ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.
May 15, 2003

Agenda for Spring 2003 Meeting of
Advisory Committee on Appellate Rules
May 15, 2003
Washington, D.C.

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised April 2003

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.	Standing Committee	Awaiting initial discussion 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
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
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 Discussed and retained on agenda 11/02
00-08	Amend FRAP 4(a)(6) 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 Discussed and retained on agenda 11/02
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 Discussed and retained on agenda 11/02
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02
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 Approved by Standing Committee 06/02 Approved by Judicial Conference 09/02 Approved by Supreme Court 03/03
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 Draft approved 11/02 for submission to Standing Committee
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 Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-17	Amend FRAP 32 to eliminate local rule variations regarding content of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
03-01	Amend FRAP 4(a)(4)(A)(vi) to clarify whether reference to "Rule 60" includes 10-day motions filed under Rule 60(a).	Hon. Jon O. Newman (CA2)	Awaiting initial discussion
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion
03-03	Amend FRAP 11 or 12 to forbid returning exhibits to parties unless electronic copies are made.	Hon. John M. Roll (D. Ariz.)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
03-04	Amend FRAP 44 to conform to proposed Civil Rule 5.1.	Civil Rules Committee	Awaiting initial discussion
03-05	Adopt new FRAP 49 to require courts to to issue written opinions in every case.	Prof. Joseph R. Weeks	Awaiting initial discussion
03-06	Adopt new FRAP 3(f) to define parties.	Solicitor General	Awaiting initial discussion

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

I. Introductions

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

II. Approval of Minutes of April 2002 Meeting

The minutes of the April 2002 meeting were approved.

III. Report on June 2002 Meeting of Standing Committee

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

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

IV. Action Items

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

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

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

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

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

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

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

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

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

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

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

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

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

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

* * * * *

Committee Note

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

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

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

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

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

to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

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

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

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

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

written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

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

All that is required to trigger the 7-day period under new subdivision (a)(6)(B) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *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.

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

1. The contents of former subdivision (B) were moved to new subdivision (A), and the contents of former subdivision (A) were moved to new subdivision (B). The subdivisions are now set forth in a more logical order. The rule first refers to the notice that must be missing before a party is eligible to move to reopen (subdivision (A)), and then refers to the notice that triggers the 7-day period to bring such a motion (subdivision (B)).

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

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

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

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

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

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

A member complained about the length of the Note, and wondered in particular whether the Note to new subdivision (B) needs to elaborate upon what constitutes "written" notice. The Reporter responded that omitting such elaboration in the Note would guarantee a circuit split over the definition of "written," meaning that the Committee would have to revisit this rule within a couple of years. The Reporter said that the examples given in the Note are not fanciful; to the contrary, every example is taken from an actual case. The member responded that, if the Note was going to elaborate on the definition of "written," it would be helpful to have that elaboration at the beginning of the Note to subdivision (B), rather than at the end. That would protect a busy practitioner from having to read the two paragraphs about the reasons for the change before getting to the third paragraph elaborating on the meaning of "written." The Reporter said that it would be easy to redraft the Note as the member requested.

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

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

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

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

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

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

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

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc.

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

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

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

Rule 35(a) has been amended to establish a uniform national interpretation of the phrase "majority of the circuit judges who are in regular active service." The federal rules of practice and procedure exist to "maintain consistency," which

Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow three inconsistent approaches to deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

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

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

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

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

One member expressed concern that, no matter what the Committee decides, judges will try to undermine the new rule. The member said that he was concerned that, because of this opposition, an amendment to Rule 35(a) might have unanticipated consequences on such issues

as the assignment of visiting or senior judges to panels. Another member said that she was not sure that an amendment to Rule 35(a) would meet with strong opposition. The focus of judges to date has been on what 28 U.S.C. § 46(c) and Rule 35(a) provide, and not on what is the best policy as an original matter.

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

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

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

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

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

These members — and others — argued that, of the three approaches taken by the courts of appeals, the absolute majority approach can most easily be defended as an interpretation of

§ 46(c). That section requires the vote of "a majority of the circuit judges of the circuit who are in regular active service"; a judge who is disqualified in a particular case is still a judge "in regular active service." Some members argued that the case majority approach also represents a plausible interpretation of § 46(c); after all, four circuits now follow that approach, and others have followed it in the past. All members agreed, though, that the qualified case majority approach was the least likely to be viewed as a simple interpretation of § 46(c), and the most likely to be viewed as superceding the statute.

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

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

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

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

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

* * * * *

(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(b).

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

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

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

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

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

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

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

The Committee took a brief break.

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

The Reporter introduced the following proposed amendments and Committee Notes:

ALTERNATIVE A

Rule 32.1. Non-Precedential Opinions

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

(b) Citation of Non-Precedential Opinions. An opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Committee Note

Rule 32.1 is a new rule addressing the issuance and citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). Subdivision (a) confirms the authority of courts to issue such opinions, and subdivision (b) authorizes the citation of such opinions for their persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim.

Subdivision (a). Subdivision (a) confirms the authority that long has been recognized and exercised by every one of the thirteen federal courts of appeals — the authority to designate an opinion as non-precedential. The courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

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

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

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

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

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

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

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

Subdivision (b). Subdivision (b) confirms that a non-precedential opinion may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing a non-precedential opinion under these circumstances. In part, then, subdivision (b) simply codifies and clarifies existing practice.

Although all of the circuits appear to have permitted the citation of non-precedential opinions in these circumstances, the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

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

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

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

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

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

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

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

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

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

ALTERNATIVE B

Rule 32.1. Citation of Non-Precedential Opinions

An opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Committee Note

Rule 32.1 is a new rule addressing the citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). This is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether designating opinions as non-precedential is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue a non-precedential opinion or forbid any court from doing so. It does not dictate the circumstances under which a court

may choose to designate an opinion as non-precedential or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential.

Rule 32.1 confirms that a non-precedential opinion may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing a non-precedential opinion under these circumstances. In part, then, Rule 32.1 simply codifies and clarifies existing practice.

Although all of the circuits appear to have permitted the citation of non-precedential opinions in these circumstances, the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

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

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

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

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

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

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

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

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

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

ALTERNATIVE C

Rule 32.1. Citation of Non-Precedential Opinions

(a) Related Cases. An opinion designated as non-precedential may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim.

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

Committee Note

Rule 32.1 is a new rule addressing the citation of non-precedential opinions (commonly but misleadingly referred to as "unpublished" opinions). This is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of non-precedential opinions, they generally agree that a non-precedential opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether designating opinions as non-precedential is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue a non-precedential opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as non-precedential or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its non-precedential opinions or to the non-precedential opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of opinions designated as non-precedential.

Subdivision (a). Subdivision (a) confirms that a non-precedential opinion may be cited to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing a non-precedential opinion under these

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

Subdivision (b). Although all of the circuits appear to have permitted the citation of non-precedential opinions in the circumstances identified in subdivision (a), the circuits have differed significantly in the restrictions that they have placed upon the citation of non-precedential opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply through the depth of its research and the persuasiveness of its reasoning.

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

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

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

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

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize non-precedential opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of non-precedential opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, non-precedential opinions are as readily available as precedential opinions. Barring citation to non-precedential opinions is no longer necessary to level the playing field.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

Several concerns were raised about the wording of Alternative B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

* * * * *

(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.

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

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

V. Discussion Items

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

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

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

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

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

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

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

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

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

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

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

- Giving all parties 30 days to appeal all orders in all cases — civil and criminal. This would render irrelevant the distinction between an "appeal in a civil case" and an "appeal in a criminal case." The Committee concluded that this approach would not work as it would provide too little time for the government to decide whether to appeal — and that, in turn, would result in the government filing numerous protective appeals.

- Giving all parties 60 days to appeal all orders in all cases. The Committee rejected this approach as giving too much time to defendants in criminal cases.

- Giving all parties 30 days to appeal in cases in which the government was not a party, and 60 days to appeal in cases in which the government was a party. The Committee rejected this approach, again because it would give too much time to defendants in criminal cases.

- Giving all parties 30 days to appeal all orders in all cases — except that the government (and the government alone) would get 60 days to appeal all orders in all cases. The Committee concluded that this approach was promising, even though it would lengthen the time for defendants in criminal cases to appeal from 10 days to 30 days, and shorten the time for parties in civil cases involving the government to appeal from 60 days to 30 days.

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

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

1. Retaining the status quo.

2. Amending Rule 4 to provide that all parties get 30 days to appeal all orders in all cases, except that the government gets 60 days to appeal all orders in all cases.

3. Amending Rule 4 to provide that all appeals are appeals in a civil case for purposes of Rule 4, with the exception of direct appeals from judgments of conviction entered under Fed. R. Crim. P. 32(d).

4. Adding a new Rule 3.1 that would take the "catalog" approach.

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

B. Items Awaiting Initial Discussion

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

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

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

2. Item No. 02-03 (uniform case information sheet)

3. Item No. 02-04 (uniform notice of appearance)

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

5. Item No. 02-06 (uniform corporate disclosure statement)

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

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

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

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

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

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

8. Item No. 02-09 (FRAP 11(e) — require courts to accept entire record)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2003 Meeting

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

VIII. Adjournment

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

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

THE MINUTES FOR THE JANUARY 16-17, 2003,

STANDING COMMITTEE MEETING

WILL BE SENT TO YOU IN A SUBSEQUENT MAILING

MEMORANDUM

DATE: April 19, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-08

Attached is a third try at a pair of amendments to Rule 4(a)(6). This draft incorporates the changes agreed upon by the Committee at its November 2002 meeting. As directed by the Committee, I added language to the text of Rule 4(a)(6)(B). In addition, at the request of a member of the Committee, I rearranged the Note accompanying the amendment so that it now begins with a description of the meaning of the amendment, rather than with a description of the circuit split that is addressed by the amendment. The member suggested that such a rearrangement might make the Note more "user friendly."

I have tried to make the rearranged Note as clear as possible, but I confess that I find it to be somewhat *less* user friendly than the original Note. A Note that describes how an amendment solves a problem before describing the problem itself is generally not going to be as readily understood as a Note that describes the problem first and the solution second. As a result, judges and attorneys may have to read the rearranged Note *twice*, as they will not be able fully to appreciate the various clarifications at the beginning of the Note until they understand the problem that the Note is intended to address. Although I think that either the rearranged Note or the original Note would suffice, I think the original Note is clearer on first read and thus more user friendly.

Moreover, I question the assumption that, by describing the meaning of the amendment in the first paragraph, we will save time for judges and attorneys. A judge or attorney who is concerned enough about the meaning of the amendment to read the Note is unlikely to stop reading after the first paragraph. How will a judge or attorney know whether there is anything worth reading in the second and third paragraphs if she stops reading after the first paragraph? In short, I fear that the rearrangement of the Note harms clarity while saving no time.

Finally, I do not believe that a Note that devotes three paragraphs to describing an amendment that resolves a four-way circuit split is unduly long. And, generally speaking, I ask the Committee to keep the following in mind when considering the appropriate length of a Note:

1. Notes are written not only for the use of attorneys in court, but for the use of judges, law clerks, attorneys, professors, and others in their offices. When a rule is amended to resolve a four-way circuit split — and thereby effectively to overrule the holdings of several courts of appeals — the Committee should explain the nature of the split, the reasons the Committee acted to resolve the split, and the full meaning of the amendment. This usually cannot be done in fewer than three or four paragraphs.

2. Notes to the Appellate Rules are read in offices and libraries far more often than they are read in court. Attorneys must sometimes read Evidence Rules — and, less frequently, the Civil and Criminal Rules — while in trial or during a short break in court proceedings. But in appellate cases the legal issues are usually identified, researched, and briefed weeks before the oral argument; oral argument is usually limited to 20 to 30 minutes; parties are usually given a chance to submit additional briefing if issues arise unexpectedly at oral argument; and decisions are usually issued weeks after oral argument. Appellate attorneys, unlike trial attorneys, almost

never need to "speed read" their way through a rule to respond immediately to an issue that has arisen unexpectedly in court.

3. Especially in the context of the Appellate Rules, a Note that is too short — that does not provide adequate explanation — will typically create more work for judges and attorneys than a Note that is too long. Take, for example, the following three sentences in the Note to the amendment to Rule 4(a)(6)(B):

> Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed 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 or observed 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.

Each of the issues addressed in these three sentences has arisen — sometimes several times — in real-life cases, and each has either split the circuits or has the potential for doing so. True, adding these three sentences requires judges, law clerks, attorneys, professors, and others to read three more sentences when they study the Note. But omitting these three sentences would likely cause judges, law clerks, attorneys, and professors to have to research the issues that these sentences address, cause judges to have to explain in their opinions why they have determined that the amendment did or did not resolve one of these issues, and, after the inevitable circuit splits develop, cause this Committee to have to amend the rule yet again and to explain that amendment in a Note that is much longer than three sentences. Drafting a Committee Note that is too *short* can epitomize being "penny wise but pound foolish."

Please understand that I am sympathetic to the desire of practitioners to ensure that the Notes are no longer than is reasonably necessary. But I urge the Committee to remember that the

reasonableness of the length of a Note — especially a Note to an Appellate Rule — cannot be judged solely from the perspective of an attorney who must frantically study a Note in the soft-bound West compilations while sitting in a courtroom.

I have included both the original Note to the amendment to Rule 4(a)(6)(B) (modified slightly to take into account the change to the text of the Rule) and the rearranged version of that Note so that the Committee can decide which version it prefers.

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 or observes written notice of the entry from any source, whichever is earlier;

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

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

* * * * *

Committee Note

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

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

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

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

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

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

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

REVISED VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

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.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe 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 observed 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 or observed 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.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits 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 oral 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 oral 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)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal. "[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).

ORIGINAL VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

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 oral 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 oral 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 that a party receive or observe 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 observed 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 or observed 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: April 18, 2003

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.

