

**ADVISORY COMMITTEE
ON
APPELLATE RULES**

**Washington, DC
April 13-14, 2004**



**Agenda for Spring 2004 Meeting of
Advisory Committee on Appellate Rules
April 13-14, 2004
Washington, D.C.**

- I. Introductions
- II. Approval of Minutes of November 2003 Meeting
- III. Report on January 2004 Meeting of Standing Committee
- IV. Action Items
 - A. Proposed Amendments Published for Comment in August 2003
 - 1. Rule 4(a)(6) (clarify whether verbal communication provides “notice”) [Item No. 00-08]
 - 2. Washington’s Birthday Package: Rules 26(a)(4) and 45(a)(2) [Item No. 00-03]
 - 3. New Rule 27(d)(1)(E) (apply typeface and type-style limitations to motions) [Item No. 02-01]
 - 4. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d) [Item No. 00-12]
 - 5. New Rule 32.1 (citation of unpublished decisions) [Item No. 01-01]
 - 6. Rule 35(a) (disqualified judges/en banc rehearing) [Item No. 00-11]
- V. Discussion Items
 - A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals) (Mr. Letter)
 - B. Item No. 03-06 (FRAP 3 — defining parties) (Mr. Letter)
 - C. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit) (Mr. Letter)
 - D. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity) (Mr. Letter)

E. Items Awaiting Initial Discussion

1 Item No. 03-10 (new FRAP 25.1) — privacy protections)

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

VII. Schedule Dates and Location of Fall 2004 Meeting

VIII. Adjournment

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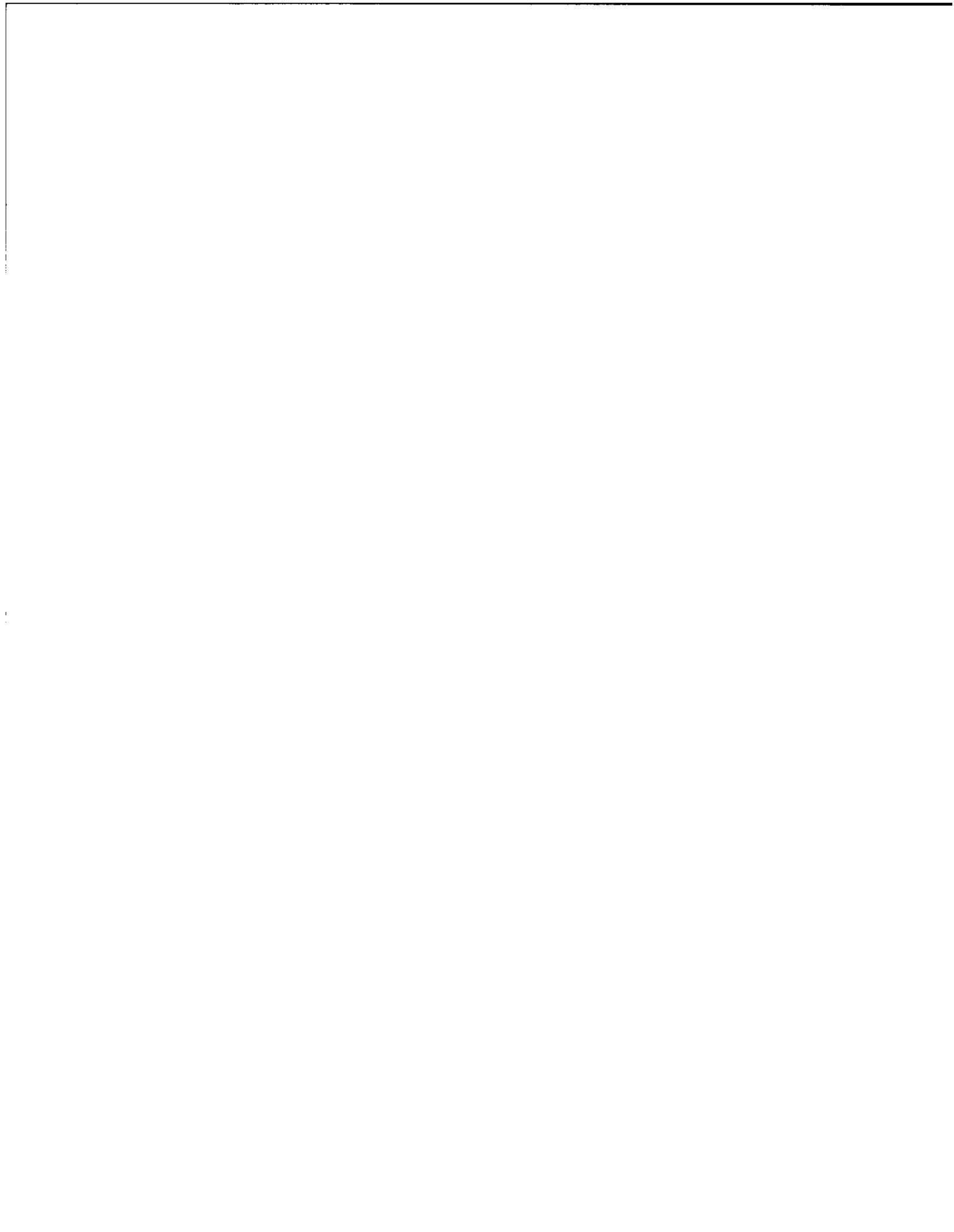
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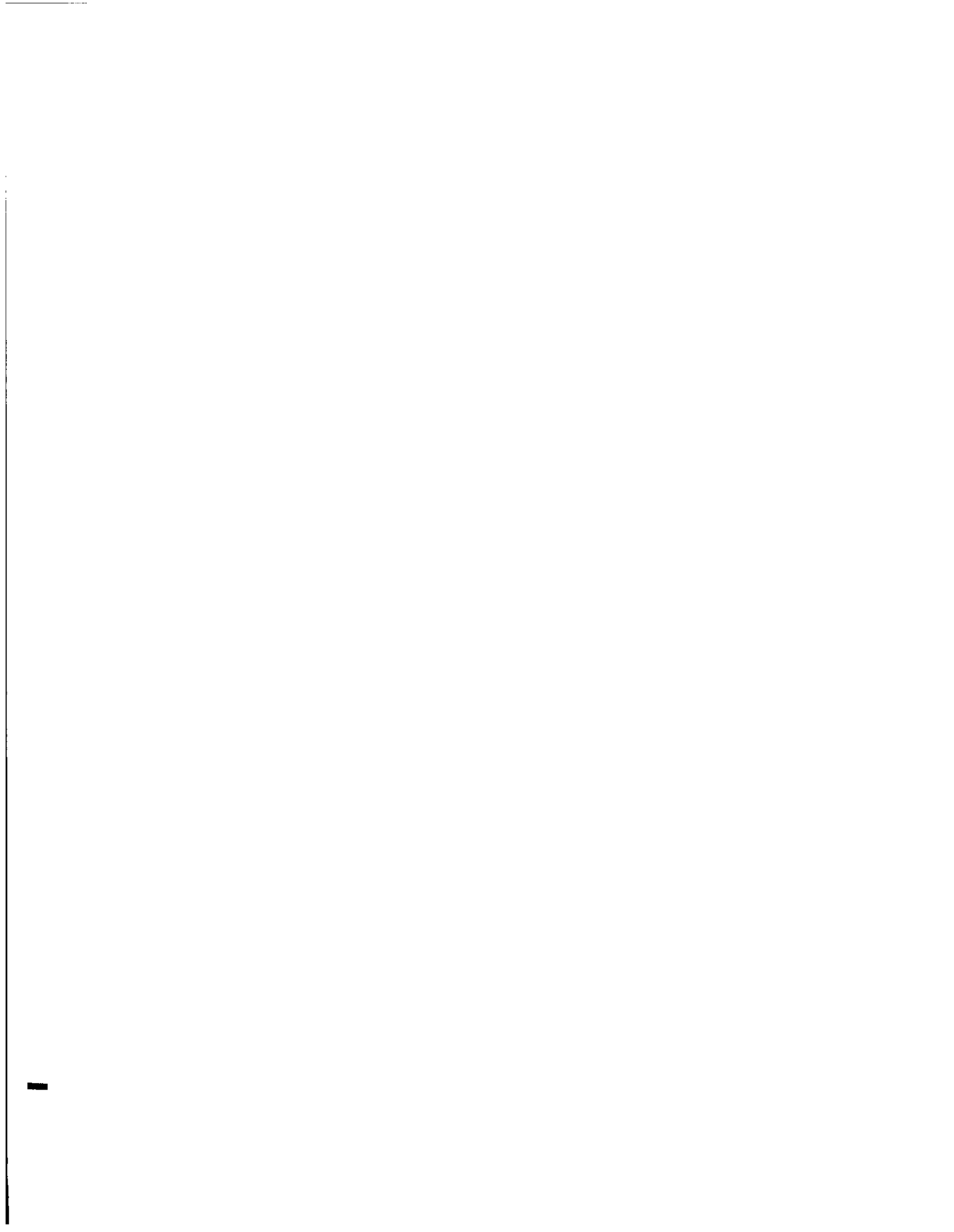
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**Advisory Committee on Appellate Rules
Table of Agenda Items — March 2004**

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Approved for publication by Standing Committee 06/03
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, awaiting revised proposal from Department of Justice Discussed and retained on agenda 11/03, awaiting further revised proposal from Department of Justice
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 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03

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
Draft approved 05/03 for submission to Standing Committee
Approved for publication by Standing Committee 06/03

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
Approved for publication by Standing Committee 06/03

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
Draft approved 05/03 for submission to Standing Committee
Approved for publication by Standing Committee 06/03

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
Draft approved 11/03 for submission to Standing Committee

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
Approved for publication by Standing Committee 06/03

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
Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study

02-17

Amend FRAP 32 to eliminate local rule variations regarding contents 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
Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study

03-02

Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs

Advisory Committee

Awaiting initial discussion
Discussed and retained on agenda 05/03
Draft approved 11/03 for submission to Standing Committee

03-06

Adopt new FRAP 3(f) to define parties.

Solicitor General

Awaiting initial discussion
Discussed and retained on agenda 05/03, awaiting revised proposal from Department of Justice
Discussed and retained on agenda 11/03, awaiting further revised proposal from Department of Justice

03-08

Amend FRAP 4(c)(1) to mandate simultaneous filing of 28 U.S.C. § 1746 declaration to take advantage of prison mailbox rule

Prof. Philip A. Pucillo

Awaiting initial discussion
Discussed and retained on agenda 11/03, referred to Department of Justice for study

03-09

Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity

Solicitor General

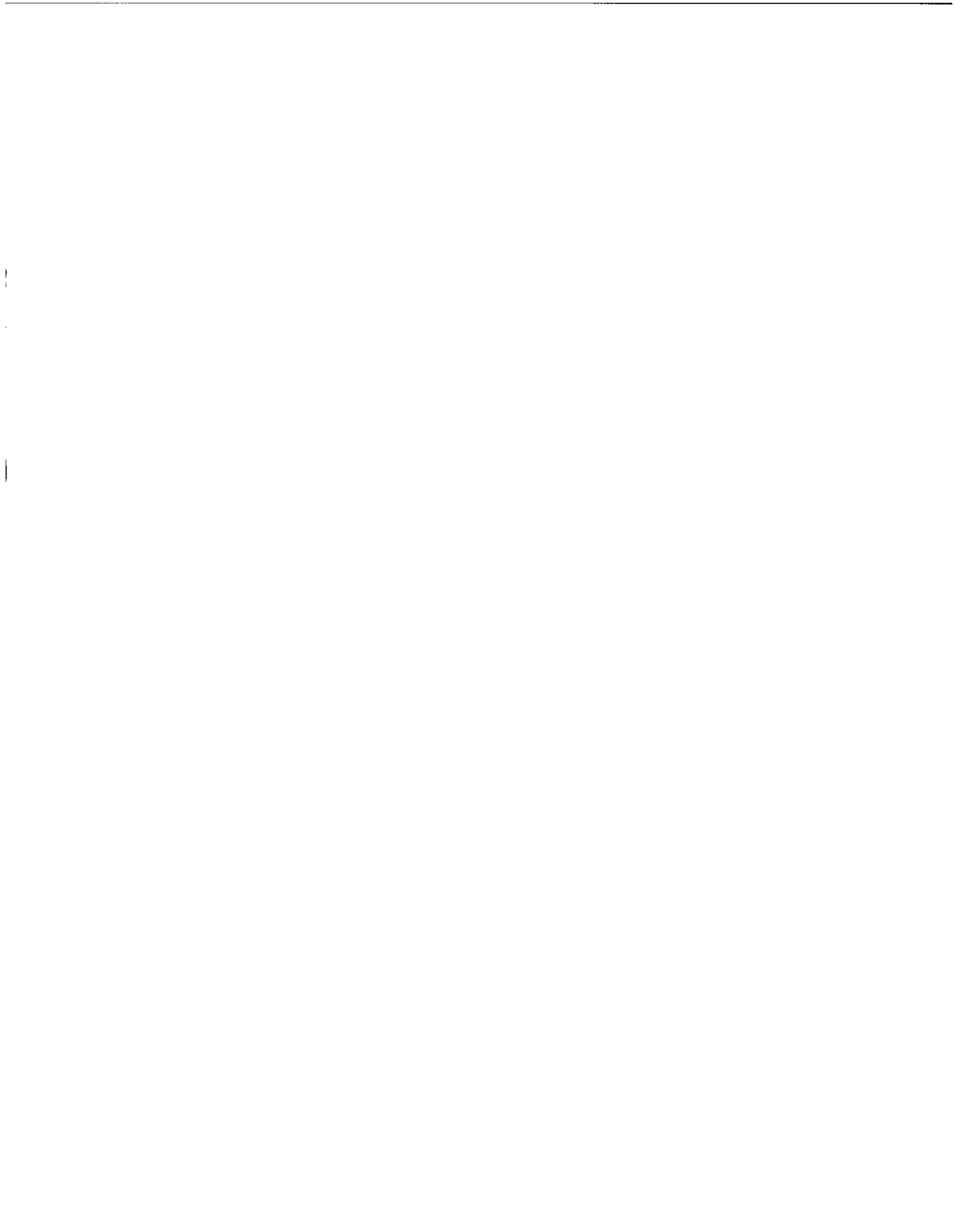
Awaiting initial discussion
Discussed and retained on agenda 11/03, awaiting revised proposal from Department of Justice

03-10

Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act

E-Government Subcommittee

Awaiting initial discussion



DRAFT

Minutes of Fall 2003 Meeting of Advisory Committee on Appellate Rules November 7, 2003 San Diego, California

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Friday, November 7, 2003, at 8:25 a.m. at the Loews Coronado Bay Resort near San Diego, California. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr. (by phone), Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge David F. Levi, chair of the Standing Committee, and his assistant, Ms. Brook Coleman; 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.

Judge Alito announced that Judge Levi had replaced Judge Anthony J. Scirica as chair of the Standing Committee. Judge Alito also announced that several changes had been made to the membership of the Advisory Committee. Judge Roberts, who formerly served on the Committee as a representative of the bar, was appointed to replace Judge Diana Gribbon Motz as a representative of the bench. Judge T.S. Ellis III was appointed to replace Judge Stanwood R. Duval, Jr. And Mr. Mark I. Levy was appointed to fill the vacancy created by the elevation of Judge Roberts. Judge Alito welcomed Mr. Levy to the Committee and said that he looked forward to welcoming Judge Ellis, who was unable to attend today's meeting.

Judge Alito said that Judge Motz and Judge Duval were also unable to attend today's meeting, but he hoped that they would be able to join the Committee at its spring meeting so that Committee members could express appreciation for their service.

Finally, Judge Alito announced that Justice Howe would be leaving the Committee following today's meeting. Judge Alito thanked Justice Howe for his service and presented Justice Howe with a certificate of appreciation.

II. Approval of Minutes of May 2003 Meeting

The minutes of the May 2003 meeting were approved.

III. Report on June 2003 Meeting of Standing Committee

The Reporter stated that, at its June 2003 meeting, the Standing Committee had approved for publication all of the amendments proposed by this Advisory Committee. The Reporter described some of the comments that members of the Standing Committee made regarding the proposed rules. The Reporter said that he would remind the Advisory Committee of those comments when the Committee reconsiders the proposed rules following the formal notice-and-comment period.

IV. Action Items

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

At Judge Alito's request, Mr. Letter introduced this item. Mr. Letter reminded the Committee that this item arose out of a suggestion by Judge Duval that Rule 4 be amended to resolve a circuit split over whether appeals of orders granting or denying applications 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)) are 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).

In the course of the first Committee discussion of Judge Duval's proposal, several members pointed out that the circuit split over the Hyde Amendment closely resembled the circuit split over whether appeals of orders granting or denying applications for a writ of error *coram nobis* were "civil" or "criminal" — a circuit split that was resolved by the amendment of Rule 4(a)(1) in 2002. The Department of Justice agreed to study the general question of whether Rule 4 should be amended to make it easier to distinguish "civil" appeals from "criminal" appeals.

At the Committee's November 2002 meeting, Mr. Letter presented a draft amendment that would have taken a "laundry list" approach to distinguishing "civil" from "criminal" appeals. The draft amendment would have defined several specific appeals as "appeals in a civil case" and other specific appeals as "appeals in a criminal case." Committee members expressed a number of objections to the "laundry list" approach and, by consensus, agreed not to pursue it further. But members asked the Department to consider whether Rule 4 could instead be amended to implement a global solution to the problem of distinguishing "civil" appeals from "criminal" appeals. A couple of Committee members specifically suggested amending Rule 4 so that, in all cases — civil and criminal — private parties would get 30 days and the government 60 days to appeal.

Mr. Letter said that the Department had studied this suggestion and decided to recommend against it for three reasons. First, now that Rule 4 has been amended to solve the

coram nobis problem, only one circuit split remains over whether a particular type of appeal is “civil” or “criminal” — and that is the split over the Hyde Amendment. That split is not serious enough to justify a fundamental reworking of Rule 4. Second, expanding the time to appeal in criminal cases from 10 to 30 days for defendants and from 30 to 60 days for the government would unduly delay criminal appeals, contrary to the oft-stated public interest in expediting such appeals. Finally, a rule that gave private parties 30 days and the government 60 days to appeal in all cases would conflict with 18 U.S.C. § 3731 and perhaps other statutes. Although the supersession clause of the Rules Enabling Act (28 U.S.C. § 2072(b)) gives the Committee authority to propose rules that vitiate existing statutes, such authority should be exercised sparingly. The circuit split over the Hyde Amendment is not important enough to justify the exercise of such authority.

Mr. Letter added that, although one public defender told him that criminal defense attorneys would welcome the extension of the time to appeal from 10 to 30 days, other criminal defense attorneys expressed no objection to the current 10-day period. Mr. Letter pointed out that the 10-day period has existed for over 70 years and has been internalized by the bench and bar. Moreover, as a result of the 2002 amendment to the time computation provisions of Rule 26, criminal defendants now effectively have 14 to 17 days to file an appeal. This is ample time, especially as, in the vast majority of cases, a notice of appeal is filed almost immediately after a judgment of conviction is entered.

The Committee discussed the Department’s recommendation at length. Most members agreed that the particular proposal that the Department had studied should not go forward. Members were concerned about slowing down the criminal appeals process and about approving a rule that would directly conflict with a statute.

At the same time, members expressed interest in continuing to try to find a solution to the problem of having to distinguish “civil” from “criminal” appeals. One member noted that, although there may be no circuit splits (other than the split over the Hyde Amendment), it is still far too difficult for attorneys and pro se litigants to figure out whether some appeals — such as appeals from various post-judgment orders — are “civil” or “criminal.”

A couple of members suggested that Rule 4 be amended to provide, in essence, that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals. The Reporter reminded the Committee that, at a previous meeting, a member had proposed that Rule 4 be amended to provide something like the following: “As used in this rule, ‘appeal in a civil case’ means every appeal except a direct appeal from a judgment of conviction entered under Fed. R. Crim. P. 32(k).”

After additional discussion — during which members questioned how many 10-day appeal deadlines might be changed to 30-day deadlines under such a rule — Mr. Letter agreed that the Department will study the proposal and make a recommendation to the Committee at a future meeting.

B. Item No. 01-03 (FRAP 26(a) — interaction with “3-day rule” of FRAP 26(c))

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26. Computing and Extending Time

* * * * *

- (c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to after the prescribed period [would otherwise expire] unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Wednesday, June 1, 2005. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 15, 2005. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday, Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 20, 2005.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

The Reporter reminded the Committee that it had referred to the Advisory Committee on Civil Rules the proposal of attorney Roy H. Wepner that Appellate Rule 26(c) be amended to clarify precisely how deadlines that are extended under its “3-day rule” should be calculated. The proposal was referred to the Civil Rules Committee because the same ambiguity has long existed under Civil Rule 6(e).

In August, the Civil Rules Committee published for comment an amendment to Rule 6(e) that would resolve the uncertainty. Under the proposal, a party would first have to calculate the “prescribed period” without reference to the 3-day extension. After the party identified the day on which the “prescribed period” would otherwise expire, the party would add three days. The paper would be due on the third day, unless the third day was a Saturday, Sunday, or legal holiday, in which case the paper would be due on the next day that was not a Saturday, Sunday, or legal holiday.

The Reporter said that the proposal of the Civil Rules Committee seems sound. It comports with the understanding of most practitioners, and it adopts the most generous of the various counting options — thereby ensuring that no attorneys will be trapped into missing deadlines. The Reporter said that he had patterned the draft amendment to Appellate Rule 26(c) after the proposed amendment to Civil Rule 6(e), with two exceptions:

First, the Reporter asked the Committee to consider whether the words “would otherwise expire” should be added after “prescribed period.” The Reporter said that, although the proposed amendment to Civil Rule 6(e) does not use “would otherwise expire,” he thought that the amendment would be clearer if it did. Second, the Reporter pointed out that he had added language to the Committee Note to clarify how deadlines should be calculated when the “prescribed period” ends on a Saturday, Sunday, or legal holiday. The Reporter said that he did

not think that either the proposed amendment to Civil Rule 6(e) or the accompanying Committee Note was sufficiently clear on this point.

After a brief discussion, the Committee agreed that the clarifying phrase “would otherwise expire” should be added to the amendment. One member expressed concern about creating an inconsistency with the proposed amendment to Civil Rule 6(e). Judge Levi (who formerly chaired the Civil Rules Committee) said that the Civil Rules Committee did not feel strongly about the precise wording of the proposed amendment to Civil Rule 6(e) and would be open to suggestions for improvement. If differences remain, the Standing Committee can examine the two proposals, approve the proposal that it prefers, and make conforming changes to the other proposal.

A member moved that the proposed amendment to Rule 26(c) — including the phrase “would otherwise expire” — be approved. The motion was seconded. The motion carried (unanimously).

Later in the meeting, a member asked to revisit the amendment to Rule 26(c). He suggested that the amendment would be even clearer if the phrase “under Rule 26(a)” was added after “would otherwise expire.” The additional language would point practitioners directly to the time calculation rules of Rule 26(a) and would underscore that those rules should be used in calculating the “prescribed period.”

A member moved that the proposed amendment to Rule 26(c) be further amended by adding the words “under Rule 26(a)” after “would otherwise expire.” The motion was seconded. The motion carried (unanimously).

C. Item No. 03-02 (FRAP 7 — clarify whether limited to only FRAP 39 costs)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 7. Bond for Costs on Appeal in a Civil Case

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. As used in this rule, “costs on appeal” means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas

bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

Rule 7 has been amended to resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statute. The Second and Eleventh Circuits hold that a Rule 7 bond can secure such attorney's fees; the D.C. and Third Circuits hold that it cannot. *Compare Pedraza v United Guar. Corp.*, 313 F.3d 1323, 1328-33 (11th Cir. 2002), and *Adsani v. Miller*, 139 F.3d 67, 71-76 (2d Cir. 1998), with *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997), and *In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985)

The amendment adopts the views of the D.C. and Third Circuits. To require parties to secure attorney's fees with a Rule 7 bond would "expand[] Rule 7 beyond its traditional scope, create[] administrative difficulties for district court judges, burden[] the right to appeal for litigants of limited means, and attach[] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes." 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE § 3953 (3d ed. Supp. 2004). Moreover, it seems likely that in many, if not most, of the cases in which a fee-shifting statute requires an appellant to pay the attorney's fees incurred on appeal by its opponent, the appellant is a governmental or corporate entity whose ability to pay is not seriously in question.

Under amended Rule 7, an appellant may be required to post a bond to secure only two types of costs. First, a Rule 7 bond may ensure payment of the costs that may be taxed under 28 U.S.C. § 1920; attorney's fees are not among those costs. *See Roadway Express, Inc. v Piper*, 447 U.S. 752, 757-58 (1980). Second, a Rule 7 bond may ensure payment of the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Although this cost is not mentioned by § 1920, it has long been recoverable under the common law and the local rules of district courts, and it is explicitly mentioned in Rule 39(e).

The Reporter said that, pursuant to the Committee's instructions, he had drafted an amendment to Rule 7 to resolve the circuit split over whether the "costs" secured by a Rule 7 bond are limited to the "costs" that are identified in Rule 39 or instead also include attorney's

fees that are defined as “costs” in a fee-shifting statute. At its May 2003 meeting, the Committee decided that Rule 7 bonds should not be used to secure attorney’s fees and asked the Reporter to draft an implementing amendment

The Reporter said that drafting the amendment proved to be more difficult than he had anticipated. The amendment cannot simply cross-reference the “costs” mentioned in Rule 39, as Rule 39 does not contain a definition of “costs.” The amendment also cannot simply cross-reference the “costs” mentioned in 28 U.S.C. § 1920; although the statute does define “costs,” it omits the cost of “premiums paid for a supersedeas bond or other bond to preserve rights pending appeal,” which cost is specifically mentioned in Rule 39. The Reporter considered drafting an amendment that would provide, in effect, that “costs” do not include attorney’s fees, but a rule that defines a word in terms of what it does *not* include may open the door to litigation about what it *does* include. The Reporter said that, in the end, he decided that “costs on appeal” should be defined to mean “the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal.”

After a brief discussion, a member moved that the proposed amendment to Rule 7 be approved. The motion was seconded. The motion carried (unanimously)

D. Item No. 03-03 (FRAP 11 & 12 — forbid returning exhibits to parties)

At its May 2003 meeting, the Committee asked the Department of Justice to study and make a recommendation regarding a proposal by Judge John M. Roll that Rule 11 or 12 be amended to require district courts to retain possession of the exhibits that were introduced into evidence in a case when that case is on appeal. Judge Roll expressed two concerns about the practice of many district courts of returning trial exhibits to the parties while their cases are pending on appeal. First, Judge Roll is concerned about the ability of appellate courts to quickly retrieve exhibits from parties. Second, Judge Roll is concerned about the possibility that exhibits will be destroyed, misplaced, or altered by the parties while the case is on appeal.

Mr. Letter said that the Department recommends that the Committee not pursue Judge Roll’s proposal. Mr. Letter said that the Department agreed with Judge Roll that the practice of returning exhibits to the parties was problematic for exactly the reasons that Judge Roll gave. But an amendment to Rule 11 or 12 forcing all district courts to retain exhibits in all cases would not be practical. The district courts are simply not equipped with the facilities, personnel, or funds to retain trial exhibits — exhibits that could be dangerous (such as a gun introduced in a criminal case) or large (such as a diesel engine introduced in a patent case). Moreover, conditions vary dramatically from district-to-district in light of such factors as the geographical scope of the district, the size and subject matter of the caseload handled by the district, and the physical facilities available to the district. In light of those realities, a uniform national rule was not workable. Instead, the courts should continue to deal with the concerns raised by Judge Roll on a case-by-case basis.

A member asked whether the Department was aware of cases in which exhibits had been lost after being returned to the parties. Mr. Letter said that such cases existed, but they were rare. He also pointed out that, even if clerks were required to retain all exhibits, exhibits would still be misplaced.

A member asked whether it was common for appellate judges to have difficulty retrieving exhibits from the parties. The appellate judges and Ms. Waldron responded that such problems are rare and almost never cause the court to delay a decision. In the vast majority of cases, the appellate court does not need to examine the exhibits introduced at trial — for example, the gun found in the defendant's car or the drugs purchased by the undercover agent. Judges are usually able to make a decision based upon the briefs and paper record. When the court needs to examine an exhibit, a phone call to one of the attorneys almost always results in the exhibit being promptly delivered.

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

E. Item No. 03-04 (FRAP 44 — differences with proposed Civil Rule 5.1)

Under Rule 44, a party who challenges the constitutionality of a federal statute in a case in which the federal government is not a party is required to notify the clerk of the challenge, and the clerk is then required to notify the Attorney General. Rule 44 is derived from 28 U.S.C. § 2403

Civil Rule 24(c) contains a similar provision, but it has largely escaped the notice of district judges and trial attorneys, most likely because it is buried in a rule regarding intervention. As a result, the federal government often has not received timely notice — or, indeed, *any* notice — of constitutional challenges to federal statutes. The Civil Rules Committee has proposed to remedy this problem by adopting a new Civil Rule 5.1. That rule would differ in several respects from current Rule 44 — most significantly, in requiring *both* the parties *and* the clerk to notify the government.

At its May 2003 meeting, the Committee asked the Department of Justice to make a recommendation regarding whether Appellate Rule 44 should be amended to conform to proposed Civil Rule 5.1. Mr. Letter said that the Department has studied the matter and concluded that no changes in Rule 44 are warranted. Mr. Letter said that, unlike current Civil Rule 24(c), Rule 44 has been working well, and there is no reason to amend the rule to impose the “double notice” obligation that would be imposed under proposed Civil Rule 5.1.

A member moved that Item No. 03-04 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

F. Item No. 03-06 (FRAP 3 — defining parties)

The Department of Justice has proposed an amendment to Rule 3. Under the amendment, all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could “opt out” of the case by filing a notice of withdrawal with the clerk. An “appellee” who supported the position of an appellant would have to file its brief within 7 days after the brief of that appellant was due. And an appellee who supported the position of an appellant would not be permitted to file a reply brief.

The Committee first discussed the proposed amendment at its May 2003 meeting. In the course of that discussion, Prof. Mooney said that the Committee had considered a similar proposal about 10 years ago, but she did not have a good memory of the details of the proposal or the reasons for its rejection. The Committee tabled further discussion to give the Administrative Office an opportunity to research the records of the Committee.

Professor Mooney’s recollection proved correct. Records discovered by Mr. Rabiej and Mr. Ishida indicate that a proposal by Judge Frank Easterbrook to pattern Rule 3 after what is now Supreme Court Rule 12.6 (and what was then Supreme Court Rule 12.4) — a proposal that was similar to the current proposal by the Solicitor General — was considered by the Committee in 1992 but eventually rejected, in part because it was unanimously opposed by the clerks and the chief deputy clerks of the circuits. The nub of the clerks’ opposition — and the main reason for the Committee’s rejection — was the belief that the Supreme Court’s rule might work for a court that decides fewer than 200 cases on the merits every year, but would not work for a circuit that must annually dispose of several thousand appeals. The Committee concluded that whatever benefits the rule would provide were outweighed by the administrative burden that the rule would impose on the parties and clerks.

Mr. Letter said that the Department continues to believe that its proposal should be approved. Mr. Letter said that, in his view, the Department’s proposal would actually help the clerks. Under the proposal, the clerks would have to ask only two questions in determining who were parties to an appeal and whether each party was an appellant or an appellee: (1) Was the person or entity a party to the district court action? If “yes,” the person or entity is a party to the appeal (unless the person or entity affirmatively notifies the clerk’s office that it has no interest in the case). If “no,” the person or entity is not a party to the appeal (unless it successfully moves to intervene). (2) Did the person or entity file a notice of appeal? If “yes,” the person or entity is an appellant. If “no,” the person or entity is an appellee.

The Committee discussed the Department’s proposal at considerable length. (Judge Roberts joined the meeting by phone during the discussion.) Members of the Committee expressed two major concerns:

First, some members expressed skepticism about the seriousness of the problem that the proposed amendment addresses. Mr. Letter said that the government had experienced ambiguity about its status in about five appeals over the past five years. Some members do not believe that five cases in five years reflects a serious problem. These members also pointed out that, even in these rare cases, the government can easily ask the court for clarification. Other members thought the problem worth solving and pointed out that it arises on occasion in litigation in which the government is not a party.

Second, members expressed a great deal of concern about the administrative burden that the proposed rule would impose upon clerks and parties. These members believe that few parties are likely to take the trouble to “opt out” of a case — even a case in which they have little interest. Rather, parties are likely to remain in the appeal so that they can receive the briefs and other papers and keep an eye on the case. As a result, there will be cases in which hundreds of parties in the district court will be deemed parties in the court of appeals — and every one of those hundreds of parties will have to be served with the briefs and other papers — even though very few of those parties will have a real stake in the appeal. Mr. Letter argued in response that, because a party who does not opt out risks being negatively affected by the appellate decision, parties may opt out more frequently than members seem to assume. Moreover, Mr. Letter said that he did not think it unreasonable to ask parties to serve all other parties — even those who are “inactive.”

Members agreed that, while the Department’s proposal made sense as a starting point, what was needed was a more efficient way of identifying the “real” parties to the appeal before briefs and other papers must be served. Ms. Waldron said that, in the Third Circuit, all parties to the district court action are initially presumed to be parties to the appeal — as would be true under the Department’s proposed rule. However, parties who are interested in *remaining* parties must file a notice of appearance. Those who do not are dropped from the appeal. Thus, the onus is on a party to take affirmative action to participate in the appeal. As a result, the Third Circuit does not experience cases in which dozens of litigants who are not really interested in an appeal are defined as “parties” and need to be served.

The Reporter pointed out that the Third Circuit system would not work nationally under the current rules, as nothing in FRAP requires the filing of a notice of appearance. A member suggested that the Committee consider whether to amend FRAP to implement the Third Circuit system nationally. In other words, the rules would provide that all parties to a case before a district court would *initially* be deemed parties to the case on appeal — but a party who did not file a notice of appearance within 10 days or so would be deemed to have withdrawn. Other members agreed that such a proposal would be worth considering.

At the request of Judge Alito, Mr. Letter agreed to ask the Department to give further thought to its proposal and to consider in particular the implementation of a “notice-of-appearance” system similar to the Third Circuit’s. Judge Alito also asked Ms. Waldron to survey

her fellow clerks to assess the seriousness of the problem of defining parties to an appeal and to assess whether a national “notice-of-appearance” system was likely to work.

By consensus, the Committee agreed to table further discussion of Item No. 03-06.

The Committee took a 15-minute break.

V. Discussion Items

A. **Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices); Item No. 02-16 (FRAP 28 — contents of briefs); and Item No. 02-17 (FRAP 32 — contents of covers of briefs)**

Judge Alito reminded the Committee that Item Nos. 02-08, 02-16, and 02-17 arose out of complaints by the ABA Council of Appellate Lawyers about variations in local circuit rules regarding appendices, briefs, and the covers of briefs. At the Committee’s request, the Department of Justice agreed to study these variations and make a recommendation to the Committee. Judge Alito asked Mr. Letter to describe the Department’s conclusions.

Mr. Letter said that the Department recommended that no action be taken with respect to appendices. There is enormous variation among local circuit rules regarding appendices; indeed, no two circuits have the same rules. As a result, it is not possible simply to tweak a national rule and thereby eliminate minor variations in circuit practice. Rather, imposing national uniformity would require just about every circuit to make significant changes to its local practices. These local practices are deeply rooted, and judges feel strongly about them. Although there is no logical reason for the local variations — and although a national rule would be welcomed by the Department and most practitioners — the Department recognizes that there is almost no chance that a rule wiping out all local variations would be approved by the Standing Committee or the Judicial Conference.

Mr. Letter said that the Department also recommended no action with respect to the covers of briefs. All circuits seem to follow the same rules, with two minor exceptions: The Second Circuit requires the docket number to be set forth on the cover in very large typeface, and the Tenth Circuit requires the name of the lower court judge to appear on the cover. Moreover, those two exceptions cannot be enforced against practitioners under Rule 32(e), which requires the courts of appeals to accept briefs that comply with Rule 32.

