasive value." This somewhat elusive term evidently means persuasive force independent of any precedential claim; the decision must persuade on its own argumentative merits, without regard for its status as a precedent or for any notions of stare decisis. [FN60] The problem is, of course, that the concepts of precedent and persuasiveness are difficult to disentangle. The habit of stare decisis is hard-wired into the brains of common law judges. And, other things being equal, it is easier to follow a lead than to blaze one's own trail. Nonetheless, as Judge Kozinski stresses in Hart, "persuasive" authority is a concept familiar to judges and lawyers. Of the eight circuits that allow citation of unpublished opinions, four--the Eighth, Tenth, Eleventh, and Fifth--provide that such opinions are "not precedent," or "not binding precedent," but that they may be cited for their "persuasive value." [FN61] This presumably has the important effect of denying these opinions the force conferred by the law-of-the-circuit rule, thus allowing ***12** them to be overruled--or simply rejected as unpersuasive--by subsequent panels of the same circuit.

5. Citable precedent. Last comes citable precedent. This term means only that the case may be cited, with the weight to be given it left open. Minimal as the concept may seem, the ability to cite a case is, of course, precisely what is at stake in no-citation rules. The ABA's recent resolution, for example, urges only that the federal appeals courts "[p]ermit citation" to unpublished opinions. Given the habit of stare decisis and the attraction of following a path already broken, I would say that, if opinions may be cited, they will be followed more often than if they may not be. Judge Kozinski memorably disagrees. [FN62] Be that as it may, the concept of citability may have important symbolic value in a system of law based on precedent, value essential to respect for the law and to the rule of law itself. Judge Kozinski in Hart has usefully articulated the rationale for citability, grounding it on a court's obligation to "acknowledge[] and consider []" prior decisions. [FN63]

Precedent thus is a rich palette. In depicting unpublished opinions as "precedents," one needs to consider the broad range of colors that may be applied.

III. The Backhanded Impact of Hart: No-Citation Rules at the Bar of the Common Law

The key issue today is not whether unpublished opinions must be binding precedents; it is whether they may be cited at all. The central split among the circuits, for example, is not over binding precedent. Of the eight circuits that permit citation, only one (the D. C. Circuit) explicitly contemplates "binding precedent"; two (the Tenth and Eleventh) state that unpublished opinions are not "binding precedent[s]"; while another two (the Fifth and Eighth) deny that they are even "precedents." The ***13** battle is over citability. Judicial defenders circle their wagons around the no-citation feature of the rules, [FN64] while many critics aim their arrows at only that feature. [FN65] Emblematic of the debate is Judge Arnold's widely- quoted comment in Anastasoff: "[S]ome forms of the

non-publication rule even forbid citation. Those courts are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday.'" [FN58]

Judge Kozinski in Hart, while rejecting the claim that unpublished opinions must be binding precedents, goes further and upholds the Ninth Circuit's rule banning citation of those opinions. [FN59] This issue indeed was presented; the validity of the no-citation rule, as applied to a citation carrying no claim of binding authority, was the question raised by the facts of Hart. Judge Kozinski concentrated, however, on the binding- authority ***14** question, [FN60] and almost as an afterthought addressed the rule's ban on citation. [FN62] At this point, moreover, his argument (to which I'll return) exchanged history and constitutional principle for wholly prudential considerations.

Nevertheless, much of what Judge Kozinski says in his discussion of binding precedent seems quite relevant to no-citation rules. Backhandedly, Judge Kozinski provides a fresh and cogent rationale for regarding those rules as inconsistent with the common law tradition and with modern federal practice. In the course of arguing that the principle of "strict binding precedent" is not constitutionally compelled, Judge Kozinski goes a long way toward demonstrating that the principle of citable precedent may be.

Consider two examples:

(1) In his discussion of history and the Constitution, Judge Kozinski writes:

> While we agree with Anastasoff that the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written, we do not agree that it was known and applied in the strict sense in which we apply binding authority today .... The concept of binding case precedent, though it was known at common law, was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.
>
> Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today. [FN64]

Judge Kozinski thus appears to say that "the principle of precedent was well established" when the Constitution was ***15** written, but that it "resembled much more what we call persuasive authority" than it did "binding authority." Does this not suggest that a principle akin to persuasive authority may have been embodied in Article III, or at least in the "common law traditions" that federal courts follow? [FN65] Given the distinguished common law pedigree that Judge Kozinski credits to the principle of persuasive authority, one might have expected him to consider that principle before upholding a rule that prohibits lawyers from citing court decisions they claim to be persuasive. While Judge Kozinski writes that "common law judges knew the distinction between binding and persuasive precedent," [FN66] he himself seems to rub out that distinction.

(2) In discussing the common law tradition, Judge Kozinski writes:

> Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue.
>
> ...
>
> Citing a precedent is, of course, not the same as following it; "respectfully disagree" within five words of "learned colleagues" is almost a cliche .... While we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence, it is well understood that--in the absence of binding precedent--courts may forge a different path than suggested by prior authorities that have considered the issue. So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities. [FN67]

When a rule prohibits citation of unpublished opinions, does that not require courts to "ignore contrary authority by failing even to acknowledge its existence"? If an earlier authority cannot be cited to the court, it cannot be "acknowledged and considered" by the court; hence, it would ***16** seem, courts have not "complied with their common law responsibilities." It is hard to see why these considerations of judicial responsibility should not have been considered in Hart as bearing on the validity of the Ninth Circuit's no- citation rule.

The case against no-citation rules asks not that unpublished opinions be regarded as binding precedents, or as precedents at all in the normative, stare decisis sense. It asks only that they be acknowledged and considered.

[FN68] This obligation serves the ends of fairness and consistency, assuring that the prior decision not be rejected without on-the-record consideration and explanation. It is a lesser requirement than the "burden of justification" that Judge Arnold considers necessary for overruling a prior decision. [FN69] But it serves the same purpose, assuring that when the law changes, it does so "in response to the dictates of reason, and not because judges have simply changed their minds." [FN70] It is one thing to tell a litigant she lost her case because the court reconsidered and rejected a prior opinion that was in her favor; it is another thing to tell her she lost her case under a rule that barred her lawyer from telling the court about that prior opinion. As Judge Kozinski says, it is "bad form to ignore contrary authority by failing even to acknowledge its existence." Why is it bad form? Because, at bottom, it disrespects the principle of precedent on which our court-made law is based, and hence dishonors the rule of law itself. Judge Kozinski's articulation of the need to "acknowledge and consider" prior decisions thus provides an apt and cogent rationale for rejecting no-citation rules.

*17 IV. VANISHING TIME: THE KOZINSKI DEFENSE OF NO-CITATION RULES

When Judge Kozinski ultimately moves in Hart from whether unpublished opinions are binding authority to whether they are citable, he departs from his earlier consideration of history, common law practice, and "persuasive precedent" and makes an argument that is wholly prudential. "Should courts allow parties to cite to these dispositions," Judge Kozinski writes, "much of the time gained [from not having to write precedential opinions in every case] would likely vanish." In support of this conclusion Judge Kozinski offers two arguments, one based on the additional time that judges (and their staffs) assertedly would need to produce opinions worthy of citation, the other stressing the extra time that judges and lawyers assertedly would need to research and process those opinions once produced. Both are legitimate concerns--especially for the Ninth Circuit, with the highest case volume of any federal circuit. Both concerns, however, appear exaggerated.

Judge Kozinski first argues that if unpublished opinions could be cited, "conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been ***18** decided might well be inadequate if applied to future cases arising from different facts." [FN75] Further, "[w]ithout comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions." [FN76] This exaltation of judges' language not only harks back to Legal Realism, as Judge Danny J. Boggs and Brian P. Brooks have pointed out. It also ignores what we all were taught in the first year of law school: [FN78] that the law is not what the judges say--that's dictum; it's what they decide. Although imprecise language indeed may mask the true facts of a case, law clerks and staff attorneys are good at stating facts--they do it often enough in published opinions--and lawyers and judges have abundant experience in distinguishing cases on their facts. When a lawyer cites an unpublished opinion, it is less likely to be because of its language than because the facts of that case are closer to those in the case before the court than are the facts of any case decided with a published opinion. [FN79] As Judge Richard Posner, himself a backer of no-citation rules, has conceded: "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are two few on point." [FN80] When a lawyer finds one of those few precedents on point, why shouldn't she be allowed to tell the court about it?

Judge Kozinski further predicts that court time will be lost because "publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts," since "different opinion writers may use slightly different language to express the same idea." And under the ***19** law-of-the-circuit rule, "conflicts--even inadvertent ones--can only be resolved by the exceedingly time-consuming and inefficient process of en banc review." [FN82]

Whatever the apparent conflicts in judicial language, though, circuit judges surely are expert at distinguishing cases on their facts. (Take a look at almost any unsuccessful petition for rehearing en banc.) And for true intra-circuit conflicts involving unpublished opinions, en banc review is not the only remedy. Others are--as I'll consider shortly--(a) making unpublished opinions citable for their "persuasive" value only, and (b) lifting the law-of-the-circuit rule for unpublished opinions, so they can be overruled by subsequent panels in published opinions. [FN83]

Furthermore, any diversion of judicial time that might originally have resulted from allowing citation of unpublished opinions may already have occurred, thanks to the availability of those opinions on line, in LEXIS and Westlaw, and now in West's Federal Appendix. Indeed, the entire controversy over unpublished opinions may be laid at the feet of LEXIS, Westlaw, and the Internet, with their technological capacity to make everything available;

the issue would not have come up, at least not with anything like its present force, in the world of books. [FN84] With the online cat now out of the bag, judges know ***20** that their opinions, designated for publication or not, are going to be read, collected, and analyzed. In most federal circuits, moreover, they may be cited. Since the sky has not fallen in those circuits, one may conclude that allowing citation not only recognizes a technological fait accompli, but need not produce the dire results that Judge Kozinski fears.

Judge Kozinski's second argument is based on the resources assertedly needed to research and process the unpublished opinions if they are citable. "[A]dding endlessly to the body of precedent--especially binding precedent--can lead to confusion and unnecessary conflict," he writes. [FN85] The primary victims would be lawyers and their clients:

> Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts, will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason. [FN87]

If a case involves facts "materially indistinguishable" from those of prior published opinions, one wonders in the first place why it was appealed. And if it was, one wonders why a lawyer--wanting to make her best arguments and facing a page limit on briefs--would cite the unpublished opinion instead of a published one. [FN89] In any event, the law books and legal databases ***21** already are "clutter[ed] up" with unpublished opinions, which many lawyers now routinely research whether they are citable or not. [FN90] And it seems not insignificant that lawyers themselves tend to be strongly opposed to no-citation rules. [FN91]

While Judge Kozinski's fears thus seem overstated, they do give pause. This is especially so for the Ninth Circuit, which issues some 4,100 unpublished opinions per year. [FN92] But that is not so many more than the 3,500 issued by the Eleventh Circuit, or the 3,200 by the Fifth--opinions that in both circuits are citable. [FN93] With eight circuits now allowing citation, the burden of proof would seem to lie with those who say that citability cannot be acceptably managed.

V. WHAT PRECEDENTIAL FORCE FOR UNPUBLISHED OPINIONS?

If unpublished opinions are to be citable, the question remains, what degree of "precedential" force should they carry? I see three possibilities: (1) binding precedent, fully subject to the law-of-the-circuit rule and thus overrulable only by the en banc court; (2) "persuasive" authority that is "not precedent," and hence not subject to the law-of-the-circuit rule; and (3) a new "overrulable" status based on lifting the law-of-the-circuit rule to allow panel overruling of a prior panel's unpublished opinion, but only if the second panel does so in a published opinion.

***22** 1. Unpublished opinions, in my view, should not be regarded as binding precedents, or otherwise as equivalent to published opinions. Judge Kozinski has shown in Hart that the Constitution does not require that all precedents be viewed as binding. Of the eight circuits that allow citation of unpublished opinions, none treat them as full-fledged, first-class, binding precedents. All eight circuits discourage citation of these opinions, and four of the eight-- the Fifth, Eighth, Tenth, and Eleventh Circuits--declare that they are "not precedents" and may be cited only for their "persuasive" value.

Treating unpublished opinions as second-class precedents--but, of course, citable ones--is readily defended. Just as the Supreme Court gives "less deference" to its summary dispositions than to cases decided with briefing, argument, and a full opinion, [FN94] no reason appears why a court of appeals may not devote less of its time and attention to a designated class of opinions and accordingly treat those opinions as having less precedential weight than others. The legitimate caseload concerns support at least this much adjustment of judicial technique. And there is little danger of deception or surprise in allowing citation. An "unpublished" opinion, even when published in the Federal Appendix, wears a scarlet "U"; no one should be surprised to discover that it carries less authority than a "published" opinion. [FN95]

2. If citable unpublished opinions are not to be binding precedents, some way must be found to free them from the law-of-the-circuit rule, which says a panel opinion is binding on all subsequent panels. The easiest way out would appear to lie in the approach presently taken by the Fifth, Eighth, Tenth, and Eleventh Circuits; these courts declare unpublished opinions to be "not precedent" (or "not binding precedent") and citable only for their "persuasive" value. Under this regime, the law-of-the-circuit rule apparently does not apply to unpublished ***23** opinions, because they are not "precedents." The "persuasive authority" approach thus enables a circuit panel to reject an

unpublished opinion as unpersuasive--with reasons, of course--without having to take the case en banc or otherwise to formally overrule the opinion. This approach can claim an extensive historical and common law pedigree, as Judge Kozinski demonstrates in Hart. It also has a familiar administrative-law analogue in Skidmore deference. [FN97] In sum, there is much to be said for the persuasive-authority approach.

3. The other approach would accord unpublished opinions "precedential" status that requires overruling, but would lift the law-of-the-circuit rule to let subsequent panels overrule them. In the D. C. Circuit, which now allows citation of unpublished opinions "as precedent," and possibly in the Fourth and Sixth Circuits, which allow citation for "precedential value," it apparently follows today that an unpublished opinion found to meet these tests becomes the law of the circuit and hence cannot be overruled by another panel. [FN98] The proposed approach would alter the law-of-the-circuit rule to allow a citable unpublished opinion to be overruled by a subsequent panel, as long as the subsequent panel did so in a published opinion.

A circuit apparently would have power to revise its rules this way. While it has been suggested that the law-of-the-circuit rule rests on constitutional, [FN99] or at least statutory, [FN100] compulsion, ***24** neither appears to be the case. [FN101] And such modification would promote, not subvert, the rule's purpose of avoiding intra-circuit conflicts: As between two conflicting panel decisions, it would be clear which one governed--the one that was published. Panels thus would not have to resort to finespun factual distinctions or aggressive claims of dictum in order to avoid the force of an unpublished precedent with which they disagreed. They could simply overrule it, if willing to do so in a published opinion. Such an approach also accords with the responsibilities of law-making. If the issuing panel did not consider its decision important enough to publish and make into law, why should that panel's opinion be binding on another panel which, having duly considered it, comes out differently and is willing to make its opinion into law? As between the two panels, the one that is consciously making law, that is willing to put its precedential money where its mouth is, ought to prevail.