At its November 2002 meeting, the Committee changed course and decided, by a 5-3 vote (with one abstention), to amend Rule 35(a) to impose the "case majority" approach currently followed by a minority of the circuits. Attached is a draft amendment and Committee Note that would implement the Committee's latest decision.

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. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

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

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

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base

in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The Third Circuit alone qualifies the case majority approach by providing 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.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). 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 two inconsistent approaches in 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.

Both the absolute majority approach and the case majority approach can be defended as reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, 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. Second, the absolute majority approach 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), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

MEMORANDUM

DATE: April 20, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-01

Attached is a revised draft of Rule 32.1 regarding the citation of "unpublished" opinions. I started with "Alternative B" (presented to the Committee at its November 2002 meeting) and made changes to meet some of the concerns that have been expressed by Committee members and by various commentators.

Rule 32.1. Citation of Judicial Dispositions

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all sources.

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

Committee Note

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

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

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat "unpublished" opinion as binding precedent 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 an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

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

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of published opinions and all other sources.

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include 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 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 unpublished opinions differently. It is difficult to justify a system under which the unpublished opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the unpublished 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). And, more 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 unpublished opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and in two years every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913-15. Moreover, "unpublished" opinions are often discussed in the media 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 "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" 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 "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as published opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no published opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no published opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) 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 an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an "unpublished" opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [unpublished opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

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

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* sources that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

NO MATERIALS

U.S. Department of Justice
Civil Division, Appellate Staff
601 D St., NW, Rm. 9106
Washington, D.C. 20530-0001

02-08

DNL
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April 11, 2003

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
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Re: Standardization of Appendix Contents, Designation and Preparation, and Brief Cover and Contents

Dear Patrick:

At the last meeting of the Federal Rules of Appellate Procedure Advisory Committee, I was asked by the Committee to consider and make recommendations concerning an ABA Council of Appellate Lawyers proposal about two issues: (1) whether there should be a uniform national rule concerning the contents and designation and preparation of the appendix and whether that goal would be easily accomplished through the elimination of the current Circuit option in FRAP 30(f); and (2) whether there should be a uniform national rule concerning the covers and contents of briefs.

This letter summarizes the FRAP and the principal permutations that the Circuits have developed with respect to requirements for appendices and briefs. As the discussion makes clear, resolution of these issues is quite complicated. The Circuits have developed widely divergent practices, and although the dissimilar requirements in the local rules underscore the difficulties faced by nationwide practitioners and the desirability of a uniform rule, they also highlight the significant changes that would be needed to create such uniformity. At this stage, the Solicitor General is still considering the issues, and the Department of Justice is not ready to make a specific proposal. I expect to have such a proposal for the Committee's Fall 2003 meeting.

Current State of the Rules

1. Appendices

02-08

At present, FRAP 30 sets out the requirements for the appendix to the briefs on appeal. Rule 30 provides instructions as to the contents of the appendix (including what to include and what to exclude); the methods of designating and preparing the appendix (with allocations of responsibilities

between the appellant and the appellee); the format; the time to file; and the number of copies to be filed.

FRAP 30 also explicitly provides for local variances. FRAP 30(a)(3) states that a Circuit, by local rule or by order in a particular case, may require the filing or service of a different number of briefs; FRAP 30(c) states that a Circuit may provide, in classes of cases or in a particular case, for a deferred appendix; and FRAP 30(f) states that a Circuit, by rule for all cases, classes of cases, or by order in a particular case, may dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record or excerpts of the record that the Circuit requires. (FRAP 30(f) was enacted specifically to avoid the preemption of local rules that at that time dispensed with the appendix. FRAP 30(f) 1967 Advisory Committee Notes.)

The Circuits have developed their own rules in accordance with these provisions, and, in addition, have added to or modified the other requirements set out in FRAP 30. As a result, no two Circuits have the same requirements for the appendix.

Several Circuits have added to the appendix contents, most commonly calling for the inclusion of the notice of appeal, see, e.g., 2d Cir. R. 30(d); 6th Cir. R. 30(f)(1)(D), or, if relevant to the appeal, the filing of the presentence investigation report,[1] see, e.g., 3d Cir. R. 30.3; 6th Cir. R. 30(f)(4); 9th Cir. R. 30-1.8 (only if referenced in the briefs).

02-08

A majority of the Circuits have taken advantage of FRAP 30(a)(3) to provide for the filing of a different number of appendices than the FRAP requires. These range from a low of two in the 10th Circuit, 10th Cir. R. 30.1(D), to a high of 12 in the Federal Circuit, Fed. Cir. R. 30(a)(5), with other Circuits requiring 3, 4, 5, or 6 copies to be filed, see, e.g., 8th Cir. R. 30A(b)(2) (three copies); 5th Cir. R. 30.1.2 (four copies); 9th Cir. R. 30-1.2 (five copies); 4th Cir. R. 30(b) (six copies). In addition, like the approach set out in the FRAP, several Circuits require either fewer or no copies of the appendix to be filed in particular types of cases such as those with in forma pauperis parties or with appointed counsel. See, e.g., D.C. Cir. R. 24(a) (appellant proceeding in forma pauperis must file one copy of a modified appendix, but four copies are preferred; 10 copies are required in the ordinary appeal); 4th Cir. R. 30(c) (six copies must be filed in the ordinary appeal, five for an appointed counsel appeal, and four for an in forma pauperis party that does not have court-appointed counsel).

The Circuits also have developed local rules addressing the designation and preparation of the appendix. FRAP 30(b) provides that parties are encouraged to agree on the contents of the appendix. In the absence of such agreement, the appellant must within 10 days after the record is filed, serve on the appellee a designation, and the appellee may, within 10 days after that, serve a

---

[1] The presentence investigation reports are typically required to be filed at the same time as the appendix, but under separate cover. See, e.g., 6th Cir. R. 30(f)(4) ("counsel shall submit, as a separate volume of the appendix labeled 'Confidential[,]' a copy of the presentence investigation report").

designation of additional items. While a majority of the Circuits have adopted this approach, the Sixth Circuit requires that the parties file a designation with their "proof brief" and then compile the appendix based on the actual items cited in the briefs. 6th Cir. R. 30(b). Some of the other Circuits (such as the Ninth and Tenth Circuits) do not provide for discussion among the parties and instead require that the appellant file an appendix or record excerpts when the appellant's brief is filed, and the appellee may file a supplemental appendix as necessary. 9th Cir. R. 30-1.2, 30-1.6; 10th Cir. R. 30.1(A)(1), 30.2(A)(1).

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02-06

Four Circuits (the Fifth, Ninth, Tenth, and Eleventh) also have taken advantage of the flexibility provided for by FRAP 30(f) and require the filing of record excerpts instead of an appendix. 5th Cir. R. 30.1; 9th Cir. R. 30-1.1(a); 10th Cir. R. 30.1; 11th Cir. 30-1. Additionally, several of the Circuits that ordinarily require the filing of an appendix, provide for the use of record excerpts or the record on appeal in pro se cases, cases proceeding in forma pauperis, social security cases, or habeas appeals. See, e.g., 2d Cir. R. 30(b) (original record instead of appendix in appeals conducted under the Criminal Justice Act, 18 U.S.C. 3006A, in forma pauperis proceedings, and social security cases); 3d Cir. R. 30.2 (no appendix required in habeas corpus and in forma pauperis cases).

2. Briefs

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As noted above, and as this letter illustrates, the issues of standardization for appendices and briefs are quite complex. The Circuits have developed a wide array of local requirements for both of these filings. Although nationwide practitioners (or even attorneys with principally local practices, but who, in a particular case, need to file a brief in another circuit) could obviously benefit from standardized rules, we appreciate the adjustments – and, in some Circuits, significant adjustments – that standardization would require. The Solicitor General is continuing to consider different alternatives, and I hope to be able to present our recommendations at the next meeting after this one.

Sincerely,

Douglas N. Letter

Douglas N. Letter
Appellate Litigation Counsel

02-16
02-17

U.S. Department of Justice
Civil Division, Appellate Staff
601 D St., NW, Rm. 9106
Washington, D.C. 20530-0001

DNL
Douglas N. Letter
Appellate Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

April 11, 2003

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Re: Standardization of Appendix Contents, Designation and Preparation, and Brief Cover and Contents

Dear Patrick:

At the last meeting of the Federal Rules of Appellate Procedure Advisory Committee, I was asked by the Committee to consider and make recommendations concerning an ABA Council of Appellate Lawyers proposal about two issues: (1) whether there should be a uniform national rule concerning the contents and designation and preparation of the appendix and whether that goal would be easily accomplished through the elimination of the current Circuit option in FRAP 30(f); and (2) whether there should be a uniform national rule concerning the covers and contents of briefs.

This letter summarizes the FRAP and the principal permutations that the Circuits have developed with respect to requirements for appendices and briefs. As the discussion makes clear, resolution of these issues is quite complicated. The Circuits have developed widely divergent practices, and although the dissimilar requirements in the local rules underscore the difficulties faced by nationwide practitioners and the desirability of a uniform rule, they also highlight the significant changes that would be needed to create such uniformity. At this stage, the Solicitor General is still considering the issues, and the Department of Justice is not ready to make a specific proposal. I expect to have such a proposal for the Committee's Fall 2003 meeting.

Current State of the Rules

1. Appendices

At present, FRAP 30 sets out the requirements for the appendix to the briefs on appeal. Rule 30 provides instructions as to the contents of the appendix (including what to include and what to exclude); the methods of designating and preparing the appendix (with allocations of responsibilities

designation of additional items. While a majority of the Circuits have adopted this approach, the Sixth Circuit requires that the parties file a designation with their "proof brief" and then compile the appendix based on the actual items cited in the briefs. 6th Cir. R. 30(b). Some of the other Circuits (such as the Ninth and Tenth Circuits) do not provide for discussion among the parties and instead require that the appellant file an appendix or record excerpts when the appellant's brief is filed, and the appellee may file a supplemental appendix as necessary. 9th Cir. R. 30-1.2, 30-1.6; 10th Cir. R. 30.1(A)(1), 30.2(A)(1).

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02-17

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02-16
02-17

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Sincerely,

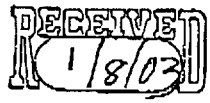
Douglas N. Letter

Douglas N. Letter
Appellate Litigation Counsel

03-01

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT



03-AP-A

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

December 31, 2002

Honorable Samuel A. Alito, Jr.
Committee on Rules of Practice and
Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Sam:

I bring to your attention an issue that has divided a panel of our Court concerning the proper interpretation of Rule 4(a)(4)(vi) of the Federal Rules of Appellate Procedure. Because it is important that provisions concerning timeliness of appeals be as clear as possible, this is a matter the Advisory Committee on Appellate Rules might wish to clarify. The issue is whether the provision of Rule 4(a)(4)(vi) applies to all motions filed under Rule 60 of the Federal Rules of Civil Procedure within 10 days after entry of judgment, or only to ten-day motions filed under Rule 60(b). In other words, are ten-day motions filed under Rule 60(a) covered by Rule 4(a)(4)(vi)?

This issue divided the panel in Dudley v. Penn-America Insurance Co., __ F.3d __, No. 01-9215 (2d Cir. Dec. 5, 2002). In an opinion by Judge Pooler, the panel majority ruled that a Rule 60(a) motion, filed within ten days of a judgment, qualifies under Rule 4(a)(4)(vi) as a motion that postpones the start of the time for appeal until entry of the order disposing of the motion. Judge Pooler's opinion includes the following statements:

> We note that it makes no practical difference in this case whether the district court construed Dudley's motion under Rule 60(a), as of course it did, or under Rule 59(e) as seeking an alteration or amendment to a judgment, or under Rule 60(b) as seeking relief from a mistaken judgment. . . . A timely motion under any of these provisions that also meets applicable time constraints of Rule 4 resets the time to file a notice of appeal to run from the entry of the order disposing of the motion. . . . Moreover, it [Rule 4] makes no distinction between Rule 60(a) and Rule 60(b).

Slip op. p. 5400.

In dissent, Judge Sotomayor noted that Rule 4(a)(4)(vi) specifies motions "for relief under Rule 60," slip op. p. 5415, and contended that a motion under Rule 60(a) "cannot be said to be 'relieving' a party of anything," slip op. 5416. Judge Sotomayor also expressed the view that the Advisory Committee's note to the 1993 amendments indicated an intention to comport with the practice of those circuits that had permitted ten-day motions making a substantive attack on a judgment to extend the time for appeal. Slip op. 5416-17. She also noted decisional law ruling that a trial judge's sua sponte non-substantive correction of a judgment does not restart the time for appeal, citing Farkas v. Rumore, 101 F.3d 20, 22 (2d Cir. 1996), and contended that no distinction should be drawn, for purposes of timeliness of an appeal, between a trial judge's non-substantive correction of a judgment, and a party's non-substantive correction under Rule 60(a). She acknowledged that Rule 4(a)(4)(vi) is not in terms limited to motions under Rule 60(b), but concluded that the other considerations she had identified persuaded her that Rule 4(a)(4)(vi) does not apply to ten-day motions under Rule 60(a).

I take no position on the issue, but believe that when able judges express differing views on a recurring issue like timeliness of an appeal, clarification from the Advisory Committee on Appellate Rules, either by amendment of the rule or some supplement to the note on the 1993 amendment would be helpful. Parties ought not to be left uncertain about this issue, and it should not remain a source of future litigation.

Sincerely,

Jon O. Newman
U.S. Circuit Judge

03-02

prisoner for payments to be made toward the filing fee: an affidavit reflecting the prisoner's assets and income, a certified copy of his or her account statement, and a consent for withdrawals from the trust fund account. Once the prisoner authorizes withdrawals and payments from his or her account and the district court orders the custodial institution to do so pursuant to § 1915(b), he or she ordinarily would not be required to take any other action to comply with the IFP order requiring payment. For this reason, the district court's inquiry into the prisoner's compliance with the IFP order before dismissal also is simplified because the court can simply review the IFP Application itself to confirm that the prisoner had authorized withdrawal and payment of the initial partial filing fee.[8]

III. Conclusion

Because the district court acted *sua sponte* and did not inquire into whether Wilson had complied with the district court's order by requesting or authorizing prison officials to withdraw the partial filing fee from his prison trust fund account, we vacate the district court's dismissal and remand this action for further proceedings consistent with this opinion.