Mr. Letter said that the Department does recommend that Rule 28 be amended to bring about more uniformity in the rules governing briefs and to require circuits to accept briefs that comply with Rule 28. Mr. Letter explained that there are more than a dozen differences in the local rules regarding briefs — and, because there is nothing like Rule 32(e) in Rule 28, practitioners have no choice but to follow each circuit’s local rules. The Department

recommends that Rule 28 be amended to incorporate the most popular of the local variations and to add a provision similar to Rule 32(e) that would force every circuit to accept briefs that comply with Rule 28, even if those briefs do not comply with the circuit's local rules. Specifically, the Department recommends that Rule 28 be amended as follows:

- (1) A new provision would require briefs to begin with an "introductory statement." The statement would include the identity of the judge or agency whose decision was being appealed, a citation to the decision being appealed if it was included in a federal reporter, a description of related cases, and, at the option of the party submitting the brief, a statement about whether oral argument is appropriate.
- (2) The statement of the case — now required by Rule 28(a)(6) — would no longer include a description of "the course of proceedings."
- (3) The statement of facts — now required by Rule 28(a)(7) — would include a description of the "prior proceedings."
- (4) Copies of all unpublished decisions cited in the brief would have to be attached to the brief or included in an addendum that accompanies the brief.

The Committee gave extended consideration to the Department's recommendations.

Most members agreed with the Department's recommendation regarding appendices. Although members shared the frustration of the ABA with the variations — and although members agreed that the variations cannot be justified by local conditions — members reluctantly conceded that there was no chance that a uniform national rule could be imposed on every circuit. Judges feel very strongly about their local rules regarding appendices. The circuit judges on the Judicial Conference would almost certainly oppose a uniform rule, and the district judges on the Conference would almost certainly defer to the circuit judges. Moreover, members feared that even surveying the chief judges about their local rules could create a backlash that would reduce the chances of getting approved more modest changes to the rules regarding briefs. By consensus, the Committee agreed to remove Item No. 02-08 from its study agenda.

There was considerable disagreement among members of the Committee regarding the Department's proposal on briefs. Some members argued that the Committee was going too far in "micro-managing" appellate practice — in trying to make every brief look the same. Other members warned that judges feel as strongly about their local rules regarding briefs as they do about their local rules regarding appendices — and judges are likely to oppose attempts to impose different rules on them or to force them to accept briefs that do not comply with their local rules. Two of the appellate judges on the Committee said that their colleagues would surely oppose the Department's proposal.

Other members disagreed. They pointed out that the changes being proposed by the Department to the rules regarding briefs were much more modest than the kind of changes that would have to be made to the rules regarding appendices. They also pointed out that circuits might welcome some of the changes. The fact that a local variation has been adopted by, say, two-thirds of the circuits is strong evidence that the variation is a good idea. A circuit that does not follow the variation may never have considered it and might not object if a national rule imposed it.

One member asked whether a middle road was possible. He said that, as far as he was concerned, the most serious problem was that clerks reject briefs that do not comply with local rules, rather than filing them and asking the parties to make corrections. Perhaps the rules could be amended so that circuits could still apply their local rules, but clerks could not reject briefs that do not comply with them. The Reporter pointed out that this is precisely what the rules provide; under Rule 25(a)(4), clerks are already barred from rejecting a brief “solely because it is not presented in proper form as required by . . . any local rule.” Ms. Waldron said that, in the Third Circuit, noncompliant briefs are filed and attorneys are asked to correct the deficiencies. The member responded that, in his experience, not all clerks are honoring Rule 25(a)(4).

One member asked whether Rule 28 could be amended to incorporate all of the local variations identified by the Department. In that way, a uniform national rule could be imposed, and every circuit would be happy because briefs would include everything that it wants. Mr. Letter and the Reporter responded that such an approach would require at least a dozen amendments to Rule 28, making Rule 28 ungainly. The Reporter also pointed out that, just as judges might object to a rule that omits from briefs information that they want, so too judges might object to a rule that requires briefs to include information that they do not want.

In the course of the Committee’s discussion, several members commented on some of the specific changes that the Department had proposed to Rule 28.

Regarding the proposed “introductory statement”: No member expressed opposition to amending Rule 28 to require the information identified by the Department. However, some members suggested that, rather than create a new category of information, it would be better to amend the descriptions of the existing categories to include the new information. For example, rather than requiring a new “introductory statement” to identify the judge or agency whose order is being reviewed, that information could be included in the statement of the case (which already requires a description of “the disposition below”).

Regarding the requirement that all unpublished decisions cited in the brief be attached to the brief: The Reporter pointed out that this requirement would be much broader than proposed Rule 32.1, which requires that copies of unpublished opinions be served and filed only when those opinions are “not available in a publicly accessible electronic database.” The Reporter also questioned whether judges would really want copies of unpublished opinions attached to the briefs. This could substantially increase the size of briefs — briefs that many judges carry while

traveling or take home at night — while not providing much useful information. Members agreed with the concerns raised by the Reporter.

Regarding the proposal to strike “the course of proceedings” from the statement of the case: Members disagreed over the merits of the Department’s proposal. Some members favored the proposal. They argued that there is widespread confusion among practicing attorneys about what is supposed to be included in the statement of the case. That confusion gives rise to two problems. The first is that many attorneys file statements that are much too long and that include a great deal of irrelevant information about the proceedings below. The second is that many attorneys include in their statements of facts the same information about the proceedings below that they include in their statements of the case. One member said that the D.C. Circuit expects parties to include a very brief description of the proceedings below in their statements of the case and then to expand upon that description in their statements of the facts.

Other members opposed the proposed change. They argued that the rule was clear as written. In the statement of the case, a party should describe the proceedings before the district court or agency whose decision is being reviewed. In the statement of facts, a party should describe the facts that gave rise to the legal dispute. As to the variations in practice, these members argued that the variations were harmless; if a party wants to devote several pages to the proceedings below, then the only one being harmed is that party. Members also argued against using Rule 28 to “micro-manage” briefs — to essentially write the briefs of attorneys for them.

One member said that, in his state, the Supreme Court merely requires a “statement of facts and proceedings below” and gives attorneys the freedom to decide how much to say about the facts giving rise to the litigation and how much to say about the proceeding below. Attorneys sometimes use that freedom unwisely, but attorneys are going to make mistakes no matter how specifically the rules dictate the contents of briefs. The member urged that Rule 28 be amended to condense the “statement of the case” and the “statement of facts” into a similarly straightforward directive. Other members expressed support for the suggestion.

Judge Levi agreed that any proposed changes to Rule 28 were likely to be resisted by members of the Judicial Conference. He said that the Conference was unlikely to be persuaded simply by arguments that national uniformity is important or that a particular change is thought by a majority of the Advisory Committee to be a good idea. Rather, if proposed changes to Rule 28 are to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the changes. For example, the Judicial Conference is likely to be impressed by evidence that, say, two-thirds of the circuits have adopted a particular practice that the Committee seeks to make uniform — or, alternatively, that only one circuit has adopted a practice that the Committee seeks to preclude. The Conference is also likely to be impressed if members of the bar get behind a proposal. In short, before the Committee proposes any changes to Rule 28, it needs to do some empirical work.

Several members concurred with Judge Levi. By consensus, the Committee agreed to table further discussion of Item Nos. 02-16 and 02-17 and to request the Federal Judicial Center to collect further information for the Committee. Specifically, the Committee would like the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28. The Committee would also like to get some sense of the reason for each variation. Does the variation reflect a recent decision by the circuit's judges or is it a longstanding rule whose purpose can no longer be recalled by any member of the court? Does the variation address a serious problem that the circuit was experiencing or does it exist because of a request made by a long-retired member of the court? Is the variation rigorously enforced by the clerk's office or does the office look the other way? Judge Alito said that he would draft a formal request to the FJC

B. Item No. 03-07 (FRAP 35 — disclose judges' votes on rehearing petitions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

* * * * *

(g) Disclosure of Vote.

(a) Petition Granted. If a petition for hearing or rehearing en banc is granted, the court must identify the judges who participated in the consideration of the petition.

(b) Petition Denied.

(A) If a petition that an appeal be heard initially en banc is denied, the court must identify the judges who participated in the consideration of the petition.

(B) If a petition that an appeal be reheard en banc is denied, the court must:

(i) identify the judges who participated in the consideration of the petition;

- (b) disclose whether a vote was taken; and
- (c) if a vote was taken, disclose how each participating judge voted.

Committee Note

Subdivision (g). The courts of appeals follow inconsistent practices when it comes to disclosing information about the consideration of petitions for hearing and rehearing en banc. For example, some circuits always identify judges who are disqualified, while other circuits never do — or do so only when a disqualified judge requests. Similarly, if a petition is denied after a judge calls for a vote, some circuits always disclose how each judge voted, while other circuits never do — or do so only when a judge writes or joins an opinion dissenting from denial of the petition.

New subdivision (g) has been added to ensure that, in every case in which a court considers a petition for hearing or rehearing en banc, the court will identify the judges who participated (and, by implication, those who did not participate) in the consideration of the petition. There is a strong public interest in ensuring that “[a] judge . . . disqualif[ies] himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Code of Conduct for United States Judges, Canon 3C(1). The need for vigilance has been underscored in recent years by media reports regarding the inadvertent failure of judges to disqualify themselves in cases in which they had “a financial interest in the subject matter in controversy.” Canon 3C(1)(c) At the same time, no important public interest appears to be furthered by keeping secret the identities of the judges who determined whether a case should be heard or reheard en banc.

New subdivision (g) also requires that, when a court denies a petition for rehearing en banc, the court must disclose whether a vote was taken. (Under Rule 35(f), a vote need not be taken unless a judge calls for a vote.) If a vote was taken, subdivision (g) requires that the vote of each participating judge be disclosed. The parties and the general public have a legitimate interest in knowing how judges exercised the authority entrusted to them, and, after a rehearing petition is denied, keeping the vote secret does not appear to further any important public interest.

Subdivision (g) does not require the disclosure of any information about the decision to grant a petition for hearing or rehearing en banc (except, as noted, the identity of the judges who participated in the decision). The public interest in disclosure is diminished, because when such a petition is granted, every judge will

likely write or join an opinion on the merits of the case. At the same time, non-disclosure serves a legitimate interest. Revealing how judges voted on the petition before those same judges consider the merits of the case would lead to speculation and assumptions about the views of particular judges and arguably give rise to the appearance of unfairness.

For similar reasons, subdivision (g) does not require disclosure of any information about the decision to deny a request that an appeal be heard en banc as an initial matter (except the identity of the judges who participated in the decision). Such a denial begins rather than concludes the court's consideration of the case; the case will typically be decided by a panel on the merits and will often be the subject of a petition for rehearing en banc. Thus, concern about the appearance of unfairness is present. At the same time, disclosing how judges voted on a petition that an appeal be heard initially en banc does not further an important public interest. The votes of the members of the panel on the merits of the case will be disclosed. If a petition for rehearing en banc is filed and denied, the votes of the entire court on that petition will be disclosed. And if such a petition is filed and granted, the votes of the entire court on the merits of the case will be disclosed.

The Reporter reminded the Committee that Judge A. Wallace Tashima — a member of the Standing Committee — had suggested that the Committee consider amending Rule 35 to require judges to disclose how they vote on rehearing petitions. The Reporter said that he had drafted an amendment to Rule 35 that would implement Judge Tashima's suggestion. Under the draft amendment, disqualifications would have to be disclosed in every case in which a party petitioned for hearing or rehearing en banc. Votes would be disclosed only when petitions for rehearing en banc were *denied*. Votes would not be disclosed when rehearing petitions were *granted*, nor would votes be disclosed when petitions to hear a case initially en banc were either granted or denied. In these latter situations, the court would be giving further consideration to the case, raising the appearance of unfairness if votes were disclosed. Moreover, in these latter situations, judges would later cast a vote — either on the merits of the case or on a petition to rehear a panel decision en banc — that would be disclosed.

The Committee first discussed the question of disclosing votes. Every Committee member who spoke expressed opposition to the proposal. In the vast majority of cases, no vote is taken, so there is nothing to disclose to parties. In the few cases in which a vote on a rehearing petition is called for, judges cast “no” votes for such a wide variety of reasons that disclosing such votes would give the parties little useful information. And even judges who cast “yes” votes often do not want those votes disclosed for fear of needlessly embarrassing a colleague. The consensus of the Committee was that, given that the vast majority of circuits do not “involuntarily” disclose votes, and given that most Committee members think that disclosing

votes would be a bad idea, and given that this issue does not directly affect practitioners, the Committee should go no further with the proposal.

Regarding disclosing disqualifications, a couple of Committee members argued that there was a legitimate public interest in making certain that judges disqualify themselves when they should. Others disagreed. Judges must review hundreds of rehearing petitions every year. Most are plainly meritless — and most do not attract a single vote to rehear. For that reason, judges do not screen rehearing petitions for disqualifications nearly as carefully as they screen cases that they hear on the merits. Undoubtedly, judges who should technically disqualify themselves from considering a rehearing petition often fail to do so, but those failures virtually never make a difference because so few rehearing petitions even attract a single vote — much less the votes of enough judges to make the question close.

If all disqualifications had to be publicly disclosed, then judges would have to spend much more time screening rehearing petitions so as not to get mentioned in articles about the failure of judges to recuse themselves (similar to those articles published by the *Kansas City Star* and *Washington Post*). At a time when judges are already overwhelmed, forcing judges to shift their time away from deciding cases on the merits and toward screening rehearing petitions for disqualifications would be unwise.

A member moved that Item No. 03-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Items Awaiting Initial Discussion

1. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit)

Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits. Under the prison mailbox rule, a paper is considered timely filed if it is deposited by an inmate in his prison's internal mail system on or before the last day for filing. The rule provides that "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding — holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.

In a brief discussion, Committee members agreed that the issue was worth considering. Committee members seemed to agree both that dismissal was too harsh a consequence for the failure to file an affidavit and that district courts should not be required to hold hearings on whether a paper was timely filed. Rather, the tentative consensus of the Committee appeared to be that the failure to file an affidavit should be called to the inmate's attention, and the inmate should be given a chance to correct the omission before his appeal is dismissed or other action taken against him.

Mr. Letter said that he would like an opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended. By consensus, the Committee agreed to table further discussion of Item No. 03-08.

2. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

Mr. Letter introduced Item No. 03-09, a recent proposal of the Department of Justice.

Under Rule 4(a)(1)(B), the 30-day deadline to bring an appeal in a civil case is extended to 60 days “[w]hen the United States or its officer or agency is a party.” Similarly, under Rule 40(a)(1), the 14-day deadline to petition for panel rehearing is extended to 45 days in a civil case in which “the United States or its officer or agency is a party.”¹ (By virtue of Rule 35(c), the extended deadline of Rule 40(a)(1) also applies to petitions for rehearing en banc).

Mr. Letter said that it is unclear whether the extended deadlines provided in Rule 4(a)(1) and Rule 40(a)(1) apply when an “officer” of the United States is sued in her *individual* capacity. Mr. Letter said that this ambiguity does not exist in the Civil Rules. Civil Rule 12(a)(3)(A) extends the deadline for responding to a summons and complaint from 20 to 60 days for “[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity,” and Civil Rule 12(a)(3)(B) goes on specifically to provide that:

An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

¹The identical phrase — “the United States or its officer or agency” — is also used in Rule 29(a) (regarding amicus curiae briefs), while the phrase “the United States, its agency, or officer” is used in Rule 39(b) (regarding assessment of costs) and the phrase “the United States or its agency, officer, or employee” is used in Rule 44(a) (regarding notice of constitutional challenges).

Mr. Letter said that the Department would like to see Appellate Rule 4(a)(1) (and Appellate Rule 40(a)(1)) amended so that the Appellate Rules are as clear as the Civil Rules about the deadlines that apply when an officer of the United States is sued in an individual capacity. Specifically, the Department proposes that Rule 4(a)(1)(B) be amended as follows:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

* * * * *

(B) When the United States or its officer, employee, or agency is a party, including an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

The Department proposed that similar language be added to Rule 40(a)(1).

Members asked a number of questions about how the rule would work in practice. How would it apply to a case in which the Department decided not to represent the officer or employee in the district court after determining that the officer's or employee's alleged actions were not connected to duties performed on behalf of the United States? What if the officer or employee was challenging that determination? How would the rule apply in a case in which the Department represented the officer or employee in the district court — after determining that the officer's or employee's alleged actions were indeed connected to duties performed on behalf of the United States — but the district court later disagreed and held that the actions were not so connected?

Members also pointed out that the proposed amendment to Appellate Rule 4(a)(1)(B) was far broader than the corresponding provisions of the Civil Rules. Civil Rule 12(a)(3) provides an

extension only when an officer or employee is sued “in an official capacity” or “in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.” An officer or employee who is sued in an individual capacity for acts or omissions that did *not* occur in connection with duties performed on behalf of the United States is not entitled to the extension.

By contrast, the draft amendment to Appellate Rule 4(a)(1)(B) provides an extension in any case in which an “officer” or “employee” of the United States is sued. The amendment makes clear that these cases “*includ[e]*” cases in which “an officer or employee of the United States [is] sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States.” But the amendment does not *limit* the extension to such cases. Thus, a secretary for a federal agency who has a car accident while driving to church on a Sunday morning and is sued in federal court could take advantage of the extension.

By consensus, the Committee agreed to table further discussion of Item No. 03-09 to give the Department time to consider the questions raised by Committee members and to redraft the proposed amendment so as to narrow its scope.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2004 Meeting

The Committee will next meet on April 13 and 14 in Washington, D.C.

VIII. Adjournment

By consensus, the Committee adjourned at 12:30 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

III

Draft minutes of the January 2004 meeting of the Standing Committee will be sent to you in a separate mailing.



IV-A-1

MEMORANDUM

DATE: March 18, 2004

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Proposed Amendments to Federal Rules of Appellate Procedure
Published for Comment in August 2003

Several proposed amendments to the Federal Rules of Appellate Procedure were published for comment in August 2003. The deadline for submitting public comments was February 16, 2004. To date, the Administrative Office ("AO") has received over 500 comments and forwarded 484 of those comments to the Committee via e-mail. Those 484 comments include all comments that were received on or before the February 16 deadline, as well as many that were not.

All comments — both the 484 comments that have already been distributed and the additional comments that have not — will be provided to Committee members on a CD that will be included in the agenda book. Any comments that are received by the AO after the agenda book is assembled will also be distributed to Committee members by e-mail or in hard copy. Although every Committee member will be given a copy of every comment — no matter when the comment is received — this memorandum will summarize only the 484 comments that have been distributed via e-mail. I have not yet reviewed the comments numbered 03-AP-485 and higher, with the exception of a couple of comments recently submitted by federal appellate judges.

The comments were highly unusual in several respects. First, we received an extraordinarily large number of comments. As noted, we have already received over 500 comments; by contrast, the much more extensive set of proposed amendments published in August 2000 attracted a total of 20 comments. Second, the overwhelming majority of the comments — close to 95 percent — pertained *only* to proposed Rule 32.1. Unfortunately, we received comparatively little feedback about the other proposed amendments. Third, most of the comments on Rule 32.1 came from just one circuit. About 75 percent of all comments (pro and con) regarding Rule 32.1 — and about 80 percent of the comments opposing Rule 32.1 — came from judges, clerks, lawyers, and others who work or formerly worked in the Ninth Circuit.¹

¹These estimates are likely low, as some of those writing from outside of the Ninth Circuit had Ninth Circuit connections that were not readily apparent. For example, a check of law school websites revealed that almost all of the 21 law professors who wrote to oppose Rule

Fourth, the vast majority of the comments on Rule 32.1 — about 90 percent — took the same position: They opposed adopting the rule. Finally, the comments regarding Rule 32.1 were extremely repetitive. Many repeated — word-for-word — the same basic “talking points” distributed by opponents of the rule,² and many letters were identical or nearly identical copies of each other.³

None of this is to suggest that the arguments made in these “talking points” or letters should be disregarded. To the contrary, as I will explain below, I agree with some of them. My point is simply that the arguments made in the last few dozen comments opposing Rule 32.1 did not differ materially from the arguments made in the first few dozen comments opposing Rule 32.1.

Because of the unusual nature of the public comments, I will report on them somewhat differently than I have reported on comments in the past. With respect to every proposed rule except Rule 32.1, I will, as usual, provide the following: (1) a brief introduction; (2) the text of the amendment and Committee Note, as published; (3) a summary of each of the public comments; and (4) my recommendation. Where commentators have made a strong argument for change — an argument that has not already been considered by this Committee — I have included with my recommendation suggested revisions to the text of the amendment or Committee Note.

With respect to proposed Rule 32.1, I will provide the same information, except that I will not summarize each of the comments individually. Because those comments are so many and so repetitive, providing a separate summary of each would take several weeks and accomplish little. With Judge Alito’s permission, I will instead provide “global” summaries of the major arguments made for and against adopting Rule 32.1, and then I will identify all those who supported or opposed the rule. My summary is meant to serve as a general overview, not as a substitute for reading the comments themselves.

With respect to each of the proposed rules, the Committee must first decide whether to approve the proposal as published, approve the proposal with modifications, devote further study to the proposal, or drop the proposal altogether. In those cases in which the Committee decides to approve the proposal with modifications, it must further decide whether the modifications are substantial (necessitating republication) or insubstantial (not necessitating republication)

32.1 had clerked for Ninth Circuit judges. It appears that many of the commentators from outside of the Ninth Circuit were also former Ninth Circuit law clerks or were inspired to write because of Ninth Circuit connections.

²A copy of the most commonly incorporated “talking points” is attached to 03-AP-025.

³For example, 9 of the 10 private practitioners from Florida who opposed Rule 32.1 sent essentially identical letters — and their letters were essentially identical to a letter sent previously by a Ninth Circuit attorney (03-AP-234).

I. Rule 4(a)(6)

A. Introduction

Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. A district court is authorized to reopen the time to appeal a judgment if the district court finds that several conditions have been satisfied, including that the appellant did not receive notice of the entry of the judgment within 21 days and that the appellant moved to reopen the time to appeal within 7 days after learning of the judgment's entry. The Committee proposed to amend Rule 4(a)(6) to clarify what type of notice must be absent before an appellant is eligible to move to reopen the time to appeal and to resolve a four-way circuit split over what type of notice triggers the 7-day period to bring such a motion.

B. Text of Rule and Committee Note

1 **Rule 4. Appeal as of Right — When Taken**

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

3 * * * * *

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

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

10 **(B)** the motion is filed within 180 days after the judgment or order is entered
11 or within 7 days after the moving party receives or observes written notice
12 of the entry from any source, whichever is earlier;

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

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

5 * * * * *

6 **Committee Note**

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

16
17 Rule 4(a)(6) has been amended to specify more clearly what kind of “notice” of the entry
18 of a judgment or order precludes a party from later moving to reopen the time to appeal. In
19 addition, Rule 4(a)(6) has been amended to address confusion about what kind of “notice”
20 triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized
21 to set forth more logically the conditions that must be met before a district court may reopen the
22 time to appeal.

23
24 **Subdivision (a)(6)(A).** Former subdivision (a)(6)(B) has been redesignated as
25 subdivision (a)(6)(A), and one important substantive change has been made.

26
27 Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to
28 appeal if it found “that a party entitled to notice of the entry of a judgment or order did not
29 receive such notice from the clerk or any party within 21 days of its entry.” The rule was clear
30 that the “notice” to which it referred was the notice required under Civil Rule 77(d), which must
31 be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to
32 that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a
33 party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d),
34 that party could later move to reopen the time to appeal (assuming that the other requirements of
35 subdivision (a)(6) were met).

1 In 1998, former subdivision (a)(6)(B) was amended to change the description of the type
2 of notice that would preclude a party from moving to reopen the time to appeal. As a result of
3 the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party
4 to receive “*such* notice” — that is, the notice required by Civil Rule 77(d) — but instead referred
5 to the failure of the moving party to receive “*the* notice.” And former subdivision (a)(6)(B) no
6 longer referred to the failure of the moving party to receive notice from “the *clerk* or any party,”
7 both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B)
8 referred to the failure of the moving party to receive notice from “the *district court* or any party.”
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10 The 1998 amendment meant, then, that the type of notice that precluded a party from
11 moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the
12 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party.
13 But the text of the amended rule did not make clear what kind of notice qualified. This was an
14 invitation for litigation, confusion, and possible circuit splits.
15

16 To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) —
17 has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the
18 court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the
19 judgment or order that the party seeks to appeal within 21 days after that judgment or order was
20 entered, then the court is authorized to reopen the time to appeal (if all of the other requirements
21 of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a
22 judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will
23 not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).
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25 **Subdivision (a)(6)(B).** Former subdivision (a)(6)(A) has been redesignated as
26 subdivision (a)(6)(B), and one important substantive change has been made.
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28 New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment
29 or order will trigger the 7-day period for a party to move to reopen the time to appeal that
30 judgment or order. However, all that is required is that a party receive or observe written notice
31 of the entry of the judgment or order, not that a party receive or observe a copy of the judgment
32 or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be
33 received from any particular source, and nothing requires that the written notice be served
34 pursuant to Civil Rules 77(d) or 5(b). “Any written notice of entry received by the potential
35 appellant or his counsel (or conceivably by some other person), regardless of how or by whom
36 sent, is sufficient to open [new] subpart [(B)’s] seven-day window.” *Wilkins v Johnson*, 238
37 F.3d 328, 332 (5th Cir. 2001) (footnotes omitted). Thus, a person who checks the civil docket of
38 a district court action and learns that a judgment or order has been entered has observed written
39 notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-
40 mail, or by viewing a website has also received or observed written notice. However, an oral
41 communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how
42 specific, reliable, or unequivocal.
43

1 Courts had difficulty agreeing upon what type of “notice” was sufficient to trigger the 7-
2 day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The
3 majority of circuits held that only written notice was sufficient, although nothing in the text of
4 the rule suggested such a limitation. *See, e.g., Bass v. United States Dep’t of Agric* , 211 F.3d
5 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision
6 (a)(6)(A) did not require written notice, “the quality of the communication [had to] rise to the
7 functional equivalent of written notice.” *Nguyen v. Southwest Leasing & Rental, Inc* , 282 F.3d
8 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed “the
9 functional equivalent of written notice” if they were sufficiently “specific, reliable, and
10 unequivocal.” *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required
11 only “actual notice,” which, presumably, could have included oral notice that was not “the
12 functional equivalent of written notice.” *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211
13 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A)
14 restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that
15 notice be received “from the district court or any party,” *see Benavides v Bureau of Prisons*, 79
16 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor
17 former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner
18 prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins Co* , 174 F.3d 302, 304-05 (2d Cir.
19 1999)).
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21 New subdivision (a)(6)(B) resolves this circuit split by making clear that only receipt or
22 observation of *written* notice of the entry of a judgment or order will trigger the 7-day period for
23 a party to move to reopen the time to appeal.

C. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

Prof. Philip A. Pucillo of Ave Maria School of Law (03-AP-007) points out that subdivisions (A) and (C) begin with “the court finds,” whereas subdivision (B) does not. He wonders whether there is a reason for this, such as an attempt to “emphasiz[e] that the determinations to be made in subsections (A) and (C) are factual findings subject to ‘clearly erroneous’ review, while the subsection (B) determination is a different creature.” If no such reason exists, he recommends deleting “the court finds” in subdivisions (A) and (C) “as extraneous and potentially confusing.”

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendment.

Jack E. Horsley, Esq. (03-AP-011) supports the proposed amendment.

Philip Allen Lacovara, Esq. (03-AP-016) supports the substance of the proposed amendment, but regards the use of the term “observes” in subdivision (B) as “clumsy and obscure.” He suggests substituting “obtains” or “acquires.” He points out that the Committee Note would make clear the full scope of either term.

Robert Bstart (03-AP-071), a litigant whose appeal in a civil case was dismissed as untimely, recommends that Rule 4 be amended to apply a rule similar to the “prison mailbox rule” of Rule 4(c) to civil litigants who are not incarcerated.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment. It agrees that the deadline to move to reopen the time to appeal should be triggered only by written notice, and that “[e]xtending written notice to observation on the Internet is certainly appropriate.”

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) supports proposed subdivision (A), which it believes helpfully clarifies that only formal notice of the entry of judgment under Civil Rule 77(d) forecloses a party from later moving to reopen the time to appeal. The Committee objects to proposed subdivision (B), though, both because it is unclear about what type of event triggers the 7-day deadline and because it is likely to lead to litigation over whether such an event occurred (for example, over whether an attorney who checked a docket actually “observed” that judgment had been entered). The Committee urges that subdivision (B) be revised so that only Civil Rule 77(d) notice triggers the 7-day deadline.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) agrees with the Committee on Appellate Courts.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Recommendation

No commentator raised any objection to proposed subdivision (A). To the contrary, everyone who has commented on subdivision (A) — formally or informally — agrees that it is clear and helpful. I recommend that the Committee approve proposed subdivision (A) as published.

With respect to proposed subdivision (B), I share the concerns raised by the two committees of the California bar. Above all else, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a lot of factfinding by district courts. Subdivision (B) could do better on both counts. The standard — “receives or observes written notice of the entry from any source” — is awkward

and, despite the guidance of the Committee Note, seems likely to give courts problems. Even if the standard is sufficiently clear, district courts will be left having to make factual findings about whether a particular attorney or party “received” or “observed” notice that was written or electronic.

The solution suggested by the California bar — using Civil Rule 77(d) notice to trigger the 7-day period — makes sense. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And using Civil Rule 77(d) as the trigger would not unduly delay appellate proceedings, for several reasons.

1. Rule 4(a)(6) applies to only a small number of cases — cases in which a losing party was not notified of a judgment by either the clerk or another party within 21 days after the judgment’s entry.
2. Even with respect to those cases, Rule 4(a)(6) applies a “hard cap” of 180 days — i.e., no party can move to reopen the time to appeal after 180 days, no matter what the circumstances. The wording of subdivision (B) will only determine when *within* those 180 days the 7-day deadline is triggered.
3. Civil Rule 77(d) permits parties to serve notice of entry of judgment, which means that the winning party can always trigger the 7-day deadline by formally serving notice upon the losing party (or, more to the point, can prevent Rule 4(a)(6) from coming into play at all by serving notice promptly after the judgment is entered).
4. Finally, a party who informally learns of the entry of a judgment against it — such as a party who is told about the judgment in a phone call — has little incentive to delay filing a notice of appeal. Presumably, the party will want to get on with the appeal as soon as possible and will not want to risk running up against the 180-day hard cap.

I recommend that the Committee approve proposed subdivision (B) with the change suggested by the California bar. A draft amendment and Committee Note that would implement the change appear below. (The paragraph of the Note in brackets may be unnecessary.) Whether this change is significant enough to require a new notice-and-comment period is a close call. My inclination is that republication is not necessary, especially given that the revised version would be more forgiving than the published version, but the Committee may disagree.

1 appellant moved to reopen the time to appeal within 180 days after the judgment or order was
2 entered. Finally, the district court had to find that no party would be prejudiced by the reopening
3 of the time to appeal.
4

5 Rule 4(a)(6) has been amended to specify more clearly what kind of “notice” of the entry
6 of a judgment or order precludes a party from later moving to reopen the time to appeal. In
7 addition, Rule 4(a)(6) has been amended to address confusion about what kind of “notice”
8 triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized
9 to set forth more logically the conditions that must be met before a district court may reopen the
10 time to appeal.
11

12 **Subdivision (a)(6)(A).** Former subdivision (a)(6)(B) has been redesignated as
13 subdivision (a)(6)(A), and one important substantive change has been made.
14

15 Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to
16 appeal if it found “that a party entitled to notice of the entry of a judgment or order did not
17 receive such notice from the clerk or any party within 21 days of its entry.” The rule was clear
18 that the “notice” to which it referred was the notice required under Civil Rule 77(d), which must
19 be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to
20 that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a
21 party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d),
22 that party could later move to reopen the time to appeal (assuming that the other requirements of
23 subdivision (a)(6) were met).
24

25 In 1998, former subdivision (a)(6)(B) was amended to change the description of the type
26 of notice that would preclude a party from moving to reopen the time to appeal. As a result of
27 the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party
28 to receive “*such* notice” — that is, the notice required by Civil Rule 77(d) — but instead referred
29 to the failure of the moving party to receive “*the* notice.” And former subdivision (a)(6)(B) no
30 longer referred to the failure of the moving party to receive notice from “the *clerk* or any party,”
31 both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B)
32 referred to the failure of the moving party to receive notice from “the *district court* or any party.”
33

34 The 1998 amendment meant, then, that the type of notice that precluded a party from
35 moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the
36 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party.
37 But the text of the amended rule did not make clear what kind of notice qualified. This was an
38 invitation for litigation, confusion, and possible circuit splits.
39

40 To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) —
41 has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the
42 court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the
43 judgment or order that the party seeks to appeal within 21 days after that judgment or order was

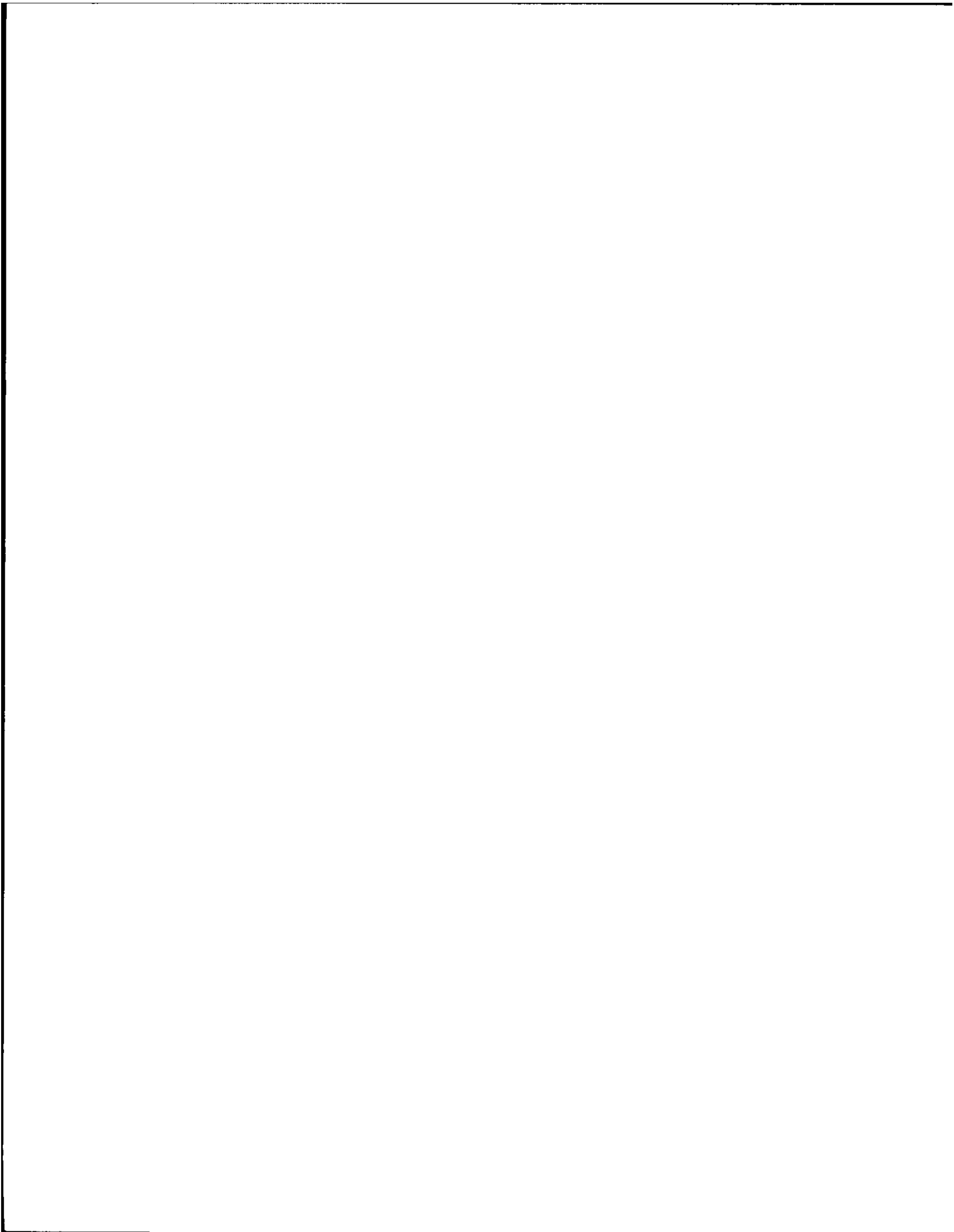
1 entered, then the court is authorized to reopen the time to appeal (if all of the other requirements
2 of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a
3 judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will
4 not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).
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6 **Subdivision (a)(6)(B).** Former subdivision (a)(6)(A) has been redesignated as
7 subdivision (a)(6)(B), and one important substantive change has been made.
8

9 Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal
10 “within 7 days after the moving party receives notice of the entry [of the judgment or order
11 sought to be appealed].” Courts had difficulty agreeing upon what type of “notice” was
12 sufficient to trigger the 7-day period. The majority of circuits that addressed the question held
13 that only *written* notice was sufficient, although nothing in the text of the rule suggested such a
14 limitation. *See, e.g., Bass v. United States Dep’t of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000).
15 By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written
16 notice, “the quality of the communication [had to] rise to the functional equivalent of written
17 notice.” *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002).
18 Other circuits suggested in dicta that former subdivision (a)(6)(A) required only “actual notice,”
19 which, presumably, could have included verbal notice that was not “the functional equivalent of
20 written notice.” *See, e.g., Lowry v McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir.
21 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared
22 only in former subdivision (a)(6)(B) (such as the requirement that notice be received “from the
23 district court or any party,” *see Benavides v Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir.
24 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B)
25 (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan*
26 *v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).
27

28 Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to
29 resolve this circuit split. Under new subdivision (a)(6)(B), only formal notice of the entry of a
30 judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d)
31 notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar,
32 circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice
33 must be served under Civil Rule 5(b), establishing whether and when such notice was provided
34 should generally not be difficult.
35

[Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate
proceedings. Rule 4(a)(6) applies to only a small number of cases — cases in which a party was
not notified of a judgment or order by either the clerk or another party within 21 days after entry.
Even with respect to those cases, no appeal can be brought more than 180 days after entry, no
matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of
the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming
into play simply by serving notice of entry within 21 days. Failing that, by later serving notice,
the winning party can trigger the 7-day deadline to move to reopen.]