Lifting the law-of-the-circuit rule thus seems desirable for circuits in which citable unpublished opinions are regarded as "precedents" and thus might invoke the rule. It might well also be done by circuits taking the "persuasive" -authority approach. While that approach allows a panel to deem a prior, unpublished panel opinion "unpersuasive" without overruling it, there will be cases in which the subsequent panel thinks the prior opinion should be formally overruled. When a panel desires to overrule an unpublished opinion by a published one, it should not have to go en banc.

For circuits deciding between "persuasive" authority and "precedent," the "persuasive" approach might be better for large circuits, where volume argues for giving less weight to unpublished authority. For any circuit, moreover, the ***25** "persuasive" approach has the virtue of providing a brighter line, one making clear that unpublished opinions, though citable, are in a class by themselves, and thus reducing the uncertainty involved in having different levels of "precedential" authority.

VI. CONCLUSION

Judge Kozinski's opinion in Hart shoots down Anastasoff's claim that unpublished opinions must be binding precedents, but simultaneously demonstrates that they must be citable. The arguments of history and common law tradition that Judge Kozinski invokes, particularly his insistence that earlier authority be "acknowledged and considered," confirm the essential role of precedent in our law and undermine the case for no-citation rules. Advancing technology is compelling the same result. In all but two federal circuits, unpublished opinions now are available not only on line, but also in West's Federal Appendix, a published reporter of unpublished opinions that is worthy of Alice in Wonderland. It is no wonder that a majority of the federal circuits, recognizing reality, now allow citation of their unpublished opinions.

While rules permitting citation of these decisions thus seem inevitable, it does not follow that unpublished opinions should be treated as binding precedents, or as precedents at all in the stare decisis sense. They may be citable only for their "persuasive" value. And even where they are regarded as precedents, the circuits should lift their law-of-the-circuit rules so that unpublished opinions may be overruled by published panel opinions. The better choice, probably, is to treat unpublished opinions as citable only for their persuasive value.

Whatever the degree of deference to be accorded unpublished opinions, the arguments for making them citable seem likely to carry the day. These arguments combine the claims of fairness, due process, public access, and respect for law itself with a new technological reality that is transforming the terms of the debate. As it becomes increasingly difficult to use the term "unpublished" with a straight face, the necessary replacement becomes the candid "uncitable." The power of courts to issue uncitable opinions is difficult to defend, and the task will only get

harder as the opinions become more *26 accessible. Powerful as the federal courts may be, they cannot hold back this wave.

[FNa1]. Elizabeth J. Boalt Professor of Law, University of California, Berkeley. I thank the several federal circuit judges, the many court officials, and the West Group representative who spoke to me for this essay. I also thank Bob Berring for helpful comments, Florence McKnight for research assistance, and the reference staff of the Boalt Hall Library.

[FN1]. Anastasoff [illegible] 10th Cir. R. App. P. & Process 169 (2001).

[FN2]. 223 F.3d [illegible], vacated as moot, [illegible] (en banc).

[FN3]. 266 F.3d [illegible]. Meanwhile, two federal appeals cases in which panels refused to follow unpublished opinions have drawn pro- Anastasoff dissents. [illegible] Rapid Transit, 257 F.3d 315 (5th Cir. 2001), petition for reh. en banc denied, [illegible] (Smith, Jones & DeMoss, JJ., dissenting); [illegible] Comptl., 277 F.3d 1361, 1368 (Fed. Cir. 2002) (Newman, J., dissenting). See infra n. 72.

[FN4]. American Bar Association, Sections of Litigation, Criminal Justice, Tort and Insurance Practice and Senior Lawyers Division, Report to the House of Delegates, Resolution No. 01A115 (Aug. 1, 2001).

[FN5]. Id.

[FN6]. See West Group Press Release, West Group Launches New National Reporter System Publication for Unpublished Decisions (Sept. 5, 2001) (copy on file with author). The press release explained that "many legal researchers want access to unpublished opinions because they often include relevant fact situations and particular applications of settled law." Id. It stated that "all U.S. Court of Appeals unpublished decisions" issued from January 1, 2001, would be included, and that each case would "receive full West Group editorial enhancements, be given a new citation and be made available in print in the West's Federal Appendix volumes, on CD-ROM and on Westlaw." Id.

[FN7]. In line with their policy of denying online access to their unpublished opinions (while allowing citation of them), see infra nn. 12, 27-28 and accompanying text, the Fifth and Eleventh Circuits make available to West only the information needed for the Decisions Without Published Opinions tables in the Federal Reporter. Telephone Interviews with West Group representative (Jan. 10, 2002, Mar. 4, 2002, May 3, 2002). (All interviews for this essay with judges, court personnel, and West Group representatives were conducted on the understanding that the sources' identities would not be disclosed. Redacted notes of each interview are on file with the author.)

[FN8]. Telephone Interview with West Group representative (Mar. 4, 2002); see also e.g. West's Federal Appendix, vol. 27 (West Group 2002).

[FN9]. West runs a disclaimer on each volume's title page and on the report of each case, stating that the cases "have not been selected for publication in the Federal Reporter." This implies, misleadingly, that West has made some sort of case-by-case selection, and it fails to state the central point that the cases are all "unpublished." However, the title-page notice does advise readers to "consult local court rules to determine when and under what circumstances these cases may be cited," and each case bears a notice reciting whatever formula the issuing circuit employs to designate its unpublished opinions and restrict their usage. See e.g. [illegible] 27 Fed. Appx. 1 (1st Cir. 2001) ("[NOT FOR PUBLICATION--NOT TO BE CITED AS PRECEDENT]").

[FN10]. The First Circuit reacted with instant alarm, hurriedly amending its rules to redefine a "published opinion" as "one that appears in the ordinary West Federal Reporter series (not including West's Federal Appendix)." 1st Cir. Interim Loc. R. 36 (b)(2)(F) (Sept. 24, 2001) (emphasis in original). See also 8th Cir. R. 28A(i) (amended Jan. 16, 2002) ("Unpublished decisions are decisions which a court designates for unpublished status"). The need for other rule-makers to take similar steps is suggested in Michael Hannon, [illegible] ("In regard to federal circuit court opinions, 'unpublished' appears to mean that the opinion is not available in print.").

[FN11]. D.C. Cir. R. [illegible]. A companion rule advises counsel, however, that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." D.C. Cir. R. 36(e)(2). The D.C. Circuit simultaneously amended its Handbook of Practice and Internal Procedures to caution that while the new rule "makes a major change in the Court's practice," and while counsel "will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue," the court's decision to issue an unpublished disposition "means that the Court sees no precedential value in that disposition, ... i.e., the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents." D.C. Cir., Handbook of Practice and Internal Procedures 42, 52 (as amended through Jan. 1, 2002). Further, "counsel should recognize that the Court believes that its published precedents already establish and adequately explain the legal principles applied in the unpublished disposition, and that there is accordingly no need for counsel to base theirarguments on unpublished dispositions." Id. at 41.

Asked why they made the rule change, two D.C. Circuit judges called the move "long overdue" and mentioned variously the Federal Appendix, the Anastasoff opinion, the broad availability of unpublished opinions through online sources and elsewhere, and that "we don't like secret law." Telephone Interviews with D.C. Cir. judges (Jan. 11, 2002, Feb. 28, 2002).

[FN12]. See 3d Cir. Press Release (Dec. 5, 2001) (announcing that as of January 2, 2002, all court opinions in counseled cases "will be posted on the court's web site ... and available for dissemination by legal publishers"; the court, however, will continue to observe Internal Operating Procedure (I.O.P.) 5.8, "which provides that the court will not cite to non-precedential opinions as authority") (emphasis in original) (available at <http:// www.ca3.uscourts.gov/> (accessed Apr. 4, 2002; copy on file with Journal of Appellate Practice and Process)). This surrender to the online world was an about-face for the Third Circuit. Until this year it had been "generally considered that the Third, Fifth and Eleventh circuits have banned electronic dissemination of unpublished opinions, and these cases are neither added to Westlaw or LEXIS nor available from the courts' websites." Hannon, supra n. 10, at 211. The Third Circuit clarified its new procedures in late February, announcing that opinions in counseled cases will now be labeled either "precedential" or "not precedential," and that "the court will continue to observe its practice of not citing not precedential opinions as authority." 3d Cir. Press Release (Feb. 21, 2002) (available at < http:// www.ca3.uscourts.gov>) (accessed Apr. 14, 2002; copy on file with Journal of Appellate Practice and Process)).

The Fifth Circuit, on the other hand, lost heart. After announcing that it would put its unpublished opinions online, in late January 2002 it reconsidered and decided to maintain the status quo. Telephone interview with Fifth Cir. official (Feb. 1, 2002). See also 5th Cir. Website FAQ ("Only opinions designated for publication (published opinions) are put on our website.") (emphasis in original) (available at <http://www.ca5.uscourts.gov> (accessed Mar. 25, 2002; copy on file with Journal of Appellate Practice and Process)).

[FN13]. See 1st Cir. R. [illegible] (unpublished opinions may be cited "only in related cases").

[FN14]. See 2d Cir. R. 0.23 (citation of written statements attached to summary orders prohibited, since they "do not constitute formal opinions of the court and are unreported or not uniformly available to all parties").

[FN15]. See 7th Cir. R. 53(b)(2)(iv) (unpublished orders "shall not be cited or used as precedent").

[FN16]. See 9th Cir. R. 36-3 (unpublished dispositions "not binding precedent" and "may not be cited") A provisional rule in effect for the thirty- month period ending December 31, 2002, allows citation of unpublished dispositions in petitions for rehearing or rehearing en banc and in requests to publish an opinion, but only for the purpose of showing conflict among published and/or unpublished dispositions. Id. R. 36-3(b)(iii).

[FN17]. See Fed. Cir. (opinion or order "designated as not to be cited as precedent ... must not be employed or cited as precedent").

[FN18]. See 4th Cir. R. (citation of unpublished opinions "disfavored," but "[i]f counsel believes, nevertheless, that an unpublished disposition ... has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited").

[FN19]. See 6th Cir. R. (citation of unpublished decisions "disfavored," but "[i]f a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited").

[FN20]. See D.C. Cir. (unpublished orders entered before January 1, 2002, "are not to be cited as precedent," but ones entered on or after January 1, 2002, "may be cited as precedent"). See also D.C. Cir. R. 36(c)(2) (panel's decision to issue unpublished disposition "means that the panel sees no precedential value in that disposition"); D.C. Circuit Handbook, supra n. 11, at 42, 52.

[FN21]. The Fifth Circuit uses both formulas, depending on when the opinion was issued. See 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, "are precedent," but "because every opinion believed to have precedential value is published," unpublished opinions "normally" should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are "not precedent"; such opinions "may, however, be persuasive," and may be cited).

[FN22]. See 8th Cir. R. 28A(i) (unpublished opinions "are not precedent and parties generally should not cite them," but parties may do so if the opinion "has persuasive value on a material issue and no published opinion of this or another court would serve as well").

[FN23]. See 10th Cir. R. 36.3 (unpublished decisions "are not binding precedents," and their citation is "disfavored"; but an unpublished decision may be cited if it has "persuasive value with respect to a material issue that has not been addressed in a published opinion" and it would "assist the court in its disposition").

[FN24]. See 11th Cir. R. 36-2 (unpublished opinions "are not considered binding precedent," but "may be cited as persuasive authority"); see also 11th Cir. R. 36-3, I.O.P. 5 (stating that "[o]pinions that the panel believes to have no precedential value are not published," and that "[r]eliance on unpublished opinions is not favored by the court").

[FN25]. See 3d Cir. I.O.P. 5.8 (explaining that "the court by tradition does not cite its unpublished opinions as authority"); 3d Cir. Press Release, Dec. 5, 2001 ("The court will continue to observe Internal Operating Procedure 5.8, which provides that the court will not cite to non-precedential opinions as authority," (emphasis in original)). In stating carefully that "the court" does not cite to unpublished opinions, the Third Circuit tacitly allows lawyers to do so. Telephone Interview with 3d Cir. official (Jan. 9, 2002) (First Amendment cited as reason for the policy).

[FN26]. Judicial Business of the United States Courts, 2001, tbl. S-3 (available at < http://www.uscourts.gov/judbus2001/tables/s03Sep00.pdf> (accessed April 20, 2002; copy on file with Journal of Appellate Practice and Process)). The eight "citable" circuits have 14,806 unpublished cases, while the four noncitable circuits have 7,114. Id. (The Federal Circuit is not included in Table S-3, so the number of unpublished cases it issues is not available. Telephone Interview with Fed. Cir. official (Jan. 11, 2002). The statistics show a total of 1,500 case dispositions for the Federal Circuit, but do not indicate how many of them are unpublished. See Judicial Business, at tbl. B-8.)

[FN27]. See supra nn. 7, 12, 21, 24.

[FN28]. An official in the Fifth Circuit reports that the unpublished opinions of that court are not uncommonly cited and that lawyers obtain them principally in two ways: (1) Lawyers who practice in a given area (immigration law, for example) have their own "networks" within which relevant unpublished opinions are passed around and even bound into mini-collections; law offices such as those of the U.S. Attorney and Public Defender also collect opinions relevant to their work; and (2) the opinions are available in chronological binders in the circuit's library. Telephone Interview with 5th Cir. official (Mar. 15, 2002); see also [illegible] 242 F.3d at 318 n. 1 (discussing unpublished Fifth Circuit cases). In the Eleventh Circuit, two court officials state that unpublished opinions are cited. One reports that "some of the larger law offices keep track" of the opinions, in some cases "running their own data banks." The other notes that the opinions are available in the court clerk's office and that unpublished opinions are commonly cited in briefs filed with that circuit. Telephone Interviews with 11th Cir. officials (Jan. 11, 2002, Mar. 15, 2002).

[FN29]. Texas Supreme Court, Comparison of Advisory Committee TRAP Recommendations and Supreme Court's Tentative Conclusions 12-15 (Jan. 14, 2002) (addressing Rule 47.7) (available at <http:// www.supreme.courts.state.tx.us/rules/Committee/> (accessed Mar. 26, 2002; copy on file with Journal of Appellate Practice and Process)). The court was divided on the issue of retroactivity and sought further guidance from its Advisory Committee, with a final decision expected by summer of 2002. Telephone Interviews with Tex. Sup. Ct official (Jan. 10, 2002, Feb. 1, 2002, Mar. 28, 2002).

The debate over unpublished opinions has become something of a public issue in Texas, with several of the state's leading newspapers editorializing in favor of the proposed rule change. See e.g. Publish or Perish: Unpublished Appellate Court Opinions Corrode Texas Law, Houston Chron. 2C (Dec. 9, 2001); Court Blackout: Too Many Opinions Are Kept Under Wraps, Dallas Morning News 14A (Dec. 31, 2001); Court Opinions Should Become Public, San Antonio Express- News 2G (Dec. 16, 2001) (characterizing no-citation rules as "unfair to Texans who must pick their judges in the voting booth"); Editorial, Forth Worth Star- Telegram 10 (Dec. 17, 2001) ("One would think that, any time a Texas appeals court issues a ruling, anyone could find it in the law books and rely on it to make an argument in one's own case. One would be wrong.").