VACATED and REMANDED.

8. A district court may, of course, choose not to include in the IFP Application a form authorizing prison officials to withdraw and make payments from the inmate's account, thereby placing the burden on the inmate to submit a separate consent or authorization form to the custodial institution for withdrawals in order to initiate the payment process. In those cases, the district court, before dismissing the complaint for the inmate's failure to pay a filing fee, must still take reasonable steps as outlined above to determine whether the prisoner has complied with the court's order and whether the failure to pay was caused by the prisoner and not by the prison officials or a lack of funds in the account.

Marie O. PEDRAZA, on behalf of herself and all other persons similarly situated, et al., Plaintiff–Appellee,

v.

UNITED GUARANTY CORPORATION, United Guaranty Residential Insurance Company, Defendants,

Joshua O. Olorunnisomo, Movant–Appellant.

No. 01–15854.

United States Court of Appeals, Eleventh Circuit.

Dec. 9, 2002.

Mortgagors brought class action against their mortgage insurers, alleging violations anti-kickback provisions of Real Estate Settlement Procedures Act (RESPA). Following settlement, the United States District Court for the Southern District of Georgia, No. 99-00239-CV-AAA-1, Anthony A. Alaimo, J., ruled that anticipated attorney fees could be included within appellate cost bond issued by the court. On appeal, the Court of Appeals, Marcus, Circuit Judge, as a matter of first impression, held that: (1) term "costs," as used in rule governing bond for costs on appeal, includes anticipated appellate attorney fees, where statutory fee shifting provision that attends underlying cause of action defines costs to include attorney fees, but (2) anticipated attorney fees were not in-

cludable under rule or under court's inherent powers.

Vacated and remanded.

1. **Federal Courts** ⇐830

Typically, district court's decision to impose cost bond is reviewed for abuse of discretion. F.R.A.P.Rule 7, 28 U.S.C.A.

2. **Federal Courts** ⇐776

Trial court's legal determination as to proper interpretation of rule governing bond for costs on appeal is reviewed *de novo*. F.R.A.P.Rule 7, 28 U.S.C.A.

3. **Federal Courts** ⇐813

Exercise of district court's inherent powers is reviewed for abuse of discretion.

4. **Federal Courts** ⇐776

Determination as to scope of district court's inherent powers is legal conclusion, and as such is reviewed *de novo*.

5. **Federal Courts** ⇐661

Term "costs," as used in rule governing bond for costs on appeal, includes anticipated appellate attorney fees, where statutory fee shifting provision that attends underlying cause of action defines costs to include attorney fees. F.R.A.P.Rule 7, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

6. **Federal Courts** ⇐661

Rule governing bond for costs on appeal did not support inclusion of appellate fees within appellate cost bond issued by district court in action under Real Estate Settlement Procedures Act (RESPA), since RESPA's fee shifting provision did not define costs to include attorney fees, but rather, provided that "the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees." Real Estate Settlement Procedures Act of 1974, § 8(d)(5), 12 U.S.C.A. § 2607(d)(5); F.R.A.P.Rule 7, 28 U.S.C.A.

7. **Federal Civil Procedure** ⇐2721, 2732.1

In addition to enjoying broad discretion to manage litigation before them, federal courts possess inherent power to require the posting of cost bonds and to provide for award of attorney fees; courts possess these powers even if procedural rules exist which govern the same conduct.

8. **Federal Courts** ⇐661

District court's inherent power to manage its affairs did not support its inclusion of estimated attorney fees within appellate cost bond in class action, where appellant was not part of class, and there was no indication that appellant willfully disobeyed any court order or had acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Melvin J. Klein, Kent F. Brooks, Dallas, TX, for Movant–Appellant.

Melinda Lawrence, Patterson, Harkavy & Lawrence, L.L.P., Raleigh, NC, Thomas M. Hefferon, Goodwin, Proctor & Hoar, Washington, DC, Thomas W. Tucker, Dye, Tucker, Everitt, Long & Brewton, P.A., Augusta, GA, Michael D. Calhoun, Gulley and Calhoun, Charles A. Bentley, Jr., Bentley & Associates, P.A., Durham, NC, for Plaintiff–Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before BLACK and MARCUS, Circuit Judges, and UNGARO-BENAGES*, District Judge.

MARCUS, Circuit Judge:

This appeal requires us to address a question of first impression in this circuit: Under what circumstances, if any, can anticipated attorneys' fees properly be included within an appellate cost bond issued by a district court pursuant to either Fed. R.App. P. 7 ("Rule 7") or the court's inherent power to manage its affairs?

The district court concluded that both Rule 7 and its inherent power are legitimate sources of authority for including attorneys' fees within an appellate cost bond, and further, that it was appropriate to rely on both of these bases in holding appellant jointly and severally liable for posting a $180,000 bond, the overwhelming majority of which corresponded to the appellee-class's estimated appellate attorneys' fees. After careful review of the parties' briefs and the body of law that bears on these issues, we conclude that although the district court correctly determined that there are cases in which anticipated attorneys' fees may be included in an appellate cost bond, it erred in holding that this is such a case. Accordingly, we vacate the district court's bond order and remand for further proceedings consistent with this opinion.

I.

The factual and procedural history of this large class action is straightforward but complex. Plaintiff Marie O. Pedraza is the representative of a class of borrowers who obtained mortgage insurance from defendants United Guaranty Corporation and United Guaranty Residential Insurance Company (collectively "UG").[1] The class claimed that in 1996 UG began systematically paying kickbacks to lenders, which in exchange agreed to steer borrowers to UG for their mortgage insurance needs, and that UG thereby violated the anti-kickback provision contained in the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a).[2]

The class filed its complaint on December 17, 1999, and UG promptly responded to these allegations by raising several defenses, including (1) that RESPA did not apply to mortgage insurance; (2) that the "filed-rate doctrine" precluded any recovery; (3) that the McCarran–Ferguson Act barred the application of RESPA; and (4) that claims brought by borrowers who had closed their loans more than one year prior to the filing of the action were barred under RESPA's statute of limitations. UG subsequently moved to dismiss on statute of limitations grounds the claims of all borrowers who had closed their loans prior to December 17, 1998. The district court denied the motion, holding that RESPA's limitations period was subject to equitable tolling for up to three years, provided that the class member pled with particularity that UG had fraudulently concealed its activities, thereby precluding the timely assertion of a claim under § 2607. *See Pedraza v. United Guaranty Corp.*, 114

* Honorable Ursula Ungaro–Benages, United States District Judge for the Southern District of Florida, sitting by designation.

1. This case actually is one of three companion actions that present the same questions. The other two are captioned: *Baynham v. PMI Ins. Co.*, 313 F.3d 1337 and *Downey v. Mortgage Guar. Ins. Corp.*, 313 F.3d 1341.

2. This section provides: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a).

F.Supp.2d 1347, 1358 (S.D.Ga.2000). Accordingly, the class amended its complaint to include allegations that would give rise to equitable tolling for members whose loans had closed between December 17, 1996 and December 17, 1998.

Discovery ensued, and on May 31, 2000 the class moved for certification. Before the court could rule on the motion, however, UG moved for summary judgment based in significant part on the first three defenses listed above. On August 14, 2000, the district court granted summary judgment to UG on the ground that the McCarran–Ferguson Act, 15 U.S.C. § 1012(b),[3] invalidated the class's RESPA claims. The class responded by moving for reconsideration under Fed.R.Civ.P. 59(e), and subsequently by filing a notice of appeal. During the pendency of this motion, settlement negotiations began between UG and the plaintiffs. These discussions ultimately proved fruitful, and on December 15, 2000, the parties filed with the court a proposed settlement.[4] The settlement agreement required UG to pay an amount exceeding $13 million to the class members. Any class member whose claim had accrued between December 17, 1996 and December 17, 1998 was required to submit a form indicating that he or she was unaware of UG's practices prior to the latter date. Although the class agreed to relinquish any future claims against UG, its members retained the right to cancel their mortgage insurance policies. Moreover, UG agreed to permanently cease and desist from two of the alleged kickback practices. On December 20, 2000, the court conditionally certified the class, ordered that the class members be notified, and scheduled a fairness hearing for June 15, 2001.

On February 7, 2001, a notice of pendency of class proposed settlement was filed, and then on March 6, 2001 notice of this settlement was published in nationally circulating newspapers. These notices delineated not only the terms of the settlement, but also the lengthy procedural history of the case and the right of class members to opt out. They also announced an April 24, 2001 deadline for the submission of objections to the settlement. Ultimately, out of 670,000 class members, three filed timely objections and 277 opted out of the class. More than 25,000 members whose claims were potentially subject to equitable tolling submitted claim forms to receive their payments.

On May 17, 2001, Olorunnisomo filed an untimely objection to the settlement, a motion for leave to file a late objection, and a motion for leave to intervene. On June 8, 2001, the district court held a hearing on appellant's motions, and denied on timeliness grounds his requests to intervene and to file an objection. Roughly a week later, the court held its fairness hearing, at which Olorunnisomo was permitted to argue that a Texas subclass, i.e., a subclass comprised of Texas residents, should be created. Specifically, appellant contended that (1) given the facts at bar, Tex. Ins. Code § 21.48A provided class members with an automatic right of recovery; and (2) UG's filed-rate defense was not recognized in Texas. Accordingly, he argued that it was unfair to require that the claims of class members residing in Texas

3. That subsection provides, in pertinent part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

4. Proposed settlements were filed in companion class actions *Baynham* and *Downey* on the same date.

be governed by the less advantageous provisions of Georgia law. The district court considered and rejected these contentions, and approved the settlement with only one minor change, *viz.*, that 20% of the attorneys' fees were to be withheld pending distribution of the settlement proceeds to the class. As a corollary of its approval of the settlement, the court vacated its previous summary judgment order.

On July 6, 2001, Olorunnisomo filed both a Rule 59 motion for reconsideration and a notice of appeal from the orders approving the settlement and denying his request to intervene. He asserted that our then recent holding in *Wooden v. Bd. of Regents*, 247 F.3d 1262 (11th Cir.2001), established that the district court's certification of the class constituted error. However, on September 19, 2001 the district court denied his Rule 59 motion for lack of standing, and appellant amended his notice of appeal to encompass the September 19, 2001 order as well.

While Olorunnisomo's motion for reconsideration was pending, the class moved to require all objectors and would-be intervenors who had filed notices of appeal to post bonds for attorneys' fees, damages, costs and interest that would be lost on appeal. Although appellant opposed the inclusion of anticipated attorneys' fees in the requested bond, he did not contest the amount of the bond sought by the class. The district court determined that attorneys' fees were properly bondable under Fed. R.App. P. 7, and in support of this conclusion it cited the holding of the United States Court of Appeals for the Second Circuit in *Adsani v. Miller*, 139 F.3d 67, 71–76 (2d Cir.), *cert. denied*, 525 U.S. 875, 119 S.Ct. 176, 142 L.Ed.2d 144 (1998). *See Baynham v. PMI Mortgage Ins. Co.*, No. 199–241, slip op. at 6 (S.D.Ga. Oct. 1, 2001) (reasoning that *Adsani*'s approach to Rule 7 "best comports with the 'American Rule'" that absent exceptional circumstances each litigant bears responsibility for its own attorneys' fees). The district court also indicated that it could include attorneys' fees in an appellate cost bond pursuant to its inherent power to manage its affairs. *See id.* at 4.[5]

However, the district court recognized the existence of constraints on its authority to require the posting of such a bond. In particular, it determined that the standard that governs the propriety of including attorneys' fees in an appellate cost bond is set forth in *Independent Fed'n of Flight Attendants v. Zipes*, where the Supreme Court held that attorneys' fees could not be assessed against losing Title VII intervenor-plaintiffs unless their claims were "frivolous, unreasonable or without foundation." 491 U.S. 754, 761, 109 S.Ct. 2732, 2737, 105 L.Ed.2d 639 (1989). The district court concluded that the *Zipes* standard was satisfied in this case, stating: "Having asserted no new reason supporting their contention that the denial of intervention was an abuse of the Court's discretion, the Court finds that the appeal of the denial of intervention is *without foundation.*" *Baynham*, slip op. at 9–10 (emphasis added).

Ultimately, the district court granted the class's bond motion in part and denied it in part,[6] and held six

5. Although the district court's holding technically related to the *Baynham* action, its holding applied with equal force to *Pedraza* and *Downey*.

6. The court granted the requested bond except insofar as the class sought compensation for the interest it would lose while the case was on appeal. It reasoned that plaintiffs were not entitled to any compensation until the conclusion of all appeals, so they were not losing any interest to which they were otherwise entitled as a consequence of any appeal. *See Baynham*, slip op. at 13–14.

objectors,[7] who had manifested an intent to appeal, jointly and severally responsible for posting a $180,000 bond. This bond encompassed both filing and copying costs, but also—and more significantly from the perspective of this appeal—approximately $29,000 per appellant in anticipated attorneys' fees. *See id.* at 12.

On October 15, 2001, Olorunnisomo filed a notice of appeal from the district court's bond order, and it is this appeal that presently is before us. Appellant challenges the order on the grounds that: (1) the term "costs," as used in Fed. R.App. P. 7, does not encompass estimated attorneys' fees on appeal; (2) even if Rule 7 permitted the inclusion of anticipated appellate attorneys' fees in some contexts, RESPA is not such a context, as attorneys' fees are explicitly distinguished from "costs" in § 2607(d)(5); (3) the district court lacked the inherent power to set an appellate cost bond to cover items not encompassed under Fed. R.App. P. 7; (4) district courts are not permitted to impose a bond to cover anticipated sanctions on appeal, i.e., to cover attorneys' fees that, it anticipates, will be shifted as a punitive or deterrent measure; (5) the court erred in determining that Olorunnisomo's appeal of the court's denial of his motion for leave to intervene was "without foundation"; (6) the court's decision to hold Olorunnisomo jointly and severally liable for the class's anticipated costs and attorneys' fees constituted an abuse of discretion; and (7) setting the bond for substantially more than what Olorunnisomo can be required to pay contravened the Fifth Amendment's Due Process Clause.