II. Washington’s Birthday Package: Rules 26(a)(4) and 45(a)(2)

A. Introduction

During the 1998 restyling of the Appellate Rules, the phrase “Washington’s Birthday” was replaced with “Presidents’ Day.” The Committee concluded that this was a mistake. A federal statute — 5 U.S.C. § 6103(a) — officially designates the third Monday in February as “Washington’s Birthday,” and the other rules of practice and procedure — including the newly restyled Criminal Rules — use “Washington’s Birthday.” The Committee proposed to amend Rules 26(a)(4) and 45(a)(2) to replace “Presidents’ Day” with “Washington’s Birthday.”

B. Text of Rules and Committee Notes

1 **Rule 26. Computing and Extending Time**

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

4 * * * * *

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

11 * * * * *

12 **Committee Note**

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

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Rule 45. Clerk’s Duties

(a) General Provisions.

* * * * *

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

* * * * *

Committee Note

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

C. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendments.

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendments.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendments.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Recommendation

I recommend that the proposed amendments be approved as published.



III. New Rule 27(d)(1)(E)

A. Introduction

The Committee proposed to add a new subdivision (E) to Rule 27(d)(1) to make it clear that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motion papers. Applying these restrictions to motion papers is necessary to prevent abuses — such as litigants using very small typeface to cram as many words as possible into the pages that they are permitted.

B. Text of Rule and Committee Note

1 **Rule 27. Motions**

2 * * * * *

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

4 **(1) Format.**

5 **(A) Reproduction.** A motion, response, or reply may be reproduced by any
6 process that yields a clear black image on light paper. The paper must be
7 opaque and unglazed. Only one side of the paper may be used.

8 **(B) Cover.** A cover is not required, but there must be a caption that includes
9 the case number, the name of the court, the title of the case, and a brief
10 descriptive title indicating the purpose of the motion and identifying the
11 party or parties for whom it is filed. If a cover is used, it must be white.

12 **(C) Binding.** The document must be bound in any manner that is secure, does
13 not obscure the text, and permits the document to lie reasonably flat when
14 open.

15 **(D) Paper size, line spacing, and margins.** The document must be on 8½ by
16 11 inch paper. The text must be double-spaced, but quotations more than

1 two lines long may be indented and single-spaced. Headings and
2 footnotes may be single-spaced. Margins must be at least one inch on all
3 four sides. Page numbers may be placed in the margins, but no text may
4 appear there.

5 (E) Typeface and type styles. The document must comply with the typeface
6 requirements of Rule 32(a)(5) and the type-style requirements of Rule
7 32(a)(6)

8 * * * * *

9 **Committee Note**

10
11 **Subdivision (d)(1)(E).** A new subdivision (E) has been added to Rule 27(d)(1) to
12 provide that a motion, a response to a motion, and a reply to a response to a motion must comply
13 with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).
14 The purpose of the amendment is to promote uniformity in federal appellate practice and to
15 prevent the abuses that might occur if no restrictions were placed on the size of typeface used in
motion papers.

C. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendment, but “only if the current page limits of Rule 27(d)(2) . . . are revised” — either to increase the number of pages (to 24 pages for motions and 12 pages for replies) or to express the limits in words instead of pages (5600 words for motions and 2800 words for replies). Public Citizen points out that most circuits now allow motions to be filed in 12- or even 11-point proportional font. Thus, the proposed amendment will substantially reduce the content of motion papers in most circuits. Increasing the page limits (or stating them in words, as Public Citizen would prefer) would compensate for this reduction and is justified by the fact that some motions — particularly dispositive motions — can be quite complex and require considerable briefing.

Matthew J. Sanders, Esq. (03-AP-122) supports the proposed amendment and recommends that the Committee go further and amend Rule 27 so that it imposes word limits, rather than page limits, on motions. He believes that the benefits of imposing word limits on briefs — “instead of worrying about altering paragraphs, headings, and sentence structure to meet

a page limit, lawyers could spend more time on the substance of their work and simply follow a word limit” — would “apply equally to motions.”

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendment.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Recommendation

I recommend that the proposal be approved as published.

I do not agree with the comments of Public Citizen and Mr. Sanders about word limits. The Appellate Rules use word limits on briefs but page limits on everything else (save Rule 28(j) letters) because that is what the clerks have told us they want. Page limits are much easier for the clerks to enforce; word limits work for briefs only because the parties must file certificates of compliance (see Form 6). If the Rules were to apply word limits to other papers, then the parties would have to file certificates of compliance for those papers as well, as clerks are not going to count the words manually. That would thicken everyone’s files and make practice more cumbersome.

The clerks have also told us that abuses are generally not a problem with respect to the papers governed by page limits. Because it is easy for the clerks to determine if, say, a motion is more than 20 pages, parties generally don’t try to file motions more than 20 pages.

As for Public Citizen’s suggestion, I think it better to approve the proposed amendment as published and leave it to parties to request more space when necessary. Rule 27(d)(2)’s page limits should be sufficient in the vast majority of cases.



IV-A-4

IV. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d)

A. Introduction

The Appellate Rules say very little about briefing in cases involving cross-appeals. This omission has been a continuing source of frustration for judges and attorneys, and most courts have filled the vacuum by enacting 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. Not surprisingly, there are many inconsistencies among these local rules.

The Committee proposed to add a new Rule 28.1 that would collect in one place the few existing provisions regarding briefing in cases involving cross-appeals and add several new provisions to fill the gaps in the existing rules. Each of the new provisions reflects the practice of a large majority of circuits, save one: Although all circuits limit the appellee's principal and response brief to 14,000 words, new Rule 28.1 would limit that brief to 16,500 words.

B. Text of Rules and Committee Notes

1 **Rule 28. Briefs**

2 * * * * *

3 (c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief. ~~An appellee~~
4 ~~who has cross-appealed may file a brief in reply to the appellant's response to the issues~~
5 ~~presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A
6 reply brief must contain a table of contents, with page references, and a table of
7 authorities — cases (alphabetically arranged), statutes, and other authorities — with
8 references to the pages of the reply brief where they are cited.

9 * * * * *

10 ~~(h) — Briefs in a Case Involving a Cross-Appeal.~~ If a cross-appeal is filed, the party who
11 files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31,
12 and 34. ~~If notices are filed on the same day, the plaintiff in the proceeding below is the~~

1 appellant. ~~These designations may be modified by agreement of the parties or by court~~
2 ~~order. With respect to appellee's cross-appeal and response to appellant's brief,~~
3 ~~appellee's brief must conform to the requirements of Rule 28(a)(1)-(11). But an appellee~~
4 ~~who is satisfied with appellant's statement need not include a statement of the case or of~~
5 ~~the facts. [Reserved]~~

6 * * * * *

7 **Committee Note**

8
9 **Subdivision (c).** Subdivision (c) has been amended to delete a sentence that authorized
10 an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules
11 regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.
12

13 **Subdivision (h).** Subdivision (h) — regarding briefing in cases involving cross-appeals
14 — has been deleted. All rules regarding such briefing have been consolidated into new Rule
15 28.1.
16

17
18 **Rule 28.1. Cross-Appeals**

19 **(a) Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-
20 (c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as
21 otherwise provided in this rule.

22 **(b) Designation of Appellant.** The party who files a notice of appeal first is the appellant
23 for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the
24 plaintiff in the proceeding below is the appellant. These designations may be modified by
25 agreement of the parties or by court order.

26 **(c) Briefs.** In a case involving a cross-appeal:

27 **(1) Appellant's Principal Brief.** The appellant must file a principal brief in the
28 appeal. That brief must comply with Rule 28(a).

1 **(2) Appellee’s Principal and Response Brief.** The appellee must file a principal
2 brief in the cross-appeal and must, in the same brief, respond to the principal brief
3 in the appeal. That appellee’s brief must comply with Rule 28(a), except that the
4 brief need not include a statement of the case or a statement of the facts unless the
5 appellee is dissatisfied with the appellant’s statement.

6 **(3) Appellant’s Response and Reply Brief.** The appellant must file a brief that
7 responds to the principal brief in the cross-appeal and may, in the same brief,
8 reply to the response in the appeal. That brief must comply with Rule
9 28(a)(2)–(9) and (11), except that none of the following need appear unless the
10 appellant is dissatisfied with the appellee’s statement in the cross-appeal:

- 11 **(A) the jurisdictional statement;**
- 12 **(B) the statement of the issues;**
- 13 **(C) the statement of the case;**
- 14 **(D) the statement of the facts; and**
- 15 **(E) the statement of the standard of review.**

16 **(4) Appellee’s Reply Brief.** The appellee may file a brief in reply to the response in
17 the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11). That
18 brief must also be limited to the issues presented by the cross-appeal.

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

21 **(d) Cover.** Except for filings by unrepresented parties, the cover of the appellant’s principal
22 brief must be blue; the appellee’s principal and response brief, red; the appellant’s

1 response and reply brief, yellow; and the appellee's reply brief, gray. The front cover of a
2 brief must contain the information required by Rule 32(a)(2).

3 **(e) Length.**

4 **(1) Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's
5 principal brief must not exceed 30 pages; the appellee's principal and response
6 brief, 35 pages; the appellant's response and reply brief, 30 pages; and the
7 appellee's reply brief, 15 pages.

8 **(2) Type-Volume Limitation.**

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

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

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

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

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

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

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

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

1 **(f) Time to Serve and File a Brief.** The appellant’s principal brief must be served and filed
2 within 40 days after the record is filed. The appellee’s principal and response brief must
3 be served and filed within 30 days after the appellant’s principal brief is served. The
4 appellant’s response and reply brief must be served and filed within 30 days after the
5 appellee’s principal and response brief is served. The appellee’s reply brief must be
6 served and filed within 14 days after the appellant’s response and reply brief is served,
7 but the appellee’s reply brief must be filed at least 3 days before argument, unless the
8 court, for good cause, allows a later filing.

9 **Committee Note**

10
11 The Federal Rules of Appellate Procedure have said very little about briefing in cases
12 involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have
13 sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local
14 rules regarding such matters as the number and length of briefs, the colors of the covers of briefs,
15 and the deadlines for serving and filing briefs. These local rules have created a hardship for
16 attorneys who practice in more than one circuit.

17
18 New Rule 28.1 provides a comprehensive set of rules governing briefing in cases
19 involving cross-appeals. The few existing provisions regarding briefing in such cases have been
20 moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the
21 existing rules. The new provisions reflect the practices of the large majority of circuits and, to a
22 significant extent, the new provisions have been patterned after the requirements imposed by
23 Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

24
25 **Subdivision (a).** Subdivision (a) makes clear that, in a case involving a cross-appeal,
26 briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2),
27 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those
28 rules by reference.

29
30 **Subdivision (b).** Subdivision (b) defines who is the “appellant” and who is the
31 “appellee” in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule
32 28(h), except that subdivision (b) refers to a party being designated as an appellant “for the
33 purposes of this rule and Rules 30 and 34,” whereas former Rule 28(h) also referred to Rule 31.
34 Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now
35 addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary.
36

1 **Subdivision (c).** Subdivision (c) provides for the filing of four briefs in a case involving
2 a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R.
3 28(d)(1)(a).
4

5 The first brief is the “appellant’s principal brief.” That brief — like the appellant’s
6 principal brief in a case that does not involve a cross-appeal — must comply with Rule
7 28(a).
8

9 The second brief is the “appellee’s principal and response brief.” Because this brief
10 serves as the appellee’s principal brief on the merits of the cross-appeal, as well as the
11 appellee’s response brief on the merits of the appeal, it must also comply with Rule 28(a),
12 with the limited exceptions noted in the text of the rule.
13

14 The third brief is the “appellant’s response and reply brief.” Like a response brief in a
15 case that does not involve a cross-appeal — that is, a response brief that does not also
16 serve as a principal brief on the merits of a cross-appeal — the appellant’s response and
17 reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the
18 text of the rule. *See* Rule 28(b). The one difference between the appellant’s response and
19 reply brief, on the one hand, and a response brief filed in a case that does not involve a
20 cross-appeal, on the other, is that the latter must include a corporate disclosure statement.
21 *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case
22 involving a cross-appeal has already filed a corporate disclosure statement with its
23 principal brief on the merits of the appeal.
24

25 The fourth brief is the “appellee’s reply brief.” Like a reply brief in a case that does not
26 involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the
27 requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of
28 Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-
29 reference.) The appellee’s reply brief must also be limited to the issues presented by the
30 cross-appeal.
31

32 **Subdivision (d).** Subdivision (d) specifies the colors of the covers on briefs filed in a
33 case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically
34 refer to cross-appeals.
35

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

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Rule 34. Oral Argument

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(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).

C. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendments.

The **Public Citizen Litigation Group** (03-AP-008) “applaud[s]” the proposed amendments, which would “streamline the briefing process and achieve national uniformity where diversity serves no purpose.” Public Citizen objects, though, that the 16,500 word limit on the appellee’s principal and response brief “seems a bit stingy,” as this brief “combines two *principal* briefs.” Public Citizen “recognize[s] that combining briefs achieves some economy,” but argues that “18,000 words — or 1650 lines of text in a monospaced face — would better accommodate the needs of the appellee in complex cross appeals.” As for the appellant’s response and reply brief, Public Citizen argues that the limit should be increased to 15,000 words

or 1,400 lines, as this brief must serve the functions of a principal response brief (typically limited to 14,000 words or 1,300 lines) and a reply brief (typically limited to 7,000 words or 650 lines).

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendments, which he says are “particularly welcome.” He has only a couple of objections:

1. Mr. Lacovara is concerned that use of the phrase “a case” in Rule 28.1(a) “may create an unintended ambiguity,” as “[i]n most if not all circuits, each appeal, including a cross-appeal, is assigned a separate docket number and thus is technically a distinct appellate ‘case,’ even though the separate cases are typically consolidated.” He suggests adding the following sentence at the end of Rule 28.1(a): “This Rule governs the briefs of all parties where an appeal and one or more cross-appeals are taken from the same order or judgment.” This, he says, would “make clear that [the new rule] appl[ies] to all parties to all related cases involving cross-appeals from the same judgment or order.”

2. Mr. Lacovara objects to the 16,500 word limit on the appellee’s principal and response brief and, more generally, to giving the appellant 28,000 total words while giving the appellee only 23,500. He argues that it is “mistaken” to assume that a “cross-appeal is likely to pose relatively insignificant issues that can be treated effectively and intelligibly in a summary fashion or by simply adopting much of the appellant’s opening brief.” He notes that “the designation of ‘appellant’ and ‘appellee’ . . . is simply the result of the fortuity of timing,” meaning that “[t]he cross-appeal may be just as substantial as the opening appeal.” He suggests that “a more realistic maximum” for the appellee’s principal and response brief would be 21,500 words.

3. Mr. Lacovara suggests that the rule should include a requirement that “both the appellee’s principal and response brief and the appellant’s response and reply brief contain appropriate headings demarcating the portion of the argument that addresses that party’s own appeal and the portion that is addressing the other party’s appellate points.”

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on his circuit unanimously oppose Rule 28.1 insofar as it would increase the word limits on briefs beyond what the Federal Circuit’s local rules now permit. The Federal Circuit’s local rules provide for four briefs, as Rule 28.1 would, but limit those four briefs to 14,000, 14,000, 7,000, and 7,000 words, whereas Rule 28.1 would increase those limits to 14,000, 16,500, 14,000, and 7,000. Rule 28.1 would thus significantly lengthen the briefs submitted to the Federal Circuit in cross-appeals.

Judge Mayer argues that the extra space is not needed. The space permitted by the Federal Circuit in cross-appeals — 21,000 words for each side — is ample in most cases. In the rare case in which 21,000 words is insufficient, the parties can ask for permission to file longer briefs. The Federal Circuit “finds that cross-appeals are often filed improperly in order to secure an additional brief and the last word,” and Rule 28.1 will “greatly exacerbate this problem” by increasing the word count for cross-appeals.

Counsel tend to use every word that they are allotted, so it is predictable that counsel will use all of the extra words that Rule 28.1 would give them. This will mean longer briefs, more repetition in briefs, and more briefing of marginal issues that counsel would otherwise drop. The courts of appeals do not need the additional work.

If a national rule regarding cross-appeals is adopted, the Federal Circuit urges that “the increased word count be limited to the subject matter of the cross-appeal, not the response to the main appeal.” Many cross-appeals involve issues that are few, minor, or conditional. Under proposed Rule 28.1, parties could address such issues in a few words, and then use most of their 16,500 words on an extra-long response in the appeal.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendments. It argues, though, that the word limit on the appellee’s principal and response brief should be increased to 28,000, and the word limit on the appellant’s response and reply brief to 21,000. Cross-appeals often raise issues that are as significant as — if not more significant than — the issues raised in appeals. Each side should have the same number of words, and each side should be given a total of 35,000 — to allow each side to submit the equivalent of a typical principal brief on the appeal (14,000) and the cross-appeal (14,000) and the equivalent of a typical reply brief (7,000).

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) supports the proposed amendments, which “succeed in providing clarity, collecting in one place all the provisions concerning the subject matter of cross-appeals, eliminating inconsistencies among various Circuit rules, and adding new provisions to fill existing gaps.” Its one objection is to the word limits. The Committee objects to giving the appellant a total of 28,000 words, but the appellee only 23,500. Although some cross-appeals are merely protective and can be addressed with fewer words, many other cross-appeals involve difficult legal issues or complicated factual scenarios that may not have been addressed — at least adequately — in the appeal. Moreover, the designation of parties as “appellant” and “appellee” often reflects nothing more than who won the race to the courthouse; 4,500 words of briefing space should not turn on such an arbitrary matter. The Committee urges that the word limit on the appellee’s principal and response brief be increased from 16,500 to 21,000.

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) objects to imposing a four-brief system in cross-appeals on the Seventh Circuit (which alone permits only three briefs) and argues that, if a four-brief system is to be imposed, the word limits should be adjusted “so that the normal type volume is spread across those briefs.” He suggests that “[s]omething like 9,000, 13,000, 9,000, and 5,000 (18,000 words on each side, or 36,000 total) would work nicely.” He points out that, if a case was so complex that more words were essential, parties could seek permission to file longer briefs. “Far better to start with 36,000 words in the normal case and go up if necessary, than to make 51,500 words the norm.”

Judge Easterbrook describes the justification for the Seventh Circuit’s three-brief practice as follows: “Many lawyers file unnecessary cross appeals either out of carelessness or, worse, an effort to obtain a self-help increase in the allowable type volume.” Many lawyers do not realize that they do not need to file a cross-appeal to defend a judgment on a ground not relied on by the district court. Or they do realize it, but file a cross-appeal anyway, in order to get additional brief space. (Under Rule 28.1, they would get “a 50% increase for the cost of one measly appellate filing fee!”) For these reasons, the Seventh Circuit went to a three-brief system, “with an invitation to counsel to apply for more words (or a fourth brief) when there was a genuine need. Very few such applications are filed, and the number of cross appeals has substantially declined, showing that many had indeed been strategic.”

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendments. It specifically “agrees that because cross-appeals are often protective in nature and the issues raised are often related to the underlying appeal, the cross-appellant does not necessarily always need as many words/length of brief as the appellant.” It also points out that, if the cross-appellant needs more words, he or she can ask for them.

The **Style Subcommittee** (04-AP-A) makes these suggestions:

1. In the final sentence of Rule 28.1(b), replace “agreement of the parties” with “the parties’ agreement.”
2. In the final two sentences of Rule 28.1(c)(4), insert “and” in place of the period after “(11)” and delete “That brief” and “also,” so that what remains is: “That brief must comply with Rule 28(a)(2)–3 and (11) and must be limited to the issues presented by the cross-appeal.”

3 Rewrite Rule 28.1(f) as follows:

- 1 **(f) Time to Serve and File a Brief.** Briefs must be served and filed as follows:
- 2 (1) the appellant’s principal brief, within 40 days after the record is filed;
- 3 (2) the appellee’s principal and response brief, within 30 days after the appellant’s
- 4 principal brief is served;
- 5 (3) the appellant’s response and reply brief, within 30 days after the appellee’s
- 6 principal and response brief is served; and

1 (4) the appellee's reply brief, within 14 days after the appellant's response and reply
2 brief is served, but at least 3 days before argument unless the court, for good
3 cause, allows a later filing.

D. Recommendation

I recommend that the proposed amendments be approved with the changes suggested by the Style Subcommittee. I also recommend — probably in vain, I recognize — that the Committee reduce the size of the appellee's principal and response brief and perhaps also the appellant's response and reply brief.

No commentator — save Judge Easterbrook — objected to any aspect of the proposed amendments except the word limits. To the contrary, all of the formal and informal comments that we have received have strongly supported the proposal.

I have some sympathy for Judge Easterbrook's arguments regarding the Seventh Circuit's three-brief system, but attempting to impose that system on the other 12 circuits would trigger strong protests from judges and, especially, attorneys. The fact that Judge Easterbrook alone objected to the four-brief system suggests that it is widely acceptable.

As to the word limits: I recognize that I am out-of-step with the Committee on this question, but I agree with Judge Mayer's recommendation that the four briefs be limited to 14,000, 14,000, 7,000, and 7,000 words. Judge Motz made precisely this suggestion at an earlier meeting of the Committee. I agree with Judge Mayer — and Judge Motz — that briefs are routinely too long, that there is no correlation between the length of a brief and its effectiveness, and that 21,000 words are usually ample to argue one side of a case — even a case involving a cross-appeal. I also agree with Judge Easterbrook that it is better to allot a smaller number of words and require parties to ask for more than to allot a larger number of words and ensure that, in thousands of appeals, briefs will be larded with unnecessary words.

If the Committee decides not to accept Judge Mayer's suggestion, then I recommend that the Committee at least consider adopting the practice of every circuit in the United States and limit the appellee's principal and response brief to 14,000 words (instead of 16,500 words). The Committee decided to do just that at its April 2001 meeting, but reversed course on a 5-4 vote at its April 2002 meeting. I thought the Committee got it right the first time. If the Committee does not reduce the size of the appellee's principal and response brief to 14,000 words, it is possible that the Standing Committee or the Judicial Conference might do so. The Standing Committee or the Judicial Conference may ask why this Committee is requiring every single circuit to expand briefing in every single cross-appeal by at least 2,500 words, and I am not sure that the proponents of the 16,500-word limit have made a compelling case that the current word limit is inadequate.

Whatever word limit the Committee settles upon, I recommend that the proposed amendments be approved. The benefits of the proposed amendments outweigh any costs that might be created by choosing an unduly high word limit — and any word limit can be changed in the future. The fact that only the Federal Circuit (plus Judge Easterbrook) objected to the word limits in proposed Rule 28.1 suggests that — notwithstanding what I said above — those word limits stand a good chance of being approved.

For reasons already stated, I do not agree with the commentators who argued that the word limits should be increased. I also do not believe that these objections should endanger approval of Rule 28.1, given that the rule does not leave any party with *fewer* words than the party now receives under prevailing circuit practices. By contrast, if Rule 28.1 were to significantly increase the word limits over those now imposed by most circuits, the rule would likely meet with opposition in the Standing Committee and especially the Judicial Conference.

The Committee has already discussed Judge Mayer's suggestion that the second and third briefs be segregated into separate parts — the part addressing the appeal and the part addressing the cross-appeal — and that a separate word limit be applied to each part. The Committee concluded that such segregation would often be difficult and result in a great deal of needless repetition.



IV-A-5

V. **New Rule 32.1**

A. **Introduction**

The Committee proposed to add a new Rule 32.1 that would require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “non-precedential,” or the like. New Rule 32.1 would also require parties who cite “unpublished” or “non-precedential” opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.

B. **Text of Rule and Committee Note**

1 **Rule 32.1. Citation of Judicial Dispositions**

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

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

11 **Committee Note**

12
13 Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or
14 other written dispositions that have been designated as “unpublished,” “not for publication,”
15 “non-precedential,” “not precedent,” or the like. This Note will refer to these dispositions
16 collectively as “unpublished” opinions. This is a term of art that, while not always literally true
17 (as many “unpublished” opinions are in fact published), is commonly understood to refer to the
18 entire group of judicial dispositions addressed by Rule 32.1.

19
20 The citation of “unpublished” opinions is an important issue. The thirteen courts of
21 appeals have cumulatively issued tens of thousands of “unpublished” opinions, and about 80% of

1 the opinions issued by the courts of appeals in recent years have been designated as
2 “unpublished.” Administrative Office of the United States Courts, Judicial Business of the
3 United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in
4 their treatment of “unpublished” opinions, most agree that an “unpublished” opinion of a circuit
5 does not bind panels of that circuit or district courts within that circuit (or any other court).
6

7 State courts have also issued countless “unpublished” opinions in recent years. And,
8 again, although state courts differ in their treatment of “unpublished” opinions, they generally
9 agree that “unpublished” opinions do not establish precedent that is binding upon the courts of
10 the state (or any other court).
11

12 Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an
13 “unpublished” opinion as binding precedent is constitutional. *See Symbol Tech., Inc v. Lemelson*
14 *Med., Educ & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Hart v. Massanari*,
15 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260
16 (5th Cir. 2001) (Smith, J., dissenting from denial of reh’g en banc); *Anastasoff v. United States*,
17 223 F.3d 898, 899-905, *vacated as moot on reh’g en banc* 235 F.3d 1054 (8th Cir. 2000). It does
18 not require any court to issue an “unpublished” opinion or forbid any court from doing so. It
19 does not dictate the circumstances under which a court may choose to designate an opinion as
20 “unpublished” or specify the procedure that a court must follow in making that decision. It says
21 nothing about what effect a court must give to one of its “unpublished” opinions or to the
22 “unpublished” opinions of another court. The one and only issue addressed by Rule 32.1 is the
23 *citation* of judicial dispositions that have been *designated* as “unpublished” or “non-
24 precedential” by a federal or state court — whether or not those dispositions have been published
25 in some way or are precedential in some sense.
26

27 **Subdivision (a).** Every court of appeals has allowed “unpublished” opinions to be cited
28 in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of
29 the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to
30 attorney’s fees. Not all of the circuits have specifically mentioned all of these claims in their
31 local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an
32 “unpublished” opinion under these circumstances.
33

34 By contrast, the circuits have differed dramatically with respect to the restrictions that
35 they have placed upon the citation of “unpublished” opinions for their persuasive value. An
36 opinion cited for its “persuasive value” is cited not because it is binding on the court or because it
37 is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes
38 that it will influence the court as, say, a law review article might — that is, simply by virtue of
39 the thoroughness of its research or the persuasiveness of its reasoning.
40

41 Some circuits have freely permitted the citation of “unpublished” opinions for their
42 persuasive value, some circuits have disfavored such citation but permitted it in limited
43 circumstances, and some circuits have not permitted such citation under any circumstances.
44 These conflicting rules have created a hardship for practitioners, especially those who practice in

1 more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one
2 uniform rule.

3
4 Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an
5 “unpublished” opinion for its persuasive value or for any other reason. In addition, under Rule
6 32.1(a), a court of appeals may not place any restriction upon the citation of “unpublished”
7 opinions, unless that restriction is generally imposed upon the citation of all judicial opinions —
8 “published” and “unpublished.” Courts are thus prevented from undermining Rule 32.1(a) by
9 imposing restrictions only upon the citation of “unpublished” opinions (such as a rule permitting
10 citation of “unpublished” opinions only when no “published” opinion addresses the same issue or
11 a rule requiring attorneys to provide 30-days notice of their intent to cite an “unpublished”
12 opinion). At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to
13 form upon the citation of all judicial opinions (such as a rule requiring that case names appear in
14 italics or a rule requiring parties to follow The Bluebook in citing judicial opinions).

15
16 It is difficult to justify prohibiting or restricting the citation of “unpublished” opinions.
17 Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for
18 their persuasive value. These sources include the opinions of federal district courts, state courts,
19 and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian
20 sonnets, and advertising jingles. No court of appeals places any restriction on the citation of
21 these sources (other than restrictions that apply generally to all citations, such as requirements
22 relating to type styles). Parties are free to cite them for their persuasive value, and judges are free
23 to decide whether or not to be persuaded.

24
25 There is no compelling reason to treat “unpublished” opinions differently. It is difficult
26 to justify a system under which the “unpublished” opinions of the D.C. Circuit can be cited to the
27 Seventh Circuit, but the “unpublished” opinions of the Seventh Circuit cannot be cited to the
28 Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it
29 is difficult to justify a system that permits parties to bring to a court’s attention virtually every
30 written or spoken word in existence *except* those contained in the court’s own “unpublished”
31 opinions.

32
33 Some have argued that permitting citation of “unpublished” opinions would lead judges
34 to spend more time on them, defeating their purpose. This argument would have great force if
35 Rule 32 1(a) required a court of appeals to treat all of its opinions as precedent that binds all
36 panels of the court and all district courts within the circuit. The process of drafting a precedential
37 opinion is much more time consuming than the process of drafting an opinion that serves only to
38 provide the parties with a basic explanation of the reasons for the decision. As noted, however,
39 Rule 32.1(a) does not require a court of appeals to treat its “unpublished” opinions as binding
40 precedent. Nor does the rule require a court of appeals to increase the length or formality of any
41 “unpublished” opinions that it issues.

42
43 It should also be noted, in response to the concern that permitting citation of
44 “unpublished” opinions will increase the time that judges devote to writing them, that

1 “unpublished” opinions are already widely available to the public, and soon every court of
2 appeals will be required by law to post all of its decisions — including “unpublished” decisions
3 — on its website. See E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899,
4 2913. Moreover, “unpublished” opinions are often discussed in the media and not infrequently
5 reviewed by the United States Supreme Court. See, e.g., *Holmes Group, Inc. v. Vornado Air*
6 *Circulation Sys, Inc.*, 535 U.S. 826 (2002) (reversing “unpublished” decision of Federal Circuit);
7 *Swierkiewicz v. Sorema N A*, 534 U.S. 506 (2002) (reversing “unpublished” decision of Second
8 Circuit). If this widespread scrutiny does not deprive courts of the benefits of “unpublished”
9 opinions, it is difficult to believe that permitting a court’s “unpublished” opinions to be cited to
10 the court itself will have that effect. The majority of the courts of appeals already permit their
11 own “unpublished” opinions to be cited for their persuasive value, and “the sky has not fallen in
12 those circuits.” Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The*
13 *Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

14
15 In the past, some have also argued that, without no-citation rules, large institutional
16 litigants (such as the Department of Justice) who can afford to collect and organize
17 “unpublished” opinions would have an unfair advantage. Whatever force this argument may
18 once have had, that force has been greatly diminished by the widespread availability of
19 “unpublished” opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal
20 Appendix. In almost all of the circuits, “unpublished” opinions are as readily available as
21 “published” opinions. Barring citation to “unpublished” opinions is no longer necessary to level
22 the playing field.

23
24 Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that
25 citing “unpublished” opinions is “disfavored” or limited to particular circumstances (such as
26 when no “published” opinion adequately addresses an issue). Again, it is difficult to understand
27 why “unpublished” opinions should be subject to restrictions that do not apply to other sources.
28 Moreover, given that citing an “unpublished” opinion is usually tantamount to admitting that no
29 “published” opinion supports a contention, parties already have an incentive not to cite
30 “unpublished” opinions. Not surprisingly, those courts that have liberally permitted the citation
31 of “unpublished” opinions have not been overwhelmed with such citations. Finally, restricting
32 the citation of “unpublished” opinions may spawn satellite litigation over whether a party’s
33 citation of a particular “unpublished” opinion was appropriate. This satellite litigation would
34 serve little purpose, other than further to burden the already overburdened courts of appeals.

35
36 Rule 32.1(a) will further the administration of justice by expanding the sources of insight
37 and information that can be brought to the attention of judges and making the entire process more
38 transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will
39 relieve attorneys of several hardships. Attorneys will no longer have to pick through the
40 conflicting no-citation rules of the circuits in which they practice, nor worry about being
41 sanctioned or accused of unethical conduct for improperly citing an “unpublished” opinion. See
42 *Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for
43 violating no-citation rule); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-
44 386R (1995) (“It is ethically improper for a lawyer to cite to a court an ‘unpublished’ opinion of

1 that court or of another court where the forum court has a specific rule prohibiting any reference
2 in briefs to [‘unpublished’ opinions].”). In addition, attorneys will no longer be barred from
3 bringing to the court’s attention information that might help their client’s cause; whether or not
4 this violates the First Amendment (as some have argued), it is a regrettable position in which to
5 put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have
6 been tempted to find a way to hint to a court that it has addressed an issue in an “unpublished”
7 opinion can now directly bring that “unpublished” opinion to the court’s attention, and the court
8 can do whatever it wishes with that opinion.
9

10 **Subdivision (b).** Under Rule 32.1(b), a party who cites an “unpublished” opinion must
11 provide a copy of that opinion to the court and to the other parties, unless the “unpublished”
12 opinion is available in a publicly accessible electronic database — such as in Westlaw or on a
13 court’s website. A party who is required under Rule 32.1(b) to provide a copy of an
14 “unpublished” opinion must file and serve the copy with the brief or other paper in which the
15 opinion is cited.
16

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

C. Summary of Public Comments

As I explained in the introduction to this memorandum, I will not summarize each of the 500-plus comments that we received about Rule 32.1, as those comments are both numerous and repetitive. Rather, I will describe the major arguments that commentators made for and against adopting the proposed rule. I will then describe the (relatively few) suggestions that commentators made regarding the wording of Rule 32.1. I will conclude by listing those who commented in favor of and those who commented against adopting the proposed rule.