[FN30]. See [illegible]; Jud. Council of Cal., Admin. Off. of the Cts., 2001 Court Statistics Report, Courts of Appeal, tbl. 9 (available at < http://www.courtinfo.ca.gov/> (accessed Mar. 21, 2002; copy on file with Journal of Appellate Practice and Process)).

[FN31]. See Unpublished Opinions (available at <http:// www.courtinfo.ca.gov/opinions/nonpub.htm/> (accessed May 8, 2002; copy on file with Journal of Appellate Practice and Process)).

[FN32]. 223 [illegible].

[FN33]. Id. at 904; see n. 41 infra and accompanying text.

[FN34]. The issue was the scope of the "mailbox rule" for filing federal tax refund claims. See Anastasoff, 223 F.3d 898.

[FN35]. 223 [illegible]. Judge Arnold's opinion was vacated as moot when the Government acceded to the contrary decision of another circuit. [illegible] (en banc).

[FN36]. See Alex Kozinski & Stephen Reinhardt, Please Don't Cite This! 20 Cal. Law. 43 (June 2000); Richard S. Arnold, Unpublished Opinions [illegible].

[FN37]. 266 [illegible] (quoting R.M.W. Dias, Jurisprudence (2d ed., Butterworth 1964)).

[FN38]. Id. at 116

[FN39]. The court also held that the rule (9th Cir. R. 36-3) had been violated, but declined to impose sanctions in view of the attorney's good-faith constitutional challenge. [illegible] Attorneys who henceforth cite unpublished cases in the Ninth Circuit presumably cannot expect such leniency, at least not from Judge Kozinski. But cf. U.S. v. [illegible] (court asks counsel to submit list of unpublished opinions superseded by its decision and cites them in its opinion, "[t]o avoid even the possibility that someone might rely upon them").

[FN40]. 266 F.3d at 1[illegible].

[FN41]. See e.g. [illegible] ("[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals."); U.S. v. Humphrey, 2002 U.S. App. LEXIS 6984 (6th Cir. 2002), at *71 ("It is axiomatic that a court of appeals must follow the precedent of prior panels within its own circuit."); Salem M. Katsh & Alex V. Chachkes, [illegible] Rules, 3 J. App. Prac. & Proc. [illegible].

[FN42]. See supra nn. 11, 20. The D.C. Circuit expressly permits lawyers to argue that an unpublished disposition is "binding precedent," or at least "precedent." See supra n. 11. In the Fifth Circuit, unpublished opinions issued before January 1, 1996, likewise "are precedent." See supra n. 11 and text accompanying n. 20.

[FN43]. See supra nn. 18, 19.

[FN44]. The Sixth Circuit apparently disagrees. See Humphrey, 2002 U.S. App. LEXIS 6984 at * 71 ("unpublished decision[s] with no binding effect"; "unpublished opinions are not controlling precedent") (citing [illegible] 263 F.3d 499, 50[illegible]; [illegible]). The explanation could be that in all these cases the court rejected the claim that the particular unpublished opinion cited had precedential value; the cases, however, are categorical in what they say about unpublished opinions. The cases do all use qualifying terms such as "binding" or "controlling" precedent. So the point may be that the Sixth Circuit does not regard "precedential value" as translating into "binding" precedent or as constituting the law of the circuit.

[FN45]. See e.g. [illegible] n. * (1990) ("The Court gives less deference to summary dispositions ...."); [illegible] ("not entitled to the same deference given a ruling after briefing, argument, and a written opinion"); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, Supreme Court Practice 216 (7th ed., BNA 1993) ("It thus seems fair to say that the whole Court agrees that summary affirmances are entitled to some weight, but to less than fully articulated decisions.").

[FN46]. See supra n. 11 and accompanying text. The Fifth Circuit also regards unpublished opinions issued before January 1, 1996, as "precedent." See supra n. 21.

[FN47]. See supra nn. 18, 19, 44.

[FN48]. The idea resembles the administrative-law concept of "Skidmore deference," under which an agency's informal interpretations of its statute are "'entitled to respect,' ... but only to the extent [they] have the power to persuade.'" [illegible] (quoting [illegible] 323 U.S. 134, 140 (1944)); see also [illegible]. Justice Jackson stated in Skidmore that the weight accorded to the administrative judgment in a particular case "will depend upon the thoroughness

evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

[FN49]. "[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive."

[FN50]. See supra nn. 21-24.

[FN51]. See supra nn. 4-5 and accompanying text.

[FN52]. "Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliche."

[FN53]. "So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities."

[FN54]. See supra nn. 11, 20-24.

[FN55]. E.g. Kozinski & Reinhardt, supra n. 36 at 43; Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J.

[FN56]. E.g. Katsh & Chachkes, supra n. 41; Stephen R. Barnett, "Unpublished" Judicial Opinions in the United States: Law Or Not? 2 European Bus. Org. L. Rev. 429, 434-437 (2001). The claim that no-citation rules violate the First Amendment by prohibiting litigants from telling the court about a prior court decision, see Katsh & Chachkes, supra n. 41, at 289, draws support from (2001). The Court there struck down, under the First Amendment, a Congressional prohibition against the use of LSC funds in cases involving an effort to "amend or otherwise challenge existing welfare law." . Calling the ban "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case," the Court declared that the enactment under review, in its attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts, ... prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."

[FN57]. 233 F.3d at 904.

[FN58]. 9th Cir. R. 36-3 (unpublished dispositions "are not binding precedent" and "may not be cited").

[FN59]. The attorney whose citation of an unpublished Ninth Circuit opinion precipitated Judge Kozinski's ruling in Hart was not citing that opinion as precedent, at least not in the sense of asking the court to follow it, but was using it to illustrate his statement that "[t]he Ninth Circuit has not explicitly ruled on the issue before this court." See Appellant's Brief at 13 n. 6, Hart v. Massanari, sub nom. Hart v. Apfel, filed Dec. 13, 1999 (citing Rice v. Chater, No. 95-35604, 1996 (reported in Decisions Without Published Opinions, 98 F.3d 1346 tbl. (9th Cir. 1996)). Judge Kozinski did not consider arguments of history or common law practice that might make the rule unconstitutional in prohibiting the mere citation of an unpublished opinion, which the attorney in Hart was doing, as distinct from application of the rule to deny an unpublished opinion the force of binding precedent, which was not involved in Hart.

[FN60]. Together, the terms "binding authority" and "binding precedent" appear forty-five times in the twenty-two page opinion.

[FN61]. On page twenty of the twenty-two-page opinion.

[FN62]. 266 F.3d at [illegible].

[FN63]. Id. at 1176.

[FN64]. Id. at 1171-1172 (citations omitted) (emphasis added); see also [illegible] ("[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive ....").

[FN65]. See 266 F.3d at [illegible] ("Federal courts today do follow some common law traditions.").

[FN66]. Id. at 1176 [illegible].

[FN67]. Id. at 1176-1177 (emphasis added).

[FN68]. On this point Judge Kozinski and Judge Arnold seem to agree. Judge Arnold rejects the courts' message that "you cannot even tell us what we did yesterday," while Judge Kozinski insists that earlier authority be "acknowledged and considered." See [illegible] 266 F.3d at 1170.

[FN69]. Anastasoff [illegible].

[FN70]. Id.

[FN71]. Hart, 266 F.3d at [illegible].

[FN72]. The relevant difference can be seen in two recent cases in which federal appeals panels refused to follow unpublished opinions, provoking dissents based on Anastasoff. In [illegible] Dallas Area Rapid Transit, 242 F.3d 315 (5th Cir. 2001), rehearing en banc denied, [illegible], a Fifth Circuit panel held that DART was not an arm of the State of Texas for purposes of Eleventh Amendment immunity, in the face of three prior unpublished dispositions to the contrary. The unpublished opinions were cited to the panel, under the Fifth Circuit rule allowing citation as "persuasive authority," see supra n. 21, and the panel discussed them in a lengthy footnote, finding them unpersuasive. [illegible]. Three judges dissented from the denial of rehearing en banc, saying the court should "revisit the questionable practice of denying precedential status to unpublished opinions." 256 F.3d at 260 (Smith, Jones & DeMoss, JJ., dissenting).

In Symbol Technologies [illegible] v. Lemelson Medical, 277 F.3d 1361 (Fed. Cir. 2002), a divided panel upheld a defense of laches to a claim of patent infringement, contrary to two prior non-precedential opinions of the Federal Circuit. (The court "reluctantly" permitted those opinions to be discussed despite the Circuit's no-citation rule, see [illegible] (Newman, J., dissenting).) While the defendant argued that the court was bound by those opinions, citing Anastasoff, the majority agreed instead with Judge Kozinski in Hart. It thus concluded: "[W]e decline to consider" the opinions. [illegible]. The dissenting judge agreed that the opinions were not binding, but found them worth considering at some length. [illegible].

While Williams and Symbol both declined to follow unpublished opinions, they differ crucially. The Fifth Circuit considered the opinions and rejected them, while the Federal Circuit "decline[d] to consider" them. The Federal Circuit's failure even to acknowledge and consider the opinions was, in Judge Kozinski's term, "bad form," Hart, 266 F.3d at 1170, it may also have been unconstitutional. See Katsh & Chachkes, supra nn. 41, 56; Velasquez, 531 U.S. at 545.

[FN73]. 266 F.3d at [illegible].

[FN74]. And especially for Judge Kozinski, whose superb published opinions are worth all the time he can put into them.

[FN75]. 266 F.3d [illegible].

[FN76]. Id.

[FN77]. Danny J. Boggs & Brian P. Brooks, [illegible], 4 Green Bag 2d 17, 22 (2001).

[FN78]. Even, I'm told, at Yale.

[FN79]. Circuit rules so require. See e.g. 4th Cir. R. (allowing citation of unpublished opinion only if "there is no published opinion that would serve as well").

[FN80]. Richard A. Posner, The Federal Courts: Challenge and Reform 166 (Harvard U. Press 1996).

[FN81]. Hart, 266 F.3d [illegible].

[FN82]. Id.

[FN83]. Judge Kozinski sees yet another drain on judicial time under a citable-opinion regime resulting from an increase in dissenting and concurring opinions: "Although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning of the rule to be applied to future cases," and hence "[u]npublished concurrences and dissents would become much more common." 266 F.3d at 1178. A survey of Volume 27 of the Federal Appendix (the latest one available as I write) yields the following figures. Among the 220 cases reported from circuits where citation is permitted, there were four dissents or concurrences, representing 1.8 percent of the cases. Among the 149 cases reported from circuits where citation of unpublished cases is banned, there were likewise four dissents or concurrences, representing 2.7 percent of the cases. The "citable" circuits thus had a lower rate of dissenting or concurring opinions than the "noncitable" circuits. Further, among the eighty-two cases reported from the Ninth Circuit, there were four dissents or concurrences, or 4.9 percent. The only other dissents or concurrences were from the (citable) Fourth and Sixth Circuits, which had two such opinions each (among forty-five and 116 reported cases, respectively). The rates of dissenting or concurring opinions thus were 4.4 percent in the Fourth Circuit and 1.7 percent in the Sixth--both figures lower than the 4.9 percent in the noncitable Ninth Circuit. Although admittedly limited, these data are inconsistent with Judge Kozinski's hypothesis that making the opinions citable increases the rate of dissents and concurrences.

[FN84]. I owe this observation to Bob Berring.

[FN85]. See [illegible] (2000) ("While our present circuit rules prohibit the citation of unpublished memorandum dispositions, [citation omitted] we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis"); Katsh & Chachkes, supra n. 41, at 301-302 ("[I]n practice, citation prohibitions hardly ease the case-review burden on the prudent practitioner.").

[FN86]. 266 F.3d [illegible].

[FN87]. Id.

[FN88]. See Katsh & Chachkes, supra n. 41, at 301 ("[T]he myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal--e.g., cases involving prisoners and social security claimants," and even if those cases were citable, courts and practitioners "would understand ... that the case law is well settled").

[FN89]. Especially since such citation likely would violate a circuit rule. See supra n. 79.

[FN90]. See Katsh & Chachkes, supra n. 41, at 301-302 (observing that prudent practitioners research uncitable cases "to mine them for new ideas," because they indicate how a court has ruled in past and thus might rule in future, and because they "still may influence a court that reads (or remembers deciding) them itself").

[FN91]. See ABA Resolution, supra n. 4; see also Kozinski & Reinhardt, supra n. 36, at 43 ("At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don't understand their problem"). A court official in a circuit in which unpublished opinions are not citable reports "a lot of clamor" to allow citation. Telephone Interview with circuit official (May 8, 2002). (Of course, the lawyers may just want to pad their bills, but that seems a questionable conclusion for a court to draw a priori.)

[FN92]. Judicial Business of the United States Courts, supra n. 26.

[FN93]. Id. It is true that they are not posted online or given to legal publishers. But they are citable by rule and, apparently, cited in practice. See supra nn. 12, 21, 24, 28.

[FN94]. See supra n. 45.

[FN95]. See supra n. 9 (citation restrictions in Federal Appendix). Indeed, citation of unpublished opinions makes clear their unpublished status and avoids confusion that may otherwise result. Cf. [illegible]-Sanchez, 222 F.3d at 1063 (citing unpublished opinions superseded by court's (published) decision "[t]o avoid even the possibility that someone might rely upon them").

[FN96]. See In re: [illegible] (cited unpublished opinion is "not law of this circuit and will not be binding on any future panel"). (The Eleventh Circuit's Rule 36-2, allowing citation as "persuasive authority," see supra n. 24, was in effect in 1995. Telephone Interview with 11th Cir. official (May 7, 2002)).

[FN97]. See supra n. 48.

[FN98]. But see Sixth Cir. cases cited supra n. 44.

[FN99]. See Katsch & Chachkes, supra n. 41, at 288 n. 5 (pointing out that Anastasoff assumes law-of-circuit rule is constitutionally required and refuting that assumption).

[FN100]. The court in [illegible] (1st Cir. 1996), described the law-of-the-circuit rule as "derived from legislation and from the structure" of the federal circuits. But the court's quotation of 28 [illegible], stating that the circuits normally sit in panels, or divisions, of "'not more than three judges,'" and its quotation of the Revision Notes to [illegible], stating that "the 'decision of a division' is the 'decision of the court,'" do not appear to make the case. The Revision Notes state that the new statutory language "preserves the interpretation established by" [illegible] (1941)--which held that circuits may sit en banc, and not only in three- judge panels. But, the Notes continue, the new language provides normally for three-judge panels and "makes the decision of a division, the decision of the court, unless rehearing in banc is ordered." The issue to which this quotation was directed thus was the size of the panel in which the judges would sit, three judges or en banc, and not the relationship between panels. The Court's concern in Textile Mills, paraphrased in LaShawn A., that "[w]ere matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit," [illegible] was expressed in support of the Court's holding that en banc courts were permissible. [illegible]. The statement was not made in support of an argument that en bancs could be avoided by application of the law-of-the-circuit rule.