7. This figure includes two objectors in *Pedraza*, three in *Baynham* and one in *Downey*. In several instances, the objector in question actually is a married couple, the members of which are parties to the same loan, and accordingly are considered a single objector.

II.

[1–4] Typically, a district court's decision to impose a cost bond pursuant to Fed. R.App. P. 7 is reviewed for abuse of discretion. *See Adsani*, 139 F.3d at 71. However, a trial court's legal determination as to the proper interpretation of Rule 7's language—e.g., whether the term "costs" should be read to encompass attorneys' fees—is reviewed *de novo*. *See id.* (citation omitted). The exercise of the court's inherent powers is reviewed for abuse of discretion. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991). However, a determination as to the scope of those powers is a legal conclusion, and as such is reviewed *de novo*. *See generally Christo v. Padgett*, 223 F.3d 1324, 1336 (11th Cir.2000).

[5] Federal Rule of Appellate Procedure 7 provides in pertinent part:

> In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary *to ensure payment of costs on appeal.*

Fed. R.App. P. 7 (emphasis added). This case requires us to determine whether the term "costs," as used in this rule, includes anticipated appellate attorneys' fees. Although we never have addressed the issue before, this precise question was analyzed in 1998 by the Second Circuit. *See Adsani*, 139 F.3d at 71–75. Given the paucity of caselaw on this point—only the D.C. and Third Circuits have joined the Second Circuit in addressing it directly[8]—coupled with the persuasiveness of the *Adsani*

8. The First Circuit has touched on this issue, but has done so by implication only. *See Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir.1987).

court's discussion and fact that the arguments of the instant litigants track those advanced before the Second Circuit, we examine the *Adsani* decision in some detail.

Adsani was a copyright infringement case in which summary judgment was granted by the district court in favor of the defendants.[9] Adsani filed a timely notice of appeal, and the district court required her, pursuant to Fed. R.App. P. 7, to post a bond in the amount of $35,000, a figure which included estimated appellate attorneys' fees. The district court cited in support of its decision the facts that the plaintiff had no assets in the United States and posted no supersedeas bond pursuant to Fed. R.App. P. 8.[10] Adsani appealed this bond order, and argued—precisely as Olorunnisomo does in this case—that the definition of the term "costs" in Rule 7 is supplied by Fed. R.App. P. 39, which plainly excludes from its scope attorneys' fees.[11] The defendants countered by arguing—as the class presently does—that the list of costs contained in Rule 39 is irrelevant, and that instead the propriety of including attorneys' fees in a Rule 7 bond should be evaluated by referring to the definition of "costs" contained in the statutory fee shifting provision that attends the plaintiff's underlying cause of action. In other words, they posited that if the fee shifting provision that applies to the underlying cause of action includes attorneys' fees within awardable "costs," then Rule 7 "costs" may likewise be said to encompass attorneys' fees. Thus, the *Adsani* defendants asserted that in copyright cases, which implicate 17 U.S.C. § 505, *see supra* note 9, Rule 7 bonds may properly include attorneys' fees. Here, the class similarly attempts to support its position by pointing to RESPA's fee shifting provision, which provides that "the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees." 12 U.S.C. § 2607(d)(5).

In *Adsani*, the Second Circuit ultimately sided with the defendants, and in so doing squarely rejected Adsani's argument that Rule 39 supplies the definition of "costs," as that term is used in Rule 7. It did so because Rule 39 contains no definition of "costs" at all, and instead clarifies the circumstances when costs should or may be awarded, *see* Fed. R.App. P. 39(a) & (b), requires the courts of appeals to establish rules pertaining to the taxation of copying costs, *see* Fed. R.App. P. 39(c), sets forth procedural requirements for the obtainment of costs, *see* Fed. R.App. P. 39(d),

9. Because of the subject matter of the dispute, the case implicated the fee shifting provision codified at 17 U.S.C. § 505, which states:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

10. The Second Circuit summarized the distinction between a cost bond under Fed. R.App. P. 7 and a supersedeas bond under Fed. R.App. P. 8 in these terms: "It appears that a 'supersedeas bond' is retrospective covering sums related to the merits of the underlying judgment (and stay of its execution), whereas a 'cost bond' is prospective relating to the potential expenses of litigating an appeal." *Adsani*, 139 F.3d at 70 n. 2.

11. The relevant language is found in Rule 39(e), which says that four distinct costs related to the taking of an appeal "are taxable in the district court for the benefit of the party entitled to costs under this rule." Fed. R.App. P. 39(e). These are: 1) the preparation and transmission of the costs of the record; 2) the reporter's transcript, if needed; 3) the premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and 4) the fee for filing the notice of appeal. *See id.*

and finally lists some costs that are taxable in the district court. *See* Fed. R.App. P. 39(e). Notably, the rule never sets forth an exhaustive list or a general definition of "costs." This analysis is plainly correct. Under no fair reading of the simple, unambiguous language of Rule 39 can an exportable definition of "costs" be perceived in the language of that provision.

This is so, we believe, despite the contrary conclusions of several treatises and the two circuit level decisions other than *Adsani* to address this issue. *See Hirschensohn v. Lawyers Title Ins. Corp.*, 118 F.3d 1575, 3d Cir., 1997, (No. 96–7312, June 10, 1997); *In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C.Cir. 1985); 20 James Wm. Moore et al., Moore's Federal Practice ("Moore's") § 307.10[2], at 307–6 (3d ed. 2002) ("Attorney's fees ... are not considered to be costs under Appellate Rule 7."); Wright, Miller & Cooper, Federal Practice & Procedure ("Wright, Miller & Cooper") § 3953, at 293 (3d ed. 1999) ("The costs secured by a Rule 7 bond are limited to costs taxable under Appellate Rule 39. They do not include attorney fees that may be assessed on appeal.").[12]

Indeed, as the *Adsani* court noted, neither *In re Am. President Lines* nor *Hirschensohn* arose in the context of an underlying statute that provides for the shifting of attorneys' fees. *See* 139 F.3d at 73–74. Accordingly, the Second Circuit, we think correctly, found both of these precedents to be distinguishable and neither to be compelling given the precise contours of the dispute then at bar. Instead, the court took Rule 39 at face value; while that Rule certainly limits the universe of costs on appeal that are taxable in the district court, it does not attempt to—much less can it be read to—set forth an omnibus, generalizable definition of "costs" that governs the construction of Fed. R.App. P. 7. As the *Adsani* court said: "We find that Adsani's argument that Rule 39's 'definition' of costs should be imported into Rule 7 is unavailing because Rule 39 has no definition of the term 'costs' but rather defines the circumstances under which costs should be awarded." 139 F.3d at 75.

12. In concluding that only the costs discussed in Rule 39 may be the subject of a Rule 7 bond, the *Hirschensohn* court relied heavily on the Third Circuit's earlier opinion in *McDonald v. McCarthy*, 966 F.2d 112, 116 (3d Cir.1992). Yet in *McDonald*, the Third Circuit simply joined a long list of courts in reaching the uncontroversial conclusion that attorneys' fees are not included among the "costs" contemplated by Rule 39. *See id.* Although this decision undoubtedly was correct, the exclusion of attorneys' fees from Rule 39 "costs" in no way informs (or purports to inform) the definition of the term "costs" in Rule 7. Indeed, in our view, the *Hirschensohn* court did not adequately explain its application of the valid proposition expressed in *McDonald* in the context of Rule 7. Although the court did cite several treatises in support of its conclusion, including Wright, Miller & Cooper, it is notable that the most recent edition of that treatise relies on *Hirschensohn* as fully one-half of its support for this reading of Rule 7. *See* Wright, Miller & Cooper, Federal Practice & Procedure § 3953, at 293.

We add that *In re Am. President Lines, Inc.*, cited no case law in support of its bare conclusion that "[t]he costs referred to [in Rule 7] ... are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." 779 F.2d at 716. Although the court cited the same treatises as did the *Hirschensohn* court, the current version of Wright, Miller & Cooper relies on *In re Am. President Lines* as the other half of its support for the limitation of Rule 7 "costs" to those discussed in Rule 39. *See* Wright, Miller & Cooper, Federal Practice & Procedure § 3953, at 293. Moore's present edition features this case as its only circuit level support for this proposition. *See* Moore's § 307.10[2], at 307–6.

Instead of gleaning the meaning of Rule 7 "costs" from Rule 39, the *Adsani* court determined that the definition of that term (as it is used in Rule 7) should be derived from the statutory fee shifting provision that attends the plaintiff's underlying cause of action. In support of this conclusion, the Second Circuit relied heavily on the Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). *Marek* was a § 1983 action brought jointly by the father and estate of a police shooting victim. Prior to the rendering of the jury's verdict, the defendants tendered a settlement offer of $100,000. *See id.* at 3–4, 105 S.Ct. at 3013–14. This was rejected by the plaintiffs, who ultimately were awarded $60,000, and subsequently sought attorneys' fees pursuant to 42 U.S.C. § 1988. *See id.* at 4, 105 S.Ct. at 3014. Although these fees totaled $171,692, all but $32,000 of this sum had been incurred after the defendants had made their settlement offer. *See id.* The defendants argued that "costs," as used in Fed.R.Civ.P. 68,[13] included attorneys' fees, and that as such they were not liable for any of the fees incurred by the plaintiffs after the rejection of the settlement offer. *See id.* Accordingly, the question confronting the Supreme Court in *Marek* was whether attorneys' fees are included within the definition of "costs" under Fed.R.Civ.P. 68.

In holding in the affirmative, the Court first acknowledged the general applicability of the American Rule regarding fee shifting, i.e., that each party bears its own attorneys' fees. *See Marek*, 473 U.S. at 8, 105 S.Ct. at 3016; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257, 95 S.Ct. 1612, 1621, 44 L.Ed.2d 141 (1975) (discussing "the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees") (citations omitted). However, the Court proceeded to note that Congress indisputably possesses the authority to abrogate the rule in any given circumstance. *See Marek*, 473 U.S. at 8, 105 S.Ct. at 3016; *Alyeska Pipeline*, 421 U.S. at 260, 95 S.Ct. at 1623 ("[W]hile fully recognizing and accepting the general rule [Congress has made] specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.").

The Supreme Court then set forth a list of statutes that permit attorneys' fees to be awarded as "costs" and observed:

> The authors of Federal Rule of Civil Procedure 68 were fully aware of these exceptions to the American Rule. The Advisory Committee's Note to Rule 54(d) ... contains an extensive list of the federal statutes which allowed for costs in particular cases; of the 35 "statutes as to costs" set forth in the final paragraph of the Note, no fewer than 11 allowed for attorney's fees as part of costs. Against this background of varying definitions of "costs," the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule. In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs

13. That rule provides, in pertinent part, that "[i]f the judgment finally obtained by the offeree is not more favorable than the [prejudgment settlement] offer [that the offeree rejected], *the offeree must pay the costs incurred after the making of the offer.*" Fed. R.Civ.P. 68 (emphasis added).

> properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

Marek, 473 U.S. at 8–9, 105 S.Ct. at 3016.

Federal Rule of Appellate Procedure 7 does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*. Quite the contrary, close scrutiny reveals that there are several substantive and linguistic parallels between Rule 68 and Rule 7. Both concern the payment by a party of its opponent's "costs," yet neither provision defines the term "costs." *See Adsani*, 139 F.3d at 74 ("Rule 7 does not have a preexisting definition of costs any more than Fed.R.Civ.P. 68 ... had its own definition."). Moreover, just as the drafters of Rule 68 were aware in 1937 of the varying definitions of costs that were contained in various federal statutes, the same certainly can be said for the authors of Rule 7, which bears an effective date of July 1, 1968. As such, the reasoning that guided the *Marek* Court's determination that Rule 68 "costs" are to be defined with reference to the underlying cause of action is equally applicable in the context of Rule 7.

As is specifically relevant in this case, section 8 of RESPA, 12 U.S.C. § 2607, was enacted in 1974. *See Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692, 695 (11th Cir.1998). Congress amended this section effective January 1, 1984 to provide that "the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees." 12 U.S.C. § 2607(d)(5). Following this change, Rule 7 was itself stylistically amended on December 1, 1998. Accordingly, the drafters of the present incarnation of Rule 7 must not only have been aware in general terms that numerous federal statutes encompass attorneys' fees within the definition of "costs," *see Marek*, 473 U.S. at 9, 105 S.Ct. at 3016, but also of the fact and nature of RESPA's fee shifting regime. This timetable also weighs in favor of defining Rule 7 "costs" in the context of a RESPA action by referring to the definition of that term contained in § 2607(d)(5).

Also counseling in favor of the adoption of the *Marek* approach in the context of Rule 7 is the fact that this interpretive method is consonant with the purposes underlying that rule, as well as the primary rationales underlying fee shifting statutes generally and § 2607(d)(5) in particular. The purpose of Rule 7 itself appears to have been correctly ascertained by the *Adsani* court, which held that:

> The court has made a determination that this particular appellant poses a payment risk because she has no assets in the United States and has failed to post a supersedeas bond. The purpose of Rule 7 appears to be to protect the rights of appellees brought into appeals courts by such appellants....