1. Summary of Arguments Regarding Substance

a. Arguments Against Adopting Proposed Rule

1. A circuit should be free to conduct its business as it sees fit unless there is a compelling reason to impose uniformity. This is particularly true with respect to measures such as no-citation rules, which reflect decisions made by circuits about how best to allocate their scarce resources to meet the demands placed upon them. Circuits confront dramatically different local conditions. Among the features that vary from circuit to circuit are the size, subject matter, and complexity of the circuit’s caseload; the number of active and senior judges on the circuit;

the geographical scope of the circuit; the process used by the circuit to decide which cases are designated as unpublished; the time and attention devoted by circuit judges to unpublished opinions; and the legal culture of the circuit (such as the aggressiveness of the local bar). These features are best known to the judges who work within the circuit every day. No advisory committee composed entirely or almost entirely of outsiders should tell a circuit that it cannot implement a rule that the circuit has deemed necessary to handle its workload, unless that advisory committee has strong evidence that a uniform rule would serve a compelling interest.

2. The Appellate Rules Committee does not have such evidence with respect to Rule 32.1. The Committee Note fails to identify a single serious problem with the status quo that Rule 32.1 would solve.

a. The main problem identified by the Committee Note is that no-citation rules impose a “hardship” on attorneys by forcing them to “pick through the conflicting no-citation rules of the circuits in which they practice.”

i. This is not much of a hardship.

- Every circuit has implemented numerous local rules, and attorneys will continue to have to “pick through” those rules whether or not Rule 32.1 is approved. It is not unreasonable to ask an attorney who seeks to practice in a circuit to read and follow that circuit’s local rules — local rules that are readily available online.
- Among local rules, no-citation rules are particularly easy to follow, as they are clear and, in most circuits, stamped right on the face of unpublished opinions. A lawyer who reads an unpublished opinion is told up front exactly what use he or she can make of it.
- It is not surprising that the Committee has not identified a single occasion on which an attorney was in fact confused about the no-citation rule of a circuit, much less a single occasion on which an attorney was “sanctioned or accused of unethical conduct for improperly citing an ‘unpublished’ opinion.” Attorneys have no difficulty locating, understanding, and following no-citation rules.

ii. Rule 32.1 would do little to alleviate whatever hardship exists.

- Most litigators practice in only one state and one circuit. Thus, most litigators are inconvenienced far more by differences between the rules of their *state* courts and the rules of their *federal* courts than they are by differences among the rules of various federal courts. The minority of attorneys who practice regularly in multiple circuits tend to work for the

Justice Department or for large law firms and thus have the time and resources to learn and follow each circuit's local rules

- Although Rule 32.1 would help these Justice Department and big firm lawyers by creating uniformity among federal circuits, it would *harm* the typical attorney who practices in only one state by creating *disuniformity* between, for example, the citation rules of the California courts and the citation rules of the Ninth Circuit.
- Even within the federal courts, Rule 32.1 would create uniformity only with respect to citation. The rule would not create uniformity with respect to the *use* that circuits make of unpublished opinions. Thus, those who practice in multiple federal circuits would still have to become familiar with inconsistent rules about unpublished opinions.

iii. If uniformity is the Committee's concern, it would be far better, for the reasons described below, for the Committee to propose a rule that would uniformly *bar* the citation of unpublished opinions.

b. The Committee Note alludes to a potential First Amendment problem. No court has found that no-citation rules violate the First Amendment, and no court will. Courts impose myriad restrictions on what an attorney may say to a court and how an attorney may say it. A no-citation rule no more threatens First Amendment values than does a rule limiting the size of briefs to 30 pages.

3. Not only has the Committee failed to identify any problems that Rule 32.1 would solve, it has failed to identify any other benefits that would result from Rule 32.1.

a. Rule 32.1 would not, as the Committee Note claims, "expand[] the sources of insight and information that can be brought to the attention of judges." Unpublished opinions provide little "insight" or "information" to anyone; to the contrary, they are most often used to mislead.

i. To understand why unpublished opinions do not provide much "insight" or "information," one needs to appreciate when and how unpublished opinions are produced.

- Appellate courts have essentially two functions: error correction and law creation. Unpublished opinions are issued in the vast majority of cases that call upon a court only to perform the former function.
- Unpublished opinions merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the

law; or address a legal issue in which the public has a significant interest. As one judge wrote: “[O]ur uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. They do *not* make or alter or nuance the law. The principles we use to decide cases in memorandum dispositions are already on the books and fully citable.” [03-AP-129]

- Unpublished opinions are also issued in cases that *do* present important legal questions, but in which the court is not confident that it answered those questions correctly — most often because the facts were unusual or because the advocacy was poor or lopsided. In such circumstances, a court may not want to speak authoritatively or comprehensively about an issue — or foreclose a particular line of argument — when a future case may present more representative facts or more skilled advocacy.
- Because an unpublished opinion functions solely as a one-time explanation to the parties and the lower court, judges are careful to make sure that the result is correct, but they spend very little time reviewing the opinion itself. Usually the opinion is drafted by a member of the circuit’s staff or by a law clerk; often, the staff member or law clerk simply converts a bench memo into an opinion. The opinion will generally say almost nothing about the facts, because its intended audience — the parties and the lower court — are already familiar with the facts. It is common for a panel to spend as little as five or ten minutes on an unpublished opinion. The opinions usually do not go through multiple drafts, members of the panel usually do not request modifications, and the opinions are not usually circulated to the entire circuit before they are released.
- An unpublished opinion may accurately express the views of *none* of the members of the panel. As long as the result is correct, judges do not care much about the language. As one judge explained: “What matters is the result, not the precise language of the disposition or even its reasoning. Mem dispos reflect the panel’s agreement on the outcome of the case, nothing more.” [03-AP-075]

ii. Because of these features, citing unpublished opinions will not only provide little “insight” or “information,” but will actually result in judges being *misled*.

- Unpublished opinions are poor sources of law. A court’s holding in any case cannot be understood outside of the factual context, but unpublished opinions say little or nothing about the facts (because they are written for those already familiar with the case). Thus, it is difficult to discern what an unpublished opinion held.
- Because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate. Even slight variations in the way that a legal

principle is stated can have significant consequences. If unpublished opinions could be cited, courts would often be led to believe that the law had been changed in some way by an unpublished opinion, when no such change was intended.

- Unpublished opinions are also a poor source of information about a judge's views on a legal issue. As noted, it is possible that an unpublished opinion does not accurately express the views of *any* judge. Citing unpublished opinions might mislead lower courts and others about the views of a circuit's judges.

iii. Even in the rare case in which an unpublished opinion might be persuasive “by virtue of the thoroughness of its research or the persuasiveness of its reasoning,” Rule 32.1 is not needed.

- First, any party can petition a court of appeals to publish an opinion that has been designated as unpublished. Courts recognize that they sometimes err in designating opinions as unpublished and are quite willing to correct those mistakes when those mistakes are brought to their attention.
- Second, and more importantly, nothing prevents any party in any case from borrowing — word-for-word, if the party wishes — the “research” and “reasoning” of an unpublished opinion. Parties want to cite unpublished opinions not because they are inherently persuasive, but because parties want to argue (explicitly or implicitly) that a panel of the circuit *agreed* with a particular argument — and for *that* reason, and not because of the opinion's “research” or “reasoning,” the circuit should agree with the argument again. As one judge commented: “[N]othing prevents a party from copying wholesale the thorough research or persuasive reasoning of an unpublished disposition — without citation. But that's not what the party seeking to actually cite the disposition wants to do at all; rather, it wants the added boost of claiming that *three court of appeals judges endorse that reasoning.*” [03-AP-169]

This, however, is a dishonest and misleading use of unpublished opinions. As described, judges often sign off on unpublished opinions that do *not* accurately express their views; indeed, it will be the rare unpublished opinion that will precisely and comprehensively describe the views of *any* of the panel's judges.

iv. In short, no-citation rules merely prevent parties from using unpublished opinions *illegitimately* — to *mislead* a court. All *legitimate* uses of unpublished opinions — such as mining them for nuggets of research or reasoning — are already available to parties.

b. Rule 32.1 would not, as the Committee Note claims, “mak[e] the entire process more transparent to attorneys, parties, and the general public.”

i. As the Committee Note itself describes, unpublished opinions are already widely available and widely read by judges, attorneys, parties, and the general public — and sometimes reviewed by the Supreme Court. Those opinions can be requested from the clerk, reviewed on the websites of the circuits and other free Internet sites, and researched with Westlaw and Lexis. Unpublished opinions are no less “transparent” than published opinions. They are not hidden from anyone.

ii. Although proponents of Rule 32.1 often cite suspicions that courts use unpublished opinions to duck difficult issues or to hide decisions that are contrary to law, there is no evidence whatsoever that these suspicions are valid. Even those (very few) judges who have expressed support for Rule 32.1 have cited only the *perception* that unpublished opinions are used improperly; they agree that the perception is not accurate. Since the Ninth Circuit changed its no-citation rule to allow parties to bring to the court’s attention in a rehearing petition any unpublished opinions that were in conflict with the decision of the panel, almost no parties have been able to do so. Every judge makes mistakes, but there is no evidence that judges are intentionally and systematically using unpublished opinions for improper purposes.

4. Although Rule 32.1 would not address any real problem with the status quo — and although Rule 32.1 would not result in any real benefit — Rule 32.1 would inflict enormous costs on judges, attorneys, and parties.

a. Judges

i. The judges of many circuits are now overwhelmed. The number of appeals filed has increased dramatically faster than the number of authorized judgeships, and Congress has been slow to fill judicial vacancies. Judges and their staffs are already stretched to the limit; there is no “margin for error” when it comes to imposing new responsibilities on them.

ii. Drafting published opinions takes a lot of time. Because judges know that such opinions will bind future panels and lower courts — and because judges know that those opinions will be widely cited as reflecting the views of the judges who write or join them — published opinions are drafted with painstaking care. A published opinion provides extensive information about the facts and the procedural background, because it is written for strangers to the case, and because those strangers will not be able to identify its precise holding without such information. The author of a published opinion will devote dozens (sometimes hundreds) of hours to writing, editing, and polishing multiple drafts. Although law clerks may help with the research or produce a first draft, the authoring judge will invest a great deal of his or her own time into drafting the opinion. The final draft will be reviewed carefully by the other members of the panel, who will often request revisions. Before the opinion is released, it will be circulated to all of the members of the court, and other judges will sometimes request changes.

iii. By contrast, as described above, unpublished opinions generally take very little time. They are written quickly by court staff or law clerks, and judges give them only cursory attention

— precisely because judges know that the opinions need to function only as explanations to those involved in the cases and will not be cited to future panels or to lower courts within the circuit.

iv. Rule 32.1 would force judges to spend much more time writing unpublished opinions just to make them suitable to be cited as persuasive authority. Judges will also take the time to write concurring and dissenting opinions, to prevent courts from misunderstanding their views. The Committee cannot:

- change the *audience* for unpublished opinions (from the parties, their attorneys, and the lower court under the current system to future panels, district courts within the circuit, and the rest of the world under Rule 32.1), and
- change the *purpose* of unpublished opinions (from giving a brief, one-time explanation to those already familiar with the case under the current system to being used forever to persuade courts to rule a particular way under Rule 32.1), and *not*
- not change the *nature* of unpublished opinions.

As one judge commented, “[the] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand.” [03-AP-329]

v. Because judges will spend much more time writing unpublished opinions, at least two consequences will follow:

- Judges will have less time available to devote to published decisions — the decisions that really matter. The quality of published opinions will suffer. The law will be less clear. Apparent inconsistencies will abound. Inadvertent intra- and inter-circuit conflicts will arise more frequently. All of this will result in more litigation, more appeals, and more en banc proceedings, which will result in even more demands on judges, which will give them even less time to devote to writing published opinions.
- Parties will have to wait much longer to get unpublished decisions. Parties now often get an unpublished decision in a few days; under Rule 32.1, they may have to wait for a year or more.

vi. Although Rule 32.1 will reduce the time that judges have available to spend on opinions, it will *increase* the amount of attention that drafting opinions will require.

- Parties will cite more cases to the courts, meaning that conscientious judges and their law clerks will have more opinions to read, explain, and distinguish in the

course of writing opinions. As one judge wrote: “Once brought to the court’s attention, . . . there is no way simply to ignore our memorandum dispositions.” [03-AP-285]

- This will be a time-consuming process, because to fully understand an unpublished opinion — which, as described above, will usually say little about the facts — the judge or the law clerk will have to go back and read the briefs and record in the case.
- The result will be that parties — who now often wait a year or more to get a published decision — will have to wait even longer.

vii. Of course, Rule 32.1 can’t change the fact that there are only 24 hours in a day. Judges are already stretched to the limit. If they have to spend more time on both published and unpublished opinions, they will have to compensate in some way. One way that judges will compensate is by issuing *no* opinion in an increasing number of cases — i.e., by disposing of an increasing number of cases with one-line orders.

- One-line dispositions are unfair to the parties, who are entitled to some explanation of why they won or lost an appeal, as well as to some assurance that their arguments were read, understood, and taken seriously. Parties who are not told *why* they won or lost an appeal — and who are not provided with any evidence that their arguments were even read — will lose confidence in the judicial system.
- One-line dispositions are unfair to lower court judges, who are entitled to know why they have been affirmed or reversed. Lower court judges cannot correct their mistakes unless those mistakes are made known to them.
- One-line dispositions deprive parties of a meaningful chance to petition for en banc reconsideration by the circuit or certiorari from the Supreme Court. Without *any* explanation of the panel’s decision, it is almost impossible for the en banc court or the Supreme Court to know if a case is worth further review.
- When judges issue an unpublished opinion, they have to discuss the basic rationale for the disposition. That provides at least some discipline. That discipline is completely lacking when a panel issues a one-line disposition.

b. Attorneys

i. Critics of no-citation rules represent only a small fraction of the bar — although, because they are very vocal, they have created the illusion that there is widespread dissatisfaction with such rules. In fact, most lawyers support no-citation rules, and for good reason.

ii. Abolishing no-citation rules would vastly increase the body of case law that would have to be researched. If unpublished opinions can be cited, then they might influence the court; and if unpublished opinions might influence the court, then an attorney must research them. As one oft-repeated “talking point” put it: “As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating.” [03-AP-025]

iii. Even an attorney who understands that unpublished opinions are largely useless and who does not want to waste time researching them will have to prepare for the possibility that his or her opponent will use them. One way or another, attorneys will have to read unpublished opinions.

iv. An attorney will be faced with a difficult dilemma when he or she runs across an unpublished opinion that is contrary to his or her position. Even if unpublished opinions are formally treated as non-binding, “the advocate is faced with the Hobson’s choice of either using up precious pages in her brief distinguishing the unpublished decisions, or running the uncertain risk of condemnation from her opponent (or worse, the court) for ignoring those decisions. In other words, even if it were possible to maintain some sort of *formal* distinction between permissively citable unpublished decisions and mandatory, precedential published opinions, the *substance* of the distinction would quickly erode.” [03-AP-462]

v. The hardship imposed on attorneys is not just a function of the dramatic increase in the *number* of opinions that they will have to read; it is also a function of the *nature* of those opinions. Because unpublished opinions say so little about the facts, attorneys will struggle to understand them. Attorneys will often have to retrieve the briefs or records of old cases to be certain that they understand what unpublished opinions held.

vi. Attorneys already find it almost impossible to keep current on the law — even the law in one or two specialities. So many courts are publishing so many opinions — and there are so many ambiguities and inconsistencies in those opinions — that it is often very difficult for a conscientious attorney to know what the law “is” on a particular question. Rule 32.1 will compound this problem many times over, not only because the number of opinions that will “matter” will multiply, but because the unpublished opinions that will have to be consulted are “a particularly watery form of precedent.” [03-AP-169] Because so little time goes into writing them, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the “holdings” of circuits.

vii. Litigators are not the only attorneys who will be burdened by Rule 32.1. Transactional attorneys and others who counsel clients about how to structure their affairs will have more opinions to read and, because more law means more uncertainty, will have difficulty advising their clients about the legal implications of their conduct. This problem will be particularly acute for attorneys who must advise large corporations and other organizations that operate in multiple jurisdictions.

viii. While all attorneys — litigators and non-litigators — will be harmed by Rule 32.1, some will be harmed more than others.

- Unpublished opinions are not as readily available as published opinions. Not all libraries and legal offices can afford to purchase the Federal Appendix and rent space to store it. And not all lawyers can afford to use Westlaw or Lexis. (Indeed, not all attorneys have access to computers.) The E-Government Act will help, but it will not level the playing field entirely. For example, the Act will not require circuits to provide electronic access to their *old* unpublished decisions, and it is unlikely that researching unpublished opinions on circuit websites will be as easy as researching those opinions on Westlaw or Lexis.
- Even if the day arrives when unpublished opinions become equally available to all, attorneys will still have to *read* them. Some attorneys are already overwhelmed with work or have clients who cannot pay for more of their time. These attorneys — including solo practitioners, small firm lawyers, public defenders, and CJA-appointed counsel — will bear the brunt of Rule 32.1. Rule 32.1 will thus increase the already substantial advantage enjoyed by large firms, government attorneys, and in-house counsel at large corporations.

c. Parties

i. As described above, all parties in all cases — both those that terminate in published opinions and those that terminate in unpublished opinions — will have to wait longer for their cases to be resolved. Delays are bad for everyone, but they are particularly harmful for the most vulnerable litigants — such as plaintiffs in personal injury cases who can no longer pay their medical bills or habeas petitioners who are unlawfully incarcerated.

ii. As described above, Rule 32.1 will result in more one-line dispositions. More parties will never be given an explanation for why they lost their appeal or even assurance that their arguments were taken seriously. This will result in *less* transparency and *less* confidence in the judicial system.

iii. As described above, Rule 32.1 will increase the already high cost of litigation. Clients will have to pay more attorneys to read more cases.

iv. Increasing the cost of litigation will, of course, harm the poor and middle class the most, adding to the already considerable advantages enjoyed by the powerful and the wealthy.

v. Rule 32.1 will particularly disadvantage pro se litigants and prisoners, who often do not have access to the Internet or to the Federal Appendix.

5. Rule 32.1 could harm state courts. For example, the rule would permit litigants to cite and federal courts to rely upon the unpublished opinions of the California *state* courts in diversity

and other actions, even though the California courts themselves have determined that these cases should not be looked to for expositions of state law. This, in turn, will enable litigants to use the unpublished decisions of the California state courts to influence the development of California law, through the “back door” of the federal courts. Thus, many of the costs imposed by Rule 32.1 on federal courts — such as the need for judges to spend more time writing unpublished opinions — will also be imposed on state courts.

6. The assurances provided in the Committee Note that Rule 32.1 will not inflict the costs described above are unpersuasive.

a. The Committee Note admits that Rule 32.1 would inflict substantial costs of the type described above if it required courts to treat their unpublished opinions as binding precedent, but then gives assurance that Rule 32.1 does not do so. The Committee is naive in believe that a clear distinction between “precedential” and “non-precedential” will be maintained.

i. As noted, parties will be citing unpublished opinions precisely for their precedential value — that is, as part of an argument (implicit or explicit) that because a panel of a circuit decided an issue one way in the past, the circuit should decide the issue the same way now. The only real interest that proponents of Rule 32.1 have in citing unpublished opinions *is* as precedent.

ii. When circuits are confronted with this argument, they will not be able to say simply that the prior unpublished opinion is not binding precedent and therefore can be ignored. Rather, the court will have to distinguish it or explain why it will not be followed. As one group of judges commented: “As a practical matter, we expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions.” [03-AP-396] From the point of view of the court’s workload, then, the Committee Note’s assurance that courts will not have to treat their unpublished opinions as binding precedent will make little difference.

iii. This phenomenon will be even more apparent in the lower courts. It will be a rare district court judge who will ignore an unpublished opinion of the circuit that will review his or her decision. If unpublished opinions are cited to lower courts, lower courts will have to treat them as though they were binding, even if that is not technically true.

iv. In sum, all of the consequences described above — such as courts having to spend more time writing unpublished opinions and attorneys having to spend more time researching them — will occur, whether or not the unpublished opinions are labeled “non-binding.”

b. The Committee Note’s argument that there is no compelling reason to treat unpublished opinions different than such sources as district court opinions, law review articles, newspaper columns, or Shakespearian sonnets misses a few important distinctions:

i. The fact that law review articles or newspaper columns can be cited in a brief will not have any effect on the *author* of such materials. The author of a law review article or a newspaper column is going to do precisely the same amount of work — and write precisely the same words — whether or not his or her work can later be cited to a court. By contrast, making the unpublished opinions of a court of appeals citable *will* affect their authors, as described above.

ii. There is no chance that law review articles or newspaper columns will be cited by parties for their precedential value — that is, as part of an argument that, because a circuit did *x* once, it should do *x* again. Law review articles, newspaper columns, and the like are cited *only* for their persuasive value because that is the only value they have. An unpublished opinion, by contrast, is cited by a party who wants a future panel of the circuit or a lower court within the circuit to decide an issue a particular way — not because the unpublished opinion, like a law review article, is powerfully persuasive, but because the unpublished opinion, unlike the law review article, was at least nominally issued in the name of the circuit.

iii. The same point can be made about the opinions of other circuits, lower federal courts, state courts, or foreign jurisdictions. As one commentator wrote:

“When the opinions, even the unpublished ones, of another court are cited, the underlying argument is as follows: the other court accepted or advanced a particular reasoning and, therefore, this court should too — it can, and should, trust the other court’s judgment. When an unpublished opinion of the same court is cited, however, the underlying argument is invariably a precedential one, in the most basic sense: this court accepted or advanced a particular reasoning in another case and, therefore, it would be fundamentally unfair not to apply that same rationale in the instant case. Such opinions *are* cited for their precedential value.” [03-AP-478]

iv. There is also no chance that a lower court will feel bound to adhere to the views of the author of a law review article or newspaper column. As one judge wrote, “Shakespearean sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value.” [03-AP-169] Or, as one bar committee wrote, “unlike unpublished decisions, there is no risk these other materials will be mistaken for the law of the circuit or given undue weight by the lower courts or litigants.” [03-AP-319]

v. According to commentators, this risk is particularly acute in the lower courts, which is why some no-citation rules apply to those courts, as well as to parties. “The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist.” [03-AP-322]

c. The Committee Note is wrong in suggesting that, because some circuits have liberalized no-citation rules without experiencing problems, the concerns about Rule 32.1 are overblown.

i. The conditions of each circuit vary significantly, making it hazardous to assume that the experience of one circuit will be duplicated in another. As noted above, circuits vary with respect to such things as the size, subject matter, and complexity of the caseload; the number of judges; and the local legal culture. Just because the Fifth Circuit is able to permit the citation of unpublished opinions does not mean that the Ninth Circuit can do so.

ii. No circuit has gone as far as Rule 32.1 would in permitting the citation of unpublished opinions. All circuits discourage such citation, forbid it in some circumstances, or both. And three circuits with relatively liberal citation rules — the Third, Fifth, and Eleventh — either do not make or have only recently made their unpublished opinions widely available. It is virtually costless for a circuit whose unpublished opinions do not appear in the Federal Appendix or in the Westlaw and Lexis databases to allow those opinions to be cited.

iii. Some circuits that have liberalized no-citation rules have done so only recently, so it is too early to know whether they will experience difficulties.

iv. Some of the circuits that permit liberal citation of unpublished opinions also make frequent use of one-line dispositions. This supports — rather than refutes — the arguments of those who oppose Rule 32.1.

7. Rule 32.1 is not a “general rule[] of practice and procedure” because, if Rule 32.1 is adopted, “some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material.” Because Rule 32.1 would “affect the construction and import of opinions,” the rule is “beyond the scope of the rulemaking authority of 28 U.S.C. § 2072.” [03-AP-329]

8. If, despite all of these arguments, the Committee decides to forge ahead with Rule 32.1, it should at least amend the rule so that it applies only prospectively — that is, so that it applies only to unpublished decisions issued after the rule’s effective date. It is unfair to allow citation of opinions that judges wrote under the assumption that they would never be cited. The D.C. Circuit’s decision to abolish its no-citation rule was applied prospectively only; the Committee should follow the D.C. Circuit’s lead.

b. Arguments For Adopting Proposed Rule

1. It is not Rule 32.1, but no-citation rules, that require a compelling justification. In a democracy, the presumption is that citizens may discuss with the government the actions that the government has taken. Under the First Amendment, the presumption is that prior restraints of speech — especially speech *about* the government made *to* the government — are invalid. In a common law system, the presumption is that judicial decisions are citable. In an adversary

system, the presumption is that lawyers are free to make the best arguments available. No-citation rules — through which judges instruct litigants, “You may not even *mention* what we’ve done in the past, much less engage us in a discussion about whether what we’ve done in the past should influence what we do in this case” — are profoundly antithetical to American values. The burden should not be on the Committee to defend Rule 32.1 but on opponents of Rule 32.1 to defend no-citation rules.

2. The main problem created by no-citation rules — a problem that Rule 32.1 would eliminate — is that no-citation rules deprive the courts, attorneys, and parties of the use of unpublished opinions. The evidence is overwhelming that unpublished opinions are indeed a valuable source of “insight” and “information.”

a. First, unpublished opinions are often read. “[L]awyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so.” [03-AP-406] Numerous commentators — supporters and opponents of Rule 32.1 alike — said that they regularly read unpublished opinions.

b. Second, unpublished opinions are often cited by attorneys. One commentator wrote: “My own experience has been that the prohibition on [citation] currently in effect in the lower courts of the Ninth Circuit is utterly disregarded, not just by bad lawyers but also by good ones — even by leading lawyers, not always, to be sure, but in many cases when there is no binding, published authority available.” [03-AP-473]

c. Third, unpublished decisions are often cited by judges. Researchers have identified hundreds of citations to unpublished opinions by appellate courts and district courts — including appellate courts and district courts in jurisdictions that have adopted no-citation rules. One of the most pointed of those citations appears in *Harris v. United Federation of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002):

“There is apparently no published Second Circuit authority directly on point for the proposition that § 301 does not confer jurisdiction over fair representation suits against public employee unions. In the ‘unpublished’ opinion in *Corredor*, which of course is published to the world on both the Lexis and Westlaw services, the Court expressly decides the point Yet the Second Circuit continues to adhere to its technological-outdated rule prohibiting parties from citing such decisions . . . thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one.”

d. Fourth, there are some areas of the law in which unpublished opinions are particularly valuable. One appellate judge, after describing a recent occasion on which a staff attorney had

cited many unpublished decisions in advising a panel of judges about how to dispose of a case, commented as follows:

“Judges rely on this material for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions. . . . We have all encountered the situation in which there is no precedent in our own circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an unpublished order. I see no reason why we ought not be allowed to consider such material, and I certainly do not understand why counsel, obligated to present the best possible case for his client, should be denied the right to comment on legal material in the public domain.” [03-AP-335]

e. Fifth, unpublished opinions can be particularly helpful to district court judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. For example, district courts are instructed to strive for uniformity in sentencing, and thus they are often anxious for *any* evidence about how similarly situated defendants are being treated by other judges. Many unpublished opinions provide this information. The value of unpublished opinions to district court judges may explain why only 4 of the 1000-plus active and senior district judges in the United States — including only 2 of the 150-plus district judges in the Ninth Circuit — submitted comments opposing Rule 32.1.

f. Sixth, there is not already “too much law,” as some opponents of Rule 32.1 claim. As one distinguished federal appellate judge wrote in one of his books: “Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point.”⁴ Attorneys are most likely to cite — and judges are most likely to consult — an unpublished opinion not because it contains a sweeping statement of law (a statement that can be found in countless published opinions), but because the facts of the case are very similar to the facts of the case before the court. Parties should be able to bring such factually-similar cases to a court’s attention, and courts should be able to consult them for what they are worth.

g. For all of these reasons, no-citation rules should be abolished. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it makes no sense to prohibit attorneys and judges from talking about the opinions that both are reading.

3. In addition to the evidence that unpublished opinions do indeed often serve as sources of “insight” and “information” for both attorneys and judges, there are other reasons to doubt the

⁴Richard A. Posner, *The Federal Courts: Challenge and Reform* 166 (1996). I should note that Judge Posner opposes Rule 32.1.

oft-repeated claim that unpublished opinions merely apply settled law to routine facts and therefore have no precedential value:

a. It is difficult for a court to predict whether a case will have precedential value. “Only when a case comes along with arguably comparable facts does the precedential relevance of an earlier decision-with-opinion arise. This point naturally leads one to question how an appellate panel can, *ex ante*, determine the precedential significance of its ruling. Lacking omniscience, an appellate panel cannot predict what may come before its court in future days.” [03-AP-435] As one attorney commented: “[W]e can and do expect a lot from our judges, but the assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes me as hero-worship taken beyond the cusp of reality.” [03-AP-454]

b. Even if a court could reliably predict whether an opinion establishes a precedent worth being cited, making that decision would *itself* take a lot of time. “The very choice of treating an appealed case as non-precedential, if done conscientiously, has to be preceded by thoughtful analysis of the relevant precedents.” [03-AP-435] Time, of course, is precisely what courts who issue unpublished opinions say they do not have.

c. Given these limitations, it is not surprising that courts often designate as “unpublished” decisions that should be citable. The most famous example involves the Fourth Circuit’s declaring an Act of Congress unconstitutional in an unpublished opinion — something that the Supreme Court labeled “remarkable and unusual.” *United States v Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993). Other examples abound. For example, in *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), the court described how 20 inconsistent unpublished opinions on the same unresolved and difficult question of law had been issued by Ninth Circuit panels before a citable decision settled the issue.

d. More evidence of the unreliability of these designations can be found in the many unpublished decisions that have been reviewed by the Supreme Court. (The most recent example is *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004), in which the Supreme Court reversed an unpublished decision that “was flawed as a matter of fact” — suggesting that the facts were neither clear nor straightforward — “and as a matter of law” — because the opinion took what the Supreme Court regarded as the wrong side of a circuit split.) The fact that the Supreme Court decides to review a case does not necessarily mean that the circuit made a mistake in designating the opinion as unpublished, but the fact that an opinion was deemed “certworthy” by the Supreme Court does suggest that *something* worthy of being cited may have occurred in that opinion.

e. Many unpublished opinions reverse the decisions of district courts or are accompanied by concurrences or dissents — implying that their results may not be clear or uncontroversial.

f. Researchers who have studied unpublished opinions have found that the decision to designate an opinion as unpublished is influenced by factors other than the novelty or complexity

of the issues. For example, the background of judges plays a role. The more experience that a judge had with an area of law in practice, the less likely the judge is to publish opinions in that area (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).

4. Even if, despite all of this evidence, it remains unclear whether unpublished opinions offer much “insight” or “information,” Rule 32.1 has a major advantage over no-citation rules: It lets the “market” function and determine the value of unpublished opinions.

a. A glaring inconsistency runs through the arguments of the opponents of Rule 32.1. On the one hand, they argue that unpublished opinions contain nothing of value — that such opinions are useless, fact-free, poorly-worded, hastily-converted bench memos written by 26-year-old law clerks. On the other hand, they argue that, if Rule 32.1 is approved, attorneys will be devoting thousands of hours to researching these worthless opinions, briefs will be crammed with citations to these worthless opinions, district courts will feel compelled to follow these worthless opinions, and circuit judges will have no alternative but to carefully analyze and distinguish these worthless opinions.

b. Opponents of Rule 32.1 can’t have it both ways. Either (i) unpublished opinions contain something of value, in which case parties *should* be able to cite them, or (ii) unpublished opinions contain nothing of value, in which case parties *won’t* cite them.

c. Under no-citation rules, judges make this decision; they bar the citation of unpublished decisions. If they’re wrong in their assessment, the “market” cannot correct them because there is no “market.” Under Rule 32.1, the “market” makes this decision. Unpublished opinions will be cited if they are valuable, and they will not be cited if they are not valuable.

5. No-citation rules create several other problems — problems that Rule 32.1 would eliminate.

a. No-citation rules lead to arbitrariness and injustice. Our common law system is founded on the notion that like cases should be decided in a like manner. It helps no one — not judges, not attorneys, not parties — when attorneys are forbidden even to *tell* a court how it decided a similar case in the past. Such a practice can only increase the chances that like cases will not be treated alike.

b. No-citation rules undermine accountability. It is striking that judges opposing Rule 32.1 have argued, in essence: “If parties could tell us what we’ve done, we’d feel morally obliged to justify ourselves. Therefore, we are going to forbid parties from telling us what we’ve done.” Put differently, judges opposing Rule 32.1 have insisted on the right to decide *x* in one case and “not *x*” in another case and not even be asked to reconcile the seemingly inconsistent decisions. Judges always have the right to explain or distinguish their past decisions or to honestly and openly change their minds. But judges should not have the right to forbid parties from mentioning their past decisions. As one judge wrote: “Public accountability requires that

we not be immune from criticism; allowing the bar to render that criticism in their submissions to us is one of the most effective ways to ensure that we give each case the attention that it deserves.” [03-AP-335]

c. No-citation rules undermine confidence in the judicial system.

i. No-citation rules make absolutely no sense to non-lawyers. It is almost impossible to explain to a client why a court will not allow his or her lawyer to mention that the court has addressed the same issue in the past — or applied the same law to a similar set of facts. Clients just don’t get it.

ii. Because no-citation rules are so difficult for the average citizen to understand, they create the appearance that courts have something to hide — that unpublished opinions are being used for improper purposes. As one judge wrote:

“It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to ‘revised and extended remarks’ inserted into the Congressional Record to op-ed pieces in local newspapers, why should the ‘unpublished’ judicial orders be the only matter off limits to citation and argument? It implies judges have something to hide.

“In some corners, there is a perception that they do — that unpublished orders are used to sweep under the rug departures from precedent. [This judge is confident that, at least in his circuit, unpublished opinions are not used improperly.] Still, to the extent that . . . the bar *believes* that this occurs, whether it does or not . . . allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice.” [03-AP-367]

iii. No-citation rules also give rise to the appearance — if not the reality — of two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low-quality justice for “no-name appellants represented by no-name attorneys.” [03-AP-408]

— Large institutional litigants — and the big firms that represent them — disproportionately receive careful attention to their briefs, oral argument, and a published decision written by a judge. Others — including the poor and the middle class, prisoners, and pro se litigants — disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk.

— Defenders of no-citation rules insist that, although judges pay little attention to the language of unpublished opinions, they are careful to ensure that the results are correct. The problem with this argument is that it “assumes that reasoning and writing are not linked, that is, that clarity characterizes the panel’s thinking about the proper decisional rule, but writing out that clear thinking is too burdensome.”

[03-AP-435] As every judge who has had the experience of finding that an initial decision just “won’t write” — and that is every judge — it is manifestly untrue that reasoning and writing can be separated. One judge put it this way: “There is . . . a wholesome, and perhaps necessary, discipline in our ensuring that unpublished orders can be cited to the courts. . . . [R]elegating this material to non-citable status is an invitation toward mediocrity in decisionmaking and the maintenance of a subclass of cases that often do not get equal treatment with the cases in which a published decision is rendered.” [03-AP-335]

d. The inconsistent local rules among circuits do indeed create a hardship for attorneys who practice in more than one circuit — a hardship that opponents of Rule 32.1 too quickly dismiss.

i. The suggestion of some opponents of Rule 32.1 that the Committee is insincere in its concern for the impact of inconsistent local rules on those who practice in more than one circuit is belied by the fact that perhaps no problem has been the focus of more of the Advisory Committee’s and Standing Committee’s attention over the past few years. The Appellate Rules have been amended several times — most recently in 2002 — to eliminate variations in local rules. Rule 32.1 and other of the rules published in August 2003 would do the same. The Advisory Committee and the Standing Committee believe strongly that an attorney should be able to file an appeal in a circuit without having to read and follow dozens of pages of local rules.

ii. Inconsistent local rules can only be eliminated one at a time. Any rule that makes federal appellate practice more uniform by eliminating one set of inconsistent local rules is obviously going to leave other inconsistent local rules untouched. That is not an excuse for opposing the rule

e. Opponents of Rule 32.1 have also been too quick to dismiss the First Amendment problems posed by no-citation rules.

i. No-citation rules offend First Amendment values — if not the First Amendment itself — in banning truthful speech about a matter of public concern — indeed, about a governmental action that is in the public domain. They also offend First Amendment values in forbidding an attorney from making a particular type of argument in support of his or her client — a type of argument that is forbidden, at least in part, because it would put the court to the inconvenience of having to defend, explain, or distinguish one of its own prior actions. What the Supreme Court said in *Legal Services Corp v. Velazquez*, 531 U.S. 533, 544-45 (2001), about restrictions that Congress had placed on legal services attorneys could be said about the restrictions that no-citation rules place on all attorneys:

“Restricting LSC attorneys in . . . presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys. . . . An informed, independent judiciary presumes an informed, independent bar. . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the

enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”

ii. No-citation rules are not like limits on the size of briefs. They differ in the character of the restriction and in the interest purportedly being served by the restriction. A 30-page limit on briefs does not forbid an attorney from making a particular argument or citing a particular action of the court, and page limits — which every court in America imposes — are necessary if courts are to function. No-citation rules, by contrast, forbid particular arguments (arguments that ask a court to follow one of its prior unpublished decisions), are imposed by only some courts, and are imposed by courts in order to protect themselves from having to take responsibility for their prior actions.