[FN101]. See supra nn. 99-100.

[FN102]. Cf. [illegible] (unpublished opinions affected by decision not citable but court nonetheless lists them as "superseded").

END OF DOCUMENT

MEMORANDUM

DATE: October 10, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 02-01

Charles R. "Fritz" Fulbruge III, the former liaison to this Committee from the appellate clerks, has brought to this Committee's attention the fact that nothing in the Appellate Rules seems to restrict the typeface and type styles that are used in motion papers. Mr. Fulbruge's reasoning — which, in my opinion, is entirely correct — is set forth in a March 18, 2002, letter to Judge Alito, a copy of which is attached.

Also attached is a draft amendment to Rule 27(d)(1). The amendment would add a new subsection (E), which would provide that motion papers must comply with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6).

Rule 27. Motions

* * * * *

(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).

* * * * *

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.

02-01

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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600 CAMP STREET
NEW ORLEANS, LA 70130

March 18, 2002

Honorable Samuel A. Alito, Jr.
United States Court of Appeals for the Third Circuit
357 United States Post Office and Courthouse
Post Office Box 999
Newark, NJ 07101–0999

Re: Proposed FED. R. APP. P. 27

Dear Judge Alito:

Last Monday I was in Austin, Texas at a Fifth Circuit Bar Association meeting and was asked an obscure question concerning proposed FED. R. APP. P. 27. Specifically the inquiry is whether there is anything in the proposed changes to the federal rules which governs permissible typeface and type styles for motions. I was confident this matter was covered, but I cannot locate a reference in any Rule to cover the question.

FED. R. APP. P. 27(d)(1), (2) and (3) discuss the format of motions and cover such matters as "reproduction," "binding," "paper size, line spacing and margins," "page limits" and "number of copies." There does not appear to be a reference to FED. R. APP. P. 32(a)(5) and (6) covering permissible typeface, or type styles.

FED. R. APP. P. 5(c) and 21(d) require conformance with FED. R. APP. P. 32(c). Rule 32(c)(2) states that "any other paper including a petition for rehearing" or "rehearing en banc", and "any response to such a petition must be reproduced" as prescribed by "Rule 32(a)" except that no cover is required and the length limits of Rule 32(a)(7) do not apply. The reference to Rule 32(a) encompasses the limitations on typeface and type style in Rule 32(a)(5) and (6). Thus, it appears briefs; petitions for permission to appeal; writs of mandamus, prohibition and other extraordinary writs; petitions for panel and en banc rehearing; and "other papers" must comply with Rule 32(a)(5) and (6). Were it not for Rule 32(c)(1), apparently a motion would also have to comply with all of Rule 32(a). However, Rule 32(c)(1) states that the form of a "motion" is governed by Rule 27(d). Unfortunately, that rule does not specify that proportionally spaced and monospaced face may be used. The rule also does not include the restriction that proportionally spaced face must include serifs, except in headings and captions, and that 14 point or larger face must be used, or that monospaced face may not exceed 10½ characters per inch. Likewise Rule 27(d) does not require "plain roman style type, although italics or boldface may be used for emphasis."

The questioner's argument is that under the FED. R. APP. P. a person may file a motion in virtually any size typeface and may use italics or script typeface, and that a court must accept such a motion for filing. This is not an earth shaking question, and in view of the late stage for the proposed rule changes, we may be unable to affect any change, if one is warranted at all, before December 2002. However, this may be a discussion topic for our April Appellate Rules Advisory Committee meeting. Hopefully, wiser legal scholars than I can find an answer without resorting to a rule change.

If you have any questions, please call me at (504) 310-7654, or send a Lotus Notes message or internet e-mail to <charles_fulbruge@ca5.uscourts.gov>.

Sincerely,

Jitty Fulbruge

cc: Professor Patrick Schiltz
John Rabiej
Marcy Waldron

V-A

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October 18, 2002

Professor Patrick J. Schiltz
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Minneapolis, MN 55403-2005

Re: Classification Of Post-Judgment Motions, Writs, and Petitions In Criminal Cases

Dear Patrick:

As you know, I was asked to provide the Committee with a proposed FRAP amendment to deal with the problem of classifying different types of appeals connected to criminal proceedings. There is considerable disagreement and confusion among the courts of appeals and litigants regarding whether various appeals are to be governed by the civil or criminal appeal deadlines. Enclosed is our proposal for the Committee's discussion and consideration. I am also providing to you again the letter that I wrote to you on March 28, 2002 on this subject because it provides much of the background that is helpful in considering this new proposal (which has been authorized by the Solicitor General). I look forward to discussing this issue with you and the rest of the Committee at the November 2002 meeting.

Sincerely,

Douglas Letter

Douglas Letter
Appellate Litigation Counsel

Proposed New Fed. R. App. P. 3.1 (10/18/02)

Rule 3.1. Appeals as of Right -- How Classified

(a) **Appeal in a Criminal Case.** Any appeal from an order

(1) entered in a criminal case, grand jury proceeding, or under a criminal docket number;

(2) granting or denying relief under the Federal Rules of Criminal Procedure or Title 18 of the United States Code;

(3) granting or denying relief relating to the criminal investigation, arrest, detention, prosecution, trial, sentencing, sentence, parole, probation or supervision of any individual or entity;

(4) granting or denying relief relating to the criminal seizure, retention, return, or forfeiture of property, or to a criminal fine or restitution; or

(5) granting or denying a motion for attorney's fees or litigation expenses in any criminal case, including under 18 U.S.C. § 3006A et seq.,

is treated as an appeal in a criminal case and is governed by Rule 4(b), except as provided in Rule 3.1(b)(1).

(b) **Appeal in a Civil Case.**

(1) **Specified Civil Appeals Relating to Criminal Cases.** An appeal from an order granting or denying

(A) a petition for habeas corpus under 28 U.S.C. § 2254;

(B) a petition for habeas corpus under 28 U.S.C. § 2241 relating to the fact or duration of incarceration after imposition of a judgment of sentence;

(C) a motion to vacate sentence under 28 U.S.C. § 2255;

(D) a motion to reduce sentence under 18 U.S.C. § 3582(c);

(E) a petition for a writ under 28 U.S.C. § 1651 challenging a final judgment in a criminal case;

(F) extradition between the United States and another nation;

(G) legal or equitable relief in an action of the type described in 28 U.S.C. §§ 1346(b) and 2679(b)(2), against the United States or its officers or employees; or

(H) legal or equitable relief in an action under 42 U.S.C. §§ 1981-1988, against state or local governmental entities and officials,

is treated as an appeal in a civil case and is governed by Rule 4(a).

(2) **Other Civil Appeals.** All other appeals of right are treated as appeals in a civil case and are governed by Rule 4(a).

(c) **Jurisdiction.** Nothing in this Rule creates jurisdiction for any motion, petition, writ, or appeal.

Proposed Advisory Committee Notes to Fed. R. App. P. 3.1

2003 Adoption

Under Rule 4, the classification of appeals as "civil" or "criminal" determines the time within which an appeal must be filed, but Rule 4 provides no definition of those terms. Case law classifying appeals for purposes of Rule 4 has been confusing and often inconsistent. For example, an appeal from a ruling on a motion under 28 U.S.C. § 2255 has been classified as "civil" even though a § 2255 motion is in other respects treated as a motion in a criminal case. *United States v. Hayman*, 342 U.S. 205 (1952). The courts of appeals have disagreed often on the classification of particular motions or orders. *Compare, e.g., In re 1997 Grand Jury*, 215 F.3d 430 (4th Cir. 2000)(treating Hyde Amendment claims as "civil" for purposes of Fed. R. App. P. 4) and *United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000)(same) *with United States v. Robbins*, 179 F.3d 1268 (10th Cir. 1999)(treating Hyde Amendment claims as "criminal" for purposes of Fed. R. App. P. 4). In fact one such circuit split resulted in the amendment of Fed. R. App. P. 4(a)(1) in 2002 to add subdivision (C) classifying an appeal from an order granting or denying a writ of error coram nobis as "civil."

Rule 3.1 has been promulgated to provide the definitions lacking in Rule 4. Although it is not possible to devise a completely logical method for classifying appealable orders granting or denying motions related to criminal cases, it is crucial to avoid delay in appealing orders relating to criminal matters (and any resulting delay in the underlying criminal matters) even if the motion, petition or proceeding which resulted in the order is arguably non-criminal in form. Furthermore, to provide clarity to appellants, a resolution of the applicable time period for appeal is at least as important as which time period is chosen. Accordingly, Rule 3.1 provides a broad description of "criminal" appeals, subjecting all such appeals to Rule 4(b)'s shorter time periods, except for appeals from specified orders. Rule 3.1 treats appeals from these specified orders, and the vast range of appeals of right not falling within the broad definition of "criminal" appeals, as "civil" appeals subjected to Rule 4(a)'s longer time periods. To reduce ambiguity, the rule labels various motions and orders as civil or criminal.

Subdivision (a). To give a broad definition of "criminal" appeals, this subdivision includes not only appeals from orders in proceedings labeled criminal,

but also appeals from orders granting or denying relief relating to criminal investigations and proceedings, and appeals from orders regarding motions seeking relief under the Federal Rules of Criminal Procedure or the "Crimes and Criminal Procedure" Title of the United States Code. The definition of "criminal" appeals includes appeals from orders on motions brought before a criminal prosecution has been initiated, orders relating to grand jury investigations, orders after criminal charges have been brought, and, except where expressly specified in subdivision (b)(1), orders after the defendant has been sentenced. For example, the following are included among "criminal" appeals: (1) appeals from orders relating to grand jury or criminal trial subpoenas; (2) appeals from orders finding criminal contempt, or civil contempt relating to a criminal or grand jury proceeding; (3) appeals from orders allowing or denying access to a criminal or grand jury proceeding, release of materials from such proceedings, or comment about such proceedings; (4) appeals from orders (including orders on habeas petitions) relating to the arrest, detention, bail, release, or extradition within the United States, of a criminal defendant, or stay of a criminal case; (5) appeals from orders granting or denying motions for return of property under Fed. R. Crim. P. 41(e), whether or not an indictment or information has been filed or the defendant has been tried or sentenced (this represents a change from the majority rule); (6) appeals from orders resolving motions to dismiss on grounds of double jeopardy or similar concepts; (7) appeals from judgments in a criminal case; (8) appeals from orders relating to criminal forfeitures (this resolves a circuit split in which some courts have treated criminal forfeiture orders as to third parties as civil); (9) appeals from orders relating to Hyde Amendment claims, *see* 18 U.S.C. § 3006A Notes (resolving a circuit split); (10) appeals from orders resolving post-trial or post-sentencing motions under the criminal rules, including Fed. R. Crim. P. 32 through 36; (11) appeals from orders relating to the revocation or modification of supervised release; and (12) appeals from orders denying writs (*e.g.*, mandamus) relating to criminal cases, unless they are challenging a final judgment. To avoid confusion, delay, and disparate time periods, appeals from such orders by third parties (*e.g.*, the media, attorneys, claimants to property) are subject to the same Rule 4(b) time period as appeals by charged defendants.

Subdivision (b)(1): Most of these specified orders are exempted because they are forms of collateral review, brought after the defendant has been sentenced, when the need for speed is lessened. Thus, appeals from orders resolving petitions for habeas corpus under 28 U.S.C. § 2241 which relate to an already-imposed incarceration under a judgment of sentence (*i.e.*, petitions addressing BOP calculation of the sentence, or petitions brought where 28 U.S.C. § 2255 is inadequate or

ineffective) are treated as "civil" appeals; by contrast, appeals from orders granting or denying relief relating to pre-judgment criminal arrest, detention, custody or extradition, even if brought by petitions for habeas corpus, would fall within subdivision (a) and be "criminal" appeals. Appeals from orders on motions to reduce sentence under 18 U.S.C. § 3582(c) are treated as "civil" appeals because they only permit modification of a term of imprisonment once it has been imposed. Similarly, subdivision (b)(1)(E) includes orders resolving a writ of error coram nobis challenging final judgment in a criminal case. Other specified orders are those in actions for money or equitable relief, such as those under 42 U.S.C. § 1983, the Federal Tort Claims Act, or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), which have traditionally been treated as civil. The filing of a post-decisional motion (*e.g.*, under Fed. R. Civ. P. 60(b)) does not change the underlying nature of the appeal from criminal to civil. To maintain the clarity resulting from this subdivision's specification, it is intended that any expansion of the list of specified orders be by rule-making rather than judicial decision.

Subdivision (b)(2). "Civil" appeals include appeals from orders granting or denying relief relating to (1) civil investigations by Congress, (2) civil arrest and detention, *e.g.*, by immigration officials, (3) petitions for habeas corpus not relating to the matters specified in subdivision (a) (*e.g.*, challenging detention by immigration officials), (4) deportation, (5) civil contempt not relating to the matters specified in subdivision (a), (6) civil forfeiture, and (7) attorney's fees or litigation expenses in civil cases.

Subdivision (c): This Rule is intended to clarify the applicable time period for appeal from a wide variety of orders. Many of these orders, however, address motions, petitions, and writs of dubious procedural and jurisdictional validity. Classifying such appeals in general, or in listing examples in the Rule and its commentary, is not meant to confer subject matter jurisdiction over such motions, petitions or writs, or appellate jurisdiction over the appeals that arise from them. Therefore, it is made clear in subdivision (c) that no jurisdiction is being conferred by this Rule. This proviso is made necessary by the 2002 amendment deleting Rule 1(b), which provided that the Appellate Rules in general could not extend or limit jurisdiction.

Proposed Amendment to Fed. R. App. P. 4

Delete Fed. R. App. P. 4(a)(1)(C).

Proposed Advisory Committee Notes to Fed. R. App. P. 4

2003 Amendment

Subdivision (a)(1)(C). This paragraph, added in 2002, is deleted as unnecessary because an appeal from an order granting or denying an application for a writ of error coram nobis from a final judgment of sentence is characterized as an appeal in a civil case by Rule 3.1(b)(1)(E).

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March 28, 2002

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Re: Classification Of Post-Judgment Motions, Writs, and Petitions In Criminal Cases

Dear Patrick:

At the April 2001 meeting of the Federal Rules of Appellate Procedure Advisory Committee, there was discussion concerning whether the time for filing an appeal in Hyde Amendment cases should be governed by civil or criminal time limits. This discussion also addressed a proposal by Judge Easterbrook that there should be a rule classifying the many post-judgment motions in criminal cases. Judge Easterbrook has written that "[a] rule could be something simple like 'an order formally in a criminal case is treated as civil for purposes of this rule unless it is a sentence of imprisonment or a criminal fine.' That would put restitution orders on the civil side (properly so, since they are functionally civil). * * * The orders that have given trouble in my court include forfeiture (which could be criminal or civil, but which ought to be treated as civil for the time to appeal), post-judgment motions for the return of property, and a variety of ancillary matters."