139 F.3d at 75.

By contrast, the fee shifting provisions in various federal statutes serve two purposes. The first is "to ensur[e] the effective prosecution of meritorious claims." *Kay v. Ehrler*, 499 U.S. 432, 437, 111 S.Ct. 1435, 1438, 113 L.Ed.2d 486 (1991). Second, fee shifting provisions help to "protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 420, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). Courts have ascribed the former purpose to § 2607(d)(5). *See Glover v. Standard Fed. Bank*, 283 F.3d 953, 965

(8th Cir.2002) ("Congress has guaranteed legal representation under RESPA by permitting attorneys fees and costs as part of each allowable recovery. This permits and encourages individual consumers to raise valid RESPA claims.") (internal citations omitted); *Mullinax v. Radian Guar., Inc.*, 199 F.Supp.2d 311, 318 (M.D.N.C.2002) (stating that the fee shifting provision ensures that the RESPA's substantive facets will be enforced).

If Fed. R.App. 7 is read to include attorneys' fees within the definition of "costs" whenever Congress has so defined the term in the statutory fee shifting provision that attends the plaintiff's underlying cause of action, then in appropriate qualifying cases—e.g., where there is a significant risk of insolvency on the appellant's part—district courts can require that the fees that ultimately would be shiftable be made available *ab initio*. It seems clear to us that the guaranteed availability of appellate attorneys' fees prior to the taking of an appeal will further the goal of providing incentives to attorneys to file (or defend against) such appeals. Notably, this reasoning coincides with the aim of Rule 7, namely, "to protect the rights of appellees brought into appeals courts by ... appellants [who have no assets in the United States and have failed to post a supersedeas bond]." *Adsani*, 139 F.3d at 75. This reading of Rule 7 also furthers the second purpose underlying fee shifting statutes, i.e., to protect defendants from the burdens that stem from being forced to defend frivolous lawsuits and to deter plaintiffs from bringing such suits. Simply stated, an appellant is less likely to bring a frivolous appeal if he is required to post a sizable bond for anticipated attorneys' fees prior to filing the appeal.[14]

For the foregoing reasons, both *Marek* and *Adsani*'s persuasive application of that decision lead us to conclude that the meaning of "costs," as used in Rule 7, should be derived from the definition of costs contained in the statutory fee shifting provision that attends the plaintiff's underlying cause of action.

III.

[6] Although we believe that pursuant to Rule 7 attorneys' fees may be included in an appellate cost bond, this does not answer the ultimate question whether the district court properly included attorneys' fees within the bond in this case. The precise question at issue before the Second Circuit—and before the Supreme Court in *Marek*—is distinguishable from the one presented here, because there is a powerful linguistic distinction between the fee shifting provisions codified at 17 U.S.C. § 505 and 42 U.S.C. § 1988 on the one hand, and RESPA's fee shifting provision, 12 U.S.C. § 2607(d)(5), on the other. Specifically, § 1988 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs*." 42 U.S.C. § 1988(b) (emphasis added). § 505 features identical language. *See* 17 U.S.C. § 505 ("[T]he court may ... award a reasonable attorney's fee to the prevailing party *as part of the costs*.") (emphasis added). By contrast, under RESPA "the court may award to the pre-

14. We note, however, that although the possible inclusion of such fees within a Rule 7 bond serves this goal, appellees will be largely protected against such baseless claims even were we to adopt the approach to Rule 7 urged by Olorunnisomo. This is so because appellate courts may on motion dismiss frivolous claims at the outset (that is, before substantial fees are incurred). *See Am. President Lines*, 779 F.2d at 717. Moreover, upon sustaining such a challenge, an award of fees and double costs would be warranted under Fed. R.App. P. 38. *See Geaneas v. Willets*, 911 F.2d 579, 582 (11th Cir.1990).

vailing party the court costs of the action *together with* reasonable attorneys fees." 12 U.S.C. § 2607(d)(5) (emphasis added). Seizing on this linguistic distinction, Olorunnisomo contends that the reasoning of the Second Circuit does not compel the same conclusion in this case as was reached in *Adsani*. We agree.

Each and every statute cited in *Marek* as including attorneys' fees within the definition of allowable costs features either the words "as part of the costs" or similar indicia that attorneys' fees are encompassed within costs. *See Marek*, 473 U.S. at 8, 105 S.Ct. at 3016. For example, § 77k(e) of the Securities Act of 1933 describes "the costs of ... suit, including reasonable attorney's fees." 15 U.S.C. § 77k(e); *see also* 15 U.S.C. § 78i(e) (same). Indeed, in setting forth the governing legal principle in that case, the Supreme Court observed: "where the underlying statute *defines 'costs' to include attorney's fees*, we are satisfied such fees are to be included as costs for purposes of Rule 68." *Marek*, 473 U.S. at 9, 105 S.Ct. at 3016 (emphasis added). The Court did not say that where the underlying statute permits the award of both costs and attorneys' fees, fees are to be included as costs for Rule 68 purposes. In explaining its holding, the Court stated: "This 'plain meaning' interpretation of the interplay between Rule 68 and § 1988 *is the only construction that gives meaning to each word* in both Rule 68 and § 1988." *Id.*, 105 S.Ct. at 3017 (emphasis added).

In contrast with the statute at issue in *Marek* and those described by the Supreme Court in that case is RESPA's fee shifting provision, § 2607(d)(5). This section, again, provides for the award of the "costs of the action *together with* reasonable attorneys fees." 12 U.S.C. § 2607(d)(5) (emphasis added). Simply stated, the words "together with" are substantively and critically different from the phrase "as part of." Whereas the latter phrase plainly encompasses attorneys' fees *within* the universe of awardable costs, the former connotes that costs and fees are distinct entities that are commonly awardable. Indeed, Justice Brennan explicitly recognized this in *Marek*, as § 2607(d)(2)(b) [15] is designated in the appendix to his dissenting opinion as an example of a statute that does *not* include attorneys' fees within "costs." *See* 473 U.S. at 48, 105 S.Ct. at 3037 (Brennan, J., dissenting).

We must assume that Congress selected the words "together with" carefully, i.e., that while it wanted both costs and attorneys' fees to be awardable under RESPA, it did not want them treated as being indistinct in the context of this statute. *See generally United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("[W]e must presume that Congress said what it meant and meant what it said."). This is especially so given that Congress had on so many previous occasions enacted statutes designating attorneys' fees "as part of costs." To hold otherwise would be to impermissibly ignore this obvious difference between the language of RESPA and these other statutes, and thereby disregard the Supreme Court's admonition in *Marek* that every word of a statute, e.g., "together with," is to be afforded meaningful effect. *See* 473 U.S. at 9, 105 S.Ct. at 3017.

Thus, although we adopt the approach to defining Rule 7 "costs" taken by Second Circuit, that analysis yields the opposite

15. This provision was the historical antecedent of, and linguistically identical to, that presently codified at § 2607(d)(5).

conclusion in this case from the one it produced in *Adsani*. This is so because RESPA's fee shifting provision, § 2607(d)(5), explicitly distinguishes attorneys' fees from awardable "costs." As such, the district court erred in this case to the extent that it relied on Fed. R.App. P. 7 in imposing a cost bond that encompassed anticipated appellate attorneys' fees.

IV.

[7] The district court also relied on its inherent power to manage its affairs as an alternate basis for its inclusion of estimated attorneys' fees within the appellate cost bond that it required of Olorunnisomo. The court was correct in recognizing that in addition to enjoying broad discretion to manage litigation before them, federal courts possess the inherent power to require the posting of cost bonds and to provide for the award of attorneys' fees. *See Chambers*, 501 U.S. at 47–48, 111 S.Ct. at 2134–35 (attorneys' fees); *HMG Prop. Investors, Inc. v. Parque Indus. Rio Canas, Inc.*, 847 F.2d 908, 916 (1st Cir.1988) (bonds). Notably, courts possess these powers "even if procedural rules exist which [govern] the same conduct." *Chambers*, 501 U.S. at 49, 111 S.Ct. at 2135.

However, insofar as a district court employs its inherent power to require one party to pay—or, indeed, bond—his adversary's attorneys' fees, this necessarily constitutes an exception to the American Rule. As the Supreme Court explained in *Chambers*, there are three permissible exceptions of this variety:

> [I]n narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel, even though the so-called "American Rule" prohibits fee shifting in most cases. As we explained in *Alyeska [Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257–59, 95 S.Ct. 1612, 1621–23, 44 L.Ed.2d 141 (1975)], these exceptions fall into three categories. The first, known as the "common fund exception," derives not from a court's power to control litigants, but from its historic equity jurisdiction, and allows a court to award attorney's fees to a party whose litigation efforts directly benefit others. Second, a court may assess attorney's fees as a sanction for the willful disobedience of a court order. Thus, a court's discretion to determine [t]he degree of punishment for contempt permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation. Third, and most relevant here, a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

501 U.S. at 45–46, 111 S.Ct. at 2133 (internal citations and quotation marks omitted); *see also F.D. Rich Co., Inc. v. U.S. for the Use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 129–30, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974) ("We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies."), *superseded by statute on other grounds*, 31 U.S.C. § 3905(j).

[8] In this case, none of the circumstances identified in *Chambers* are pres-

ent. Beginning with the first, although Pedraza's efforts unquestionably benefitted her class, Olorunnisomo is not part of that class. Accordingly, appellant did not benefit from her actions as class representative, and the "common fund exception" is not implicated by the facts of this case. *See Alyeska Pipeline*, 421 U.S. at 257, 95 S.Ct. at 1621 (discussing "the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, *from the fund or property itself or directly from the other parties enjoying the benefit*") (emphasis added). Nor is the second situation contemplated by *Chambers* present here; there is no allegation or indication that Olorunnisomo willfully disobeyed any court order.

This leaves the third scenario mentioned by the *Chambers* Court, *viz.*, that the fee shifting is warranted because Olorunnisomo acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Yet the district court explicitly did not conclude that this standard is satisfied here, holding instead that "the appeal of the denial of intervention is *without foundation*." *Baynham*, slip op. at 10 (emphasis added). Though the court thus found appellant's appeal to be objectively meritless, this is vastly different from the subjective bad faith contemplated by the third exception to the American Rule identified in *Chambers*. Indeed, in *Christiansburg Garment*—from which the *Zipes* standard employed by the district court was derived—the Court explicitly distinguished a claim that is "without foundation" from one advanced in subjective bad faith. *See* 434 U.S. at 421, 98 S.Ct. at 700 ("In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

In imposing the bond against Olorunnisomo, the district court said nothing that can be construed as a finding that appellant had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Instead, the court focused exclusively on the objective merit of his claims. Although the objectively unreasonable advancement of a claim warrants the imposition of statutorily-authorized attorneys' fees against, for example, a Title VII plaintiff (or intervenor, under *Zipes*), it is insufficient to justify an analogous action pursuant to the court's inherent power. *See Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 149 (2d Cir.2001) ("Under the inherent power of the court to supervise and control its own proceedings, an exception to the American Rule has evolved which permits the court to award a reasonable attorneys' fee to the prevailing party when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. '[A]n action is brought in bad faith when the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons.'" (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 40 (2d Cir.1993))) (other citations and internal quotation marks omitted).

Accordingly, although the district court could have required Olorunnisomo to include attorneys' fees in an appellate bond pursuant to its inherent power to manage its affairs, it did not make the requisite factual findings in this case that would have permitted it to do so.

V.

In sum, the district court's requirement that Olorunnisomo post an appellate cost bond that included estimated attorneys'

fees was not justified under Fed. R.App. P. 7 because RESPA's fee shifting provision, § 2607(d)(5), does not define "costs" to include attorneys' fees, and was not warranted under its inherent power to manage its affairs because the court did not find that appellant had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Although the district court was free to require Olorunnisomo to post an appellate cost bond, it was improper to include anticipated attorneys' fees within such a bond.[16] Accordingly, we vacate the court's order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

G. Craig BAYNHAM, on behalf of themselves and all other persons similarly situated, Linnie Baynham, Jerry M. Tucker, Ann Helm, on behalf of themselves and all other persons similarly situated, Plaintiffs–Appellees,

v.

PMI MORTGAGE INSURANCE COMPANY, Defendant,

Elizabeth F. Savage, Ernest H. Kelley, Debra J. Kelley, Movants–Appellants,

Elvis Gates, Melissa Gates, Interested–Parties.

No. 01–15855.

United States Court of Appeals, Eleventh Circuit.

Dec. 9, 2002.

Class action suit was brought against mortgage insurance companies for violation of Real Estate Settlement Procedures Act (RESPA). The United States District Court for the Southern District of Georgia, No. 99-00241-CV-AAA-1, Anthony A. Alaimo, J., approved settlement, and set appellate bond for objecting class members. On appeal from bond order, the Court of Appeals, Marcus, Circuit Judge, held that appellate cost bond should not have included appellees' anticipated attorney fees.

Vacated and remanded.

Federal Courts ⇐661

Where underlying action was for violation of Real Estate Settlement Procedures Act (RESPA), appellate cost bond for plaintiff class members who objected to settlement could not properly include appellees' anticipated attorney fees, absent finding members had willfully disobeyed court order, or had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Real Estate Settlement Procedures Act of 1974, § 8(d)(5), 12 U.S.C.A. § 2607(d)(5); F.R.A.P.Rule 7, 28 U.S.C.A.

Kent F. Brooks, Melvin J. Klein, Dallas, TX, Paul S. Rothstein, Paul S. Rothstein & Associates, N. Albert Bacharach, Jr.,

16. Given this holding, it is unnecessary for us to address any of appellant's various other arguments.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

03-03

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JERRY E. SMITH
EVIDENCE RULES

February 19, 2003

Honorable Samuel A. Alito, Jr.
United States Court of Appeals
357 United States Post Office and
Courthouse
Post Office Box 999
Newark, NJ 07101-0999

Dear Judge Alito:

Judge John M. Roll, a member of the committee, has raised concerns about the widespread practice of district courts returning exhibits to the parties after trial and before the completion of an appeal. He was unsure, however, which committee is the most appropriate one to handle it, the Civil, Criminal, or Appellate Rules Committee. I understand from John Rabiej that, after several communications among the committee chairs and reporters, an informal consensus has developed that your Appellate Rules is the best one to handle the matter. I hope that your committee will take the lead on this issue.