6. In opposing Rule 32.1, commentators offer a “parade of horrors” that they claim will be suffered by judges, attorneys, and parties if no-citation rules are abolished.

a. Many of the “horrors” in this parade are the same “horrors” that were paraded out when unpublished opinions became available on Westlaw and Lexis — and then again when unpublished opinions started being published in the Federal Appendix. None of the predictions was accurate.

b. The predictions regarding Rule 32.1 are no more reliable. Dozens of state and federal courts have already liberalized or abolished no-citation rules, and there is absolutely no evidence that the dire predictions of Rule 32.1’s opponents have been realized in those jurisdictions. There is no evidence, for example, that judges are spending more time writing unpublished opinions or that attorneys are bombarding courts with citations to unpublished opinions or that legal bills have skyrocketed for clients. While it is true that there are differences among circuits, the circuits that permit citation are similar enough to the circuits that forbid citation that there should be *some* evidence that liberal citation rules cause harm, and yet no such evidence exists.

c. It is no accident that most of the opposition to permitting citation to unpublished opinions comes from judges and attorneys who have no experience permitting citation to unpublished opinions. It is likewise no accident that little opposition to Rule 32.1 was heard from the judges and attorneys who have such experience. As one judge commented: “What *would* matter are adverse effects and adverse reactions from the bar or judges of the 9 circuits (and 21 states) that now allow citation to unpublished opinions. And from that quarter no protest has been heard. This implies to me that the benefits of accountability and uniform national practice carry the day.” [03-AP-367]

7. Regarding the argument that Rule 32.1 would dramatically increase the workload of judges:

a. First, there is no evidence that this has occurred in jurisdictions that have abandoned or liberalized citation rules. One reason why liberalizing citation rules does not seem to result in more work for judges is that unpublished opinions have never been written just for parties and

counsel, as proponents of no-citation rules insist. Those decisions have also been written for the en banc court and the Supreme Court. “This may be why the nine circuits that allow citation to these documents have not experienced difficulty: the prospect of citation to a different panel requires no more of the order’s author than does the prospect of criticism in a petition for a writ of certiorari.” [03-AP-367]

b. Second, judges already have available to them options that would reduce their workloads far more than no-citation rules.

i. Judges now spend too much time on drafting published opinions.

- The overwork that judges cite in arguing against Rule 32.1 is in part a function of increasing caseloads — which are largely outside of judges’ control — but also a function of a particular style of judging. Some of the arguments against Rule 32.1 reflect an attitude toward judging that has become too common in the federal appellate courts and that should be changed.
- A judge who claims that he or she sometimes needs to go through 70 or 80 drafts of an opinion before getting every word exactly right has confused the function of a judge with the function of a legislator. Judges are appointed not to draft statutes, but to resolve concrete disputes. What they hold is law; everything else is dicta. Lower court judges understand this; they know how to read a decision and extract its holding.
- Judges could save a lot of time if they would abandon “the discursive, endless federal appellate opinion.” [03-AP-435] Judges should write short, direct opinions that address only the one or two issues that most need substantial discussion. Instead, judges too often trudge through every issue mentioned anywhere in a brief. Judges should also spend less time obsessing over every footnote and comma.

ii. Judges also now spend too much time on drafting unpublished opinions.

- If unpublished opinions were written as judges claim — if they were two- or three-paragraph opinions that started with “the parties are familiar with the facts” and then very briefly described why the court agreed or disagreed with the major contentions — then parties would not *want* to cite them. But many unpublished decisions go far beyond this. They are 10 or 12 pages long, they contain a great deal of discussion of the facts, and they go on and on about the law. If an opinion looks like a duck and quacks like a duck, parties are going to want to cite it like a duck.
- It is odd to fix the problems with unpublished opinions not by fixing the problems with unpublished opinions but by barring people from talking about unpublished

opinions. Judges would not need no-citation rules if they would confine themselves to issuing (1) full precedential opinions in cases that warrant such treatment or (2) two- or three-paragraph explanations in cases that do not. The problem is that judges insist on “a third, intermediate option: a full and reasoned but unprecedent[ial] appellate opinion.” [03-AP-219] Judges have only themselves to blame.

c. Third, if abolishing no-citation rules had the impact on judges’ workload that Rule 32.1’s opponents fear, then no-citation rules would not be on the wrong side of history. But they are. “The citadel of no-citation rules is falling. There is a clear trend, both in the individual federal circuits and in the states, toward abandoning those rules. Nine of the thirteen circuits now allow citation of unpublished opinions. And while a majority of the states still prohibit such citation, the margin is slim and dwindling.” [03-AP-032] As courts have uniformly gotten *more* busy, the trend has uniformly been toward *liberalizing* rules regarding the citation of unpublished opinions. Obviously even busy courts have been able to handle their caseloads despite abolishing no-citation rules.

d. Rule 32.1 would, in some respects, *reduce* the workload of judges, because no-citation rules require judges and litigants to treat as issues of first impression questions that have already been addressed many times by the circuit.

i. Take, for example, *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), in which the Ninth Circuit admitted that various panels had issued at least 20 unpublished opinions resolving the same unsettled issue of law at least three different ways — all before any published opinion addressed the issue. To quote *Rivera-Sanchez*,

“Our conclusion that this decision meets the criteria for publication was prompted by the fact that it establishes a rule of law that we had not previously announced in a published opinion. Various three-judge panels of our court, however, have issued a number of unpublished memorandum decisions taking different approaches to resolving the question whether the Supreme Court’s opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), requires a district court faced with a defendant convicted of illegal re-entry after deportation whose indictment refers to both 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2) to resentence or merely correct the judgment of conviction. These conflicting mandates undoubtedly have created no small amount of confusion for district judges who serve in border districts. While our present circuit rules prohibit the citation of unpublished memorandum dispositions, see 9th Cir. R. 36-3, we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis.

“During oral argument, we asked counsel to submit a list of the unpublished dispositions of this court that have confronted this issue. The parties produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct the problem. Under our rules, these unpublished memorandum dispositions have no precedential value, see 9th Cir. R. 36-3, and this

opinion now reflects the law of the circuit. To avoid even the possibility that someone might rely upon them, however, we list these unpublished memorandum decisions below so that counsel and the district courts will know that each of them has been superseded today.”

ii. It is hard to know how the Ninth Circuit’s no-citation rule saved the court any time in this instance. An issue that could have been settled authoritatively on the first or second occasion instead was litigated at least 21 times. Had an attorney representing a party in, say, the sixth case been able to draw the court’s attention to its five prior decisions, it seems likely that the court would have issued a published opinion settling the issue. And attorneys likely would not have litigated the issue over and over again if the court’s rules had not required them to treat an issue that had already been addressed 20 times as an issue of first impression. No-citation rules keep issues “in play” — and thus encourage litigation — much longer than necessary.

8. Regarding the argument that Rule 32.1 would result in more one-line dispositions:

a. Opponents of Rule 32.1 have argued both (i) that one-line dispositions would be harmful because parties would not get an explanation of why they won or lost *and* (ii) that the explanation that many unpublished opinions give parties about why they won or lost is not accurate. What judges are arguing is that they need to be able to keep up the *illusion* of giving parties adequate explanations for the results of cases. This is not a compelling reason to maintain no-citation rules.

b. It would be better for courts to issue no opinion at all than an opinion that so poorly reflects the views of the judges that those judges are unwilling to have it cited back to them. If, as many judges claim, unpublished opinions accurately report only a result — and not necessarily the reason for the result — then the court should just issue a *result*. As one commentator wrote: “If the result of adopting the proposed rule is to force judicial *staff* to write less in unpublished orders, then so be it. It is better to have a one-sentence disposition written by an actual judge th[a]n three pages written by a recent law school graduate masquerading as a judge. There is no point . . . for offering an explanation of the court’s reasoning to litigants when the court itself is unwilling to be bound by that reasoning.” [03-AP-414]

9. Regarding the argument that Rule 32.1 would result in unpublished opinions being used to mislead courts — or that courts would misuse or misunderstand unpublished opinions:

a. The circuit judges who write unpublished opinions do not need this protection. Whatever the flaws of unpublished opinions, those flaws are best known to the judges who write them. It is unlikely that a court will give its own opinion “too much” weight or not understand the limitations of an opinion that it wrote.

b. Lower court judges also do not need this protection.

i. Some of the comments against Rule 32.1 take a dim view of the abilities of district court judges. Commentators suggest, for example, that no-citation rules are needed to keep district court judges from being “distracted” by citations to unpublished opinions and to prevent judges from giving those opinions too much weight.

ii. This concern is misplaced. District court judges are entrusted on a daily basis with the lives and fortunes of those who appear before them. They regularly grapple with the most complicated legal and factual issues imaginable. They are quite capable of understanding and respecting the limitations of unpublished opinions.

iii. District courts have nonbinding authorities cited to them every day. For example, a district court in Oregon may have a decision of the Ninth Circuit, a decision of the Second Circuit, a decision of the Illinois Supreme Court, and a law review article cited to it in the course of one brief. It is not terribly difficult for the district court to understand the difference between the Ninth Circuit cite and the other cites. Likewise, it will not be terribly difficult for the district court to understand the difference between a published opinion of the Ninth Circuit that it is obligated to follow and an unpublished decision that it is not.

iv. District judges have the courage to disagree with unpublished decisions that they believe are wrong. Moreover, given that numerous circuit judges have commented publicly about the poor quality of unpublished decisions, it may not even take much courage to disagree with those decisions. In several circuits, unpublished decisions can be cited to district courts, and there is no evidence that district courts have felt compelled to treat those decisions as binding for fear of provoking the appellate courts.

10. Regarding the argument that Rule 32.1 would result in attorneys having to do much more legal research and clients having to pay much higher legal bills:

a. To begin with, if no-citation rules really spared attorneys and their clients from the fate predicted by opponents of Rule 32.1, then those rules would be widely supported by the bar. They are not, at least outside of the Ninth Circuit:

i. The ABA House of Delegates declared in 2001 that no-citation rules are “contrary to the best interests of the public and the legal profession” and called upon the federal appellate courts to “permit citation to relevant unpublished opinions.”

ii. The former chair of the D.C. Circuit’s Advisory Committee on Procedures wrote: “Probably more than any other facet of appellate practice, these [no-citation] policies have drawn well-deserved criticism from the bar and from scholars. When I chaired the D.C. Circuit’s Advisory Committee on Procedures, this kind of practice was perennially and uniformly condemned — all to no avail.” [03-AP-016]

iii. Rule 32.1 is supported by such national organizations as the ABA and the American College of Trial Lawyers, by bar organizations in New York and Michigan, and by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice.

iv. By contrast, only lawyers who clerked for or who appear before Ninth Circuit judges have complained in great number about Rule 32.1. If Rule 32.1 were likely to create the predicted problems, lawyers from throughout the United States should be rising up against it, led by such organizations as the ABA.

b. In any event, Rule 32.1 would not create serious problems for attorneys and their clients:

i. Opponents of Rule 32.1 are simply wrong in arguing that they now have *no* duty to research unpublished opinions, but, if those opinions could be cited, they would then have a duty to research *all* unpublished opinions.

ii. It is not the ability to *cite* unpublished opinions that triggers a duty to research them.

— If unpublished opinions contain something of value, then attorneys *already* have an obligation to research them — so as to be able to advise clients about the legality of their conduct, predict the outcome of litigation, and get ideas about how to frame and argue issues before the court.

— If unpublished opinions do not contain something of value, then attorneys will not have an obligation to research them even if they can be cited. No rule of professional responsibility requires attorneys to research useless materials.

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

11. Several of those who commented in favor of Rule 32.1 made clear that they were doing so only because they view it as a valuable “first step.” These commentators argued that the practice of issuing unpublished decisions should be abolished and criticized the Committee for “legitimizing” or “tacitly endorsing” the practice in Rule 32.1. At the same time, at least one judge said that he did not object to Rule 32.1, but that he wanted to put the Committee on notice that he would strongly oppose any future rule requiring that unpublished opinions be treated as precedential.

2. Summary of Arguments Regarding Form

Not surprisingly, the comments that we received about Rule 32.1 focused on the substance, not on the drafting. Most of the remarks about the drafting were off-hand, such as the occasional comment that Rule 32.1 was “clear” or “well drafted.” The commentators did not seem to have any trouble understanding the rule.

The only confusion about the meaning of the rule that appeared with any frequency in the comments was the assumption that the rule would require courts to treat unpublished opinions as binding precedent. (I am not referring to the commentators who explained why they thought Rule 32.1 would do so *de facto*; I am referring only to those who seemed to assume that it would do so *de jure*.) It is difficult to know how much confusion exists on this point, as the commentators used the word “precedent” loosely. Some used it to mean binding precedent; others used it to mean merely non-binding guidance; and still others were not clear about how they were using it. In any event, I do not believe that this confusion can be traced to the drafting of either the rule or the Committee Note. Rather, I suspect that, to the extent that there was confusion on the point, it was confined to commentators who had heard about the rule but had not read it themselves.

Several commentators — in reference to the sentence in the Committee Note about the “conflicting” local rules of the courts of appeals — pointed out that the rules do not “conflict,” in the sense of demanding inconsistent conduct from any person, because each circuit’s rule applies only to that circuit’s unpublished opinions.

Only **three commentators** — all supporters of Rule 32.1 — suggested that it be rewritten in some respect:

Philip Allen Lacovara, Esq. (03-AP-016) supports Rule 32.1, but recommends a couple of changes:

1. Mr. Lacovara objects that, by referring to dispositions that have been “designated as . . . ‘non-precedential,’” Rule 32.1(a) “necessarily implies that such designations have legal force and effect” — something Mr. Lacovara disputes. So as to avoid “legitimizing” the attempts by judges to label some of their opinions “non-precedential,” Rule 32.1(a) should end with the word “dispositions”: “No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions.”

2. Mr. Lacovara argues that, even if that suggestion is rejected, the Committee should eliminate the “generally imposed” clause in Rule 32.1(a). He thinks it is “ludicrous” for the Committee to approve a proposed rule “that appears to license the circuits by local rule to ban *all* citations to all prior decisions.” He also dismisses the concern, mentioned in the Committee Note, that a circuit might promulgate a local rule requiring that copies of all unpublished opinions cited in a brief be served and filed. He believes that such a local rule is already foreclosed by Rule 32.1(b).

Prof. Stephen R. Barnett of the University of California at Berkeley School of Law (Boalt Hall) (03-AP-032) strongly supports the substance of Rule 32.1(a), but, in a recent law review article, was very critical of its drafting — and, in particular, of the decision to forego what he calls a “permissive” approach (that is, to state affirmatively that unpublished opinions may be cited) in favor of a “prohibitory” approach (that is, to bar restrictions on the citation of unpublished opinions):

1. Despite acknowledging that the text of the rule addresses only the “citation” of unpublished opinions, and despite acknowledging that the Committee Note “is at pains to make clear that [the] proposed Rule ‘says nothing whatsoever about the effect that a court must give’ to an unpublished opinion,” Prof. Barnett still believes that it is “not clear” whether Rule 32.1(a) would force courts to treat unpublished opinions as binding precedent. He argues that a local rule deeming unpublished opinions to be “non-precedential” could be seen as a “restriction” placed upon the “citation” of those opinions — and, because this “restriction” would be placed only upon unpublished opinions, it would be barred by Rule 32.1(a) as drafted. Prof. Barnett argues this problem — and others — could be avoided if Rule 32.1(a) would simply state affirmatively: “Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court.”

2. Prof. Barnett acknowledges that his alternative would not prevent courts from placing restrictions upon the citation of unpublished opinions, such as branding them as “disfavored” or providing that they can be cited only when no published opinion will serve as well. But Prof. Barnett makes three points about these restrictions (which he refers to as “discouraging words”):

- a. First, Prof. Barnett argues that it is not clear whether a local rule that disfavors the citation of unpublished opinions or that restricts the citation of unpublished opinions to situations in which adequate published opinions are lacking imposes a “restriction” upon the citation of unpublished opinions — and thus it is unclear whether Rule 32.1(a) as drafted is effective in barring such local rules. He argues that to instruct counsel that citation of unpublished opinions is “disfavored” is not necessarily to “restrict” their citation. He also points out that some restrictions on citation are worded in terms of counsel’s “belief” about the adequacy of published opinions on an issue — and that such rules are more “admonitory” than “enforceable.” He concedes, though, that some local rules do appear to impose a “restriction” on citation, and thus would be barred by Rule 32.1(a) as drafted — but not by his alternative.
- b. Second, Prof. Barnett downplays the possibility that a circuit dominated by “adamant anti-citationists . . . might impose some ‘prohibition or restriction’ that would make it difficult or impossible for attorneys to cite unpublished opinions.” In Prof. Barnett’s view, “[f]ederal circuit judges can be expected to obey the Federal Rules of Appellate Procedure, and to do so in spirit as well as in letter.”

- c. Finally, Prof. Barnett argues that, in any event, circuits *should* be able to discourage the citation of unpublished opinions and *should* be able to impose restrictions upon them — such as the restriction that they can be cited only when adequate published opinions are absent. Prof. Barnett repeats the familiar arguments about the lesser quality of unpublished opinions and argues that there is nothing wrong with treating them as “second-class precedents” — “as long as the[ir] citation is *allowed*.”

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) supports the rule, but generally agrees with Prof. Barnett’s comments about drafting. He also singles out for criticism the following sentence in the Committee Note: “At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions.”) Judge Easterbrook points out that Rule 32(e) *does* bar circuits from imposing typeface or other requirements, and thus the Committee Note to Rule 32.1 should not imply that circuits retain this authority.

The **Style Subcommittee** (04-AP-A) makes the following suggestions:

1. Change the heading from “Citation of Judicial Dispositions” to “Citing Judicial Dispositions.”
2. In subdivision (a), change “upon the citation of” to “on citing” both places where the phrase occurs.
3. In subdivision (b), change “A party who cites” to “If a party cites,” insert a comma after “database,” insert “the party” before “must file,” and delete “other written.”

3. List of Commentators

a. Commentators Who Oppose Proposed Rule

Federal Circuit Court Judges

First Circuit

Chief Judge Michael Boudin (03-AP-192) (did not expressly oppose Rule 32.1, but said that almost all of the First Circuit’s judges believe that restricting citation to situations in which no published opinion adequately addresses the issue is “a reasonable local limitation”)

Second Circuit

Chief Judge John M. Walker, Jr. (03-AP-329) (on behalf of himself and 18 active and senior judges on the Second Circuit)

Third Circuit

Senior Judge Ruggero J. Aldisert (03-AP-293)

Fourth Circuit

Judge M. Blane Michael (03-AP-401)

Fifth Circuit

Senior Judge Thomas M. Reavley (03-AP-170)

Sixth Circuit

Judge Boyce F. Martin, Jr. (03-AP-269)

Seventh Circuit

Judges John L. Coffey, Richard D. Cudahy, Terence Evans, Michael S. Kanne, Daniel A. Manion, Richard A. Posner, Ilana Diamond Rovner, Diane P. Wood, and Ann Claire Williams (03-AP-396) (joint letter)

Eighth Circuit

Senior Judge Myron H. Bright (03-AP-047)

Chief Judge James B. Loken (03-AP-499) (reporting that 7 of 9 active judges and 3 of 4 senior judges expressing a view on Rule 32.1 opposed it)

Ninth Circuit

Senior Judge Arthur L. Alarcón (03-AP-290)

Judge Carlos Tiburcio Bea (03-AP-130)

Senior Judge Robert R. Beezer (03-AP-292)

Judge Marsha S. Berzon (03-AP-134)

Senior Judge Robert Boochever (03-AP-046)
Senior Judge James R. Browning (03-AP-076)
Judge Jay S. Bybee (03-AP-327)
Judge Consuelo M. Callahan (03-AP-318)
Senior Judge William C. Canby, Jr. (03-AP-110)
Senior Judge Jerome Farris (03-AP-156)
Senior Judge Warren J. Ferguson (03-AP-167)
Senior Judge Ferdinand F. Fernandez (03-AP-061)
Judge Raymond C. Fisher (03-AP-366)
Judge William A. Fletcher (03-AP-059)
Senior Judge Alfred T. Goodwin (03-AP-026)
Judge Susan P. Graber (03-AP-400)
Senior Judge Cynthia Holcomb Hall (03-AP-133)
Judge Michael Daly Hawkins (03-AP-291)
Senior Judge Procter Hug, Jr. (03-AP-063)
Judge Alex Kozinski (03-AP-169)
Senior Judge Edward Leavy (03-AP-289)
Judge M. Margaret McKeown (03-AP-350)
Senior Judge Dorothy W. Nelson (03-AP-131)
Senior Judge Thomas G. Nelson (03-AP-067)
Senior Judge John T. Noonan, Jr (03-AP-052)
Judge Diarmuid F. O'Scannlain (03-AP-285)

Judge Richard A. Paez (03-AP-273)

Judge Stephen Reinhardt (03-AP-402)

Judge Pamela Ann Rymer (03-AP-233)

Judge Barry G. Silverman (03-AP-075)

Senior Judge Otto R. Skopil, Jr. (03-AP-135)

Senior Judge Joseph T. Sneed (03-AP-077)

Judge Richard C. Tallman (03-AP-081)

Judge Sidney R. Thomas (03-AP-398)

Senior Judge David R. Thompson (03-AP-403)

Judge Stephen S. Trott (03-AP-129)

Senior Judge J. Clifford Wallace (03-AP-082)

Judge Kim McLane Wardlaw (03-AP-132)

Tenth Circuit

None

Eleventh Circuit

None

Federal Circuit

Judge Timothy B. Dyk (03-AP-397)

Senior Judge Daniel M. Friedman (03-AP-506)

Chief Judge Haldane Robert Mayer (03-AP-086) (on behalf of all Federal Circuit judges)

Judge Paul R. Michel (03-AP-505)

Senior Judge S. Jay Plager (03-AP-297)

Federal District Court Judges

Northern District of California

Senior Judge William W. Schwarzer (03-AP-065)

District of Hawaii

Chief Judge David Alan Ezra (03-AP-250)

Northern District of Illinois

Judge Robert W. Gettleman (03-AP-054)

Senior Judge Milton I. Shadur (03-AP-066)

Federal Magistrate Judges

District of Arizona

Magistrate Judge Virginia A. Mathis (03-AP-136)

Central District of California

Magistrate Judge Jeffrey W. Johnson (03-AP-399)

Magistrate Judge Joseph Reichmann (Retired) (03-AP-484)

Federal Bankruptcy Judges

Central District of California

Judge Alan M. Ahart (03-AP-351)

Judge Ellen Carroll (03-AP-278)

Judge Geraldine Mund (03-AP-074)

Chief Judge Barry Russell (03-AP-405)

Judge John E. Ryan (03-AP-252)

Judge Maureen A. Tighe (03-AP-294)

Judge Vincent P. Zurzolo (03-AP-174)

Southern District of California

Chief Judge John J. Hargrove (03-AP-281) (on behalf of himself and 3 other judges on his court)

Eastern District of Washington

Judge Patricia C. Williams (03-AP-056)

Other Federal Judges

U S. Court of International Trade

Chief Judge Jane A. Restani (03-AP-137)

U.S. Tax Court

Judge Mark V. Holmes (03-AP-359)

State Appellate Judges

California

Justice William W. Bedsworth, California Court of Appeal, Fourth Appellate District (03-AP-280) (on behalf of himself and 5 colleagues)

Justice Paul Boland, California Court of Appeal, Second Appellate District (03-AP-295)

Chief Justice Ronald M. George, Supreme Court of California (03-AP-471)

Presiding Justice Laurence D. Kay, California Court of Appeal, First Appellate District (03-AP-404)

Justice Richard C. Neal (retired), California Court of Appeal, Second Appellate District (03-AP-126)

Presiding Justice Robert K. Puglia (retired), California Court of Appeal, Third Appellate District (03-AP-155)

Justice Maria P. Rivera, California Court of Appeal, First Appellate District (03-AP-048)

Justice W.F. Rylaarsdam, California Court of Appeal, Fourth Appellate District (03-AP-193)

Presiding Justice Arthur G. Scotland, California Court of Appeal, Third Appellate District (03-AP-372)

Justice Gary E. Strankman (retired), California Court of Appeal, First Appellate District (03-AP-296)

Wisconsin

Judge Ralph Adam Fine, Wisconsin Court of Appeals (03-AP-068)

State Trial Judges

California

Judge N.A. "Tito" Gonzales, Superior Court, Santa Clara County (03-AP-038)

Law Professors

Dean Scott A. Altman, University of Southern California Law School (03-AP-314)

Prof. Jerry L. Anderson, Drake University Law School (03-AP-078)

Prof. Stuart Banner, UCLA School of Law (03-AP-072)

Prof. Brian Bix, University of Minnesota Law School (03-AP-021)

Prof. Charles E. Cohen, Capital University Law School (03-AP-298)

Prof. Ross E. Davies, George Mason University School of Law (03-AP-392)

Prof. Michele Landis Dauber, Stanford Law School (03-AP-029)

Prof. Ward Farnsworth, Boston University School of Law (03-AP-221) (neither supports nor opposes rule, but raises concerns)

Prof. Victor Fleischer, UCLA School of Law (03-AP-062)

Prof. Thomas Healy, Seton Hall University Law School (03-AP-380)

Prof. Michael S. Knoll, University of Pennsylvania Law School (03-AP-093)

Prof. Mark Lemley, Boalt Hall School of Law (03-AP-153)

Prof. Rory K. Little, Hastings College of the Law (03-AP-334)

Prof. Gregory N. Mandel, Albany Law School (03-AP-274)

Prof. Brett H. McDonnell, University of Minnesota Law School (03-AP-467)

Prof. Richard W. Painter, University of Illinois College of Law (03-AP-091)

Prof. Ethan Stone, University of Iowa College of Law (03-AP-198)

Prof. George M. Strickler, Tulane Law School (03-AP-100)

Prof. Daniel P. Tokaji, Moritz College of Law, Ohio State University (03-AP-045)

Prof. Eugene Volokh, UCLA School of Law (03-AP-158)

Prof. Nhan Vu, Chapman University School of Law (03-AP-477)

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Jennifer M. Mason, Esq., Holland & Knight LLP, Washington, DC (03-AP-361)

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Brian J. Murray, Esq., Jones Day, Washington, DC (03-AP-096)

Daniel M. Nelson, Esq., Kirkland & Ellis, Washington, DC (03-AP-307)

Eugene M. Paige, Esq., Washington, DC (03-AP-301)

David B. Rivkin, Jr., Esq., Baker & Hostetler LLP, Washington, DC (03-AP-479)

Sylvia Royce, Esq., Washington, DC (03-AP-116)

Derek L. Shaffer, Esq., Cooper & Kirk, Washington, DC (03-AP-080)

Kenneth W. Starr, Esq., Kirkland & Ellis LLP, Washington, DC (03-AP-469)

Arlus J. Stephens, Esq., Washington, DC (03-AP-229)

Robert E. Toone, Esq., Washington, DC (03-AP-092)

David B. Walker, Esq., Washington, DC (03-AP-441) (on behalf of himself and 21 other former Federal Circuit law clerks)

Christian A. Weideman, Esq., Williams & Connolly LLP, Washington, DC (03-AP-302)

First Circuit

Damon A. Katz, Esq., Boston, MA (03-AP-231)

Anthony J. Vlatas, Esq., York, ME (03-AP-310)

Second Circuit

Brian J. Alexander, Esq., Kreindler & Kreindler LLP, New York, NY (03-AP-379) (on behalf of entire firm)

Ramsey Clark, Esq., New York, NY (03-AP-431)

David S. Gould, Esq., Port Washington, NY (03-AP-053)

Daniel B. Levin, Esq., Debevoise & Plimpton LLP, New York, NY (03-AP-105)

Joanne Mariner, Esq., New York, NY (03-AP-427)

Julian J. Moore, Esq., New York, NY (03-AP-282)

Richard H. Rosenberg, Esq., New York, NY (03-AP-117)

James E. Stern, Esq., Syracuse, NY (03-AP-260)

Theresa Trzaskoma, Esq., Brooklyn, NY (03-AP-043)

Amir Weinberg, Esq., Paul, Weiss, et al., New York, NY (03-AP-022)

Rowan D. Wilson, Esq., Cravath, Swaine & Moore LLP, New York, NY (03-AP-466)

Harvey Winer, Esq., Salzman & Winer, LLP, New York, NY (03-AP-332)

Third Circuit

Craig L. Hymowitz, Esq., Blank Rome LLP, Philadelphia, PA (03-AP-421)

Fourth Circuit

Gail S. Coleman, Esq., Bethesda, MD (03-AP-024)

Josh Goldfoot, Esq., Arlington, VA (03-AP-121)

Jeffrey A. Lamken, Esq., Arlington, VA (03-AP-433)

Carlton F.W. Larson, Esq., Arlington, VA (03-AP-360)

Benjamin I. Sachs, Esq., Olney, MD (03-AP-030)

Bruce Wieder, Esq., Burns, Doane, Swecker & Mathis, LLP, Alexandria, VA (03-AP-430)

Fifth Circuit

Robert N. Markle, Esq., New Orleans, LA (03-AP-015)

Harry Susman, Esq., Susman Godfrey LLP, Houston, TX (03-AP-412)

Sixth Circuit

Richard Crane, Esq., Nashville, TN (03-AP-125)

Joseph R. Dreitler, Esq., Jones Day , Columbus, OH (03-AP-309)

Charles M. Miller, Esq., Law Clerk, Supreme Court of Ohio, Columbus, OH (03-AP-228)

Seventh Circuit

Fred H. Bartlit, Jr., Esq., Bartlit Beck et al., Chicago, IL (03-AP-266)

Sean W. Gallagher, Esq., Bartlit Beck et al., Chicago, IL (03-AP-245)

Robert K. Niewijk, Esq., Oak Park, IL (03-AP-095)

Mark Ouweleen, Esq., Bartlit Beck et al., Chicago, IL (03-AP-258)

David B.H. Williams, Esq., Williams, Bax & Ellis, P.C., Chicago, IL (03-AP-313)

Eighth Circuit

Veronica L. Duffy, Esq., Duffy & Duffy, Rapid City, SD (03-AP-001)

Jonathan C. Wilson, Esq., Davis, Brown, et al., Des Moines, IA (03-AP-306)

Ninth Circuit

Daniel J. Albregts, Esq., Las Vegas, NV (03-AP-358)

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Marilyn Weiss Alper, Esq., Senior Judicial Research Attorney, California Court of Appeal, Second Appellate District, Los Angeles, CA (03-AP-304)

Fred H. Altshuler, Esq., Altshuler, Berzon, et al., San Francisco, CA (03-AP-244)

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Donna Bader, Esq., Laguna Beach, CA (03-AP-185)

Scott Bales, Esq., Lewis and Roca LLP, Phoenix, AZ (03-AP-416)

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Danny Chou, Esq., Staff Attorney, California Supreme Court, Sacramento, CA (03-AP-254)

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Monica J. Wahl, Esq., CA (03-AP-373)

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J. Craig Williams, Esq., The Williams Law Firm, Newport Beach, CA (03-AP-017)

Stephanie Rae Williams, Esq., Sedgwick, Detert, Moran & Arnold LLP, Los Angeles, CA (03-AP-316) (on behalf of herself and 3 colleagues)

Barbara A. Winters, Esq., Howard Rice et al., San Francisco, CA (03-AP-483)

Victor H. Woodworth, Esq., Newport Beach, CA (03-AP-224)

Steven Wyner, Esq., Wyner & Tiffany, Torrance, CA (03-AP-034)

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Michael D. Young, Esq., Weston Benshoof et al., Los Angeles, CA (03-AP-109)

Martin Zankel, Esq., Bartko, Zankel, Tarrant & Miller, San Francisco, CA (03-AP-041)

Tenth Circuit

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Eleventh Circuit

Stephen N. Bernstein, Esq., Stephen N. Bernstein, P.A., Gainesville, FL (03-AP-475)

Barry W. Beronet, Esq., Beronet & Keene, Pensacola, FL (03-AP-463)

Barry A. Cohen, Esq., Cohen, Jayson & Foster, P.A., Tampa, FL (03-AP-363)

Bradley A. Conway, Esq., Bradley A. Conway, P.A., Orlando, FL (03-AP-448)

Kevin A. Cranman, Esq., Atlanta, GA (03-AP-299)

Armando Garcia, Esq., Garcia and Seliger, Quincy, FL (03-AP-451)

Walter L. Grantham, Jr., Esq., Clearwater, FL (03-AP-476)

James K. Jenkins, Esq., Maloy & Jenkins, Atlanta, GA (03-AP-275)

Peter Kontio, Esq., and Todd David, Esq., Alston & Bird LLP, Atlanta, GA (03-AP-470)

Louis Kwall, Esq., Kwall, Showers & Coleman, P.A., Clearwater, FL (03-AP-447)

David R. Parry, Esq., Bauer, Crider, Pellegrino & Parry, Clearwater, FL (03-AP-424)

Christopher P. Saxer, Esq., Fort Walton Beach, FL (03-AP-480)

Mark Snyderman, Esq., Dunwoody, GA (03-AP-472)

Alan R. Soven, Esq., Miami, FL (03-AP-452)

Overseas

John McGuire, Esq., Cleary, Gottlieb, Steen & Hamilton, London, England (03-AP-407)

Igor V. Timofeyev, Esq., Associate Legal Officer, Office of the President, International Criminal Tribunal for the Former Yugoslavia, The Hague, Netherlands (03-AP-411)

Jana L. Torok, Esq., Camp Casey, Korea (03-AP-236)

In-House Attorneys

D.C. Circuit

John P. Frantz, Esq., Verizon Communications, Washington, D.C. (03-AP-261)

Second Circuit

William P. Barr, Esq., Executive Vice President and General Counsel, Verizon, New York, NY (03-AP-272)

Paul T. Cappuccio, Esq., Executive Vice President and General Counsel, Time Warner Inc , New York, NY (03-AP-064)

Ninth Circuit

Marc D. Bond, Esq., Assistant Counsel, Law Department, Union Oil Company of California, Anchorage, AK (03-AP-058)

Jeffrey B. Coyne, Esq., Vice President, General Counsel, and Corporate Secretary, Newport Corporation, Irvine, CA (03-AP-145)

James R. Edwards, Esq., Senior Legal Counsel, Corporate Legal Department, Qualcomm, San Diego, CA (03-AP-120)

Gregory T.H. Lee, Esq., President, Eureka Casinos, Las Vegas, NV (03-AP-157)

John M. Nettleton, Esq., Corporate Counsel, Starbucks Coffee Company, Seattle, WA (03-AP-226)

Adam J. Pliska, Esq., Director of Business & Legal Affairs, World Poker Tour, West Hollywood, CA (03-AP-440)

Sheldon W. Presser, Esq., Senior Vice President & Deputy General Counsel, Warner Bros. Entertainment Inc., Burbank, CA (03-AP-346)

Jerri L. Solomon, Esq., Senior Corporate Counsel, Farmers Group, Inc., Los Angeles, CA (03-AP-417)

Thomas F. Tait, Esq., President, Tait & Associates, Inc., Santa Ana, CA (03-AP-140)

John Vaughan, Esq., President and CEO, T and T Industries, Inc., Fullerton, CA (03-AP-108)