These points raise very difficult issues, which admit of no easy answer. We have prepared an analysis of the problem, and provide several different ways of looking at them, depending upon different policy choices. At this stage, the Department of Justice is not ready to make a specific proposal on how to solve these issues. I hope to have such a proposal for the Committee's next meeting. I did nevertheless want to give the Committee a sense of the breadth of the inquiry.

1. Current State of the Law

The current state of the law confirms that there is a need for further guidance on the question of how to classify post-judgment motions related to criminal cases. The various types of motions, writs and petitions, and how they are currently treated by the federal courts, are set forth below:[1]

(1) *Motions to Vacate Sentence under 28 U.S.C. § 2255.* Pursuant to statutory rule, these motions are treated as "civil" for purposes of FRAP 4, and are therefore governed by the timing for civil appeals. See Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. The Advisory Committee Notes to this Rule observe that a § 2255 motion is a "further step in the movant's criminal case rather than a separate civil action," but ultimately conclude, based on the Supreme Court's language in United States v. Hayman, 342 U.S. 205 (1952), that appeals from § 2255 rulings are analogous to appeals from habeas corpus petitions, which are treated as civil for purposes of time to appeal.

(2) *Writs of coram nobis.* The writ of error coram nobis is most often used to correct legal and factual errors by persons who have finished serving their federal sentences (and hence are no longer "in custody" for § 2255 purposes). The circuit courts are badly split on how they are to be treated. Compare United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (using "civil" time for appeals); United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989) (same); United States v. Craig, 907 F.2d 653 (7th Cir. 1990) (same) with United States v. Mills, 430 F.2d 526 (8th Cir. 1978) (using "criminal" time for appeals); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985) (same).

(3) *Hyde Amendment cases.* Criminal defendants seeking to recover attorneys fees for vexatious, frivolous, or bad faith prosecutions may file Hyde Amendment claims. As with coram nobis, the circuit courts are split over how to approach these cases in terms of time to appeal. Compare In re 1997 Grand Jury, 215 F.3d 430 (4th Cir. 2000) (treating Hyde Amendment as "civil" for purposes of FRAP 4); United States v. Truesdale, 211 F.3d 898 (5th Cir. 2000) (same) with United States v. Robbins, 179 F.3d 1268 (10th Cir. 1999) (treating Hyde Amendment case as "criminal" for purposes of FRAP 4).

(4) *Rule 41(e) motions to recover property.* Motions filed by criminal defendants to recover property obtained in an unlawful search or seizure have usually been deemed "civil" for purposes of FRAP 4. See United States v. Garcia, 65 F.3d 17 (4th Cir. 1995); Hunt v. Department of Justice, 2 F.3d 96 (5th Cir. 1993); United States v.

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[1] As far as we have determined, the federal courts have not considered the timeliness of appeals from extradition orders, if those orders are subject to appeal at all.

Taylor, 975 F.2d 402 (7th Cir. 1992); United States v. Martinson, 809 F.2d 1364 (9th Cir. 1987); United States v. Madden, 95 F.3d 58 (10th Cir. 1996).

(5) *Forfeiture actions.* The appellate courts have divided over how to treat the appeals of criminal forfeiture orders. Some courts treat them as civil matters. See United States v. Lavin, 942 F.2d 177, 181-82 (3d Cir. 1991). Other courts view them as part of the criminal proceeding. See United States v. Casas, 999 F.2d 1225, 1232 (8th Cir. 1993) (criminal forfeiture proceeding under 21 U.S.C. § 853(a)(2)); United States v. Yerardi, 192 F.3d 14, 19 (1st Cir. 1999) (criminal forfeiture proceedings under 18 U.S.C. §§ 982, 1963); United States v. Apampa, 179 F.3d 555, 556-57 (7th Cir. 1999) (criminal forfeiture proceedings under 21 U.S.C. § 853 "criminal" as to defendant; "civil" as to third parties); United States v. Alcaraz-Garcia, 79 F.3d 769, 772 n.4 (9th Cir. 1996) (implying the same in dicta); United States v. Gilbert, 244 F.3d 888, 906-07 (11th Cir. 2001) (criminal forfeiture proceedings under 18 U.S.C. § 1963(l) are "criminal" as to defendant; "civil" as to third parties).

(6) *Remaining common law writs (e.g., coram vobis, audita querela).* As an initial matter, the existence and/or utility of these writs is still uncertain, but these writs are ostensibly authorized by the All Writs Act, 28 U.S.C. § 1651. There have been few cases that have addressed the status of these writs for purposes of appellate time limits, so these cases may need to be addressed by analogy to coram nobis or other analogous types of filings detailed above.

The Committee should be aware that the question of whether an appeal is "in a criminal case" (and thus governed by the Rule 4(b)) or "in a civil case" (and thus governed by Rule 4(a)) does not arise solely for sentencing and post-sentencing rulings. That issue also arises for pre-trial rulings, such as orders by a grand jury judge denying a motion to quash a grand jury subpoena and granting a motion to compel, which the Third Circuit recently held was an order in a civil case. Impounded, 277 F.3d 407, 410-11 (3d Cir. 2002). If such rulings, or rulings on Rule 41(e) motions filed before the indictment or information, or other orders appealable on an interlocutory basis, are regarded as civil for purposes of Rule 4, such a determination could delay investigation and prosecution of criminal cases.

I also note that, while Rule 4 does not define what a "civil case" or "criminal case" is, the 1967 and 1979 Advisory Committee Notes state that a "civil case" includes bankruptcy, admiralty, maritime, and arbitration matters, and possibly suggests that there are no other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b). More importantly, the 1967 Notes make clear that Rule 4(a) was derived from former Civil Rule 73(a), and Rule 4(b) from former Criminal Rule 37(a)(2), both "without any change of substance" -- which suggests that Rules 4(a) and 4(b) might be intended to apply to those proceedings to which the Civil and Criminal Rules respectively apply. The Civil Rules are applicable "in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty," including habeas corpus, mandamus and quo warranto. Fed. R. Civ. P. 1, 81(a)(2), (b). The Criminal Rules are applicable "in all criminal proceedings," and, where provided, "to preliminary, supplementary, and special proceedings" before Magistrate

Judges, but not to civil forfeitures, extradition, collection of fines and penalties, or perhaps to delinquency proceedings. Fed. R. Crim. P. 1, 54.

2. Possible Classification Rationales

In a very literal respect, every one of the above-mentioned post-judgment filings is a "step in the criminal process." As a result, relying upon this observation may be of marginal utility. However, there are several possible policy rationales that might serve as a suitable mechanism for sorting "civil" post-judgment motions from "criminal" ones.

There is one practical consideration to keep in mind at the outset -- consistency. Some of the various post-judgment filings listed above, are interchangeable -- that is, a person may have the option of proceeding under one or more of these remedies as alternatives to one another. Any rule adopted needs to account for this possibility, to avoid the result of having persons circumventing the "criminal" time limits ascribed to one form of relief by simply filing its "civil" counterpart, and to avoid jurisdictional traps for litigants.

With these considerations in mind, there are various policy options we have identified so far:

(1) *Liberty interests demand shorter time limits.* There is a strong policy interest in the quick and orderly disposition of criminal cases. The Speedy Trial Clause of the Sixth Amendment and the federal Speedy Trial Act, 18 U.S.C. § 3161 et seq., implement this policy. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration.").

This policy would dictate a rule that uses the criminal time limits for motions filed while the defendant's liberty interests are necessarily being infringed (presumably because the defendant is in custody). Thus, for example, a Rule 35 motion to correct a sentence would almost always be subject to criminal appeal time limits (but not always, since the defendant might not be in custody at that time), while a petition for a writ of coram nobis would never be criminal, because a defendant is by definition out of custody. Motions under Rule 41(e) and the Hyde Act would probably be "civil," because they will most often (though not always) be filed by a person who is out of custody. Thus, this rule provides a way of classifying motions that more or less corresponds with the policy that supports it.

The drawback to using this policy to justify a rule is that it is inconsistent with Rule 11 governing § 2255 motions. By definition, § 2255 movants are "in custody" and yet § 2255 motions are explicitly designated as "civil" for purposes of appellate time limits.[2] To the extent that the

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[2] It might be possible to change the rule governing § 2255. This may not be wise as a policy matter, however, because the potential alternative to § 2255, a writ of habeas corpus under

Committee takes § 2255's civil time limits as the expression of a policy that it does not wish to disturb (and with potentially good reason, given the interchangeability between § 2255 and § 2241), this policy could still provide a workable rule -- every post-judgment motion in a "criminal" case, with the exception of a Rule 35 motion or the direct appeal of the conviction or sentence, is to be treated as a "civil" motion for time purposes. This would provide for consistency and clarity, albeit at the expense of theoretical crispness (which would mandate that all motions filed while the movant is likely to be in custody be deemed criminal). This trade-off could nevertheless be justified as a necessary -- and reasonable -- balance of competing policies.

(2) *Finality of convictions demands shorter time limits.* In numerous opinions, the Supreme Court has repeatedly emphasized the importance of bringing an end to constant litigation over criminal convictions. See, e.g., Teague v. Lane, 489 U.S. 288 (1989). Shorter time limits for appeals of post-judgment motions would certainly serve the goal of bringing post-conviction litigation to an end more quickly.

As one might expect, this policy would dictate a rule that treated any litigation touching upon the validity of the underlying conviction or sentence as "criminal" for purposes of FRAP 4. This would call for Rule 35 motions, § 2255 motions, coram nobis petitions, and any All Writs Act petitions attacking the conviction or sentence to be deemed "criminal." Rule 41(e) motions and Hyde Amendment actions, because they do not affect the validity of the underlying conviction or sentence, could conceivably be deemed "civil."

The difficulty with this approach is that it ignores the current treatment of § 2255 motions as "civil." It would allow for "gaming" as defendants attempt to file § 2255 motions or § 2241 motions -- which are treated civilly -- in lieu of coram nobis or other All Writs Act filings. Thus, this may not be an ideal rule.

(3) *Remedial / punitive nature of the relief sought.* Some courts have suggested that the nature of the relief sought by the order appealed should dictate the classification. Appeals of orders that are punitive should be treated like criminal motions, while those seeking remedial relief should be treated like civil motions. Judge Easterbrook's proposal is a variant of this approach, as he would deem as criminal the appeal of orders that involve a "sentence of imprisonment or a criminal fine," see Judge Easterbrook letter at 2 -- both of which are arguably "punitive."

Neither the broader principle nor Judge Easterbrook's proposal seems workable. With respect to the former, the difference between motions that are "remedial" in nature and those that are "punitive" in nature would often be a very difficult one to discern. The Supreme Court has had a great deal of difficulty in distinguishing between the two in its Double Jeopardy jurisprudence, see,

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28 U.S.C. § 2241, is still treated as "civil" under the relevant case law. Because, as discussed above, consistency is important, changing the time limits governing § 2255 may lead to a rash of § 2241 petitions seeking leave to proceed under § 2241 on the ground that § 2255's new time limits may be "unavailable" or "ineffective" under § 2255's "safety valve" language.

e.g., United States v. Ursery, 518 U.S. 267 (1996), and the instant situation is unlikely to fare much better. While Rule 41(e) motions and Hyde Amendment motions appear to be "remedial," so is almost every other type of motion directed at the criminal conviction or sentence -- Rule 35 motions, for example, are "remedial" insofar as they "remedy" an unlawful or invalid conviction or sentence. To the extent the difference between "remedial" and "punitive" turns on whether the type of relief sought is monetary versus declaratory or injunctive, this distinction may also be clumsy and unclear. See, e.g., Heck v. Humphrey, 512 U.S. 477 (1994) (distinguishing between § 2241 and 42 U.S.C. § 1983 actions based on the remedy sought); Edwards v. Balisok, 520 U.S. 641 (1997) (same).

Judge Easterbrook's proposal may suffer from many of the same infirmities. Nearly every type of post-judgment motion except for Hyde Amendment claims and Rule 41(e) motions attack a "sentence of imprisonment or a criminal fine" -- either directly (in the case of a direct appeal) or, most commonly, collaterally (in the case of § 2255 motions, coram nobis petitions, or Rule 35 motions). Judge Easterbrook does not appear to advocate this straightforward reading of his proposed rule, however, as he notes that coram nobis would likely be "civil" under his proposed rule, see id., and he does not seem to advocate changing the "civil" nature of § 2255 motions under Rule 11 of the 2255 Rules. Thus, without further clarification, this rule also seems unworkable.

(4) *Judicial economy / identity of issues.* Judge Motz of this Committee wrote, in a concurring opinion in United States v. Holland, 214 F.3d 523 (4th Cir. 2000), that post-conviction motions should be deemed "criminal" if they would involve resolution of the same issues contested at trial (e.g., guilt or sentencing). Thus, in her view, because Hyde Amendment awards and Rule 41(e) motions turn on the validity of the underlying prosecution, they should be deemed "criminal" for purposes of FRAP 4. This policy would dictate a rule that deems almost every post-conviction motion "criminal." Such a rule would serve the important purpose of reducing delay in proceedings arising out of criminal matters. Nevertheless, for the reasons noted above, this rule might be inconsistent with the current rules governing § 2255 motions.

3. Conclusions

As noted at the outset, the issues here are devilishly complex. The Department of Justice is not yet ready to make a formal proposal to the Committee, but we are working on one. As between listing the various motions explicitly in a new rule, or announcing a broad principle, it may be of greatest assistance to judges and litigants to list the particular types of motions in a rule, with language in an Advisory Note explaining the rationale behind the classifications, thereby providing courts with a helpful reference as they are forced to examine new pre- and post-conviction filings that may be created in the future. In any event, I hope to be able to propose a new rule at the next meeting after this one.

Sincerely,

Douglas Letter
Appellate Litigation Counsel

02-02

Veronica Nunley
645 Hummingbird Drive
Ellijay, Georgia 30540

August 23, 2002

The Honorable Samuel A. Alito, Jr.
Chairman, Advisory Committee on Appellate Rules
United States Court of Appeals
357 United States Post Office and Courthouse
Post Office Box 999
Newark, NJ 07101-0999

RE: BRIEF FILED WITH U.S. SUPREME COURT AUGUST 15, 2002

Dear Judge Alito:

I am corresponding with you as an 11th Circuit Court litigant and on behalf of many others similarly situated concerning the local rules of the 11th Circuit Court. I believe that the issues I am presenting to you are within the jurisdiction of this committee and that it is very important for you to understand the effect of local rules upon 11th Circuit litigants. I have enclosed a copy of my brief for your information. I do anticipate, with all due respect, that you will reply to my letter.