The Criminal Rules Committee remains interested in the issue and would welcome the opportunity to provide input or feedback on any proposal considered by your committee. Please call me if I or anyone on the committee can be of assistance to your committee on this matter.

Sincerely,

Ed Carnes

Ed Carnes

cc: Honorable Anthony J. Scirica
Honorable John M. Roll
Professor Patrick J. Schiltz
Professor Daniel R. Coquillette
Peter G. McCabe, Secretary

03-03

-----Original Message-----

---- Forwarded by John Rabiej/DCA/AO/USCOURTS on 01/30/2003 08 33 AM ----

John Roll

01/23/2003 01:04 PM

To: John Rabiej/DCA/AO/USCOURTS@USCOURTS

cc: Ed Carnes/CA11/11/USCOURTS@USCOURTS, Stephen McNamee/AZD/09/USCOURTS@USCOURTS

Subject: Proposed Agenda Item for Next Meeting

John -

Hope all is well with you. I spoke with Judge Carnes yesterday about a proposed agenda item for our next meeting and he suggested that I contact you. I believe that he felt the topic is important but said that I should verify that it is a topic within the purview of the criminal rules committee.

I write this e-mail to you because I encountered a great deal of difficulty making contact with your office by phone yesterday and today (perhaps due to a storm system) and I want to raise this as soon as possible.

The topic I raise is one I have discussed with you in the past. It deals with the disposition of exhibits after trial and before appeal. The practice in the District of Arizona (and elsewhere for the most part) is to have all trial exhibits returned to the respective parties after trial has been completed. This procedure is followed in both criminal and civil proceedings. Exhibits are returned in criminal cases regardless of the verdict. As a practical matter, this is of concern to me and to several other district jduges with whom I have spoken.

Two matters are of particular concern: 1) the ability of appellate courts to timely retrieve trial exhibits from the respective parties; and 2) the integrity of those retrieved exhibits.

An example of how the current procedure could produce disastrous results may be seen in some of the mega-cases prosecuted in federal court. One matter which has been assigned to me involves a drug tunnel connecting a residence in Naco, Sonora with a mobile home just across the border in Naco, Arizona. The tunnel was over 200 feet long. In this case, many individuals were indicted and 7 tons of cocaine and fully automatic weapons were seized. The origin of the drugs, according to prior presentence reports involving certain defendants, is two major Mexican drug cartels. This summer, lead defendant William Dillon, who was recentlly apprehended in Mexico and returned to the United States, will go to trial in this district. His trial will far exceed in length and complexity the two earlier trials of co-defendants over which I presided. It will also likely involve 400-500 exhibits. Under the current procedure, after the trial is completed, even if Mr. Dillon is convicted and faces mandatory guidelines of life, the respective exhibits will be returned to the government and Mr. Dillon's retained counsel unless and until requested by the Ninth Circuit.

The opportunity for serious mischief in connection with trial exhibits seems too apparent to dispute.

With the blessing of our chief judge, a very small pilot program has been initiated here in Tucson division. All documentary and photographic exhibits admitted into evidence at trial are scanned before

being returned to counsel. The compact disc containing the scanned exhibits is then made part of the court file and is forwarded to the Ninth Circuit in the event of appeal.

The reasons for the current procedure of releasing all exhibits immediately following return of verdict are not insubstantial. Most of us are aware of state court clerks' offices innundated with enormous numbers of trial exhibits committed to their care until requested by an appellate court or otherwise released by court order.

However, technology has now progressed to the point whereby the only options are no longer limited to 1) retention of all exhibits by the clerk's office, or 2) release of all exhibits to counsel. Other methods are available to guarantee the availability and integrity of trial exhibits until appeals have been exhausted.

I fear that the federal judiciary's failure to addres this very serious matter will mean that in only a matter of time, a very high profile matter will be resolved unsatisfactorily because of the unavailability/loss/alteration of one or more trial exhibits.

Although I realize that this matter involves both civil and criminal litigation, if it is within the area of responsibility for the criminal rules committee, I would respectfully request that this item be an agenda item for our next meeting.

Thank you for your consideration of this matter.

Best wishes

John

John M. Roll, U.S. District Judge
District of Arizona - Tucson
(520) 205-4520

03-04

Schiltz, Patrick J.

From: Edward H. Cooper [coopere@umich.edu]
Sent: Thursday, February 27, 2003 1:23 PM
To: pjschiltz@stthomas.edu; theodore.hirt@usdoj.gov
Cc: dLevi@caed.uscourts.gov; John_Rabiej@ao.uscourts.gov
Subject: Draft Civil Rule 5.1 - Statute Challenged


5.1B

Dear Pat and Ted,

The attached WordPerfect 5.1 file is, appropriately, a draft Civil Rule 5.1. I think I have mentioned this project to Pat briefly at some time in the distant past. Now that we have worked it into a form that is at least generally agreeable to the Department of Justice, it seems ripe for consideration by the Appellate Rules Committee. Of which more in a moment.

The most recent amendment of Appellate Rule 44 brought a "mailbox" suggestion from a federal judge that the Civil Rules should do something about implementing the section 2403 requirement that notice be given to an Attorney General when a federal or state statute is challenged on constitutional grounds. The provision in present Rule 24(c) is rather buried away from view. The Department of Justice found the suggestion agreeable because they do not always get notice when they should.

The process of working through the draft has led to several departures from Appellate Rule 44. The most obvious departure is that Rule 5.1 creates a dual notification requirement -- notice must be sent both by the party who raises the constitutional challenge and by the court. The Department believes that this dual obligation is justified by its experience with district-court litigation. At least three committees -- Standing, Appellate, and Civil -- should consider whether that is a basis for distinguishing trial-court practice from appellate practice. The other differences may be a matter of interest as well.

The Civil Rules Committee has not deliberated this proposal beyond the initial determination that a draft should be developed. We expect to have it on the agenda for discussion on May 1. I realize that there is little time for a concerted response by the Appellate Rules Committee. It would help, however, to have any preliminary reaction that might be generated by May 1.

I will be out of the country from tomorrow, February 28, to return to the office on Monday, March 10. It may be useful to chat after you have a chance to think about this draft.

All best, Ed

Notice of Constitutional Challenge to Statute

This material is set out in two parts. Part I describes the origins of the proposal to adopt a new rule governing notice of constitutional challenges to a state or federal statute. The new rule would replace part of present Rule 24(c). Part II sets out a draft Rule 5.1 that has been developed in cooperation with the Department of Justice.

I The Origins

Civil Rule 24(c) and Appellate Rule 44 implement 28 U.S.C. § 2403:

> (a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *
>
> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible, and for argument on the question of constitutionality. * * *

Appellate Rule 44, including a new subdivision (b) that took effect on December 1, 2002, provides:

> **(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding to which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
>
> **(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must

> give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This rule reflects § 2403, but makes some departures from its terms.

Judge Barbara B. Crabb, commenting on the 2002 amendment when it was proposed, added the suggestion that a similar rule should be added to the Civil Rules "to assist district courts in remembering to make the requir[ed] notification." The comment apparently reflects the view that present Rule 24(c) does not provide an appropriate reminder, perhaps because of its relatively obscure location in the rule on intervention.

The Department of Justice, although not the originator of this project, has expressed the view that a new rule will be useful. The Department's experience has been that notice of constitutional challenges to federal statutes is not given to the Attorney General as often as should be. For whatever reason, the combination of § 2403 with Civil Rule 24(c) is not doing the job.

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

> **(c) Procedure.** * * * When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, office, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. There is a plausible argument that these provisions should be relocated. They might be added to Civil Rule 5, which includes service requirements, or they might be established as a new Rule 5.1.

The differences between Appellate Rule 44 and Civil Rule 24(c) highlight the issues that might be addressed if revision is undertaken. Rule 44 imposes a more explicit duty on the party who raises the constitutional question. It transfers the notice requirement from "court" to "clerk." It adds an element found neither in § 2403 nor in Rule 24(c) — the duty of notice applies if the parties include an officer or employee who is not sued in an official capacity. It refers broadly to a "proceeding" rather than the "action" referred to in statute and Rule 24(c). It does not reflect the words that limit the statute to a challenge to an Act of Congress or state statute "affecting the public interest." Finally, Rule 44 seems to apply only if a party raises the constitutional question; both § 2403 and Rule 24(c) apply when constitutionality "is drawn in question," thus reaching a case in which the court raises the question.

The departures of Appellate Rule 44 from § 2403 raise the interesting question whether Rule 44 is intended to supersede the statute to the extent of the departures. Does it require the clerk to give notice without inquiring whether the challenged statute affects the public interest? Does it — as seems apparent — supersede the seeming statutory rule that notice (certification) is not required when an officer or employee is sued in an individual capacity? Would a Civil Rule modeled on Appellate Rule 44 have the same effects?

Because Rule 24(c) does most of the work, there is no urgent need to add this project to the agenda. But there is no particular reason to defer. The issues go far beyond mere style. These questions seem ripe for consideration when agenda time allows.

In working from Appellate Rule 44, attention should focus on the differences between district-court and appellate-court proceedings. The most specific difference is that Civil Rule 4(i)(2)(B) requires service on the United States when an officer or employee is sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The United States will have notice of the action, although it may not have notice of the constitutional challenge if it does not assume the burden of defense. It would be possible to draft the rule to dispense with notice and certification when a United States employee is sued in an individual capacity but not an official capacity. Remember that the statute requires notice only if "the United States or any agency, officer or employee thereof is not a party." A rule goes beyond the statute if it requires notice to the court — and certification by the court to the Attorney General — when an officer of the United States is sued in an individual capacity, whether or not the claim is related to official duties. There is room to dispense with the notice requirement if we wish. But it seems better to adhere to Appellate Rule 44. Reliance on Rule 4(i)(2)(B) alone may not ensure adequate or timely notice to the

Attorney General.

It would be possible to adopt Appellate Rule 44 nearly verbatim, changing only the words that describe the court of appeals and the circuit clerk. The Department of Justice, however, believes that more complicated provisions are desirable for district-court proceedings. Appellate Rule 44 expands on the statute by requiring a party to give written notice to the circuit clerk of a constitutional challenge. Civil Rule 24(c) requires a party to "call the attention of the court to its consequential duty." Both rules recognize the court's § 2403 obligation to "certify" or "notify" the Attorney General. Draft Rule 5.1 adds a requirement that the party who questions the constitutionality of a statute not only file a notice but also send the notice to the Attorney General. This double requirement is designed to provide added assurance of notice. The Department believes that notice is particularly important at the district-court level to ensure an opportunity to participate in developing the record. It adds that the "streamlined nature of appeals" puts circuit clerks in a better position to ensure prompt dispatch of notice early in the appeal process.

The Appellate Rules Committee worked hard in developing the Appellate Rule 44 amendments that took effect in 1998 and 2002. It will be important to work with them to determine whether there are sound reasons to distinguish the Civil Rule from the Appellate Rule, and whether some of the Civil Rule proposals might profitably be adopted into the Appellate Rule. The Standing Committee will demand justification for any distinctions that remain after working through the coordination process. As one more illustration: Rule 24(c) now protects against forfeiture of a constitutional objection. The draft rules carry this provision forward, despite the lack of any comparable provision in Appellate Rule 44.

II Rule 5.1 Drafts

(A) Draft More Like Appellate Rule 44

The first draft Rule 5.1 follows the structure of Appellate Rule 44 more closely than the second draft. The differences of content dictate some changes in structure, and the provisions of Appellate Rule 44 are rearranged to bring the party's notice obligation closer to the beginning of the first sentence in each subdivision:

RULE 5.1. CONSTITUTIONAL CHALLENGE TO STATUTE — NOTICE AND CERTIFICATION

(a) Notice and Certification of Constitutional Challenge to Act of Congress; Intervention.

(1) *Notice.* A party who questions the constitutionality of an Act of Congress must, if no party to the action is the

United States, or an agency, officer, or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) serve [send][1] the Notice, along with the pleading or other paper that raises the question, on [to] the Attorney General of the United States in the manner provided by[2] Rule 4(i)(1)(B).

(2) ***Certification.*** The court must certify to the Attorney General [under 28 U.S.C. § 2403]:

(A) a Notice filed under Rule 5.1(a)(1), and

(B) any question raised by the court as to the constitutionality of an Act of Congress.

(3) ***Intervention.*** The court may set a time not less than 60 days from the Rule 5.1(a)(2) certification for intervention by the Attorney General.

(b) Notice and Certification of Constitutional Challenge to State Statute.

(1) ***Notice.*** A party who questions the constitutionality of a state statute must, if neither the state nor any of its officers, agencies, or employees is a party:

(A) file a Notice of Constitutional Challenge, stating

---

[1] The choice between "serve" and "send" is not easy. Rule 4(i) governs service on the United States. But the element of service on the United States by Rule 4(i)(1)(B) is "by also sending a copy * * * to the Attorney General * * *."

[2] "[U]nder" might seem better style. But Rule 4(i) directly governs only service of summons and complaint. "[I]n the manner provided by" is the Department of Justice suggestion, and seems wise.

the question and identifying the pleading or other paper that raises the question, and

(B) send the Notice, along with the pleading or other paper that raises the question, to the State Attorney General.

(2) ***Certification.*** The court must certify to the State Attorney General [under 28 U.S.C. § 2403]:

(A) a Notice filed under Rule 5.1(b)(1), and

(B) any question raised by the court as to the constitutionality of a state statute.

(3) ***Intervention.*** The court may set a time not less than 60 days from the Rule 5.1(b)(2) certification for intervention by the Attorney General.

(c) No Forfeiture. A party's failure to file and send the Notice or the court's failure to certify the constitutional challenge as required by Rule 5.1(a) or (b) does not forfeit any constitutional right otherwise timely asserted.