Eleventh Circuit

Michael Bishop, Esq., Chief Intellectual Property Counsel, BellSouth Corporation, Atlanta, GA (03-AP-315)

Deval L. Patrick, Esq., Executive Vice President, General Counsel, and Corporate Secretary, The Coca-Cola Company, Atlanta, GA (03-AP-027)

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Fifth Circuit

Roberta Gonzalez, Pflugerville, TX (03-AP-118)

Seventh Circuit

Carole Tkacz, Gary, IN (03-AP-163)

Ninth Circuit

Dr. Philip K. Anthony, CEO, Bowne DecisionQuest, Torrance, CA (03-AP-206)

Chris L. Britt, President, Marwit Capital, Newport Beach, CA (03-AP-147)

Hartwell Harris, Law Student, Boalt Hall School of Law, Berkeley, CA (03-AP-205)

Mark Kerslake, Province Group, Newport Beach, CA (03-AP-143)

Farahnaz Nourmand, Los Angeles, CA (03-AP-089)

Bethany L. O'Neill, San Diego, CA (03-AP-189)

John A. Sandberg, President, Sandberg Furniture, Los Angeles, CA (03-AP-148)

Homan Taghdiri, Los Angeles, CA (03-AP-088)

Wayne Willis, Los Altos, CA (03-AP-300)

Unknown

Katherine Kimball Windsor (03-AP-241)

Organizations

ACLU Foundation of Southern California, Los Angeles, CA (03-AP-235)

Advisory Council of the United States Court of Appeals for the Federal Circuit, Washington, DC (03-AP-410)

Appellate Courts Committee, Los Angeles County Bar Association, Los Angeles, CA (03-AP-201)

Attorney General's Office, State of California, Sacramento, CA (03-AP-395)

Attorney General's Office, State of Washington, Olympia, WA (03-AP-382)

California La Raza Lawyers Association, Los Angeles, CA (03-AP-268)

Committee on Appellate Courts, State Bar of California, San Francisco, CA (03-AP-319)

Committee on Federal Courts, State Bar of California, San Francisco, CA (03-AP-393)

Federal Circuit Bar Association, Washington, DC (03-AP-409)

Hispanic National Bar Association, Washington, DC (03-AP-415)

Litigation Section, Los Angeles County Bar Association, Los Angeles, CA (03-AP-347)

Northern District of California Chapter, Federal Bar Association, San Francisco, CA (03-AP-374)

Orange County Chapter, Federal Bar Association, Irvine, CA (03-AP-429)

b. Commentators Who Favor Proposed Rule

Federal Circuit Court Judges

Judge Frank H. Easterbrook (CA7) (03-AP-367)

Judge David M. Ebel (CA10) (03-AP-010)

Judge Kenneth F. Ripple (CA7) (03-AP-335)

Judge A. Wallace Tashima (CA9) (03-AP-288)

Law Professors

Prof. Stephen R. Barnett, Boalt Hall School of Law (03-AP-032)

Prof. Richard B. Cappalli, Temple University, James E. Beasley School of Law (03-AP-435)

Prof. Andrew M. Siegel, University of South Carolina School of Law (03-AP-219)

Prof. Michael B.W. Sinclair, New York Law School (03-AP-283)

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D.C. Circuit

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Second Circuit

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Third Circuit

David R. Fine, Esq., Kirkpatrick & Lockhart LLP, Harrisburg, PA (03-AP-223)

Fourth Circuit

Dr. Mark S. Bellamy, Esq., Virginia Beach, VA (03-AP-324)

Kerry Hubers, Esq., Alexandria, VA (03-AP-209)

Roy M. Jessee, Esq., Mullins, Harris & Jessee, P.C., Norton, VA (03-AP-230)

Steven R. Minor, Esq., Elliott Lawson & Minor, Bristol, VA (03-AP-210)

Fifth Circuit

Stephen R. Marsh, Esq., Wichita Falls, TX (03-AP-216)

Sixth Circuit

Kurt L. Grossman, Wood, Herron & Evans LLP, Cincinnati, OH (03-AP-426)

Charles E. Young, Jr., Esq., Knoxville, TN (03-AP-214)

Seventh Circuit

Beverly B. Mann, Esq., Chicago, IL (03-AP-408)

Eighth Circuit

Mark G. Arnold, Esq., Husch & Eppenberger, LLC, St. Louis, MO (03-AP-002)

Hugh R. Law, Esq., Lowenhaupt & Chasnoff, LLC, St. Louis, MO (03-AP-212)

David J. Weimer, Esq., Kramer & Frank, P.C., Kansas City, MO (03-AP-005)

Ninth Circuit

Anonymous (03-AP-238)

Gary Michael Coutin, Esq., San Francisco, CA (03-AP-465)

David W. Floren, Esq., Santa Rosa, CA (03-AP-227)

James B. Friderici, Esq., Delaney, Wiles, et al., Anchorage, AK (03-AP-006)

Robert Don Grifford, Esq., Reno, NV (03-AP-213)

James B. Morse, Jr., Esq., Tempe, AZ (03-AP-222)

Kenneth J. Schmier, Esq., Committee for the Rule of Law, Emeryville, CA (03-AP-239)

Jonathan M. Shaw, Esq., Susman Godfrey LLP, Seattle, WA (03-AP-208)

Leslie R. Weatherhead, Esq., Witherspoon, Kelley, Davenport & Toole, Spokane, WA (03-AP-473)

Tenth Circuit

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Samuel M. Ventola, Esq., Rothgerber, Johnson & Lyons, Denver, CO (03-AP-217)

Eleventh Circuit

J. Christopher Desmond, Esq., Law Clerk, U.S. District Court for the Southern District of Georgia, Savannah, GA (03-AP-211)

Michael N. Loebel, Esq., Fulcher, Hagler, et al., Augusta, GA (03-AP-454)

Craig N. Rosler, Esq., Birmingham, AL (03-AP-149)

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Debra D. Coplan, Los Angeles, CA (03-AP-323)

Paul Freda, Los Gatos, CA (03-AP-284)

Laurence Neuton, Los Angeles, CA (03-AP-317)

Organizations

Association of the Bar of the City of New York and the Association's Committee on Federal Courts, New York, NY (03-AP-464)

Citizens for Voluntary Trade, Arlington, VA (03-AP-414; 03-AP-456)

Committee on Courts of Appellate Jurisdiction, New York State Bar Association, Albany, NY (03-AP-097)

Committee on U.S. Courts, State Bar of Michigan, Lansing, MI (03-AP-394)

Public Citizen Litigation Group, Washington, DC (03-AP-008)

Trial Lawyers for Public Justice and the TLPJ Foundation, Washington, DC (03-AP-406)

c. Requests to Testify

Jessie Allen, Esq., on behalf of Brennan Center for Justice, New York University School of Law, New York, NY (03-AP-035)

Judah Best, Esq., on behalf of Section of Litigation of American Bar Association, Washington, DC (03-AP-069)

William T. Hangle, Esq., and James W. Morris, III, Esq., on behalf of American College of Trial Lawyers, Philadelphia, PA (03-AP-083)

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D. Recommendation

Given the strong public interest in Rule 32.1, this memorandum will likely be read by many who are not members of the Committee, and therefore I should probably start by emphasizing that what follows is merely my recommendation. It does not necessarily represent the views of the Chair or any member of the Committee. As Reporter, I give the Committee my best advice and help the Committee implement its decisions, but those decisions are emphatically the Committee's, and the Committee can and often does disagree with me. (Indeed, in the specific case of Rule 32.1, the Committee has already disagreed with me once, as I will describe below.)

I recommend that Rule 32.1 be removed from the Committee's study agenda — or, failing that, that further action on Rule 32.1 be postponed to give the Federal Judicial Center ("FJC") time to study some of the issues raised by the commentators.

In the seven years that I have served as Reporter to the Committee, I have often been impressed by the unique credibility enjoyed by the Rules Enabling Act ("REA") process. Several

factors account for that credibility, but one of the most important, I think, is that the REA process generally works on a consensus or near-consensus basis. For the most part, the advisory committees identify technical problems and propose uncontroversial solutions.

There are exceptions, of course. Judges like to do things the way judges like to do things, so even a proposal about something like word limits on briefs filed in cross-appeals can attract strong arguments. Generally, though, the advisory committees work hard to find common ground and build consensus. As a result, objections to proposed rules are usually neither many nor passionate.

Only rarely do advisory committees take on truly controversial issues and push ahead over the strong opposition of substantial numbers of judges. These rare occasions have at least two things in common. First, the advisory committees are addressing truly serious problems. Second, the advisory committees have a high level of confidence that, despite opposition, the proposals are correct on the merits.

Obviously, rules governing the citation of unpublished opinions are controversial. At our April 2001 meeting, Judge Will Garwood and I argued against proceeding with the Justice Department's proposal to abolish no-citation rules⁵ precisely because we knew from our surveys of the chief judges that the proposal would generate much controversy, that it would likely not be approved by the Judicial Conference, and that even publishing the proposal for comment would use up a great deal of this Committee's time and "capital."

Obviously, a majority of the Committee disagreed with our arguments, but, with respect, I continue to believe that we were right about the strength of the opposition to national rulemaking on the topic of unpublished opinions. I recognize, of course, that most of the opposition to Rule 32.1 came from one circuit, where a campaign against the rule was led by some of that circuit's judges. But even taking that into account, one cannot deny that many outstanding judges and lawyers of various backgrounds, temperaments, and philosophies have thought carefully about Rule 32.1, strongly object to it, and will feel aggrieved if Rule 32.1 is approved over their objections.

Rule 32.1 is therefore one of those rare proposals that is highly controversial. I ask, then, whether the two features I described above are true. Does Rule 32.1 address a truly serious problem? And, if so, does the Committee have a high level of confidence that Rule 32.1 is correct on the merits?

For me, the first question is easier than the second. I agree with those opponents of Rule 32.1 who ask, in essence: "What's the big deal? What's the problem crying out for a solution? Are no-citation rules really inflicting a lot of harm on a lot of people?" I know that there are

⁵An identical proposal had been removed from the Committee's study agenda in April 1998 after nearly all of the chief judges surveyed by Judge Garwood opposed it.

answers to those questions, having summarized those answers above. But, at the end of the day, I am just not convinced that no-citation rules pose a problem of the same magnitude as discovery abuse, misuse of class actions, or admissibility of expert testimony — problems that have been addressed in the past by controversial rules. My conclusion is bolstered by the fact that no-citation rules already seem to be on their way to extinction; whatever harm they cause, they cause less of it every year.

I find the merits to be a closer call. I started as an agnostic on the question of whether no-citation rules are necessary or wise. The comments persuade me that they are not — and that Rule 32.1 is probably right on the merits. Sometimes one is influenced to support a proposal by the strength of the arguments for it, and other times one is influenced to support a proposal by the weakness of the arguments against it. My support for Rule 32.1 is more a product of the latter than the former

Some of the arguments against Rule 32.1 strike me as clearly incorrect. For example, the argument that Rule 32.1 exceeds the authority granted by 28 U.S.C. § 2072 has several problems, not the least of which is that the no-citation rules that Rule 32.1 seeks to abolish are themselves promulgated under Rule 47(a), which gives each court of appeals authority to “make and amend rules governing its practice.” I cannot agree that a court of appeals has power to use its local rules to *bar* citation, but the Supreme Court does not have power to use the Appellate Rules to *permit* citation. If a no-citation rule is a rule of “practice” for purposes of Rule 47(a), then surely Rule 32.1 is a rule of “practice” for purposes of § 2072.

Other arguments against Rule 32.1 are internally inconsistent. To cite one example, opponents argue both (1) that unpublished opinions contain nothing of value and (2) that, if unpublished opinions could be cited, attorneys would have a professional obligation to research them, briefs would be full of citations to them, district courts would feel bound to follow them, and circuit courts would have to distinguish and explain them. To cite another, opponents argue both (1) that unpublished opinions often do not accurately describe the reasoning behind a decision and (2) that it is important that courts be able to continue to issue unpublished opinions because the parties are entitled to know the reasoning behind a decision. Opponents walk fine lines in trying to reconcile these and other tensions within their arguments, but I don’t think they always succeed.

Still other arguments against Rule 32.1 suffer from gaps in their reasoning. Commentators often stated — with little or no elaboration — that, if Rule 32.1 was approved, *x* would occur, and then devoted paragraphs to describing how awful *x* would be. What was often missing was a careful explanation of why Rule 32.1 would necessarily lead to *x* in the first place. Take, for example, the following “talking point,” which appeared in almost identical form in dozens of letters:

“If unpublished opinions *could* be cited, lawyers would have no choice but to treat them as a significant source of authority. [*Why?*] As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very

circuit court before which they are now litigating. [*Why?*] Even if courts did not regard unpublished dispositions as controlling, lawyers would still be obliged to afford them significant weight in practicing before circuit courts. [*Why?*]" [03-AP-025]

This paragraph basically repeats the same assertion three times. The assertion may very well be true, but repetition does not make it so.

Many of the arguments against Rule 32.1 were exaggerated. For example, I was not impressed with the argument that judges would be obliged to read every unpublished opinion cited in every brief — and, because those opinions are so cryptic, judges would have to call up the records and read the briefs to try to figure out what they really held. I clerked on two federal appellate courts, and I know that judges and their law clerks rarely read every *precedential* source that is cited in a brief, much less every non-*precedential* authority. A 10-case string cite is a 10-case string cite, and no one reads all 10 cases — whether published or not — unless there is good reason to do so. Judges and their law clerks have always used discretion in doing research, and they would continue to use discretion if Rule 32.1 was approved.

What most struck me about the arguments against Rule 32.1 is that they sometimes made a better normative case *for* Rule 32.1 than the arguments of the rule's supporters. Take, for example, the following argument, made in a letter signed by several judges:

"[Unpublished orders will be] thrown back in our faces . . . no matter how often we state that unpublished orders though citable (if the proposed rule is adopted) are not precedents. For if a lawyer states in its brief that in our unpublished opinion in *A v. B* we said *X* and in *C v. D* we said *Y* and in this case the other side wants us to say *Z*, we can hardly reply that when we don't publish we say what we please and take no responsibility. We will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel. Citability would upgrade case-specific orders that this circuit has intentionally confined to the law of that particular case to *de facto* precedents that we must address." [03-AP-396]

Putting aside whether this prediction is sound as an empirical matter, I am struck by the notion that the "moral duty" referred to by the letter is characterized as a duty that does not arise when a court *does* something, but only when what the court does is *pointed out* to it. In other words, the moral duty is not a duty to do or not to do something, but rather a duty to respond after someone calls the court's attention to its own actions. And, we are told, it is imperative to prevent this moral duty from arising by silencing litigants.

This is a rather revealing argument. Indeed, even the use of the term "thrown back in our faces" to describe the citation of an unpublished opinion is telling. It implies that "say[ing] what we please and tak[ing] no responsibility" is *exactly* what courts want to do in unpublished opinions. It also implies that the real objection to Rule 32.1 is not that it would prevent courts from continuing to issue unpublished opinions that are sloppily drafted by clerks and all of that,

but that it would make judges *take responsibility* for the way they produce unpublished opinions. And that, it seems to me, is one of the best arguments that can be made for Rule 32.1.

On balance, I obviously was not persuaded by many of the arguments against Rule 32.1. At the same time, I was not entirely convinced that Rule 32.1 should be approved. Here is my major concern:

I do not doubt that the judges on at least some circuits are absolutely overwhelmed. I also agree that, with so little margin for error, this Committee must be extremely careful before approving a rule change that might substantially increase the workload of federal judges. I think it undeniable that Rule 32.1 would change — at least in some circuits and at least to some extent — both the purpose of and the audience for unpublished opinions. It is not unreasonable to fear that, as a result, *something* about the drafting of unpublished opinions might change.

This is, of course, an empirical question — indeed, it is *the* empirical question that is at the heart of the disagreement over Rule 32.1. Although supporters and opponents have normative differences, what underlies their dispute is an enormous gulf between their perceptions about what would happen if Rule 32.1 was approved. How would the lives of judges and attorneys change? Supporters answer “not much and for the better.” Opponents answer “a great deal and for the worse.”

At this point, I just don't think the Committee has the information it needs to confidently assess who is right. It is possible, though, that the Committee could collect that information with the help of the FJC. As noted by Rule 32.1's supporters, many federal and state appellate courts have abolished or liberalized no-citation rules in recent years. These jurisdictions can provide evidence about the effect of those actions on judges and attorneys.

It is also true, as noted by Rule 32.1's opponents, that the data will have to be analyzed with care, and that apple-to-apple comparisons will be difficult. Rule 32.1 would combine with the E-Government Act to create a system in which (1) all unpublished opinions would be available online and (2) the circuits would not be able to discourage or restrict the citation of those opinions in any way. No federal circuit has had any experience with such a system — either because the circuit discourages or restricts citation or because the circuit's unpublished opinions have only recently been made available to Westlaw and Lexis (or, in the case of the Eleventh Circuit, are still not made available).

Despite these problems, data collected by a well-designed study could be quite helpful. But it may not be worth doing that study, as no amount of data is likely to sway the most ardent supporters and opponents of Rule 32.1. Instead, they will (with some justification) cite the differences between Rule 32.1 and current circuit practices and argue that, because of these differences, data contrary to their positions prove nothing.

In short, I recommend that the Committee remove Rule 32.1 from its study agenda or, if the Committee thinks it would be worthwhile, postpone further action on Rule 32.1 to give the FJC time to study the empirical claims made by supporters and opponents of the rule.

Two additional points:

1. I obviously do not favor approving Rule 32.1 at this time, but, in the interest of completeness, here is what I consider to be the best argument for going forward with the rule:

Let us suppose that the worst-case scenario predicted by Rule 32.1's opponents comes true. Let us suppose that Rule 32.1 is approved and, as a result, judges change their practices. Judges devote more time to writing some unpublished opinions, so that they cannot be misused or misunderstood — and, as to the others (the vast majority), judges write no opinion at all but instead substitute one-line dispositions.

Is this worst-case scenario really so bad? Is it clear that this system is not preferable to the current system? Consider two of the arguments made frequently by opponents of Rule 32.1:

First, many of Rule 32.1's opponents stress the poor quality of unpublished opinions. They tell us that the opinions are drafted hurriedly by law clerks — often by cutting-and-pasting bench memos. They tell us that judges spend little time reviewing the language of the opinions, being concerned only about the result. They tell us that the opinions may not accurately reflect the views of even a single judge. They tell us that the opinions do not adequately describe the facts and are not precise in the way that they describe the law. In a word, the quality of the opinions is lousy.

Second, many of Rule 32.1's opponents complain that the world is already awash in too much law. There are too many decisions to read. It is too expensive to do legal research. There are too many ambiguities and conflicts in the law because too many courts have said the same things too many times — inevitably in slightly different ways. Unpublished opinions already contribute to this problem, because, even in jurisdictions in which they cannot be cited, they are regularly read. (Does anyone think that the attorneys in *Rivera-Sanchez* did not read any of the Ninth Circuit's 20 previous directly-on-point decisions because those decisions were unpublished?)

If one accepts these two arguments, then wouldn't the ideal solution be to get rid of unpublished opinions altogether? Would it not be *good* if Rule 32.1 resulted in judges issuing (1) full, published, citable, precedential decisions in cases that warrant them and (2) one-line (or perhaps one-paragraph) orders in cases that do not? Would not a world of fewer and better opinions be preferable for everyone? One leading opponent of Rule 32.1 analogized unpublished opinions to "sausage [that is] not safe for human consumption." [03-AP-169] Isn't the best way to deal with such "sausage" to *stop making it*?

The more I think about the comments on Rule 32.1, the more I am struck by how strange the current system is. Unpublished opinions are the crazy uncle in the attic of the federal judiciary, and no-citation rules are the whispered instructions to party guests not to hurt the hosts' feelings by mentioning that uncle. One commentator — a former Ninth Circuit clerk and opponent of Rule 32.1 — described the current system well:

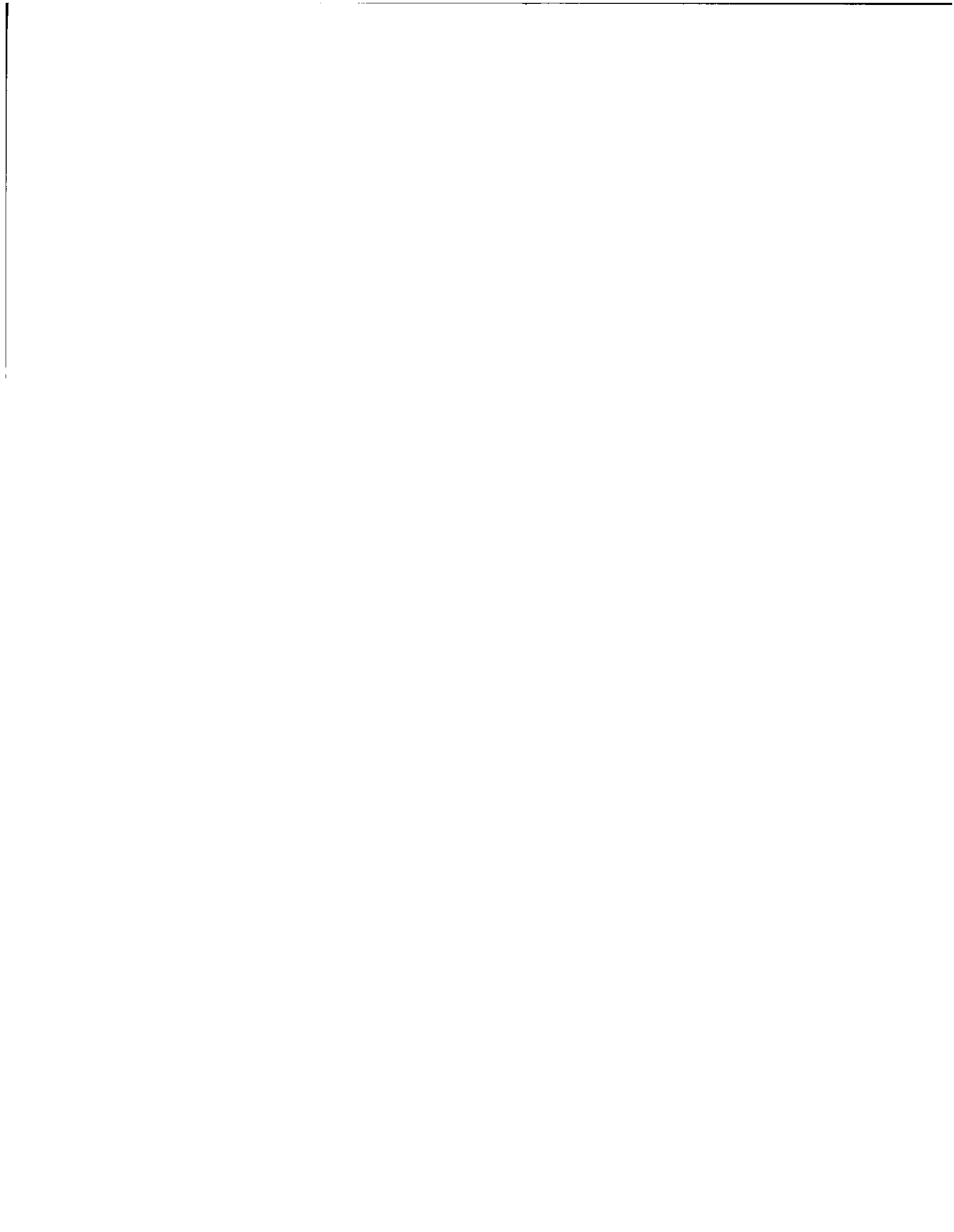
“No one knows what to do with unpublished circuit decisions. Even in circuits that allow citation, such as the Tenth Circuit, they represent a limbo of pseudo-precedent that is not binding but yet has more effect than merely legal advocacy. The respect they are given varies from near zero to that given binding precedent; they may be treated like a law review article, a Federal Supplement decision from another circuit, or a published opinion of the authoring court itself. Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid.” [03-AP-432]

Right now, federal courts handle the problem of this “limbo of pseudo-precedent” by *ignoring* it — by averting their gaze. If Rule 32.1 makes it impossible for judges to avert their gaze — and, as a result, judges stop issuing lousy unpublished opinions in favor of either good published opinions or one-line orders — I personally would regard that as an improvement over the current system.

I recognize, of course, that many will object that one-line dispositions deprive the parties of an explanation of the outcome of their appeals, leaving them feeling cheated and eroding their confidence in the judicial system. No doubt there is something to this, but bear in mind the following: First, the judicial system already issues millions of one-word decisions, from a trial judge's “sustained” in response to an objection at trial to the Supreme Court's “denied” in response to a petition for a writ of certiorari. People may not like it, but they seem to live with it. Second, providing reasons for every appellate decision may no longer be possible, given that the resources of the courts are not keeping pace with rising caseloads. Congress cannot give courts fewer resources to handle more cases and expect nothing to change. Finally, given what we've been told about unpublished opinions, I wonder whether they are preferable to one-line dispositions. Is an inaccurate explanation really better than no explanation at all?

2. Regarding the drafting of Rule 32.1: Although we struggled with the wording — and although none of us was entirely satisfied with the drafting — we received little feedback regarding drafting from either the commentators or the Style Subcommittee. The major complaint was Prof. Barnett's. He believes that the rule should be stated affirmatively (“unpublished opinions may be cited”), not negatively (“restrictions may not be placed on the citation of unpublished opinions”). He does not share the Committee's concern that judges who oppose Rule 32.1 will try to undermine it by imposing restrictions on the citation of unpublished opinions, such as warnings that such citation is disfavored or instructions that such citation is not allowed unless no published decision is on point. In any event, Prof. Barnett believes that circuits *should* be free to impose such restrictions.

I have a great deal of respect for Prof. Barnett, but I do not agree with him on either point. First, even reading a small sample of the comments opposing Rule 32.1 makes clear the depth of feeling against citing unpublished opinions. I was struck in particular by one judge's not-too-subtle threat that, if Rule 32.1 is adopted, his circuit will simply ignore it by using the authority given to courts in Rule 2 to "suspend any provision of these rules in a particular case." [03-AP-289] Second, this Committee and the Standing Committee should not expend a great deal of their "capital" in a major political struggle in order to change the rules of 4 of the 13 circuits from altogether banning the citation of unpublished opinions to banning it unless there is no published decision on point. That hardly seems worth the candle. If the Committee is going to press forward, it should press forward with a version of Rule 32.1 that would make a real difference — one that does not permit any restrictions on the citation of unpublished opinions.



IV-A-6

VI. Rule 35(a)

A. Introduction

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 follow two different approaches when one or more active judges are disqualified. Seven circuits follow the “absolute majority” approach (disqualified judges count in the base in considering whether a “majority” of judges have voted for hearing or rehearing en banc), while six follow the “case majority” approach (disqualified judges do not count in the base). Two circuits — the First and the Third — explicitly qualify the case majority approach by providing that a majority of all judges — disqualified or not — must be eligible to participate in the case; it is not clear whether the other four case majority circuits agree with this qualification.

The Committee proposed amending Rule 35(a) to adopt the case majority approach.

B. Text of Rule and Committee Note

1 **Rule 35. En Banc Determination**

- 2 **(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit
3 judges who are in regular active service and who are not disqualified may order that an
4 appeal or other proceeding be heard or reheard by the court of appeals en banc. An en
5 banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
- 6 (1) en banc consideration is necessary to secure or maintain uniformity of the court’s
7 decisions; or
 - 8 (2) the proceeding involves a question of exceptional importance.

9 * * * * *

10 **Committee Note**

11
12 **Subdivision (a).** Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide
13 that a hearing or rehearing en banc may be ordered by “a majority of the circuit judges who are in
14 regular active service.” Although these standards apply to all of the courts of appeals, the circuits
15 are deeply divided over the interpretation of this language when one or more active judges are
16 disqualified.

1 The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R.*
2 *Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner’s claim that his rights under § 46(c) had
3 been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had
4 eight active judges at the time; four voted in favor of rehearing the case, two against, and two
5 abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding,
6 in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants “the
7 right to know the administrative machinery that will be followed and the right to suggest that the
8 en banc procedure be set in motion in his case.” *Id.* at 5. *Shenker* did stress that a court of
9 appeals has broad discretion in establishing internal procedures to handle requests for rehearings
10 — or, as *Shenker* put it, “to devise its own administrative machinery to provide the *means*
11 whereby a majority may order such a hearing.” *Id.* (quoting *Western Pac. R.R. Corp. v. Western*
12 *Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is
13 meant by “a majority” in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly
14 did not suggest that the phrase should have different meanings in different circuits.
15

16 In interpreting that phrase, a majority of the courts of appeals follow the “absolute
17 majority” approach. Marie Leary, *Defining the “Majority” Vote Requirement in Federal Rule of*
18 *Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8-9*
19 *tbl.1* (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the
20 base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a
21 circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are
22 disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of
23 the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.
24

25 A substantial minority of the courts of appeals follow the “case majority” approach. *Id.*
26 Under this approach, disqualified judges are not counted in the base in calculating whether a
27 majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit’s 12
28 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must
29 vote to hear a case en banc. (The Third Circuit alone qualifies the case majority approach by
30 providing that a case cannot be heard en banc unless a majority of all active judges —
31 disqualified and non-disqualified — are eligible to participate in the case.)
32

33 Rule 35(a) has been amended to adopt the case majority approach as a uniform national
34 interpretation of the phrase “a majority of the circuit judges . . . who are in regular active service”
35 in § 46(c). The federal rules of practice and procedure exist to “maintain consistency,” which
36 Congress has equated with “promot[ing] the interest of justice.” 28 U.S.C. § 2073(b). The
37 courts of appeals should not follow two inconsistent approaches in deciding whether sufficient
38 votes exist to hear a case en banc, especially when there is a governing statute and governing rule
39 that apply to all circuits and that use identical terms, and especially when there is nothing about
40 the local conditions of each circuit that justifies conflicting approaches.
41

42 Both the absolute majority approach and the case majority approach are reasonable
43 interpretations of § 46(c), but the absolute majority approach has at least two major
44 disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical

1 matter, counted as voting against hearing a case en banc. To the extent possible, the
2 disqualification of a judge should not result in the equivalent of a vote for or against hearing a
3 case en banc. Second, the absolute majority approach can leave the en banc court helpless to
4 overturn a panel decision with which almost all of the circuit’s active judges disagree. For
5 example, in a case in which 5 of a circuit’s 12 active judges are disqualified, the case cannot be
6 heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion.
7 This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to
8 control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power*
9 *Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh’g
10 en banc), *rev’d sub nom. Nat’l Cable & Telecomm Ass’n, Inc v. Gulf Power Co.*, 534 U.S. 327
11 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

C. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) “strongly” supports the proposed amendment.

Chief Judge Michael Boudin of the First Circuit (03-AP-009; 03-AP-192) reports that his court has abandoned the absolute majority approach in favor of the qualified case majority approach. He also reports that the First Circuit supports the proposed amendment to Rule 35(a), with one important proviso. Judge Boudin draws the attention of the Committee to 28 U.S.C. § 46(d), which provides: “A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.” In Judge Boudin’s view, this provision *requires* the “qualification” in the “qualified case majority rule” — that is, the qualification that a case cannot be heard or reheard en banc unless a majority of *all* judges in regular active service are eligible to participate. Judge Boudin believes that the omission of an explicit quorum requirement in the proposed amendment to Rule 35(a) “is not a problem so long as the committee notes . . . make clear that the unqualified rule you propose is not intended to override any existing quorum requirement embodied in section 46(d) or — if I have misread that section — any quorum requirement that a court of appeals might reasonably adopt.”

Judge J. Harvie Wilkinson III of the Fourth Circuit (03-AP-012) opposes the proposed amendment. He is “not certain why a difference in circuit practice needs to be replaced by a uniform command,” especially as “[t]his is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct.” He is also concerned that, under the proposed amendment, “the en banc court could be convened by less than a majority of the active judges, and that a disposition could issue from a majority of the reduced court” — something that he believes would “undermine the purpose of an institutional voice for which the en banc court was designed.” Finally, he is also concerned that the proposed amendment would result in an increase in the number of en banc proceedings, consuming much-needed resources and possibly aggravating internal tensions within courts.

Chief Judge William W. Wilkins of the Fourth Circuit (03-AP-013) opposes the proposed amendment for the reasons given by Judge Wilkinson.

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendment: “The Advisory Committee’s proposal for a single, national approach is sound. It represents a reasonable interpretation of the governing statute, 28 U.S.C. § 46(c). By analogy to the ‘*Chevron* doctrine,’ the Advisory Committee’s interpretation of the range of permissible options deserves deference.”

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on the Federal Circuit — which currently follows the absolute majority rule — unanimously oppose the proposed amendment. The courts of appeals should be left to interpret Rule 35(a) inconsistently. If uniformity is to be imposed, it should be the absolute majority approach followed by a majority of the circuits, not the case majority approach followed by a minority. The case majority approach is deficient in permitting a small number of judges to issue opinions on behalf of the en banc court; for example, on a 12-member court with 5 members disqualified, 4 judges could issue en banc opinion binding all 12 judges on the court, even if 8 of the 12 judges do not agree with it. En banc review is reserved for cases of exceptional important (or cases involving a conflict of authority), and such cases should be decided only by an absolute majority of judges. Finally, although national uniformity may be important with respect to rules that govern the conduct of the parties, it is not as important when it comes to the internal procedures of each court.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment, as it is “sensible” to “standardize” en banc procedures and to “exclude from the count those judges who are disqualified.”

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) “fully supports” the proposed amendment. Practice on this issue should not vary from circuit to circuit. Moreover, the absolute majority approach is objectionable because, under it, “the disqualification of a judge is essentially deemed as a vote against granting an en banc hearing,” which is “contrary to the purpose of a judge recusing him/herself.”

Chief Judge Douglas H. Ginsburg of the D.C. Circuit (03-AP-368) reports that a majority of the active judges of the D.C. Circuit oppose the proposed amendment for the reasons described by Judge Mayer.

Prof. Arthur D. Hellman of the University of Pittsburgh School of Law (03-AP-369) strongly supports the proposed amendment, largely for the reasons given by Judge Edward Carnes in his *Gulf Power Co.* opinion. Prof. Hellman writes mainly to respond to the arguments of Judge Mayer:

Judge Mayer objects that the case majority rule permits a minority of judges to control the law of the circuit. What Judge Mayer fails to acknowledge is that the absolute majority approach does exactly the same thing — and makes such a phenomenon both more likely and more pernicious. Under the absolute majority approach, a three-judge panel — perhaps a panel with one senior judge and one visiting judge in the majority, and one active judge in dissent — can decide a case in a manner that is acceptable to *no* active judge. If 6 of the circuit's 12 judges are disqualified, there is nothing that the circuit can do to correct the error.

If the panel's error is one of creating law, then the circuit may be able to take another case presenting the same issue en banc in a few years — that is, if a majority of nondisqualified judges can be mustered. (The stock holdings of the judges and a lack of turnover on the court might mean that it will be many years before a majority of nonrecused judges will be available.) In the meantime, the lower courts of the circuit are stuck applying bad law, and the citizens of the circuit are stuck conforming their behavior to bad law.

Importantly, though, the en banc court will *never* get a chance to correct the injustice inflicted on the parties in the particular case. “[T]he absolute majority rule disables the only *relevant* majority from working its will at the only time when it matters.” One function of the appellate courts is to declare and clarify law, but the more important function is to do justice in individual cases.

Judge Mayer's further argument that this issue merely relates to “the internal procedures of each court” ignores one crucial point: “By definition, a judge who is recused from participation in a case should have no influence over that case's outcome. Yet under the absolute majority rule, nonparticipation is equivalent to a ‘no’ vote.” In other words, use of the absolute majority rule is not just a matter of how paper is pushed inside a circuit; it directly affects the rights of the parties. “Recused judges . . . have a direct influence over the outcome of the case,” which violates the very notion of recusal.

Prof. Hellman points out that these concerns led to inclusion in the Judicial Improvements Act of 2002 of a provision that would have amended 28 U.S.C. § 46(c) to more clearly impose the case majority rule. That provision was dropped from the bill (which eventually became law) because Congress was informed that the Committee was actively addressing the issue. Prof. Hellman hints that if the proposed amendment to Rule 35(a) is not enacted, Congress may very well impose the case majority rule itself.