What can I do to have you read my letter? I fear that everything I write in this letter will fall on deaf ears and that I am nothing to the court system, that I don't exist. I am just a plain Jane Doe -- a faceless and nameless member of the public. I do not have a degree in anything. I am not skilled in the law. Fortunately for me, I can speak, read and write. I know that a lot of folks in this country do not have the ability to write a letter to you. Those are the folks along with many others like myself who assume that they have a perfect right to justice and that the courts will do whatever is necessary to uphold their rights under the Constitution for the United States of America and not to obstruct them.

What am I supposed to do when I enter the court system and find that the court itself has bolted the doors to justice? How am I supposed to deal with a court that is hostile to me and tells me that I don't belong there? To whom am I supposed to turn when the courts are accountable to no one? To whom am I supposed to seek a remedy? I am not learned in the law as court officers are, but. I can discern and I can discriminate and I see that the 11th Circuit Court has instituted local rules that have caused a very serious problem in the administration of justice. There appears to be no remedy and there appears to be no justice because the courts are pitting their will against the will of the people. The will of the people is expressed in our great Constitution for the United States of America in that it provides that

the legislative branch set policy and that the judicial branch settle disputes. Contrary to the will of the American people, the establishment and enforcement of specific 11th Circuit Court local rules set policy, not procedure to settle disputes. The 11th Circuit court has established and enforced local rules that forfeit procedures that the Federal Rules of Appellate Procedure provide to 11th Circuit Court litigants concerning the establishment of the record on appeal through FRAP Rules 3, 10, 11, 12, and 31. As a result, the 11th Circuit Court has inflicted national and state constitutional deprivations and insurmountable burdens upon its litigants in obtaining meaningful access to the courts and meaningful appellate review. The setting of this type of social-judicial policy essentially holds justice hostage. The courts have granted themselves absolute judicial immunity to legislate judicial policy instead of settling disputes, i.e., enacting rules that have the effect of law, that adversely affect the constitutional and substantive rights of litigants. This works a fraud upon the public. JUSTICE being absent, HOPE still remains. HOPE, the sister of JUSTICE, endures through this crisis that we may communicate one to another through reason which is the soul of the law.

Congress, through the Rules Enabling Act of 1988, authorized and delegated rulemaking authority to the judicial branch. Contrary to congressional intent, 11th Circuit local rules do exactly what Congress had forbidden them from doing: abridging, enlarging and modifying substantive rights of litigants before the 11th Circuit Court. Fairness of procedure has been violated by the 11th Circuit Court local rules themselves. As outlined in my brief, the 11th Circuit local rules have established procedures that block its appellants from accessing the record on appeal. The "Rules Chart" at Appendix AA of my brief corroborates that the 11th Circuit local rules evade FRAP rules in relation to the record on appeal and clearly evinces that FRAP rules provide for no such procedures.

I believe that this case is highly unusual and deserving of your critical review. Even if the Supreme Court never hears this case, this committee can initiate changes that will protect the rights of all 11th Circuit Court litigants in their pursuit of justice. Should you need further information, please feel free to contact me at the address listed above.

Very sincerely yours,

Veronica Nunley

Veronica Nunley

cc: Supreme Court of the United States
Office of the Clerk
U.S. Supreme Court Bldg.
One First Street, N.E.
Washington, D.C. 20543-0001

V-B-2 thru 22

September 17, 2002

Hon. Samuel A. Alito, Jr.
United States Court of Appeals
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Proposed Amendments to Federal Rules of Appellate Practice and to Judicial Code

Dear Judge Alito:

Your Honor, on behalf of the Advisory Committee on Appellate Practice, requested suggestions from the Council of Appellate Lawyers regarding amendments to the Federal Rules of Appellate Procedure, to the local rules implementing the Federal Rules and to the Judicial Code. On behalf of the Council, I reply to Your Honor's inquiry.

The Council notes first that the rules work and that the Council has no quarrel with the substance of any Federal Rule of Appellate Procedure or with the local court rules which implement them. Most lawyers handle federal appeals within the circuits in which they practice and are comfortable with the present rules with which they are familiar. The desire for uniformity affects primarily those lawyers who appear in more than the circuit in which their offices are geographically situated.

The Council recognizes that the courts of appeal have in recent years deleted most local rules which simply refer to the corresponding federal rule of appellate procedure. Not all have been eliminated.[1] Such rules add little if anything. It would be preferable if there were no such local rule.

[1]District of Columbia Rules 28(d), 32(a), Second Circuit Rules 11(b), 11(e), 32(b), Third Circuit Rule 32.2(b), Fourth Circuit Rules 12(e), 18, 21(b), Fifth Circuit Rules 22, 28.1, 29.2, 29.3, 32.2, 32.3, 34.2, Sixth Circuit Rules 27(a), 27(g), 30(g), Eighth Circuit Rule 27A(b), Ninth Circuit Rules 15-1, 21-1, 28-1(a), 32-1, 32-3.

Save for the foregoing comment, we have grouped our suggestions into 1) comments regarding the mechanics for appealing, 2) comments regarding the procedure for informing the appellate court what was presented to the trial court, 3) electronic service and filing and 4) interlocutory appeals.

I

MECHANICS FOR APPEALING; FORMS

One would think that the process of appealing should be simple. The appellant files a notice of appeal with the district court clerk together with checks for the appropriate fee. Upon receipt, the clerk files the notice of appeal, notifies the clerk of the court of appeals and transmits to counsel for the appellant a form with which to order transcripts or to certify that no transcript is required. The clerk of the court of appeals, when notified of the appeal, submits to counsel a form notice of appearance and a form certificate of interested persons. Counsel completes the forms and submits them to the proper addressee with whatever fees are required.

To look at the local rules implementing Fed.R.App.P. 3, Fed. R.App.P. 7, Fed.R.App.P. 10(a), Fed.R.App.P. 12 and Fed.R.App.P. 26.1, one would think that this is the judicial equivalent of quantum physics. Local rules with individual nuances abound; most courts of appeal have their own forms, all are substantively identical to the forms appended to the Federal Rules.[2] There may be and probably is a need for local rules to implement the federal rules, but we do not see the need for local rules or for

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[2]District of Columbia Local Rule 26.1, First Circuit Local Rule 3(a), Forms 1, 5, Appearance Form, Second Circuit Local Rule 3(d), Forms for Criminal Notice of Appeal, Local Form C for Civil Appeals, Local Form D for Civil Appeals, Local Form D for Motions, Third Circuit Local Rules 3, 26.1.0, Fourth Circuit Local Rules 3(a), 3(b), 26.1, Forms 1, 5, A, Transcript Request Form, Fifth Circuit Local Rules 3,26.1.1, 28.2.1, Forms 1, 5, Sixth Circuit Local Rule 26.1, Forms 6CA-1,6CA-3,6CA-30, 6CA-53, 6CA-68, Seventh Circuit Local Rules 3, 26.1, Forms 1, 5, Eighth Circuit Local Rules 3B, 26.1A, Appeal Information Form, Ninth Circuit Local Rules 3-1, 3-2, 3-3, 3-4, Forms 1, 5, 6, 7, Tenth Circuit Local Rules 3.1, 3.4, Forms 1, 2, 6, Eleventh Circuit Local Rules 26.1-1, 26-1.2, 26-1.3, Forms 1, 5, Federal Circuit Local Rule 47.3(c), 47.4, Forms 1, 4, 5, 6.

different forms for case information sheets, appearances, corporate disclosure statements or transcript request forms. These items should be uniform throughout the federal system.

II

THE RECORD AND APPENDIX

Fed.R.App.P. 10 and Fed.R.App.P. 11 govern the record on appeal, the procedures required to order the transcript and to identify and marshal the documents and other evidentiary materials that constitute the record on appeal, and the process by which the courts of appeal access those materials. Fed.R.App.P. 30 governs the content and format of the appendix. These rules would seem to involve primarily mechanical implementation of largely logistical matters, but we find that the various circuits follow local rules that differ in ways that can cause confusion for practitioners, particularly among those whose appellate practice involves more than one or two circuits. Of all the areas in which practice among the circuits differs, this topic reflects the greatest differences.

One source of confusion is the interplay between the attorneys' responsibilities under Fed.R.App.P. 30 to provide an appendix and the district court's clerk's responsibilities under Fed. R.App.P. 10 and Fed.R.App.P. 11 to assemble and forward the record. Several courts of appeal dispense with the need to file an appendix and require, instead, that counsel file "excerpts of record," a term which seems to be exactly the same as an appendix.[3] In the other circuits, the district court clerk forwards its entire record to the court of appeals, and the parties must file an appendix with specified contents.[4] We find it difficult to determine if there is any substantive difference.

In some circuits, the complete district court record remains

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[3]Fifth Circuit Local Rule 30.1, Ninth Circuit Local Rule 30-1, Tenth Circuit Local Rule 30.1 and Eleventh Circuit Local Rule 30-1

[4]District of Columbia Local Rule 30, First Circuit Local Rule 30, Second Circuit Local Rule 30, Third Circuit Local Rule 30.3, Fourth Circuit Local Rule 30(a), 30(b), Sixth Circuit Local Rule 30, Seventh Circuit Local Rule 30, Eighth Circuit Local Rule 30A(b) and Federal Circuit Local Rule 30(a)(2).

in the district court. These differences stem at least in part from the language of the rules. For example, Fed.R.App.P. 11(b)(2) requires the district court clerk to forward the documents constituting the record to the circuit clerk. However, Fed.R.App.P. 11(e) allows courts of appeals to refuse to accept the entire record from the district court, and to accept instead a copy of the docket entries. As a result, some courts of appeal provide that the district court record remains in the district court[5] while the entire record is forwarded in other circuits.

If the record remains in the district court, particularly if the district court is not located in the same courthouse as either the court of appeals clerk's office or in the same courthouse in which a panel member maintains chambers, counsel has incentive to include in the appendix more portions of the record than he might otherwise include. This incentive is particularly pronounced in those circuits, such as the Tenth Circuit, in which counsel must designate parts of the district court record as the record on appeal and can be held to have waived an issue if the record support on an issue is insufficient.

There seems to be little disagreement on the fundamental purpose of Fed.R.App.P. 10, 11 and 30 read together: to provide the court of appeals with a convenient opportunity to review the documents and evidence in the court below, especially those portions of the record that pertain to the issues necessary to resolve the appeal. The Council believes that the practice among the courts of appeal should be the same, that the record on appeal should be filed with the clerk of the court of appeals, and that the parties - particularly the appellant - should provide the appellate court with a bound volume of the pleadings and evidence required to analyze the issues. Whether that volume is labeled an appendix or "excerpts to the record" is immaterial.

We suspect that technological advances will soon permit the trial court record to be digitized (save for demonstrative evidence) and presented to the appellate court in some paperless fashion such as a CD-ROM. Such advances will moot this issue. However, while that day may loom on the horizon, it is not yet within the range of practicality for all but a handful of law firms or, we suspect, the courts of appeal.

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[5]Third Circuit Local Rule 11.2, Sixth Circuit Local Rule 11(a)(1), Seventh Circuit Local Rule 11-4.1, Eighth Circuit Local Rule 11A and Federal Circuit Local Rule 11(a)

III

MOTIONS AND BRIEFS

We recognize that there has been a greater uniformity among the circuits since Rules 27, 28, 29, 31 and 32 were revised in 1998. Local rules, however, continue to differ with respect to page, word and line limitations.

Motion practice is not uniform despite the 1998 amendments. Fed.R.App.P. 27(a)(2)(C) does not allow a separate brief in support of or in response to a motion and Fed.R.App.P. 27(d)(3) requires an original and three copies, subject to local option. Notwithstanding, Second Circuit Rule 27(a)(2)(b) requires briefs in support of and in response to motions. First Circuit Rule 27(c) and Tenth Circuit Rule 27.2(B) require briefs, but only in connection with a motion for summary disposition - the First Circuit requiring four copies and the Tenth Circuit an original and seven copies, Several courts require an original and four copies, District of Columbia Rule 27(b), Second Circuit Rule 27(a)(3), Ninth Circuit Rule 27-1(1). Fed.R.App.P. 27(a)(2)(C)(ii) expressly provides that a moving party may not file a proposed order granting the relief requested. Federal Circuit Rule 27(a)(9) requires a proposed order if the order is entered by consent.

There is confusion among lawyers as to the difference between the statement of the case and the statement of facts; geography appears to be a factor in this confusion. Perhaps the content of these sections could be clarified in the rule. There is also overlap between the statement of the case and the statement of the facts and between the summary of argument and the argument. This overlap is felt particularly when local rules reduce the permissible length of briefs. Although Fed.R.App.P. 28(g) permits principal briefs of up to 50 pages and reply briefs of up to 25 pages, Federal Circuit Local Rule 32(a)(7)reduces these limits to 30 pages and 15 pages, respectively subject to Fed.R.App.P. 32(a)(7)(B). We would appreciate guidance as to whether a reply brief by the appellant, in a case involving a cross-appeal, is a principal brief warranting 30 pages or a reply brief warranting only 15, Fed.R.App.P. 32(a)(7)(A), (B)(ii) and as to the color of the cover of such a brief, Fed.R.App.P. 32(a)(2). One could even argue that the rules permit an appellant to file an answer to the appellee's cross appeal (30 page) and a reply to the appellee's opposition (15 pages).

Notwithstanding the Advisory Committee Comment to the 1994 amendment of Rule 25(e),[6] we do not understand why the several circuits require parties to file different numbers of briefs. Except for en banc consideration, all circuits decide appeals in panels of three judges, and the difficulty of distributing briefs to judges whose chambers are not in the same building or city as the clerk should not affect the number of briefs required. Fed. R.App.P. 31(b) requires that parties file 25 copies of each brief and serve two copies served on counsel for each separately represented party. Implementation of this rule varies markedly, and no circuit requires 25 copies.[7] Perhaps Fed.R.App.P. 31(b) should be amended to conform to some lesser, uniform number.

Fed.R.App.P. 32(a)(5)(A) requires that proportionally spaced face be 14 point or higher and that monospaced face not contain more than 10½ characters per inch. This rule is modified by half

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[6]"Subdivision (e). Subdivision (e) is a new subdivision. It makes it clear that whenever these rules require a party to file or furnish a number of copies a court may require a different number of copies either by rule or by order in an individual case. The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order."

[7]See, District of Columbia Rule 31 (original and 14 copies, First Circuit Rule 31(b) (10 copies), Second Circuit Rule 31(b) (10 copies), Third Circuit Rule 31.1 (10 copies), Fourth Circuit Rule 31(d) (8 copies), Fifth Circuit Rule 31.1 (7 copies), Sixth Circuit Rule 31(a) (ultimately 7 copies in two stage procedure), Seventh Circuit Rule 31(b)(15 copies), Eighth Circuit Rule 28Aa (ten copies), Ninth Circuit Rule 31-1 (original and 15), Tenth Circuit Rule 31.5 (original and 7), Eleventh Circuit Rule 31-3 (original and 6), Federal Circuit Rule 31(b)(original and 11).

the courts of appeal, particularly as to proportional fonts.[8]

The mandated content of briefs is not uniform among circuits. Fed.R.App.P. 28(a) lists 11 items for inclusion in an appellant's brief. Many circuits add additional categories.[9] We see little reason for the supplemental rules, all of which make sense and most of which could be either incorporated into the federal rules or discussed in commentary to the federal rules. Even brief covers, though complying with the color scheme of Fed. R.App.P. 32(a)(2), differ.[10] We see little reason for these local rules.