(B) More Compact Alternative Draft

This draft departs further from the structure of Appellate Rule 44, recognizing that increased complexity may dictate greater revision:

(a) ***Notice.*** A party who questions the constitutionality of a statute must:

(1) if the statute is an Act of Congress and no party to the action is the United States, or an agency, officer, or employee of the United States sued in an official capacity:

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) serve [send] the Notice, along with the pleading or other paper that raises the question, on [to] the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B);

(2) if the statute is a state statute and neither the state nor any of its officers, agencies, or employees is a party:

(A) file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question, and

(B) send the Notice, along with the pleading or other paper that raises the question, to the State Attorney General.

(b) ***Certification.*** The court must certify to the Attorney General or to the State Attorney General [under 28 U.S.C. § 2403]:

(A) a Notice filed under Rule 5.1(a), and

(B) any question raised by the court as to the constitutionality of an Act of Congress or a state statute.

(c) ***Intervention.*** The court may set a time not less than 60 days from the Rule 5.1(b) certification for intervention by the Attorney General or State Attorney General.

(d) ***No forfeiture.*** A party's failure to file and send a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b) certification, does not forfeit a constitutional right otherwise timely asserted.

(C) "Fully Styled" Draft

This draft seeks to economize by combining the provisions for an Act of Congress and for a state statute. Probably it is too compact — it may be an illustration of drafting that clearly says what it is intended to say only after the reader knows what it means. It is offered for sacrifice.

(a) ***File Notice.*** A party who questions the constitutionality of a statute must file a Notice of Constitutional Challenge, stating the question and identifying the pleading or other paper that raises the question:

(1) if the statute is an Act of Congress and neither the United States nor an agency, officer, or employee of the United States sued in an official capacity is a party, or

(2) if the statute is a state statute and neither the State nor a State officer, agency, or employee is a party.

(b) ***Send Notice.*** A party who files a Rule 5.1(a) notice must send the notice, and the pleading or other paper that raises the question, to:

(1) the Attorney General of the United States in the manner provided by Rule 4(i)(1)(B), or

(2) the State Attorney General if the notice addresses a state statute.

(the balance would be certification, intervention, no forfeiture as above.)

COMMITTEE NOTE

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party who questions the constitutionality of an Act of Congress or a state statute to file a Notice of Constitutional Challenge and send it to the United States Attorney General or State Attorney General. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States or State Attorney General. The notice will better ensure that the Attorney General is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene. The court's § 2403 certification obligation remains unchanged.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and former Rule 24(c) by requiring notice and certification of a constitutional challenge to any Act of Congress or state statute,

not only those "affecting the public interest." It is better to enable the Attorney General to determine whether the Act or statute affects a public interest.

Rule 5.1 __ provides that the court may limit the time for intervention by the Attorney General, but must allow at least 60 days. The 60-day period mirrors the time to answer set by Rule 12(a)(3)(A). [To make this period effective, the court should not make a final determination sustaining a challenge before the Attorney General has responded.]

03-04

(c) Public Officer: Identification; Substitution.

(1) **Identification of Party.** A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.

(2) **Automatic Substitution of Officeholder.** When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 45. Clerk's Duties

(a) General Provisions.

(1) **Qualifications.** The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

(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

References in Text

The Contract Disputes Act of 1978, referred to in subsec. (a), is Pub.L. 95–563, Nov. 1, 1978, 92 Stat. 2383, as amended, which is classified principally to chapter 9 (section 601 et seq.) of Title 41, Public Contracts. For complete classification of this Act to the Code, see Short Title note set out under section 601 of Title 41 and Tables.

Effective and Applicability Provisions

1978 Acts. Amendment by Pub.L. 95–563 effective with respect to contracts entered into 120 days after Nov. 1, 1978 and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub.L. 95–563, set out as a note under section 601 of Title 41, Public Contracts.

1966 Acts. Amendment by Pub.L. 89–506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub.L. 89–506, set out as a note under section 2672 of this title.

§ 2402. Jury trial in actions against United States

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

(June 25, 1948, c. 646, 62 Stat. 971; July 30, 1954, c. 648, § 2(a), 68 Stat. 589; Oct. 26, 1996, Pub.L. 104–331, § 3(b)(3), 110 Stat. 4069.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1996 Acts. Amendment by section 3(b)(3) of Pub.L. 104–331, effective Oct. 1, 1997, see section 3(d) of Pub.L. 104–331, set out as a note under section 1296 of this title.

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(June 25, 1948, c. 646, 62 Stat. 971; Aug. 12, 1976, Pub.L. 94–381, § 5, 90 Stat. 1120.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1976 Acts. Amendment by Pub.L. 94–381 not applicable to any action commenced on or before Aug. 12, 1976, see section 7 of Pub.L. 94–381, set out as a note under section 2284 of this title.

§ 2404. Death of defendant in damage action

A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.

(June 25, 1948, c. 646, 62 Stat. 971.)

§ 2405. Garnishment

In any action or suit commenced by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees. Any person so summoned shall appear in open court and depose in writing to the amount of his indebtedness to the corporation at the time of the service of the summons and at the time of making the deposition, and judgment may be entered in favor of the United States for the sum admitted by the garnishee to be due the corporation as if it had been due the United States. A judgment shall not be entered against any garnishee until after judgment has been rendered against the corporation, nor until the sum in which the garnishee is indebted is actually due.

When any garnishee deposes in open court that he is not and was not at the time of the service of the summons indebted to the corporation, an issue may be tendered by the United States upon such deposition. If, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs.

Any garnishee who fails to appear at the term to which he is summoned shall be subject to attachment for contempt.

(June 25, 1948, c. 646, 62 Stat. 971.)

03-05

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March 4, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed rule change

Dear Mr. McCabe:

This is to request that consideration be given by the Judicial Conference to the adoption of a new rule of appeallate procedure that would require federal appellate courts to issue written opinions for all dispositions. Since it is a proposed appellate procedure change, it presumably should be submitted to the Advisory Committee on Appellate Rules. Specifically, the rule would provide as follows:

Rule 49. Written opinions

The court must issue a written opinion explaining the basis for each disposition. The opinion should expound on the law as applied to the facts of the case and set out the basis for the disposition.

The initial basis for my proposal is that it is required by the constitution. The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. In my view, this due process protection means that every person appearing in a court of the United States is due an explanation from the court for the reasons for its disposition, given the facts and the law. But in addition to being constitutionally required, I believe that my proposed rule change can be supported by powerful arguments of expediency. I have set out below, in summary form, a few of these arguments.

- The necessity for written justification is a powerful preventive of wrong decisions. The Supreme Court has for just this reason in several contexts required administrative officials to justify their decisions. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 267 (1970)(holding that statement of reasons for decision is one of "minimal procedural requirements" to justify termination of welfare benefits); *Morrissey v. Brewer,* 408 U.S.

471 (1972)(holding that due process requires statement of reasons for parole revocation); *Wolff v. McDonnell,* 418 U.S. 539 (1974)(holding that due process requires statement of reasons for revocation of inmate's good time credits); *Goss v. Lopez,* 419 U.S. 565, 581 (1975)(requiring statement of reasons for suspension of student from school). There is no reason why a "reasons" requirement would not assist judicial officers in reaching correct results in the same manner that it assists administrative officers.

A disposition without a written opinion removes the discipline that requires judges to reach decisions that are justified by the law and not simply their personal preferences. Karl Llewellyn's statement of this principle is perhaps the best known.

> In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.

Karl Llewellyn, THE COMMON LAW TRADITION 26 (1960). Professor Llewellyn's observations have been mirrored by many others. As noted by Judge Coffin,

> [a] remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes . . . . Somehow, a decision mulled over in one's head or talked about in conference looks different when dressed up in written words and sent out into the sunlight . . . . [W]e may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.

F. Coffin, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 57 (1980); *see also* Henry Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267, 1292 (1975)("The necessity for justification is a powerful preventive of wrong decisions."); *cf. United States v. Forness,* 125 F.2d 928, 942 (2d Cir. 1942)(Frank, J.)("[A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper.").

- Without written opinions, cases can resolved in a manner inconsistent with other decisions, and blatantly at odds with established law and precedent, thus harming the litigants and undermining the public's confidence in the justice system. This has been widely recognized. As noted by the principal academic commentators in this area, "[a] key characteristic of decisions without opinions is their failure to provide the parties or the court below with any hint as to the court's reasoning. Accordingly, the practice under these rules has been uniformly condemned by commentators, lawyers, and judges." William Reynolds & William Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Court of Appeals,* 78 COLUM. L. REV. 1167, 1174 (1978)(footnotes omitted).
- When an appeals court issues no rationale for its disposition, it makes it virtually impossible to appeal to the Supreme Court. The court may well actually be deciding a case based on a statutory or constitutional interpretation in conflict with the interpretation that is concurrently being given the same statute or constitutional provision by other circuits. But without any requirement to actually articulate the court's rationale, the circuit court split is unknown. The split may continue for years, and effect many litigants, before two circuits actually produce the conflicting written, and published, decisions that reveal the split and and thereby make Supreme Court review possible.
- Federal law (28 U.S.C. § 1291) gives litigants a statutory right to appeal federal district court rulings to the federal court of appeals. Judgments without written opinions abrogate this right, and essentially makes the appeals courts into courts of certiorari. That is, if a circuit court can pick and choose which dispositions it believes suitable for providing a reasoned opinion supporting its disposition and can resolve the rest by simply reciting "we find no reversible error," there is at least the perception created that only the former dispositions have actually been given the court's full attention. This is appropriate for the Supreme Court exercising certiorari review; it is not appropriate for a circuit court to which every litigant has a statutory right to appeal. *See generally* William Richman & William Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition,* 81 CORNELL L. REV. 273, 293 (1996)("Although Congress has given all losing litigants a statutory right to 'appeal,' decisional shortcuts have had the practical effect of transforming the courts of appeals into certiorari courts."); William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform,* 48 U. CHI. L. REV. 573, 626 (1981)("The conclusion is inescapable that, with regard to a large part of their caseload, the circuit courts have

transformed themselves, contrary to congressional mandate, into certiorari courts.").

- Because there is less potential for public scrutiny, the lack of written opinions increase the perception of, and the potential for, corruption in our courts.
- Based on their public statements, many well regarded judges would applaud the rule change that I propose. Justice Stevens is an example.

> The judges [in former times] were guided by few written laws, but developed a meaningful set of rules by the process of case-by-case adjudication. Their explanations of why they decided cases as they did provided guideposts for future decisions and an assurance to litigants that like cases were being decided in a similar way. Many of us believe that those statements of reasons provided a better guarantee of justice than could possibly have been described in a code written in sufficient detail to be fit for Napoleon.

Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 472 (1981)(Stevens, J., dissenting). Judge Patricia Wald of the D.C. Circuit has reached the same conclusion.

> My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the court that a bare signal of affirmance, dismissal, or reversal does not.

Patricia Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge,* 42 MD. L. REV. 766, 782 (1983). Judge Holloway of the Tenth Circuit has agreed.

> [T]he basic purpose for stating reasons within an opinion or order must never be forgotten — that the decision must be able to withstand the scrutiny of analysis, against the record evidence, as to soundness under the Constitution and the statutory and decisional law we must follow, as to its consistency with our precedents. Our orders and judgments, like our published opinions, should never be shielded from searching examination.

In re Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992)(Holloway, C.J., dissenting). Judge Rubin of the Fifth Circuit has reached the same conclusion.

> Every judge should be required to give his reasons for a decision, and those reasons should be sufficient to explain the result to the litigants but also to

> enable other litigants to comprehend its precedential value and limits to its authority.

Alvin Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency,* 55 NOTRE DAME LAW. 648, 655 (1980).

There is widespread recognition of the need for the rule change that I am proposing. Most recently, in the June 27, 2002, hearings on unpublished judicial opinions in the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, Professor Arthur Hellman explicitly made the recommendation that a rule of the type I propose be put in place.

> All cases should be decided by written decisions carefully written to explain who won and shy, considering facts and the weight of all conflicting legal principles no matter how complex. Opinions should teach the parties and the public the appropriate law to be used in all factually similar cases, and explain why conflicting arguments and precedents are rejected. No working hypothesis of result should harden into a final result until it has survived thorough scrutiny by at least three well-trained and experienced minds considering legal argument and precedents that bring to bear the benefit of historical experience. All decisions must carry the warranty that they are decided by legal principles, right or wrong, that have been equally applicable to all similarly situated in the past, or will be for the foreseeable future. That warranty only becomes implicit when each decision becomes a part of the law itself.

Professor Hellman's view has been consistently the view of the organized bar.

> Every decision should be supported, at minimum, by a citation of the authority or statement of grounds upon which it is based. When the lower court decision was based on a written opinion that adequately expresses the appellate court's view of the law, the reviewing curt should incorporate that opinion or such portions of it as are deemed pertinent, or, if it has been published, affirm on the basis of that opinion.

ABA COMMISSION OF STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 58 (1977).

> We recommend that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision. . . . Opinions can be signed or unsigned, published or unpublished, but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court.

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 50 (1975).

> The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions.

Id. at 69.

You should note that the rule change that I propose does not enter the debate over classification of opinions as precedential vs. non-precedential, nor does it prohibit courts from such classification. Nor does it enter the debate over citation of opinions classified as non-precedential.

I would note that most of the discussion on both sides of the non-precedential opinion debate implicitly have been assuming that all opinions receive or should receive written opinions of one sort or another. Even those opposing citation of non-precedential opinions have recognized the value of written opinions in all cases when they have threatened — in Advisory Committee on Appellate Rules meetings and in front of the same House Subcommittee hearings referenced above — to write fewer opinions if citation of non-precedential opinions is allowed. Judge Alex Kozinski said at the June 27, 2002 House hearing:

> 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". . . . And 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 opinion. 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 . . . .