The Committee on Federal Courts of the State Bar of California (03-AP-393) supports the proposed amendment, largely for the reasons described in the Advisory Committee Note. The Committee believes that fundamental fairness requires that parties be treated alike under the same statute and rule, no matter the circuit in which the parties are litigating. The Committee also believes that recusal of a judge should not result in the equivalent of a vote against rehearing. Finally, the Committee criticizes the absolute majority approach because it can leave the en banc court helpless to overturn a panel decision with which all or almost all of the active judges disagree.

Citizens for Voluntary Trade (03-AP-414) supports the proposed amendment. The argument of the Federal Circuit that each circuit should be free to choose its own approach has already been rejected by Congress (which enacted a national statute) and the Supreme Court (which promulgated a national rule). The specter of a minority of active judges issuing an en banc opinion for the court — which can occur under the case majority approach — is not terribly troubling, given that several circuits have already adopted the case majority approach and given that *every* en banc opinion of the Ninth Circuit is issued by a minority of active judges (sometimes by less than a quarter of the active judges). More importantly, counting recused judges in the base violates general principles of parliamentary law and unfairly prejudices the litigant seeking rehearing, because it counts each recused judge as the equivalent of a vote against rehearing.

Chief Judge James B. Loken of the Eighth Circuit (03-AP-499) reports that “[t]en of the eleven Eighth Circuit judges who responded on this question, including all eight active judges, join the Federal Circuit in opposing the adoption of proposed Rule 35(a).” Those judges opposed Rule 35(a) because they did not believe that a national rule is “necessary [] or appropriate.” In addition, some judges opposed Rule 35(a) because the case majority rule makes en banc rehearings more likely — and such rehearings “require a large investment of our widely-dispersed judicial resources, a geographical factor that is doubtless not uniform among the circuits.”

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Recommendation

I recommend that the proposal be approved as published, except that I recommend that the Committee Note be revised in certain respects (explained below).

None of the commentators who argues that each circuit should be free to do as it wishes comes to grips with the fact that Congress (in enacting § 46(c)) and the Supreme Court (in approving Rule 35(a)) have already decided differently. It is highly unlikely that either Congress or the Court intended that “majority” mean one thing in half of the circuits and another thing in the other half. A national standard already *exists*; circuits just conflict in their interpretations of what that standard means.

Judge Wilkinson is correct, of course, that “[t]his is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct.” [03-AP-012] (Judge Mayer made a similar point.) But that is not the same as saying that the rule relates only to the internal operating procedures of the court. In some circuits, recusals act as votes against a party’s request for rehearing en banc; in others, recusals do not. The rights of the parties are directly affected.

On the merits of the rule, I have been persuaded that the case majority rule is superior to the absolute majority rule. The case majority rule seems to me, first, to represent a more plausible interpretation of § 46(c) (for reasons that I describe in the revised Committee Note

below), and, second, to be a better policy choice (for the reasons described by Prof. Hellman). As we have discussed several times, both rules leave open the possibility of a “worst-case scenario”: The absolute majority rule makes it possible for a *panel* to determine the law of the circuit over the objection of most (or even all) of the circuit’s active judges; the case majority rule makes it possible for an *en banc court* composed of substantially fewer than all of the circuit’s active judges to determine the law of the circuit.

On balance, it seems to me that the worst-case scenario that arises under the absolute majority rule is “worse” — considering both the likelihood that it will occur and what will happen when it does occur — than the worst-case scenario that arises under the case majority rule. Moreover, the absolute majority rule, unlike the case majority rule, counts every recusal as a vote against rehearing — which, as several commentators pointed out, defeats the purpose of recusals. Finally, circuits can protect themselves to some degree from the case majority rule’s worst-case scenario by following the lead of the First and Third Circuits and insisting that a case cannot be heard *en banc* unless a majority of all active judges are eligible to participate.

While I recommend approval of the amendment to Rule 35(a), I also recommend that the Committee Note be revised in three respects:

1. I recommend that the Committee Note put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). One of the strongest arguments in favor of the amendment is that the existence of § 46(c) means that there should be a consistent national practice. In addition, Standing Committee members have argued that, in deciding what approach to adopt, this Committee should choose the approach that represents the best interpretation of § 46(c), whether or not that approach is the one that the Committee would choose as an original matter.

2. I recommend that the Committee accommodate Judge Boudin’s request. Judge Boudin’s reading of § 46(d) is at least plausible (although it is not the only plausible reading). More importantly, Judge Boudin is not asking that either the text of the amendment or the Committee Note *endorse* his reading; rather, he is asking merely that a line or two be added to the Committee Note to make clear that the amendment is not meant to *foreclose* it.

From the beginning, this Committee has regarded the Third Circuit’s approach as the best policy choice; its only concern has been reconciling that approach with the language of § 46(c). If the text of the amendment remains unchanged, and if the Committee Note points circuits to the quorum requirement of § 46(d), then it seems likely that most or all circuits will end up with the Third Circuit approach. If a split over the meaning of § 46(d) later develops, the Committee can revisit Rule 35(a) at that time. But there is no reason for the Committee to be more specific about the meaning of § 46(d) now. The statute has almost never been interpreted, most likely because it is difficult to find any example of a “case majority” circuit taking a case *en banc* when only a minority of its active judges were eligible to participate.

3. In his comment, Prof. Hellman — who is the leading expert on § 46(c) and Rule 35(a) — has made a couple of points that had not occurred to me and that I think strengthen the case for the case majority approach. I have added a few words to the Committee Note to incorporate those points.

ALTERNATIVE DRAFT

1 **Rule 35. En Banc Determination**

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

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

9 * * * * *

10 **Committee Note**

11
12 **Subdivision (a).** Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide
13 that a hearing or rehearing en banc may be ordered by “a majority of the circuit judges who are in
14 regular active service.” Although these standards apply to all of the courts of appeals, the circuits
15 are deeply divided over the interpretation of this language when one or more active judges are
16 disqualified.

17
18 The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R.*
19 *Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner’s claim that his rights under § 46(c) had
20 been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had
21 eight active judges at the time; four voted in favor of rehearing the case, two against, and two
22 abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding,
23 in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants “the
24 right to know the administrative machinery that will be followed and the right to suggest that the
25 *en banc* procedure be set in motion in his case.” *Id.* at 5 *Shenker* did stress that a court of
26 appeals has broad discretion in establishing internal procedures to handle requests for rehearings
27 — or, as *Shenker* put it, “to devise its own administrative machinery to provide the *means*
28 whereby a majority may order such a hearing.” *Id.* (quoting *Western Pac. R.R. Corp. v. Western*

1 *Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what
2 is meant by “a majority” in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker*
3 certainly did not suggest that the phrase should have different meanings in different circuits.
4

5 In interpreting that phrase, seven of the courts of appeals follow the “absolute majority”
6 approach. See Marie Leary, *Defining the “Majority” Vote Requirement in Federal Rule of*
7 *Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals* 8 tbl.1
8 (Federal Judicial Center 2002) Under this approach, disqualified judges are counted in the base
9 in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit
10 with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are
11 disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of
12 the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.
13

14 Six of the courts of appeals follow the “case majority” approach. *Id.* Under this
15 approach, disqualified judges are not counted in the base in calculating whether a majority of
16 judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit’s 12 active
17 judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to
18 hear a case en banc (The First and Third Circuits explicitly qualify the case majority approach
19 by providing that a case cannot be heard en banc unless a majority of all active judges —
20 disqualified and non-disqualified — are eligible to vote.)
21

22 Rule 35(a) has been amended to adopt the case majority approach as a uniform national
23 interpretation of § 46(c). The federal rules of practice and procedure exist to “maintain
24 consistency,” which Congress has equated with “promot[ing] the interest of justice.” 28 U.S.C.
25 § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding
26 whether sufficient votes exist to hear a case en banc, especially when there is a governing statute
27 and governing rule that apply to all circuits and that use identical terms, and especially when
28 there is nothing about the local conditions of each circuit that justifies conflicting approaches.
29

30 The case majority approach represents the better interpretation of the phrase “the circuit
31 judges . . . in regular active service” in the first sentence of § 46(c). The second sentence of
32 § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard
33 by a court en banc — uses the similar expression “all circuit judges in regular active service.” It
34 is clear that “all circuit judges in regular active service” in the second sentence does not include
35 disqualified judges, as disqualified judges clearly cannot participate in a case being heard or
36 reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent
37 sentences in a statute should be interpreted the same way, the best reading of “the circuit judges
38 . . . in regular active service” in the first sentence of § 46(c) is that it, too, does not include
39 disqualified judges.
40

41 This interpretation of § 46(c) is bolstered by the fact that the case majority approach has
42 at least two major advantages over the absolute majority approach:
43

1 First, under the absolute majority approach, a disqualified judge is, as a practical matter,
2 counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the
3 extent possible, the disqualification of a judge should not result in the equivalent of a vote for or
4 against hearing a case en banc.
5

6 Second, the absolute majority approach can leave the en banc court helpless to overturn a
7 panel decision with which almost all of the circuit's active judges disagree. For example, in a
8 case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc
9 even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits
10 one active judge — perhaps sitting on a panel with a visiting judge — effectively to control
11 circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v.*
12 *FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en
13 banc), *rev'd sub nom. National Cable & Telecomm Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327
14 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous
15 legal interpretation, the en banc court will never be able to correct the injustice inflicted by the
16 panel on the parties to the case. Moreover, it may take many years before sufficient non-
17 disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the
18 meantime, the lower courts of the circuit must apply — and the citizens of the circuit must
19 conform their behavior to — an interpretation of the law that almost all of the circuit's active
20 judges believe is incorrect.
21

22 The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28
23 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that
24 § 46(d) might be read to require that more than half of the number of circuit judges in regular
25 active service be eligible to participate in order for the court to hear or rehear a case en banc.

V-A



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Re: Possible Amendment to FRAP 4 Notice of Appeal Times

Dear Patrick:

At our last meeting, the Federal Rules of Appellate Procedure Advisory Committee asked the Department of Justice to consider the possibility of amending FRAP 4 to provide that the time limitations of FRAP 4(b) for criminal cases would apply only to direct appeals from judgments of conviction under FRCrP 32(k), and that the time limitations of FRAP 4(a) would apply to all other appeals. After studying this proposal, and soliciting information and viewpoints from U.S. Attorneys' Offices around the nation, the Department of Justice strenuously opposes it because it would cause serious delays in the many pre-judgment appeals that can be taken in criminal proceedings. There is a very strong public interest that these appeals not be delayed. I set out below an alternative proposal that would provide some clarity, while at the same time keeping criminal proceedings on a highly desirable fast track.

At the outset, however, I want to emphasize again our view that the proposed amendment tries to fix what is not broken. In the vast majority of cases, whether an appeal is civil or criminal is resolved by uncontested precedent, common sense, and the assignment of criminal or civil docket numbers by district court clerks' offices. The Committee has already resolved the only significant Circuit split concerning what is civil versus what is criminal (concerning *coram nobis* writs), and the Circuit split over the Hyde Amendment does not pose a serious problem warranting the substantial process needed to achieve a FRAP amendment.

1. Some background knowledge of the statutes and rules setting notice of appeal times is necessary.

By statute, the time for taking appeals in private cases “of a civil nature” is 30 days after the entry of the appealable judgment, order, or decree. 28 U.S.C. 2107(a). In any action in which the United States, or its agencies or officers is a party, all parties – whether private or governmental – have 60 days from such entry. 28 U.S.C. 2107(b).

FRAP 4(a) also discusses the deadlines for filing notices of appeal “in a Civil Case,” and provides the same timing for civil cases as does Section 2107. See FRAP 4(a)(1).

No statute currently sets the period within which a defendant in a criminal case may file a notice of appeal. However, the time for the Government to appeal in criminal cases is generally set by 18 U.S.C. 3731 at 30 days.

FRAP 4(b)(1) governs appeal times in “a Criminal Case,” and provides ten days for a defendant, and 30 days for the Government. A cross-appeal may be filed by a defendant within ten days of the Government’s appeal, and by the Government within 30 days of a defendant’s appeal.

In addition to these statutes and rules setting the notice of appeal times in general, there are various specialized statutes and rules providing different times for particular types of appeals. For example, ten days are provided to appeal in the following situations: (1) certain interlocutory civil appeals (28 U.S.C. 1292(b)); (2) Government appeals under the Classified Information Procedures Act (18 U.S.C. App. 3, Sec. 7); and, (3) discretionary appeals from orders involving class action certifications (FRCP 23(f)).

2. As I have previously discussed with the Committee, the difference in criminal and civil notice of appeal times reflects the general practice that criminal appeals are handled more expeditiously by the Circuits than standard civil cases. See, *e.g.*, Second Circuit Local Rules Appendix Part B (“Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals”); Fifth Circuit Local Rules Appendix I (“Plan for Expediting Criminal Appeals”). Such treatment appears to be based partially on statutory command (see 18 U.S.C. 3731 (criminal appeals by the Government “shall be diligently prosecuted”; 18 U.S.C. 3145(c) (appeals under the Bail Reform Act from a release or detention order “shall be determined promptly”)), and a lengthy tradition, recognized by the Supreme Court. See *Corey v. United States*, 375 U.S. 169, 171-72 (1963) (“The dominant philosophy embodied in these rules” governing federal criminal appeals – including the ten-day period for filing notices of appeal -- reflects the concern “that criminal appeals be disposed of as expeditiously as the fair and orderly administration of justice may permit”).

Pre-judgment criminal appeals implicate an even stronger public policy: the need for speedy investigations, speedy trials, and speedy sentencings. Most prominently, the Constitution requires a “speedy and public trial.” U.S. Const., Amend. VI.¹ As the Supreme Court has explained, this

¹ Similarly, “delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment,” *United States v. MacDonald*, 456 U.S. 1, 7 (1982), and delay prior to sentencing has been held to raise a constitutional claim, see, *e.g.*, *United States v. Gibson*, 353 F.3d

requirement exists not merely for the defendant's benefit, but also for the benefit of the public. Flanagan v. United States, 465 U.S. 259, 264-65 (1984). Delays undermine the prosecution's ability to meet its burden of proof, increase the cost of pretrial detention, and extend "the period during which defendants released on bail may commit other crimes." United States v. MacDonald, 435 U.S. 850, 862 (1978). Delay between arrest and punishment prolongs public anxiety over community safety if a person accused of a serious crime is free on bail, and may also adversely affect the prospects for rehabilitation. See Barker v. Wingo, 407 U.S. 514, 520 (1972). Finally, when a crime is committed against a community, there is a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. See Flanagan, 465 U.S. at 264-65.

As the Court has observed, these concerns are particularly critical today: "Promptness in bringing a criminal case to trial has become increasingly important as crime has increased, court dockets have swelled, and detention facilities have become overcrowded" *Id.* at 264. Indeed, Congress passed the Speedy Trial Act "not only to protect a defendant's constitutional right to a speedy trial, but also to serve the public interest in bringing prompt criminal proceedings." United States v. Moss, 217 F.3d 426, 432 (6th Cir. 2000). Accord United States v. Hall, 181 F.3d 1057, 1062 (9th Cir. 1999); United States v. Barnes, 159 F.3d 4, 13 (1st Cir. 1998) ("the public has at least as great an interest as the defendant in an expeditious criminal trial"); see *e.g.*, 18 U.S.C. 3161(h)(8)(A) (requiring the court to consider "the best interests of the public * * * in a speedy trial"). Similar concerns give rise to "the public's interest in the fair and expeditious administration" of grand jury investigations. See United States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991), quoting United States v. Dionisio, 410 U.S. 1, 17 (1973).

For these reasons, the Speedy Trial Act and the Criminal Rules have set short deadlines for charges, trials, and sentencings in criminal cases. If the case is initiated by arrest, the defendant must be brought before a judge without delay, must be promptly charged, and, if uncharged, must have a preliminary hearing within 10 days if in custody, 20 days if not. FRCrP 5(a)(1)(A), 5(b), 5.1(c). If charged by complaint, an information or indictment must be filed within 30 days. 18 U.S.C. 3161(b). The court must set a trial date "at the earliest practicable time." 18 U.S.C. 3161(a). Generally, trial must be set for within 30 to 70 days after the indictment or information is filed. 18 U.S.C. 3161(c). Post-verdict motions seeking a judgment of acquittal, a new trial on grounds other than newly discovered evidence, or an arrest of judgment must be filed within seven days of the guilty verdict. FRCrP 29(c), 33(b)(2), 34(b). Finally, "[t]he court must impose sentence without unnecessary delay." FRCrP 32(b)(1).

3. In light of this considerable interest in speedy criminal proceedings, the proposed amendment to FRAP 4 would create a serious problem by increasing the appeal period to 60 days for the various appeals filed from orders issued before judgment in criminal cases. There are many such appeals; courts have held that defendants have the right to appeal before trial to challenge numerous pre-judgment orders, including:

21, 26 (D.C. Cir. 2003) (citing cases)

(1) orders denying motions to dismiss indictments on double jeopardy grounds, Abney v. United States, 431 U.S. 651, 659-63 (1977);

(2) orders denying motions to dismiss indictments for collateral estoppel or res judicata reasons, United States v. Ruhbayan, 325 F.3d 197, 201 (4th Cir. 2003), United States v. Castiglione, 876 F.2d 73 (9th Cir. 1988);

(3) orders denying motions to dismiss indictments under the Speech or Debate Clause, Helstoski v. Meanor, 442 U.S. 500, 508 (1979);

(4) orders to dismiss indictments as violating prior plea agreements, United States v. Romero, 967 F.2d 63, 65 (2d Cir.1992);

(5) orders to dismiss informations where a right to indictment has been claimed, United States v. Yellow Freight System, Inc., 637 F.2d 1248, 1251 (9th Cir. 1980);

(6) orders refusing to grant or reduce bail, Stack v Boyle, 342 U.S. 1, 6 (1951);

(7) orders authorizing involuntary medication of defendants, Sell v. United States, 123 S. Ct. 2174, 2182 (2003);

(8) orders committing defendants to federal facilities for mental evaluations, United States v. Filippi, 211 F.3d 649, 650-51 (1st Cir. 2000);

(9) orders granting motions to transfer juveniles for adult prosecution, United States v. One Juvenile Male, 40 F.3d 841, 843 (6th Cir. 1994);

(10) refusals to conduct hearings about restrained assets, United States v. Jones, 160 F.3d 641, 644 (10th Cir. 1998);

(11) orders refusing to modify gag orders, United States v. Brown, 218 F.3d 415, 420 (5th Cir. 2000); and

(12) orders denying a counsel's motion to withdraw from representing a defendant in the criminal proceedings, United States v. Oberoi, 331 F.3d 44, 47 (2d Cir. 2003).

Allowing a lengthy delay in most of these appeals would harm both the trial court and the prosecution. For example, if a defendant can wait 60 days before appealing the denial of a motion to dismiss the indictment, the district court and prosecution will be left in limbo as to whether the prosecution can be maintained, leaving them with the unpalatable choice of doing nothing until the appeal period expires and thereby delaying the time-sensitive proceedings, or going forward with the proceedings and risking that they will be brought to a screeching halt and perhaps nullified by a defendant's belated appeal. The same is true for orders transferring juveniles, committing

defendants to find them competent to stand trial, medicating defendants to render them competent, or allowing counsel to withdraw -- the court and prosecution would be left with the unpalatable choice to stand still for 60 days or to go forward with trials and other proceedings that could be voided by a belated appeal. FRAP 4 should not be framed to permit such delays.

Another problem with the proposed change to FRAP 4 is posed by the fact that the federal courts have held that in many situations uncharged individuals or entities, including subjects of investigations, can appeal orders in criminal investigations and prosecutions, including:

(1) orders that the individuals or entities are in contempt for refusing to comply with grand jury or trial subpoenas, United States v. Ryan, 402 U.S. 530, 532 (1971);

(2) orders to comply with, or denying motions to quash, grand jury or trial subpoenas directed to third parties, where compliance is opposed by the individuals or entities, Perlman v. United States, 247 U.S. 7, 12-13 (1918), Impounded, 277 F.3d 407, 410 n.3 (3d Cir. 2002), In re Grand Jury Subpoena, 220 F.3d 406, 410 (5th Cir. 2002);

(3) orders that the counsel of the individuals or entities comply with subpoenas, In re Grand Jury Subpoenas, 123 F.3d 695, 698 (1st Cir. 1997), In re Federal Grand Jury Subpoenas, 975 F.2d 1488 (11th Cir. 1992);

(4) orders that the records of subpoena enforcement proceedings would not be sealed, In re Sealed Case, 237 F.3d 657, 664 (D.C. Cir. 2001);

(5) orders, before charges are filed, to return property seized by law enforcement, United States v. Hess, 982 F.2d 181 (6th Cir. 1992);

(6) orders refusing to terminate grand jury proceedings for certain misconduct, In re November 1979 Grand Jury, 616 F.2d 1021, 1024-25 (7th Cir. 1980); and

(7) orders restricting access to trial courtroom, In re Associated Press, 162 F.3d 503, 507 (7th Cir. 1998).

Again, permitting delay in filing most of these appeals harms the non-appealing parties and the justice system. Allowing the recipients of grand jury or trial subpoenas to wait 60 days to appeal, after being found in contempt or otherwise refusing to comply, threatens intolerable delay in the investigation and prosecution of crimes, and could deprive both grand and petit juries, given their limited time span, of valuable evidence. Granting the 60-day period to suspects and others challenging orders enforcing third party subpoenas in criminal matters or orders refusing to return property, even if it did not keep evidence from the courts, would place both the prosecution and the courts in a difficult position, giving them the same undesirable choice of waiting or proceeding while knowing that an appeal (and stay) might follow and invalidate what has been done. The same is true for appeals from orders refusing to terminate grand jury proceedings. FRAP 4 obviously should not

allow such delay in criminal investigations and prosecutions.

Moreover, the proposed amendment could be a source of concern to defendants as well, because it would allow the Government 60 days before filing a notice of appeal in pre-judgment appeals in criminal cases. By statute, the Government can appeal from various pre-judgment orders:

(1) orders dismissing an indictment or information as to any count or part thereof, 18 U.S.C. 3731;

(2) pre-trial or post-trial orders suppressing or excluding evidence, quashing subpoenas, or requiring the return of seized property, ibid.;

(3) orders granting release, denying revocation of bail, or refusing to modify the terms of release or bail, ibid.;

(4) orders granting a new trial as to any count or part thereof, ibid.; and

(5) orders granting post-verdict judgments of acquittal as to any count or part thereof, ibid., United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977).

In addition, courts have held that the Government can appeal from:

(6) orders disqualifying the Attorney General or a U.S. Attorney's Office, United States v. Bolden, 353 F.3d 870, 875 (10th Cir. 2003), Matter of Grand Jury Subpoena of Rachon, 873 F.2d 170 (3d Cir. 1989);

(7) orders striking death penalty notices, United States v. Ferebe, 332 F.3d 722, 726 (4th Cir. 2003);

(8) orders staying criminal investigations or proceedings, United States v. General Dynamics Corp., 828 F.2d 1356 (9th Cir. 1987); and

(9) pre-sentencing orders denying specific performance of plea agreements, United States v. Alexander, 869 F.2d 91, 94 (2d Cir. 1989).

While the Government has the strong incentive and intention to appeal as promptly as possible from adverse orders, defendants might not wish to wait an extra 30 days before they know whether the Government will allow acquittals, dismissals, new trial orders, or striking of death penalty notices to stand, or will be filing an appeal and seeking conviction or capital punishment. Allowing an additional 30 days for the Government to appeal also increases the time by which trial, retrial, or the capital punishment phase may be delayed. There is no current reason why FRAP 4 should be modified to automatically allow an additional 30 days to file an appeal in those instances

Accordingly, there is an overwhelming public interest in the speedy resolution of criminal cases, which includes pre-judgment appeals. By covering only appeals from final criminal judgments of conviction under FRCrP 32(k), the proposed amendment to FRAP 4 would slow down criminal matters in a wide variety of situations, and thus is not a good idea.

4. In addition, this proposal would conflict with case law finding appeals from post-judgment orders denying motions under Title 18 and under the Federal Rules of Criminal Procedure to be appeals in a criminal case. Once sentence is imposed, FRCrP 35(a) gives the district court only seven days within which to correct the sentence, and an appeal from such an order has been held to be an appeal in a criminal case. See, e.g., United States v. Janovich, 688 F.2d 1227, 1228 (9th Cir. 1982). While the time for filing motions under FRCrP 33(b)(1) and 35(b) are longer, appeals from orders on such motions have also been found to be appeals in criminal cases. See, e.g., Awon v. United States, 308 F.3d 133, 139 (1st Cir. 2002) (Rule 33 motion). The only exception is appeals from post-judgment motions for return of property under FRCrP 41(g), which have been held to be civil appeals. See, e.g., United States v. Potes-Ramirez, 260 F.3d 1310, 1313 & n.7 (11th Cir. 2001).

The posited amendment would also conflict with court decisions holding that appeals from post-judgment orders denying motions to modify sentence under 18 U.S.C. 3582 are criminal. See, e.g., United States v. Ono, 72 F.3d 101, 102-03 (9th Cir. 1995). Similarly, appeals from orders to clarify terms of defendants' supervised release under 18 U.S.C. 3583 have been held to be criminal. United States v. Lilly, 206 F.3d 756, 760-63 (7th Cir. 2000).

5. As I have previously told the Committee, we do not think an amendment to FRAP 4 is warranted. Nevertheless, if this rule is to be amended, any change should ensure that the shorter criminal period applies to pre-judgment appeals in criminal cases, and to those appeals from post-judgment orders that courts have held are criminal appeals.²

Accordingly, if the Committee believes that FRAP 4 should be changed, I recommend that any amendment would provide the following: "Any appeal filed from a judgment or order that is entered under Rule 32 of the Federal Rules of Criminal Procedure, issued under a criminal docket number, issued in relation to a grand jury proceeding, or issued in response to a motion brought under Title 18 of the United States Code or the Federal Rules of Criminal Procedure, is an appeal in a criminal case for purposes of Rule 4."

Such a clarification could be placed in a new FRAP 4(b)(1)(C), akin to FRAP 4(a)(1)(C), added in 2002. Also, FRAP 4(b)(1) could be amended to apply to any "notice of appeal by an appellant other than the government." Finally, if these changes were made, FRAP 4(a)(1)(C) should

² I note that occasional court decisions have allowed the 60-day period for appeals from pre-judgment orders for which expedition should have been required. For example, the Third Circuit has held that the subjects of a grand jury investigation who challenge the denial of a motion to quash or modify a subpoena directed to third parties have 60 days in which to appeal, because FRAP 4(b) refers only to appeals by "defendants." Impounded, 277 F.3d at 411 & n.4 (citing contrary cases).

also be amended to provide: “Any appeal that is not an appeal in a criminal case, as defined in Rule 4(b)(1)(C), is an appeal in a civil case for purposes of Rule 4. In addition, an appeal from an order granting or denying a motion to vacate sentence under 28 U.S.C. § 2255, a petition for a writ of habeas corpus under 28 U.S.C. §§ 2254 or 2241, an application for a writ of error coram nobis, an application for attorneys’ fees or costs, or a motion for return of property entered after judgment in a criminal case, is an appeal in a civil case for purposes of Rule 4. This Rule does not alter any appeals period for an appeal in a civil case specifically set by any other rule or statute.”

This amendment would reconfirm that appeals in a criminal case include not only appeals from the judgment, but also appeals from orders entered under the criminal docket number, thus providing an easy standard that catches most of the instances cited above where pre-judgment expedition is required. Because criminal matters are sometimes mistakenly placed on a civil docket, e.g., Smith v. Smith, 145 F.3d 335, 338 (5th Cir. 1998) (criminal contempt); United States v. Thoreen, 653 F.2d 1332, 1337 (9th Cir. 1981) (same), and because grand jury matters are often not docketed on a criminal docket, the amendment goes further to specify other types of pre-judgment orders (orders relating to grand jury proceedings, and grand jury and criminal trial subpoenas, and orders issued in response to motions under the Criminal Rules) that should be subject to the 10-day period for criminal appeals. The proposal would also preserve the courts’ findings that almost all appeals from post-judgment orders under the Criminal Rules and Title 18 are criminal appeals.

By broadening Rule 4(b)(1) to include also appeals filed by all non-governmental parties, this amendment would end the existence of different appeal periods for such parties from the same order, and ensure expedition when suspects or other persons oppose grand jury or criminal trial subpoenas directed to third parties, or seek return of property being used in a criminal investigation or prosecution. Under our proposal, for example, an appeal arising from opposition to a grand jury subpoena would be subject to the 10-day period whether it was from an order imposing civil contempt or criminal contempt on the subpoenaed party, or denying a motion to quash the subpoena by a suspect or other person. See In re Grand Jury Subpoenas, 902 F.2d 244, 247 (4th Cir. 1990) (appeal of order denying motion to quash grand jury subpoena directed to third party is criminal).

At the same time, this amendment would ensure that the longer 60-day civil period will apply to appeals from the wide variety of orders in civil cases, and to orders granting or denying traditionally civil post-judgment remedies for criminal defendants -- motions to vacate under 28 U.S.C. 2255, petitions for writs of habeas petitions under 28 U.S.C. 2241 and 2254, applications for writs of error coram nobis, and post-judgment motions for return of property under FRCrP 41(g) -- even if issued under the criminal docket. It would also resolve the minor Circuit split over appeals from orders denying applications under the Hyde Amendment, which, as applications for attorneys’ fees, would be considered civil. See United States v. Truesdale, 211 F.3d 898, 902-04 (5th Cir. 2000).

6. In sum, given that there is no serious problem requiring an amendment to FRAP 4, we do not favor any change to the existing rule. However, if an amendment is to be made, the version I was asked by the Committee to analyze raises serious problems, and should not be adopted. Rather, the

alternative version discussed above and set out in the attached pages should be substituted.

I am happy to discuss these issues with you and the rest of the Committee at our next meeting.

Sincerely,

Douglas N. Letter
Appellate Litigation Counsel

PROPOSED AMENDMENT TO RULE 4

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) Any appeal that is not an appeal in a criminal case, as defined in Rule 4(b)(1)(C), is an appeal in a civil case for purposes of Rule 4. In addition, an appeal from an order granting or denying a motion to vacate sentence under 28 U.S.C. § 2255, a petition for a writ of habeas corpus under 28 U.S.C. §§ 2254 or 2241, an application for a writ of error coram nobis, an application for attorneys' fees or costs, or a motion for return of property entered after judgment in a criminal case, is an appeal in a civil case for purposes of Rule 4[(a)]. This Rule does not alter any appeals period for an appeal in a civil case specifically set by any other rule or statute.

* * * * *

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a **[defendant's]** notice of appeal **by an appellant other than the government** must be filed in the district court within 10 days after the later of:

- (i) the entry of either the judgment or the order being appealed, or
- (ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

- (i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any **appellant**.

(C) Any appeal filed from a judgment or order that is entered under Rule 32 of the Federal Rules of Criminal Procedure, issued under a criminal docket number, issued in relation to a grand jury proceeding, or issued in response to a motion brought under Title 18 of the United States Code or the Federal Rules of Criminal Procedure, is an appeal in a criminal case for purposes of Rule 4.

* * * * *







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October 15, 2003

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Re: Possible Amendment to FRAP 4 Notice of Appeal Times

Dear Patrick:

At our last meeting, the Federal Rules of Appellate Procedure Advisory Committee asked me to report on a possible amendment to FRAP 4, which would provide 30 days for notices of appeal for all private parties in both civil and criminal cases, and 60 days for notices of appeal by the Government in both types of cases. For various reasons, the Department of Justice strongly opposes this proposal, and instead believes that no change in the FRAP 4 notice of appeal times is either necessary or desirable.

Although there would be one benefit from the simplified proposal (eliminating the need to decide if a case is governed by civil or criminal appeal times), we do not believe that there remains any pressing problem with FRAP 4 that needs to be fixed, and that extending the time for criminal appeals – both by the Government and by defendants – would raise a variety of problems, and would cause the overall substantial disadvantage of slowing down appeals in criminal cases. In addition, the proposal described above would require the Committee to recommend to the Supreme Court that it take the serious step of promulgating a rule that would directly overrule existing statutory provisions.

1. Some background knowledge of the statutes and rules setting notice of appeal times is necessary.

By statute, the time for taking appeals in private cases "of a civil nature" is 30 days after the entry of the appealable judgment, order, or decree. 28 U.S.C. 2107(a) In any action in which the United States, or its agencies or officers is a party, all parties – whether private or governmental --

have 60 days from such entry. 28 U.S.C. 2107(b).

FRAP 4(a) also discusses the deadlines for filing notices of appeal “in a Civil Case,” and provides the same timing for civil cases as does Section 2107. See FRAP 4(a)(1).

No statute currently sets the time within which a defendant in a criminal case may file a notice of appeal. However, the time for the Government to appeal in criminal cases is generally set by 18 U.S.C. 3731 at 30 days.

FRAP 4(b)(1) governs appeal times in “a Criminal Case,” and provides ten days for a defendant, and 30 days for the Government. A cross-appeal may be filed by a defendant within ten days of the Government’s appeal, and by the Government within 30 days of a defendant’s appeal.

In addition to these statutes and rules setting the notice of appeal times in general, there are various specialized statutes and rules providing different times for particular types of appeals. For example, ten days are provided to appeal in the following situations: (1) certain interlocutory civil appeals (28 U.S.C. 1292(b)); (2) Government appeals under the Classified Information Procedures Act (18 U.S.C. App. 3, Sec. 7); and, discretionary appeals from orders involving class action certifications (FRCP 23(f)).

2. The difference in criminal and civil notice of appeal times reflects the more general practice that criminal appeals are handled more expeditiously by the Circuits than standard civil cases. See, e.g., Second Circuit Local Rules Appendix Part B (“Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals”); Fifth Circuit Local Rules Appendix I (“Plan for Expediting Criminal Appeals”). Such treatment appears to be based partially on statutory command (see 18 U.S.C. 3731 (criminal appeals by the Government “shall be diligently prosecuted”; 18 U.S.C. 3145(c) (appeals under the Bail Reform Act from a release or detention order “shall be determined promptly”), and a lengthy tradition, recognized by the Supreme Court. See Corey v. United States, 375 U.S. 169, 171-72 (1963) (explaining purpose of rules governing federal criminal appeals – including the ten-day period for filing notices of appeal: “The dominant philosophy embodied in these rules reflects the twin concerns that criminal appeals be disposed of as expeditiously as the fair and orderly administration of justice may permit, and that the imposition of actual punishment be avoided pending disposition of an appeal”). See also U.S. Const., Amend VI (providing a constitutional right to a “speedy and public trial”).

3. As I recall, the FRAP Committee began examining the notice of appeal times several years ago because there had been court of appeals case law addressing the issue of whether different cases are governed by the civil or criminal deadlines in different contexts. By proposing a new rule, which was eventually adopted by the Supreme Court, the Committee expressly resolved a conflict existing among the Circuits concerning the time for appeal from an order granting or denying a writ of *coram nobis* (see FRAP 4(a)(1)(C)). (There is still an inconsistency within the Circuits concerning the nature of Hyde Amendment appeals, but, as I have previously informed the Committee, this situation does not pose a serious problem and does not warrant the substantial

process needed to achieve a FRAP amendment.)

In the course of considering the appeal time issue, Committee members have raised the question whether the period for notices of appeal by criminal defendants is too short, and should be expanded to equal the Government's deadline of 30 days. By letter of March 26, 2002 (a copy of which is attached here), I have already explained why such an expansion is unnecessary and problematic. In addition, some members of the Committee have suggested that any future controversies about appeal times could be eliminated by making all notices of appeal due within 30 days, regardless of the type of case or party involved. I opposed this proposal, pointing out that there is a very good reason why the Government has 60 days in civil cases to file a notice of appeal: the Solicitor General must be given sufficient time to gather recommendations from various interested federal agencies and to decide whether or not to appeal, and this process works in many cases, thus saving the district and appellate courts substantial time and resources as fewer protective notices of appeal are filed

Another informal proposal was then raised, providing that all notices of appeal by private parties would be due within 30 days, and all notices of appeal by the Government would be due within 60 days (I do not know how this proposal would treat the various types of speedy specialized appeals mentioned above.)