We further believe that the Federal Rules should permit parties to file briefs in a CD-ROM format. Current rules of some circuits already require that a litigant file a brief on diskette with its hard copy brief;[11] the rules should encourage use of the

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[8]District of Columbia Rule 32(a)(1)(11 point acceptable), Second Circuit Rule 32(a) (12 points), Fifth Circuit Rule 32.1 (12 point proportional, 12½ characters monospaced), Seventh Circuit Rule 32(b)(12 points in brief and 11 in footnotes), Tenth Circuit Rule 32.1 (13 point type acceptable), Eleventh Circuit Rule 31-3 (original and 6).

[9]District of Columbia Rule 28(a), Second Circuit Rule 28(2) (10 copies), Third Circuit Rule 28.1, Fourth Circuit Rule 28(b) (8 copies), Fifth Circuit Rule 28.2, 28.3, Sixth Circuit Rule 28 (c), 28(e), Seventh Circuit Rule 28(a), 28(c), Eighth Circuit Rule 28Aa (ten copies), Ninth Circuit Rule 28-2, Tenth Circuit Rule 28.2(C), 28.2(D), Eleventh Circuit Rule 28-1, Federal Circuit Rule 38(a). Other circuits require that portions of the record below be bound with the briefs and consider them either to be a part of the brief or volume one of an appendix, First Circuit Rule 28, Third Circuit Rule 28.1(a)(3), 32.2(c), Sixth Circuit Rule 30(b), Seventh Circuit Rule 30(a), Eighth Circuit Rule 28A(b), Ninth Circuit Rule 28-2.7, Tenth Circuit Rule 28.2(A).

[10]Second Circuit Rule 32(c)(docket number must be at least 1" high), Third Circuit Rule 32.3(a)(rejecting color scheme for briefs filed in support of and in opposition to motions), Fifth Circuit Rule 32.7, Eleventh Circuit Rule 32-2 (specifies thickness of cover page and discusses details of binding).

[11]First Circuit Rule 32(a) and Eighth Circuit Rule 28A(d) require that parties file not only a paper brief but also a floppy

CD-ROM format contains significantly greater memory to store not only the text of the brief but also the text or images of thousands of pages of cases and other supporting materials. A floppy disk does not have such capacity. As (we believe) all computers now contain a "d" drive, any hardship on counsel will probably be in the form of a "learning curve" as attorneys learn how to "burn" a CD-ROM.

We appreciate that for historical reasons, some courts of appeal retain the captions as filed in the court below and that others phrase the captions in the form of Appellant v. Appellee. Although reasons of history and of logic support both formats, we wonder if this, too, should be uniform. On the one hand, uniformity has the virtue of simplicity within the federal system; on the other hand, most cases do not advance beyond the court of appeals and most courts of appeal caption their cases in accordance with local historical custom.

IV

ELECTRONIC SERVICE AND FILING

Under the Federal Rules of Appellate Practice as amended this year to take effect on December 1, 2002, a Court of Appeals may permit papers to be filed by electronic means if the papers are consistent with technical standards set by the judicial conference, Fed.R.App.P. 25(a)(2)(D). Fed.R.App.P. 25(c)(1)(D), to become effective later this year, permits service by e-mail or fax if a party has consented in writing to such service.

Only two circuits discuss electronic filing as we construe the term; most consider electronic filing to be filing by fax,

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diskette. The Eleventh Circuit allows a party to file a diskette with a paper brief, Rule 31-5(a). Fifth Circuit Rule 31.1. and Eighth Circuit Rule 28A(c) require a party to certify what word processing program was employed to produce a paper brief. The Eighth Circuit and the Federal Circuit require that the party filing an electronic brief "certify that the diskette has been scanned for viruses and that it is virus-free," Eighth Circuit Rule 28A(d), Federal Circuit Rule 32(e)(3)(B). The Federal Circuit rule is limited to briefs filed on CD-ROM.

and their rules, while similar, have minor differences.[12] The Council has no difficulty with current rules on filing by fax with prior authorization. Those rules should be expanded to permit electronic filing and service in accordance with the standards of 2002, not those of 1994 when Fed.R.App.P. 25(c) was last amended. The rules of the Eighth Circuit and Eleventh Circuit offer guidance. The Council believes that the rules should permit parties to file briefs in electronic format simultaneously with traditional paper briefs. We also understand that some district courts permit filing of briefs through the PACER system in pdf format; we understand that CD-ROM briefs require a different format.

V

INTERLOCUTORY APPEALS

We believe that the collateral order exception to the final judgment rule requires clarification or modification. There are some situations in which appellate review of an interlocutory order is not only desirable, it is necessary. The exceptions codified in 28 U.S.C. §1292(b) are all appropriate but insufficient. Attempts to codify other classes of interlocutory orders which could be appealed would simply generate new and imaginative argu-

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[12]Only Eighth Circuit Rule 25A and Eleventh Circuit Rule 25-3 discuss electronic filing and electronic service; the Eleventh Circuit also authorizes filing by fax only with prior authorization from the clerk in emergencies and compelling circumstances. Other courts of appeal construe electronic service only as service by facsimile. District of Columbia Rule 25 permits filing and service by fax only in "emergencies or other compelling circumstances;" First Circuit Rule 25 is similar but requires subsequent filing of "hard copies;" Third Circuit Rule 25, Fourth Circuit Rule 25 and Ninth Circuit Rule 25-3.1 permit filing by fax only if authorized in advance by the clerk in emergencies or other compelling circumstance; the rules say nothing about electronic service. The Third Circuit requires subsequent filing of "an original signed document." Similarly, Fifth Circuit Rules 25 and 27.3. Tenth Circuit Rule 25.3 permits filing by fax only if authorized by the clerk; no standards are stated for exercise of the clerk's authority. Federal Circuit Rule 25(b) permits filing of a limited class of documents by fax without prior authorization if the certificate of service states that other parties have also been served by facsimile.

ments to "pigeonhole" issues within and without those classes. Any broader class of interlocutory order which may be appealed should be limited to a case by case analysis with input from the trial judge.

The collateral order doctrine, as it stands, offers some opportunity for immediate appeal from discovery orders and from orders denying claims of privilege, e.g., Pearson v. Miller, 211 F. 3d 57 (3d Cir. 2000) but simultaneously removes the appearance of such an opportunity, e.g., Powell v. Ridge, 247 F.3d 520 (3d Cir. 2001), Bacher v. Allstate Insurance Co. 211 F.3d 52 (3d Cir. 2000).[13] Clarification is desirable. We believe that modification of Fed.R.App.P. 5 presents a better opportunity than case by case exposition. Alternatively, we suggest amendment of 28 U.S.C §1291 to codify an expanded definition of "final judgment."

A trial court should have greater ability to recommend that a court of appeal review an interlocutory order without the necessity for a final judgment if delay until entry of final judgment is likely to moot the issue, if the issue is not resolved within the circuit, if the issue is likely to recur, if there is reason to believe that the court of appeal might adopt the position of the party which did not prevail in the trial court. The Council does not quarrel with the final judgment rule, but it believes that the rule - like all rules - sometimes impedes justice and believes that the policy against interlocutory appeals should be relaxed; trial judges should have discretion to recommend particular orders for immediate appeal subject to review by the court of appeals in a procedure similar to that now employed by Fed.R.App.P. 5. This may require an amendment to the Judicial Code. Cases which might have benefitted from a more liberal rule include, by way of example, Carringer v. Tessmer, 253 F.3d 1322 (11th Cir. 2001)(dismissal of claim for lack of standing not appealable since claims against others remained in case), We, Inc. v. City of Philadelphia, 174 F.3d 322 (3d Cir. 1999)(appeal denied of order denying claim of immunity grounded in First Amendment).

If a trial judge denies certification, it is probable that some parties will still seek immediate review under the collateral order doctrine. While it is theoretically conceivable that a judge could be so blinded to arguments of a party that a denial

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[13]We do not suggest that the confusion is limited to any one circuit.

of certification would violate any standard, we believe that the likelihood of such an event is minimal. More likely, any such bias - particularly if justified by neither the evidence nor the law - would infect the final judgment.

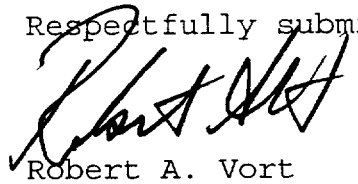
VI

CONCLUSION

In responding to Your Honor's inquiry, comments were solicited by e-mail from Council members. We attach their responses as Appendix I to this report. I attach as Appendix II rule amendments proposed by members of the committee which drafted this response for the Executive Board of the Council. The Council has not endorsed any of these proposals. The Council appreciates the ability to express its views to the Advisory Committee on Appellate Practice, and it states its willingness to provide future input and assistance to the Advisory Committee.

Council members who participated in this response are Charles Craven, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, Pennsylvania; Ronald A. Krauss, Campbell, Campbell, Edwards & Conroy, Wayne, Pennsylvania; Victor H. Olds, Holland & Knight, LLP, New York, New York; Kannon Shanmugam, Kirkland & Ellis, Washington, D.C.; and Robert A. Vort, Pearce, Vort & Fleisig, LLC, Hackensack, New Jersey.

Respectfully submitted,



Robert A. Vort

APPENDIX I

Rule 3.1 Appeal as of Right - Defined

(a) An appeal as of right may be taken from a final order or from an appealable collateral order of a district court.

(b) A final order is any order that

(1) disposes of all claims and of all parties; or

(2) any order that is expressly defined as a final order by statute; or

(3) any order entered as a final order pursuant to subdivision (c) of this rule.

(c) Determination of Finality. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim or when multiple parties are involved, the trial court or other governmental unit may enter a final order as to one or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Such an order is appealable as of right when entered. In the absence of such a determination and entry of a final order, any order or other form of decision that adjudicates fewer than all the claims and parties shall not constitute a final order. In addition, the following conditions shall apply:

(1) The district court is required to act on a motion for a determination of finality under subdivision (c) within 30 days of entry of the order. During the time a motion for a determination of finality is pending, the action is stayed.

(2) A notice of appeal may be filed within 30 days afer entry of an order as amended.

(3) Unless the district court acts on the motion within 30 days of entry of the order, the district court shall no longer consider the motion and it shall be deemed denied.

(4) Any denial or deemed denial of a motion for a determination of finality under subdivision (c) shall be reviewable only for abuse of discretion and only by the

grant of a petition for permission to appeal pursuant to Fed.R.App.P. 5.

(5) The time for ruling a petition for review will begin to run from the date of entry of the order denying the motion for a determination of finality or, if the motion is deemed denied, from the 31st day. A petition for review may be filed within 30 days of the entry of the order denying the motion or within 30 days of the deemed denial.

(d) An appealable collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

(1) Examples of appealable collateral orders include: **[provide list from precedents]**

(2) Examples of non-appealable collateral orders include: **[provide list from precedents].**

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an order is interlocutory and the appeal is not one of right under Fed.R.App.P. 3.1 but is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action and on the district court judge.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Fed.R.App.P. 4(a) for filing an otic of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting it permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion filed within 30 days of the entry of the order, to include the required permission or statement. In that

event, the time to petition runs from entry of the amended order. In the event that the district court denies the motion or fails to decide the motion within 30 days of its filing date, the time to petition runs from entry of the order denying the motion or from the 31st day from the filing date of the motion, whichever time period is the less.

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument

(1) The petition must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and

(E) an attached copy of:

(i) the order, decree, or judgment complained of and any related opinion or memorandum, and

(ii) any order stating the at the district court's permission to appal or finding that the necessary conditions are met.

(2) A party may file an answer in opposition or a cross-petition within seven days afer the petition is served.

(3) The petition and answer will be submitted without oral argument unless the court of appeals orders otherwise.

(c) Form of Papers; Number of Copies. All papers must conform to Rule 32(a)(1). An original and four copies must be filed unless the court requires a different number by order in a particular case.

(d) Grant of Permission; Fees; Cost Bond: Filing the Record.

(1) within ten days after the entry of the order grant-

ing permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Fed.R.App. P. 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Fed.R.App.P. 11 and Fed.R.App.P. 12(c).

Rule 32. Form of Briefs, Appendices and Other Papers

(e) Form of a corresponding electronic brief. In addition, the filing of a paper brief, a party may file a corresponding electronic brief contained on a compact disc-read only memory (CD-ROM), subject to the following requirements:

(1) Content. A corresponding brief must be identical in content to he paper brief. A corresponding brief, however, may contain hypertext links to cited material that was part of the record below, or to cited supporting materials such as cases, statutes, treatises, law review articles, or similar authorities. A corresponding brief must be self-contained and static.

(2) Labeling. A corresponding brief must be labeled with the caption of the case, the number of the case and the type of brief included on the CD-ROM. The same information must also be contained on the packaging of the CD-ROM. In addition, the packaging must contain a statement that sets forth the instructions for viewing the brief and the minimum equipment required for viewing; certifies the corresponding brief does not contain computer viruses; and identifies the software used to check for such viruses.

(3) Time for filing and service. Any corresponding brief must be filed and served no later than seven days after the paper brief is filed or seven days after the joint appendix is filed, whichever is later.

(4) Manner for filing and service. Except for the time of filing, any corresponding brief mut be filed and served in the same manner and the same number of copies as the paper brief.

Rule 47. Local Rules by Court of Appeals

(a) Promulgation

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules to govern those areas of its practice which are not addressed by the Federal rules of Appellate Procedure. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order.

(2) All local rules must be consistent with - but not duplicative of - Acts of Congress and rules adopted under 28 U.S.C. §2072, including but not limited to the Federal Rules of Appellate Procedure.

(3) Each local rule shall be compiled and printed in juxtaposition with the corresponding Federal Rule of Appellate Procedure and local internal operating procedure. Each local rule and internal operating procedure shall be numbered to identify the court and the corresponding Federal Rule of appellate Procedure (e.g., 1st Circuit Rules, 1 Cir. 4. 4). Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is proposed for promulgation or amendment together with an explanation of the need for such rule or amendment. The Administrative Office shall forward those submissions to the Judicial Council for review and approval. No local rule shall be effective without the approval of the Judicial Council.

(4) Upon docketing each appeal or similar initial proceeding, and upon docketing a new appearance of counsel, the circuit clerk shall inform counsel of the existence and the availability of the court's local rules and shall provide counsel with the web site where the current copy of the local rules can be found and offer o provide a printed copy of the rules upon written request. Each court will maintain distribute prin-

ted copies of its local rules free of charge.