An argument might be made that the problems addressed by the rule change that I am proposing are not sufficiently significant in scope to justify the change. The official statistics on appellate cases decided without comment are provided to the Congress and public each year in Table S-3 of the Annual Report of the Director of the Administrative Office of the Courts,

Leonidas Ralph Mecham. For the most recent three years data currently available, these reports state the following:

Year	Number of Cases w/o Written Comment	% of Total Cases
2001	1356	4.7%
2000	1136	4.1%
1999	1299	4.9%

In my view, these numbers would be too high even if they were accurate. But my research suggests that these statistics grossly understate the scope of the problem that my rule change is intended to address. I do not want to suggest the existence of any kind of malice or incompetence here, but it appears that, in at least some of the circuit courts, the clerical personnel who are responsible for supplying the circuit's statistics to the Administrative Office are reporting as "Cases without Written Comment," only those cases that explicitly refer to the circuit's local rule permitting affirmance without opinion. Other dispositions that do not expressly cite the local rule are reported to the Administrative Office as being dispositions supported by a written opinion even when that "written opinion" consists of nothing more than a pro forma recitation of the words, "having considered the arguments of the parties, we find that the district court committed no reversible error."

Finally, the rule change that I propose would impose little real burden on the circuit courts in most cases. The kind of "written opinion" necessary to comply with the rule need not be elaborate and, at least so far as I am concerned, it need not be designated for publication or citation. It could be accomplished by the law clerk assigned to write the bench memorandum on the case with a few minutes of work to modify the bench memorandum already in existence. But the point of my proposed rule change is that, sometimes, even written opinions of this kind just "won't write" because the disposition that the court has reached cannot be justified by the law and facts. When this occurs, the court has good reason to question its disposition and an unjust result can thereby be avoided. It would not take many such instances for the result of this rule change to justify the relatively minimal effort that will result from its adoption.

Thank you for your consideration.

Sincerely,

Joseph R. Weeks
Professor of Law

cc: Honorable Samuel A. Alito, Jr.
Professor Patrick J. Schiltz
Honorable Anthony J. Scirica
Professor Daniel R. Coquillette

03-06

U.S. Department of Justice

Civil Division, Appellate Staff
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DNL

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April 11, 2003

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Re: FRAP Amendment Proposal to Define the Parties before the Court of Appeals

Dear Patrick:

I am writing because the Solicitor General wishes to propose to the FRAP Committee a rules change to fix an apparent gap in the FRAP, and to conform those rules to the existing Supreme Court rules with regard to identifying the parties before the court.

Surprisingly, the FRAP do not define who is an "appellee," although that term is used throughout the rules. See FRAP 6(b)(2)(B)(ii), 9(a)(2), 10(b)(3), 11(c), 20, 28(b)-(d),(h),(i), 30(b),(c), 31(a),(c), 32(a)(2), 34(d),(e), 35(c), 38, 39(a)(3), 43(a)(3). The lack of a definition can be a problem when a party adversely affected by a district court decision does not appeal, but seeks to file a brief or otherwise participate in an appeal filed by another party.

The Supreme Court rules broadly recognize that all parties to the case below are presumptively parties in the Supreme Court (though they may choose not to participate); those rules designate as appellee or respondent every party that has not sought review. See S. Ct. R. 12.6, 18.2. That approach avoids the need to distinguish between parties based on their legal positions or their adversary relationship to an appellant. It also allows all parties to participate in the review of a lower court decision.

We propose that a nearly identical provision be added to FRAP 3. Moreover, we recommend that FRAP 3 be amended to clarify that every party to a case in district court is presumptively entitled to participate in the court of appeals as a party. This change would conform to Supreme Court practice.

1. As it now stands, there is no definition in the FRAP of who is a party to an appeal, in part because of the lack of a definition for the term "appellee" in these rules. This gap is puzzling because the Supreme Court rules specifically address this issue. The uncertainty in FRAP in turn can affect practice before the Supreme Court because that Court's Rules 12.6 and 18.2 refer to the parties in the court below as the basis for determining who is a party to a case before the Supreme Court.

Supreme Court Rule 12.6 provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. * * * A party noted as no longer interested may remain a party by notifying the Clerk promptly * * * of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents * * *. Parties who file no document will not qualify for any relief from this Court.

Supreme Court Rule 18.2 sets a similar, but slightly different, procedure for appeals.

2. The issue about who is an appellee in the court of appeals arose in recent discussions before the FRAP Committee. The Circuit clerks had proposed a rule to require an appellant to name the appellees in the notice of appeal, thereby minimizing the burden on Circuit clerks to identify the appellees for docketing purposes. The FRAP Committee rejected this proposal, in part because the clerks' proposal appeared to assume a narrow definition of "appellee," perhaps based on a party's position adverse to the appellant. The proposal and ensuing discussion brought to light the absence of a definition of "appellee" in the FRAP. If adopted, our proposal should clarify the docketing procedures and may simplify the tasks of the Circuit clerks.

The issue has also arisen in a few litigation contexts. For example, in one case, the district court issued a preliminary injunction against a federal agency, but the Government determined not to appeal that interlocutory decision. However, an intervenor-defendant did appeal the preliminary injunction, and the district court later decided to stay its decision on the request for a final injunction until after the appeal was concluded. At that point, the Government sought to participate in the appeal and to be aligned with the appellant even though it had not filed a notice of appeal. The FRAP provided no procedure for this situation; the Government was plainly not an appellant, but it was unclear if it could be an appellee, and yet an appellee who wished to support overturning the district court judgment.

The problem with the lack of definition of "appellee" can also arise in the *qui tam* context under the False Claims Act, when the Government has exercised its statutory right to intervene (see 31 U.S.C. 3730(b)). When the district court dismisses an action on grounds unique to the relator's

status (such as if the *qui tam* plaintiff is not a proper relator under the terms of the statute), the Government might not itself appeal, but might seek to participate in the relator's appeal in order to assert its concerns. In these circumstances, the Government has sometimes succeeded in convincing an appellate court to allow it to participate as an appellee aligned with the appellant, but these determinations have by necessity been *ad hoc*.

3. The final sentence of Supreme Court Rules 12.6 and 18.2 demonstrates that the procedural question about who is an appellee may also raise a related substantive issue: When is a non-appealing party entitled to claim the benefit of a reversal obtained in an appeal filed by another party. See S. Ct. R. 12.6, 18.2 ("Parties who file no document will not qualify for any relief from this Court."). The new rule we propose in the FRAP is not intended to change existing law on that question, nor to preclude the continuing development of that law by the courts of appeals. Existing law -- as it has been developed by the courts of appeals to date -- does not generally require that the non-appealing party participate in an appeal as a prerequisite to benefitting from an appellate decision. Accordingly, to avoid confusion in this area, we have omitted from the new rule any reference to such a requirement.

There is some uncertainty under current law concerning the effect of an appellate decision on a non-appealing party. It is well-accepted that a losing party in one case cannot benefit from an appeal brought by a similarly situated party in a different case, even if the cases were consolidated and the lower court issued a single decision. See Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 399-401 (1981). Indeed, as a "general rule[,] * * * when less than all the co-defendants [in a single case] appeal from an adverse judgment, the non-appealing co-defendants cannot benefit from an appellate decision reversing the judgment." Abatti v. CIR, 859 F.2d 115, 119 (9th Cir. 1988). "[P]arties failing to appeal are not usually entitled to the benefits of a reversal obtained by appealing co-parties * * *." Floyd v. District of Columbia, 129 F.3d 152, 157 (D.C. Cir. 1997). This rule has no application to injunctive orders, which can be modified at any time based on a change in the governing law. See, e.g., Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 437-438 (1976).

Even in damages cases there seem to be some exceptions to the rule that a party that does not appeal does not gain the benefit of the appellate ruling. See Abatti, 859 F.2d at 119 (referring to cases involving "joint tortfeasors, cross claimants, or multiple parties asserting rights against a stakeholder"); see also, e.g., Floyd, 129 F.3d at 157; Bryant v. Technical Research Co., 654 F.2d 1337, 1341-1343 (9th Cir. 1981); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 743-745 (5th Cir. 1980); In re Barnett, 124 F.2d 1005, 1009-1010 (2d Cir. 1942); but see id. at 1013-1014 (L. Hand, J., dissenting). Those exceptions flow from "the principle that once a timely notice of appeal has been filed from a judgment, the court has jurisdiction to review the entire judgment." Abatti, 859 F.2d at 119 (citing Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468, 476 (8th Cir. 1977)). That principle, in turn, reflects the view that "rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require." Hysell, 559 F.2d at 476.

Those exceptions, and the conclusion that a court may waive the requirement of separate appeals, may be undercut by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), which held that the requirements of FRAP 3 and 4 are jurisdictional prerequisites for an appeal to proceed. See Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1416 (7th Cir. 1989), cited in Moores Fed. Practice 3d § 304.11. But the question has not been explored in detail by the courts of appeals, and the state of the law remains unsettled.

The effect of the Supreme Court Rules in this context is itself somewhat uncertain. The Seventh Circuit has recognized that a party that does not participate before the Supreme Court is not entitled to the benefit of a decision. See Local 322, Allied Indus. Workers v. Johnson Controls, Inc., 969 F.2d 290, 293 (7th Cir. 1992) (former Supreme Court Rule 12.4 (now Rule 12.6) "simply permits a litigant * * * an opportunity to participate before the Supreme Court * * *. It is not a mechanism by which parties * * * can deliberately bypass a Supreme Court proceeding and then attempt to reap the benefit of a judgment favorable to the other parties"). But that case did not address the more difficult question whether a party that chose not to petition for certiorari, but who did participate as a respondent in support of the petitioner, is entitled to such a benefit. The new rule we propose would ensure that a non-appealing party is left in the same position it otherwise would have occupied, whether or not it chose to participate in the appellate proceedings brought by another party. Thus, we propose to omit from the new FRAP provision any reference to the effect of an appellate decision on non-appealing parties.

Our proposal includes two relatively minor differences from the model provided by the Supreme Court rules; these are based on the FRAP's provisions for *amicus* briefs. See FRAP 29(e), (f). First, the proposed rule would require an appellee who supports an appellant to file its brief within 7 days after the appellant's brief is filed. This is the same period allowed for *amicus* briefs and is intended to minimize the duplication of argument between a party and any supporting *amici*. Second, our proposed rule would prohibit an appellee supporting an appellant from filing a reply brief, except by leave of the court of appeals.

I look forward to discussing this proposal with you and the members of the Committee at our next meeting.

Sincerely,

Douglas Letter

Douglas Letter
Appellate Litigation Counsel

Rule 3. Appeal as of Right -- How Taken; Parties

* * *

(f) Parties.

(1) All parties to the case before the district court are deemed parties in the court of appeals, but a party having no interest in the outcome of the appeal may so notify the Clerk of the court, with service on the other parties.

(2) All parties other than appellants or cross-appellants are considered appellees, but any appellee who supports the position of an appellant or cross-appellant must serve and file a brief within 7 days after the brief of that appellant or cross-appellant (see Rule 31(a)(1)). Except by the court's permission, an appellee may not file a reply brief, even if the appellee supports the position of an appellant or cross-appellant.

Committee Note

New Rule 3(f) is based on Supreme Court Rules 12.6 and 18.2, which provide that each party to a case is deemed a party for purposes of appellate (or certiorari) review. Previously, the FRAP lacked a definition of "appellee," although the rules refer to the obligations of an appellee in various places. See FRAP 6(b)(2)(B)(ii), 9(a)(2), 10(b)(3), 11(c), 20, 28(b)-(d),(h),(i), 30(b),(c), 31(a),(c), 32(a)(2), 34(d),(e), 35(c), 38, 39(a)(3), 43(a)(3). This rule makes clear which parties are entitled to file briefs and other papers as an appellee. It also clarifies, at the outset of an appeal, which parties to the case below are parties to the appeal. It imposes an obligation on all parties to the case below to consider whether they intend to participate in the appeal, and to notify the clerk in certain circumstances. When an appellee supports the position of an appellant (or cross-appellant), the appellee must file its brief within 7 days after the brief of an appellant whose position the appellee supports. This schedule is the same as that for amicus briefs. See Rule 29(e). As with amicus briefs, this schedule is intended to minimize duplication of argument. Similarly, an appellee is normally not permitted to file a reply brief, except by the court's permission in a particular case. The new rule is not intended to change existing law concerning when a non-appealing party may seek the benefit of a reversal obtained by another party. The general rule is that a party must itself appeal in order to obtain the benefit of a reversal. "[P]arties failing to appeal are not usually entitled to the benefits of a reversal obtained by appealing co-parties * * *." Floyd v. District of Columbia, 129 F.3d 152, 157 (D.C. Cir. 1997); see also, e.g., Abatti v. CIR, 859 F.2d 115, 119 (9th Cir. 1988). But there are certain exceptions to that general rule as well, including for injunctive orders, which can be modified at any time based on a change in the governing law. See, e.g., Pasadena City Bd. of

Education v. Spangler, 427 U.S. 424, 437-438 (1976). Some cases also suggest exceptions to the general rule in some cases involving joint tortfeasors or cross-claimants, as well as interpleader cases. See Floyd, 129 F.3d at 157; Abatti, 859 F.2d at 119. It is not clear to what extent those exceptions have survived the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). See Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1416 (7th Cir. 1989); but see Floyd, 129 F.3d at 157 (vacating entire judgment where only one defendant appealed). The new rule simply makes clear that a non-appealing party is entitled to participate as an appellee; it does not alter existing law concerning when a favorable court of appeals judgment will inure to the benefit of a non-appealing party. The new rule applies only to appeals, not to petitions for review or enforcement of an agency order (see FRAP 15).

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) **The appellant must serve and file a brief within 40 days after the record is filed. ~~The~~ An appellee must serve and file a brief within 30 days after the appellant's brief is served, except that an appellee supporting the position of the appellant must serve and file a brief within 7 days after the appellant's principal brief.**

* * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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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

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ASSOCIATE DIRECTOR

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."

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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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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.