(b) Enforcement

(1) A local rule imposing a requirement of form, number of copies, or time of filing for a brief or for a motion (other than a motion for rehearing or with regard to the court's mandate) must not be enforced in a manner that causes a party to lose rights because of a non-wilful failure of the self-represented party or of the party's counsel of record to comply with the requirement. Whenever possible, an opportunity shall be given to comply with the requirement in a reasonably prompt period of time.

(2) No sanction or other disadvantage may be imposed for non-compliance with any procedural requirement not in federal law, federal rules or the local circuit rules unless the alleged violator had been furnished in the particular case with actual notice of the requirement and with an opportunity to comply with the requirement in a reasonably prompt period of time.

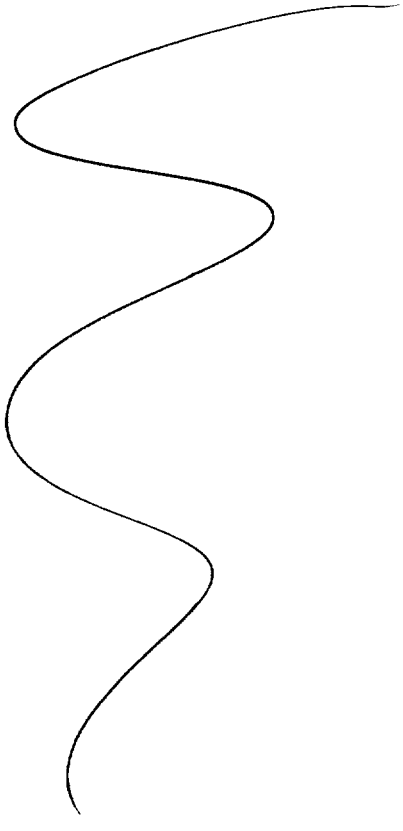
28 U.S.C. §2071 should be revised to reinforce the revisions to Fed.R.App.P. 47 by placing more control in the Judicial Conference over the promulgation of local rules.

Supplemental

Agenda

Book

Materials



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

November 5, 2002

Members of Appellate Rules Committee

Dear Committee Members:

I am sending you two items that I recently received and that relate to our upcoming meeting in San Francisco. First, Mark R. Kravitz, a member of the Standing Committee, sent me a copy of an article that he recently published in the National Law Journal concerning en banc voting. Second, I am enclosing a recent letter from Andrew S. Pollis and Paul L. Nettleton, Co-chairs of the Appellate Practice Committee of the ABA's Section of Litigation.

I look forward to seeing you all in San Francisco.

Sincerely,

Samuel A. Alito, Jr.
United States Circuit Judge

Encs.

cc: John Rabiej

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

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http://www.abanet.org/litigation

October 24, 2002

The Honorable Samuel A Alito, Jr.
United States Court of Appeals for the Third Circuit
United States Post Office and Courthouse Building
1 Federal Square
Newark, New Jersey 07101-0999

Re: Advisory Committee on the Federal Rules of Appellate Procedure

Dear Judge Alito:

We write in response to your solicitation of recommendations from the members of the ABA Litigation Section's Appellate Practice Committee for improvements to the rules governing federal appellate practice. The Co-Chairs of our Appellate Rules and Statutes Subcommittee, Sharon N. Freytag and Laurie Webb Daniel, are very aware of the concern that you expressed regarding the proliferation of conflicting local rules and procedures. In fact, they both testified on this topic at two of the public hearings held several years ago by the White Commission on Structural Alternatives for the Federal Courts of Appeals. After we received your letter, they sought additional input from appellate practitioners across the country on this issue as well as on the question of whether there are additional types of interlocutory orders that should be made appealable pursuant to 28 U.S.C. § 1292(e). Our Subcommittee also coordinated with the corresponding committee of the Council of Appellate Lawyers ("CAL") as it conducted its investigation into these same questions.

We agree with the conclusions expressed in CAL's September 17, 2002 letter to you on this subject. The members of the bar who engage in appellate advocacy in more than one federal circuit favor uniformity in the rules governing the record on appeal, the appendix, word count and font requirements, and electronic filings. We also agree that it is difficult to catalog all of the types of interlocutory orders that should be made appealable, and that the collateral order exception to the final judgment rule could use some clarification. We would add, however, that in some instances it is beneficial to specify by rule or statute the appealability of certain types of interlocutory orders. In particular, it has been suggested that 28 U.S.C. § 1292 be amended to provide for an interlocutory appeal as a matter of right for orders relating to jurisdiction under the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602, *et seq.*

We hope that this general feed-back is of some use to you and your Committee, and we thank you for soliciting our views.

Respectfully,

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MASTER

with Mark

En Banc

COUNTING HEADS SHOULD be simple and straightforward. Not so in the federal courts of appeals. By statute and federal rule, it takes a vote of a "majority of the circuit judges who are in active regular service" to grant an en banc hearing or rehearing. Surprisingly, however, there is no uniform rule on whether recused or disqualified judges are included for purposes of determining whether a case satisfies the "majority" vote threshold.

In fact, there currently are significant differences among the circuits on this important issue, prompting Judge Edward Carnes recently to chide his colleagues for allowing the definition of a "majority" to "vary with geography." *Gulf Power Co. v. FCC*, 226 F.3d 1220, 1225 (11th Cir. 2000).

Federal appellate courts ordinarily hear and decide cases in three-judge panels. However, the circuit courts have long had the power to hear or rehear cases before all of the judges within a circuit—that is, en banc. In confirming this authority in 1941, the U.S. Supreme Court emphasized that hearing cases en banc allows federal courts to avoid conflicts within a circuit. *Textile Mills Corp. v. Commissioner*, 314 U.S. 326 (1941).

It thus "enable[s] the [circuit] court to maintain its integrity as an institution by making it possible for a majority of its judges to control...its decisions." *U.S. v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-90 (1960).

Congress codified en banc hearings in 1948

In 1948, Congress codified the power to hear cases en banc in 28 U.S.C. 46(c). That section now provides that appeals in the federal circuits will be heard by "a panel of not more than three judges...unless hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." Rule 35(a) of the Federal Rules of Appellate Procedure similarly states that a "majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." Except in limited circumstances, senior circuit judges are ineligible to participate in en banc voting.

Neither § 46(c) nor Rule 35(a) defines what constitutes a majority when one or more judges in regular active service in the circuit are recused, disqualified, ill or otherwise unavailable to participate in consideration of the case. Do these disqualified judges count in determining the base on which the "majority" vote required by the statute and rule is calculat-

courts of appeal—a split discussed in detail in a recent publication by the Federal Judicial Center. M. Leary, "Defining the 'Majority' Vote Requirement in Fed. R. App. Proc. 35(a)," Feb. 2002. As the author of this study explains, the circuits have developed three methods of calculating whether a "majority" of judges has voted to hear a case en banc: the "absolute majority rule," the "case majority rule" and the "modified case majority rule."

Eight U.S. circuit courts—the 1st, 4th, 5th, 6th, 8th, 11th, D.C. and Federal—follow the absolute-majority rule. Under this approach, the majority vote is calculated based on the number of all of the active judges in the circuit at the time the vote is taken, including those judges who are ineligible to participate in the vote due to recusal or disqualification.

Gulf Power, cited at the outset, illustrates the operation of this rule nicely. At the time of that case, there were 12 judges in regular active service in the 11th Circuit. Therefore, to obtain a "majority" under the absolute majority rule, at least seven had to vote for rehearing en banc. However, five judges were disqualified in *Gulf Power*, leaving only seven judges actually voting. Of those seven, six favored rehearing en banc. Nevertheless, since a vote of seven was needed to reach a "majority" under the absolute-majority rule, the court denied the request for rehearing en banc.

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Proponents of the absolute-majority approach focus on the goals of en banc review, which are to allow a majority of the circuit to control, and secure uniformity, in the court's decisions. Those purposes are best served, they argue, by ensuring that the decision to grant en banc review reflects the views of a majority of the active judges in the circuit. *Zahn v. International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring).

CLASS

R. Kravitz

Voting

minority of circuit judges to thwart rehearings. In *Gulf Power*, for example, a single judge was able to block a rehearing en banc favored by six of the circuit's judges. "Consequently, a panel decision supported by only a small minority of [a circuit was], because of recusals...insulated from reconsideration in banc." *Lewis v. University of Pittsburgh*, 725 F.2d 928-29 (3d Cir. 1984).

A judge questions the absolute-majority rule

Carnes has also questioned whether the absolute-majority rule truly does guarantee that the circuit's majority controls the law of the circuit, especially today when so many circuit panels are comprised of senior visiting judges. As he asked rhetorically in *Gulf Power*: "What possible justification can there be for the absolute majority rule—why make it possible to have the law of the circuit determined by one active judge against the views of six others, or by a senior and a visiting judge or two visiting judges against the views of six judges in active service?" 226 F.2d at 1223.

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To address these concerns, four circuits—the 2d, 7th, 9th and 10th—have developed the case-majority rule.

Under this approach, the vote required to hear a case en banc is determined solely on the number of judges who are eligible to participate in the particular case. "Neither vacancies nor disqualified judges [are] counted in determining the base on which 'a majority...' [is] calculated...for purposes of ordering a hearing or rehearing en banc." 2d Cir. Local R. 35.

This approach thus eliminates the possibility that recused or disqualified judges can influence the result in cases in which they are ineligible to vote.

As *Gulf Power* illustrates, the case-

thereby confirming Carnes' lament that the definition of "majority" does indeed vary by geography.

The 3d Circuit is the only one to have opted for the modified-case-majority rule, an approach that is billed as a compromise between the absolute- and case-majority rules. Both the case-majority rule and the 3d Circuit's modification exclude recused or disqualified judges from the base when calculating the majority needed for en banc review.

However, under the modified approach, the number of judges eligible to vote for rehearing in any particular case must constitute a majority of the regular judges in active service in the circuit. 3d Cir. Local R. 35.3.

Here is how the rule works. If the 3d Circuit has 10 judges in regular active service and five are recused or disqualified, that case cannot be reheard en banc.

For in that circumstance, the number of judges eligible to vote for rehearing en banc is less than a majority of active judges in the circuit. If, however, only four judges are recused, the votes of only four of the remaining six judges are all that is needed to satisfy the majority-vote requirement. The absolute-majority rule, by contrast, would require the vote of all six of the eligible judges to hear the case en banc.

According to its proponents, the 3d Circuit's modified approach permits the court to hear those cases that at least a substantial minority in the circuit believes are important.

At the same time, the rule ensures that decisions are not issued by "en banc" panels that include only a minority of the judges in the circuit. Still, the rule can sometimes produce anomalous results as the examples cited above illustrate. For, in the first example, a case that obtained the votes of five of the circuit's judges could never be considered en banc, while in the second example, a case that garnered the votes of only four judges could be heard en banc.

As if the disparate approaches among the circuits were not confusing enough, several circuits have themselves flip-flopped over the years. The 2d and 9th circuits—once devotees of the absolute-majority rule—now fall in the case-majority rule camp.

Yet, during the same period, the 4th and 8th circuits went in precisely the opposite direction. They now champion the absolute majority rule, even though they once followed the case majority approach. And until it fashioned its modified-case majority approach, the 3d Circuit adhered to the absolute majority rule. See generally, M. Leary, supra.

Almost 20 years ago, Judge Arlin Adams warned that "the current lack of uniformity among the circuits on this important issue creates the appearance of right determined by happenstance."

AMERICAN ACADEMY OF APPELLATE LAWYERS

November 11, 2002

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Honorable Samuel A. Alito, Jr.
Chair, Advisory Committee on Appellate Rules
United States Court of Appeals
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Newark, NJ 07101-09999

Your Honor:

I write as President of the American Academy of Appellate Lawyers, an association of 250 leading appellate counsel from across the country.

The Board of Directors of the Academy recently adopted a position paper on unpublished opinions following review by the Fellows. In light of your committee's consideration of this topic at the November meeting in San Francisco, we wanted you to have a copy of the paper.

The Academy will continue to study the issue and anticipates publishing a more extensive discussion in the future. More information about the Academy and the process that led to this position can be found on our website: www.appellateacademy.org.

Very truly yours,

STERNE, KESSLER, GOLDSTEIN & FOX
P.L.L.C.

Kenneth C. Bass, III

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AMERICAN ACADEMY OF APPELLATE LAWYERS

REPORT

Recommendation Regarding Unpublished Opinions And No-Citation Rules

The crisis of volume in the appellate courts in the United States during the last 30 years has brought significant changes to the process of the appellate courts. The adoption of a distinction between published opinions and unpublished opinions frequently coupled with a no-citation rule has become increasingly troublesome.

Expression of some of these concerns can be found in sources such as the symposium issue of The Journal of Appellate Practice and Process, Vol. 3, No. 1, Spring, 2001; The Commission on Structural Alternatives to the Federal Courts of Appeals; The State of New York Committee to Promote Public Trust and Confidence in the Legal System; the vacated opinion of the Eighth Circuit in Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc), and many others. The modern challenge of fulfilling the functions of appellate courts in the face of an overcrowded docket has proved to be neither easy nor simple.

The primary purposes of appellate courts are: (1) to correct error in the trial court; (2) to declare law by enunciating and harmonizing; (3) to do substantial justice; and (4) to supervise the lower courts and provide legitimacy to the process.

Appellate courts meet a strongly felt need for judicial review of alleged error from trial courts. An unsuccessful litigant has lost a dispute. The litigant believes there was an error of law in the process. The litigant is normally entitled to judicial review by an appellate court which will either validate or correct the decision of the trial court.

Appellate courts have multiple constituencies including citizens, litigants, lawyers, trial court judges, and the appellate court judges. These beneficiaries of the process need cases decided correctly, consistently, in accordance with constitutional requirements, and in a manner that achieves public trust and confidence.

To accomplish these goals, there should be an appellate process that is open, visible, knowable, accountable and confidence inspiring. Uncitable, unpublished opinions are neither open, visible, knowable, accountable or confidence inspiring.

The adoption by appellate courts of no-citation rules for unpublished opinions has raised many concerns including:

- The doctrine of judicial precedent as a foundation for the common law.
- Creation of a second class shadow body of law.
- Quality in deciding cases.
- Lack of openness in the judicial branch of government;
- Accountability of appellate courts to the bar and public.
- Accountability of trial courts to the appellate courts, the bar, and the public.
- Equal access to the common law.
- Freedom of speech.
- Right to petition the judicial branch for redress of grievances.
- The nature and function of the appellate judge.
- Article III of the United States Constitution.
- Consistency in deciding cases.
- Harmony in deciding cases.

In most cases in most appellate courts, the process is currently structured so that the written opinion is the only significant vehicle which might enable the process to be open, visible, knowable, accountable and confidence inspiring. Under these conditions, the Academy adopts the following:

Minimum Standard For Appellate Decision

The Academy believes that opinions of appellate courts, whether "published" or "unpublished" should consist at a minimum of: (1) a written opinion; (2) a recitation of the facts; (3) a statement of the issues; (4) a statement of the relief granted; (5) citation to the precedent relied upon; (6) equal legal status with other decisions of the same court; (7) available; (8) searchable; and (9) citable to the court.