4. From our perspective, the first problem with this proposal is that it will put in motion the substantial process for amending a FRAP provision when there is no actual need for it. As you know, some Committee members in the past have expressed the view that ten days is too short a period for a criminal defendant to decide to appeal. However, our understanding is that this period has been the rule for approximately 70 years, and the federal criminal bar is by now fully familiar with it. In addition, the recent change to FRAP 26(a)(2), covering its method of counting days, means that criminal defendants actually have between 14 and 17 days (depending upon the calendar) in which to have a notice of appeal filed, thus mitigating lingering concerns that a ten-day period is too short. And, we are not aware that the Committee has ever heard convincing evidence that defendants are being prejudiced by the current ten-business day notice of appeal time.

In addition, there is an overwhelming policy interest in the speedy resolution of criminal cases, which includes their appeals. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that the Government and criminal defendants should proceed expeditiously with their appeals. Defendants challenging their convictions and sentences through appeals should move swiftly so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the process of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely"); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy

considerations supporting prescription of a very short time for appeal in a criminal case”).

Additional time for criminal defendants to appeal will have reverberations on timing through different aspects of a criminal case. For example, 18 U.S.C. 3145(c) commands that an appeal from a release or a detention order “shall be determined promptly.” An expansion of the time for filing a notice of appeal from the current 10/30 day scheme to a 30/60 day scheme would undermine that command. As noted earlier, 18 U.S.C. 3731 limits to 30 days the period within which the Government may appeal an order releasing a defendant, dismissing an indictment, suppressing evidence, or granting a new trial. Particularly with respect to interlocutory appeals, an expansion of the current time limits would delay trials in a manner inconsistent with the statutory and constitutional speedy trial guarantees. Once sentence is imposed, FRCrP 33(b)(2) and 34(b) give the defendant only seven days to file a motion seeking relief from the judgment. Likewise, FRCrP 35(a) gives the district court only seven days within which to correct the sentence. These short seven-day periods are designed to fit within the defendant’s ten-day window for filing a notice of appeal. Like the ten-day period, they expedite post-judgment review and move the case quickly to the court of appeals.

We also note that many of the Government’s criminal appeals are from interlocutory orders. Providing 60 days to file a notice of appeal in such situations will cause serious disruption and delay for the underlying case, and seems thoroughly inconsistent with the principle of speedy resolution of such cases. Indeed, a 60-day period for filing a notice of appeal would plainly be antithetical to the structure and purpose of the Speedy Trial Act, which provides the Government with only 70 days to bring a case to trial. See 18 U.S.C. 3161(c)(1).

Further, we believe that increasing the notice of appeal time for defendants will result in more appeals by defendants, particularly among those who pled guilty. As defendants have increased time to contemplate their ongoing incarcerations, and come under the greater influence of “jailhouse lawyers,” we think it likely that more of them will decide to launch unmeritorious appeals, thereby increasing the burden on the courts. And, a longer notice of appeal time will create greater opportunities for defendants to delay final resolution of their cases through such additional trial court pleadings as reconsideration motions, ineffective-assistance-of-counsel claims, attacks on prosecutorial conduct, and bail requests. Our experience is that many such generally wasteful filings are currently avoided as defendants instead follow the tradition of moving rapidly on to the court of appeals and final determinations.

Any change in the current FRAP 4 rules would also raise some complications with the need to consider cross-appeals. In criminal cases, the United States currently can file a cross-appeal within 30 days of any defendant’s notice of appeal. See FRAP 4(b)(1)(B). And, any defendant has ten days beyond the filing of an appeal by the Government. See FRAP 4(b)(1)(A)(ii). While surmountable, this problem simply underscores our concern that amending well-established FRAP provisions can be difficult as changes in one rule affect various other related rules. This problem would have to be solved, as well as the need to find appropriate phrasing to deal with the timing for the various specialized appeals mentioned earlier.

5. The proposal on the table also raises a serious concern because it would call for altering some statutorily-set appeal periods. As noted previously, the time for the Government to appeal in criminal cases is established by statute at 30 days. And, the time for private parties to appeal in civil cases involving the Government is set by statute at 60 days. The new proposed rule would override those deadlines.

The statutory scheme providing the Supreme Court with the power to set the rules for the lower Article III courts does provide that the Court can establish new rules overriding existing contrary statutory provisions. See 28 U.S.C. 2072 (providing that the Supreme Court has the power to prescribe general rules of practice and procedure in the United States district and appellate courts, and that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect”). And, the rules process provides Congress with notice of new proposed rules, and time to override them through legislation if it wishes. See 28 U.S.C. 2074.

Thus, although the Rules Enabling Act allows the Supreme Court to promulgate new rules that directly override statutes, we believe this power has been sparingly, if ever, used to date. It strikes us as odd to test this principle on a new rule that does not appear to be demanded by any pressing need.

In sum, given the fact that there does not appear to be a serious problem requiring an amendment to FRAP 4, we do not favor the radical revisions to FRAP 4 tentatively proposed to me. We believe that such a change is unnecessary, will likely lead to more and slower criminal appeals, and an increased number of filings by convicted defendants in the district courts seeking to disrupt proceedings, rather than moving on to the appellate stage. Accordingly, we strongly urge the Committee to leave in place the long-entrenched rules that govern notices of appeal, and that do not appear to be causing any significant trouble.

Sincerely,

A handwritten signature in cursive script that reads "Douglas N. Letter".

Douglas N. Letter







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March 26, 2002

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Re: Time To File Notice Of Appeal In Criminal Cases

Dear Patrick:

At the April 2001 meeting of the Federal Rules of Appellate Procedure Advisory Committee, there was discussion concerning an amendment to FRAP 26(a)(2) to make the time-computation provisions of FRAP consistent with those of the Federal Rules of Civil Procedure. During that discussion some members of the Committee raised the issue of whether the time within which defendants can file appeals in criminal cases should be increased beyond ten days because the Government has 30 days in which to appeal in such cases. See FRAP 4(b)(1). I was asked by Judge Garwood to study this issue and report to the Committee, which I am now doing by this letter. We do not believe that any change in the current rule is warranted.

There are persuasive policy and practical reasons for the Government to have more time than defendants to decide whether to appeal a criminal case. First, it takes the Government, because of its sheer size and bureaucratic organization, more time than most private parties to decide whether or not to appeal a decision. By regulation, any appeal must be authorized by the Solicitor General. See 28 C.F.R. § 0.20(b). This process entails memoranda by the United States Attorney's Office that tried the matter and by the Criminal Division at the Main Justice Department, followed by consideration by attorneys in the Solicitor General's Office. For obvious reasons, this process of winnowing the cases in order to pursue only appropriate appeals takes time.

We note that, in many instances, there is a strong preference for obtaining final appellate authorization -- or at least an indication that authorization to appeal likely will be forthcoming -- before any notice of appeal is filed. This practice is beneficial to the courts because it minimizes the number of protective notices of appeal that must be filed.

The Federal Rules of Appellate Procedure generally recognize that the appeal consideration process within the Department of Justice requires extra time. These rules grant more time to the Government to file a notice of appeal in civil cases (60 days when the Government is a party, versus 30 days when the appeal involves only private litigants) (see FRAP 4(a)(1)), and more time to seek

en banc review of adverse appellate decisions. See FRAP 40(a) (granting parties 45 days, instead of 14 days, to file a petition for rehearing in a civil case when the United States is a party).

Second, the Government's decision to appeal -- apart from the time-consuming institutional review associated with that process -- usually entails a probing substantive analysis of both the merits of the issue as well as the institutional consequences of pursuing an appeal. This consideration is necessary because the Government must not only consider whether an appeal makes sense in a particular case, but also the ramifications of such an appeal in terms of presenting a uniform position across the nation and in terms of consistency with whatever the Government's overarching policy is in the particular area. These are factors that an individual defendant simply need not consider.

We recognize that in the civil context, both the Government and private parties are given the same extra time to file an appeal in cases involving the Government. See FRAP 4(a). Apparently, this equal-time rule was adopted in the civil context because, in the view of the 1946 Advisory Committee, "[i]t would be unjust to allow the United States * * * extra time and yet deny it to other parties in the case." See 9 Moore's Federal Practice § 203.25[1], § 3-102 (2d ed. 1985).

However, the dynamics of criminal cases are fundamentally different from civil cases, and there is no good reason to extend the practice in civil cases to criminal ones. There is a special public policy interest in the speedy and orderly disposition of criminal cases -- embodied most prominently in the Speedy Trial Clause in the Constitution, the Speedy Trial Act (18 U.S.C. §§ 3161 *et seq.*), and the resulting priority given to criminal cases on court dockets. Indeed, the very fact that the Government is granted only 30 days in criminal cases to file a notice of appeal -- instead of the 60 days it is accorded in civil cases -- indicates that time is of the essence in criminal cases, and that the extra time given to the Government in criminal cases is a necessary concession to practical realities, a concession that should not be extended to other parties who do not face that reality.

Not surprisingly, the one appellate decision we have found to evaluate the time disparity contained in FRAP 4(b) for the Government and for defendants upheld that disparity against an equal protection challenge. Then-Ninth Circuit Judge Anthony Kennedy wrote:

Applying [the rational basis] test, we have no difficulty finding that the different periods provided the government and criminal defendants for filing an appeal do not deny defendants the equal protection of the laws. It is reasonable to presume that it takes a large, bureaucratic organization such as the government, responsible for prosecuting thousands of cases across the country, a greater time to assess the merits of an appeal than it does an individual defendant. In reaching its decision whether or not to appeal, the government must be concerned, moreover, with the consistency of its positions and the future impact of the case, considerations that do not weigh as heavily, if at all, in the decision of the defendant.

United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986).

In addition, the appeal rights of the Government and of defendants are quite different in criminal cases. The Government may appeal in criminal cases only when authorized by statute and not barred by the Double Jeopardy Clause. Thus, the Government may appeal only in limited circumstances, authorized by 18 U.S.C. §§ 3731 and 3742, which usually involve interlocutory orders that have the effect of terminating a prosecution, post-verdict rulings that disregard a jury's verdict, or the severity of a sentence. The Government cannot appeal a not guilty verdict. By contrast, a defendant generally cannot appeal except from the final judgment of conviction (with some narrow exceptions). Thus, a defendant's decision to appeal typically involves only the verdict and sentence.

Moreover, we are aware of no pressing problem that would seem to favor amendment of Rule 4(b) to allow more time for defendants to appeal.

As noted already, there is a strong policy interest in the speedy resolution of criminal cases. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that criminal defendants should proceed expeditiously with challenges to their convictions and sentences, so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the journey of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely."); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy considerations supporting prescription of a very short time for appeal in a criminal case")

Balanced against the need for quick finality is the fairness consideration of allowing criminal defendants sufficient time to file a timely appeal. At this point, however, we know of no evidence suggesting that ten days is proving insufficient for criminal defendants to decide whether to appeal and to file a notice. Because such a high percentage of defendants convicted in disputed criminal proceedings do appeal, it seems clear that this decision is not generally a difficult one. Further, the federal rules do not obligate defendants to file a brief or even file a list of issues to be preserved or questions presented within that time. Thus, the need for defendants to decide quickly that they want a notice of appeal filed is not an onerous burden,

In our view, given the strong public policy favoring fair but expeditious processing of criminal matters, and the absence of any evidence suggesting that the current ten-day time limit needs to be lengthened, there is no reason to propose amendments to FRAP 4(b) at this time.

Sincerely,

Douglas Letter
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March 8, 2004

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Re: Item No. 03-06 (FRAP 3 -- defining parties)

Dear Patrick:

At our last meeting, the Advisory Committee on Appellate Rules asked me to consider a possible alternative to the Department of Justice's proposal to define the parties to an appeal. The discussion at that meeting included mention of the Third Circuit's system, which initially deems all parties in the district court also to be parties to the appeal, but requires a party (or counsel) to file a notice of appearance within a limited period. See 3d Cir. LAR 46.2. Such a procedure is not a good alternative to the proposal we have adopted, for the reasons set out below.

The goal of requiring some affirmative participation by a party in the district court (such as by filing a notice of appearance) apparently is to establish at an early stage of the case a limited and unchanging list of participants for purposes of service by parties and the court of appeals clerk. I note that this goal is somewhat different from the impetus for the Department's proposal, which was to ensure the ability of any party below to participate in the appeal, if the party wishes to do so, irrespective of whether that party prevailed below, and irrespective of whether the party filed a notice of appeal. Further, we hoped to define the method for parties in the lower court to appear in the court of appeals. As you know, our proposal largely tracked the existing Supreme Court rules on this subject.

In order to be effective, a scheme that requires a district court party at an early stage in the appellate proceedings to state affirmatively that it intends to participate in the appeal would have to provide that failure to file a notice of appearance conclusively determines that a person or entity that was a party to the case below is not a party to the appeal. Thus, if (for example) mail service is delayed and counsel does not receive the circuit clerk's docketing notice (or the underlying notice

of appeal) in time to comply with the cut-off date for participation under a scheme such as the Third Circuit's, the person or entity would not be a party to the appeal (although it would presumably remain a party to the case below). If that person or entity sought to participate in the appeal, a motion to intervene would presumably be required to obtain party status. That procedure could result in the odd situation of a clearly interested party, subject to the judgment of the court below, nevertheless being labeled an "intervenor" in the appeal. That does not seem consistent with our understanding of how appellate courts treat parties in most cases under the current rules, and we would strongly oppose such an outcome. Even if a motion to intervene were not required following a failure to file a timely notice of appearance, presumably some motion for affirmative relief would be required to allow the party to participate. Again, this does not appear to be how the system works today in any federal court of appeals. Even in the Third Circuit, if a party fails to file a notice of appearance within 10 days of the initial docketing notice (a period that is often too short for a response, in light of the delays in mailing), the court does not appear to require a motion for late filing. Nor are we aware of such a requirement in other circuits.

As you are aware, the Department's proposal would instead deem all parties to the district court proceeding to be parties to the appeal, unless a party affirmatively "opts out" of further participation in the appeal. Much of the discussion of this proposal at our last meeting turned on objections lodged some dozen years ago by the circuit clerks and their chief deputies to a different proposal (No. 90-4, Amendment of FRAP 3(c) in light of the Supreme Court's decision in Torres). According to Professor Mooney's April 13, 1992, memorandum on that proposal (at 2), the reason for rejecting the Supreme Court model at that time was that "it would be extremely difficult for the courts of appeals to ascertain the identity of the parties because the courts of appeals have difficulty obtaining district court records."

It is not clear whether that concern remains to this day. I believe that, with the advent of electronic case filing systems, there has already been and will continue to be improvement in the integration of the circuit clerks' computer docketing information with those of the district clerks. Thus, if this problem has not already disappeared, I expect that it will do so in the very near future. I also note that most circuits, including the Third, send an initial docketing notice to all parties. As I understand it, the addresses and other information for that initial mailing are obtained from the district court record. If the address information for all district court parties and their counsel is available at the time this docketing notice is sent, that should provide a sufficient starting point for our proposed rule without requiring additional work by the circuit clerks.

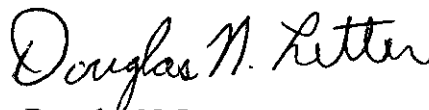
The Advisory Committee's discussion of this proposal raised concerns about the administrative burdens it could impose in some cases on clerks and parties to serve persons or entities that are not actually interested in participating in the appeal. There did not appear to be a consensus understanding about how many such cases might present this problem. In our experience, however, they would be the small exception, not the typical appeal. Where a party or the court is faced with burdensome service requirements that appear to be unnecessary, a simple solution would be to allow an alignment of the docket to remove those parties that have no interest in the appeal. Such a correction could be made on motion of a party or on the court's own initiative, with notice

to all parties of the intended elimination of parties from the docket. If a party obtains such notice (by motion or otherwise) and does not object, there would be good reason to believe that service on that party is no longer required. In this way, administrative burdens could be minimized in those very few appellate cases with unnecessarily long service lists.

Administrative agency review cases may require different treatment, because of the possibility of a larger number of participants in some agency actions, and because agency docketing systems may not be able to transmit party information to circuit clerks as easily as district court systems. Nevertheless, as you may recall from the Advisory Committee's Fall 1998 discussion of No. 97-04 (notice to parties in proceedings to review informal rulemaking), commenters in informal rulemaking proceedings are not considered parties for purposes of FRAP 15(c) and FRAP 3(d). See also D.C. Cir. R. 15(a) (specifying that commenters need not be served); Sierra Club v. EPA, 118 F.3d 1324, 1326 (9th Cir. 1997) (same). Thus, this problem will not arise in the category of cases typically with the largest agency dockets.

In sum, I urge the Committee to consider adopting the proposal made by the Department on this subject, so that the appellate rules are similar to the Supreme Court rules.

Sincerely,

A handwritten signature in cursive script that reads "Douglas N. Letter".

Douglas N. Letter
Appellate Litigation Counsel
Civil Division, Department of Justice





MARCIA M. WALDRON
CLERK

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website pacer.ca3.uscourts.gov

TELEPHONE
215-597-2995

December 1, 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 Professor Schiltz:

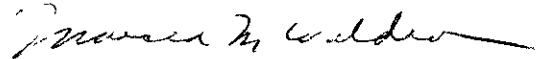
At our recent meeting, the Committee asked that I survey the Circuit Clerks regarding the amendment to Rule 3 proposed by the Solicitor General. The amendment is designed to solve the problem created when a party who did not file a notice of appeal wants to file a brief in support of the appellant. The consensus of the clerks was that this situation arises so rarely that a national rule is not necessary. Many clerks felt that a national rule would create more work than the problem itself creates, which is usually solved by motion. Such motions are complex, but the situation occurs in very few cases. The proposal to fix the problem would affect all cases and would thus consume more time than sorting out motions in the few cases in which non-filing parties wish to file a brief in support of the appellant.

Only the practices in the First, Third and Eleventh Circuits seem similar to the proposed rule. The Third and Eleventh circuits send notice of docketing the appeal to all parties in the district court and require an entry of appearance. If no appearance is entered by counsel, then that party is no longer in the case. Opposing counsel need not serve them and the clerk's office no longer sends copies of orders, opinions, etc. The First Circuit serves everyone unless a party files a non-participation letter.

Professor Patrick . Schlitz
December 1, 2003
Page 2

Other circuits determine the parties to the appeal by examining the notice of appeal, district court docket, and order appealed. Only those who file or jointly sign a notice of appeal are appellants. Parties adverse to the appellant in the district court are considered appellees. Parties who were on the same side as the appellant and who did not file a notice of appeal, must file a motion if they wish to participate in the appeal. This practice limits from the outset the number of parties that must be notified.

Very truly yours,



Marcia M. Waldron
Clerk

MMW/gin

cc: Honorable Samuel A. Alito
Douglas Letter, Esq.



MEMORANDUM

DATE: October 15, 2003
TO: Advisory Committee on Appellate Rules
FROM: Patrick J Schiltz, Reporter
RE: Item No. 03-06

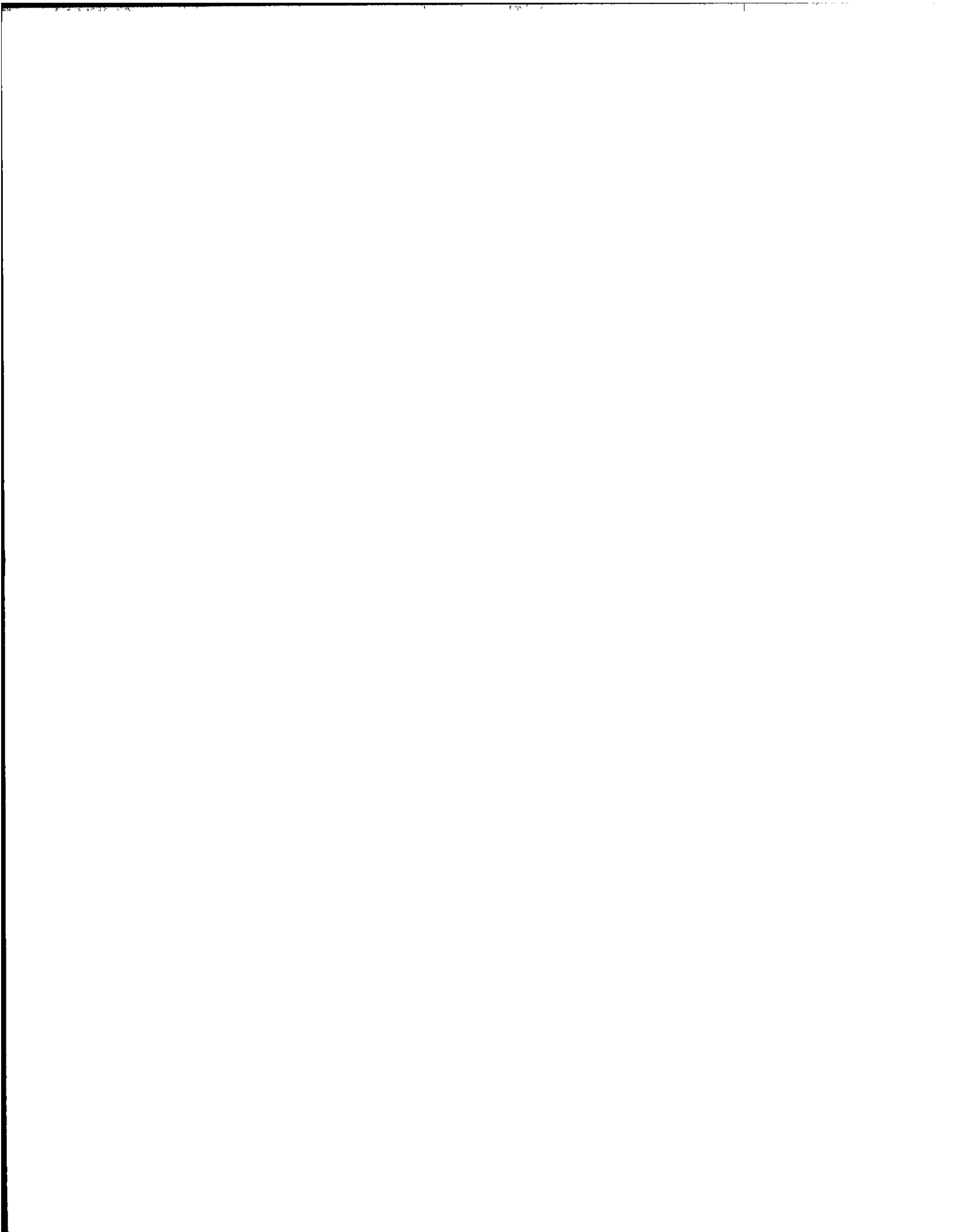
At its May 2003 meeting, the Committee gave initial consideration to a proposal by the Solicitor General that a new Rule 3(f) be added to provide that all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could withdraw from the case by filing a notice with the clerk. An “appellee” who supported the position of an appellant would have to file its brief within seven days after the brief of that appellant was due and would not be permitted to file a reply brief. The Solicitor General’s proposal — which is attached — is patterned after Supreme Court Rules 12.6 and 18.2

In the course of the Committee’s discussion, Professor Mooney said that she had a vague recollection that the Committee had considered and rejected a similar proposal about ten years ago. She could not recall the reasons why the proposal was rejected. John Rabiej and James Ishida agreed to research the records of the Committee

Professor Mooney’s recollection proved correct. A proposal by Judge Frank Easterbrook to pattern Rule 3 after what is now Supreme Court Rule 12.6 (and what was then Supreme Court Rule 12 4) — a proposal that was similar to the current proposal by the Solicitor General — was

considered by the Committee but eventually rejected, in part because it was unanimously opposed by the clerks and the chief deputy clerks of the circuits. The nub of the clerks' opposition — and the main reason for the Committee's rejection — was the belief that the Supreme Court's rule might work for a court that decides fewer than 200 cases on the merits every year, but would not work for a circuit that must annually dispose of several thousand appeals. The Committee concluded that whatever benefits the rule would provide were outweighed by the administrative burden that the rule would impose on the parties and clerks.

Attached is the material that John and James provided regarding the Committee's consideration of Judge Easterbrook's proposal.



TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 90-4, Amendment of Fed. R. App. P. 3(c) in light of the Supreme Court's decision in Torres

At its January 1992 meeting, the Standing Committee approved immediate publication, under expedited procedures, of the proposed amendment to Fed. R. App. P. 3(c) and the conforming amendments to Rule 15(a) and Forms 1, 2, and 3. Because the Standing Committee believed that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms immediately and only for a three month period. The three month period will allow the Advisory Committee to consider the comments and submit a report to the Standing Committee for its June meeting.

Although the comment period has not ended yet and there likely will be further comments to consider, I have begun the GAP report summarizing the three comments received to date. The draft pages are attached to this memorandum. As Judge Ripple explained in his February 4 memorandum summarizing the actions taken by the Standing Committee at the January meeting, a telephone conference will be needed to finalize the Advisory Committee's response to all of the comments. However, the Committee may begin the task at the April 30 meeting.

In addition to generally considering the comments submitted on the proposed amendments, the Standing Committee requested that the Advisory Committee continue to explore alternative approaches that would preserve as many appeals as possible. Specifically, the Standing Committee asked the Advisory Committee to consider an approach analogous to that in Supreme Court Rule 12.4.

This memorandum will first discuss the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. It will then discuss the other comments submitted on the published draft.

SUPREME COURT APPROACH

Supreme Court Rule 12.4 provides that all parties to a proceeding sought to be reviewed are parties in the Supreme Court unless the petitioner notifies the Court that the petitioner believes that one or more of the parties below has no interest in the outcome of the petition. A party noted as no longer interested may remain a party by notifying the clerk of the party's intention to remain a party. All parties not named in the petition as petitioners are respondents but any respondents who support the position of the petitioner must meet the time schedule for filing papers which is applicable to the

petitioner.

The Advisory Committee briefly considered this approach at its meeting last December, but did not pursue it in depth. See Minutes of the December 4 & 5 meeting at page 11. Although the minutes do not reflect the reason the Advisory Committee rejected the Supreme Court approach, I believe the committee dismissed the approach for the same reason it rejected the suggestion that all parties represented in the court below by the attorney filing the notice of appeal should be appellants -- it would be extremely difficult for the courts of appeals to ascertain the identity of the parties because the courts of appeals have difficulty obtaining district court records.

The Supreme Court addresses that problem by requiring the petitioner to list in the petition for certiorari all parties to the proceeding in the court whose judgment is sought to be reviewed. Sup. Ct. R. 14.1(b). If the petitioner either intentionally or accidentally fails to name a party, the party still is automatically a party to the proceeding in the Supreme Court by reason of Sup. Ct. R. 12.4, if the party so desires.

All parties should receive notice of the filing of a petition for certiorari, and thus of their status as respondents, because a petitioner is required to serve all respondents (i.e. all parties to the proceeding in the court below) with notice of the filing of a petition for certiorari, Sup. Ct. R. 12.1, as well as with a copy of any document notifying the Clerk of the Supreme Court of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. Sup. Ct. R. 12.4. If an unnamed party is not so served, "the unnamed party should notify the Clerk and other parties of his intentions as soon as he is otherwise made aware of the filing and, where necessary, obtain an appropriate extension of time from the Clerk, under Rule 29.4 [now Rule 30.4], to file a brief or memorandum stating his position." Robert L. Stern, et al., Supreme Court Practice, 348 n.57 (6th ed. 1986).

So, while the possibility that a petitioner may fail to list all persons who were parties to the proceeding under review creates some uncertainty at the Supreme Court as to the identity of all the parties before the Court, in most cases the rule requiring the petitioner to list all of the parties in the petition will supply the Court with the names of all the parties. In those instances in which a party's name is omitted, the party has not lost the right to be heard.

Judge Easterbrook's comment on the proposed amendments contains a draft amendment of Fed. R. App. P. 3(c) using the Supreme Court Rule as a model. Judge Easterbrook's draft provides:

- 1 (c) Content of the notice of appeal.- The notice of
- 2 appeal shall specify the party or parties taking the appeal;
- 3 shall designate the judgment, order or part thereof appealed

4 from; and shall name the court to which the appeal is taken.
5 Form 1 in the Appendix of Forms is a suggested form of a
6 notice of appeal. All parties to the proceeding in the
7 court whose judgment is sought to be reviewed shall be
8 parties in the court of appeals, unless any party or counsel
9 notifies the clerk of the court of appeals in writing that a
10 party has no interest in the outcome of the appeal. A
11 person noted as no longer interested may remain a party by
12 promptly notifying the Clerk, with service on the other
13 parties, of desire to remain a party. All parties other
14 than those identified as appellants by name in the caption
15 or body of the notice of appeal shall be appellees, but any
16 appellee who supports the position of an appellant shall be
17 treated as an appellant if that party meets the time
18 schedule for filing briefs established for the appellants.
19 An appeal shall not be dismissed for informality of form or
20 title of the notice of appeal.

With regard to the uncertainty issue, Judge Easterbrook points out in his comments that "[i]n the years before Torres few (maybe no) voices were heard to the effect that "et al." and similar designations prejudiced opponents or burdened judicial administration. Courts across the nation accepted such documents."

Judge Easterbrook's draft would more closely approximate the Supreme Court's practice, and minimize the uncertainty problem, if it also required appellants to list in the notice of appeal the names of all the parties to the proceeding to be reviewed.

Supreme Court Rule 12.4 provides that all parties to the proceeding below are parties in the Supreme Court unless the petitioner notifies the Clerk in writing that the petitioner believes that one or more of the parties below has no interest in the outcome of the petition. Judge Easterbrook's draft allows any party or counsel to so notify the court. I think the alteration makes sense clearly to the extent that it allows a party to

notify the court that it has no interest in the case and will not be participating, and probably also to the extent that it allows a party other than the appellant to notify the court when the party is aware that another party has no continuing interest.

Sup. Ct. R. 12.4 requires service of all such notices on all other parties to the proceeding below. Judge Easterbrook dropped the service requirement from his draft of Rule 3(c) presumably because Fed. R. App. P. 25(b) requires service "of all papers filed by any party . . . on all other parties to the appeal or review." However, it might be better to include a service provision in Rule 3 because an ambiguity may be created by the interplay between Fed. R. App. P. 25 and draft Rule 3(c). Fed. R. App. P. 25 requires service on all parties to the appeal. The draft Rule 3(c) would drop persons noted as no longer interested from the list of parties, unless such persons promptly notify the clerk of their desire to remain parties. It is not clear that Rule 25 would require service of such notice on persons who will be dropped as parties as a result of the notice. (The answer to the question may depend upon whether the provision in lines 6 through 10 of the draft are seen as self-executing. However, it would be a simple matter to clarify the question by rule.)

Therefore, if the Committee is interested in pursuing this approach, I suggest the following amended draft:

Amended Draft

1 (c) Content of the notice of appeal.- The notice of
2 appeal shall specify the party or parties taking the appeal;
3 shall list all the parties to the proceeding in the district
4 court whose judgment is to be reviewed; shall designate the
5 judgment, order, or part thereof, appealed from; and shall
6 name the court to which the appeal is taken. Form 1 in the
7 Appendix of Forms is a suggested form of a notice of appeal.
8 All parties to the proceeding in the court whose judgment is
9 to be reviewed shall be parties in the court of appeals,
10 unless any party or counsel notifies the clerk of the court
11 of appeals in writing that a party has no interest in the
12 outcome of the appeal. A copy of the writing shall be
13 served on all parties to the proceeding in the district

14 court. A person noted as no longer interested may remain a
15 party by promptly notifying the clerk, with service on the
16 other parties, of desire to remain a party. All parties
17 other than those identified as appellants by name in the
18 caption or body of the notice of appeal shall be appellees,
19 but any appellee who supports the position of an appellant
20 shall be treated as an appellant if that party meets the
21 time schedule for filing briefs established for the
22 appellants. An appeal shall not be dismissed for
23 informality of form or title of the notice of appeal.

The Court of Appeals Clerks and Chief Deputy Clerks met in late February. Mr. Strubbe, the liaison between the clerks and the Advisory Committee, reserved time on the clerks' meeting agenda to discuss FRAP amendments being considered by the Advisory Committee. Judge Ripple asked Mr. Strubbe to discuss the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. Following the meeting Mr. Strubbe wrote to Judge Ripple stating the following:

One thing all clerks and chief deputies agreed upon is that we should not adopt a rule similar to Supreme Court Rule 12.4. Everyone agreed that such a rule could create confusion and potentially lead to the filing of numerous additional documents to notify clerks that parties noted by the appellants as no longer interested in the litigation still have the intention to remain parties. This system, to us, appears unnecessarily complex and unwieldy.

Judge Ripple also spoke to Mr. Frank Lorson, Deputy Clerk of the Supreme Court of the United States, about the operation of the Supreme Court rule. Mr. Lorson reported that, in the context of Supreme Court practice, the rule works well with only occasional problems. There are, on occasion, problems with party interveners. There are also occasional problems with enforcing time limitations for filing on respondents who, for purposes of filing, must follow the time limitations imposed on the petitioner because they really support the side of the petitioner. Finally, Mr. Lorson noted that there have been occasional problems with appeals from three judge district courts. In these cases, it is somewhat more difficult to ascertain the proper alignment of the parties. These appeals are filed under Supreme Court Rule 18.2.

Other Comments

Magistrate Judge Rosenberg suggested the rule should require that notices of appeal list the names of the parties in the body and that naming parties in the caption should not be sufficient because captions may be used as a matter of course and without conscious review. The published draft clearly provides that naming parties in either the caption or the body is sufficient because, although the aim of the published draft is clarity, it seems to create an unnecessary trap to treat the names in the caption as insufficient.

Judge Ginsburg questions the adequacy of the portion of the amendment dealing with class actions. She suggests that the rule should require the designation of at least one person qualified to take the appeal.

Although the published rule ordinarily requires a notice of appeal to name each party taking the appeal, it states that "[i]n class actions, whether or not the class has been certified, it shall be sufficient for the notice to state that it is filed on behalf of the class." For obvious reasons, the draft does not require the naming of all actual or potential class members. And because putative class members may appeal an order denying class certification if the named plaintiffs choose not to appeal, the rule avoids requiring that a "party" be named as class representative.

Judge Ginsburg's suggestion is that the rule should require that a notice of appeal be brought in the name of at least one person qualified to take the appeal. Along with her suggestion, she forwarded a copy of the D.C. Circuit opinion in Walsh v. Ford Motor Co., 945 F.2d 1188. In that case, Jack Walsh was the only party specified in a notice of appeal seeking review of the district court's denial of class certification. Prior to the filing of the notice of appeal, Mr. Walsh had entered a settlement agreement with Ford in which Walsh released Ford from "any and all actions or causes of action, suits, claims, counterclaims" that Walsh had against Ford. The court determined that because Walsh had relinquished "any and all" of his claims against Ford, he could not appeal. The court then concluded that it did not have authority to review the class certification denial because without Walsh as an appellant, no party was adequately "specified" as required by Fed. R. App. P. 3(c).

One possible response to Judge Ginsburg's suggestion is that the proposed change in Rule 3(c) eliminates the need for "specifying" a party in notices of appeal in class actions. Indeed, the Supreme Court has already modified that rule by finding in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), that a putative class member (who is not a named party) may appeal an adverse class determination order.

In McDonald, however, the notice of appeal was brought in the name of a particular putative class member, who sought to intervene, and not simply on behalf of unnamed putative class members. Perhaps a better way to analyze Judge Ginsburg's

suggestion is to consider whether Article III requires a notice of appeal to name at least a class member or putative class member as representative of the others. Without the naming of at least one person qualified to bring the appeal, the appeal actually would be brought by the attorney seeking to represent the class.

Requiring that a notice of appeal in class actions name at least one person qualified to bring the appeal as representative of the others provides some assurance that there is still a justiciable controversy. Although the constitutional requirement of a case-or-controversy exists, the Supreme Court has recognized that a legally cognizable interest in the traditional sense rarely exists with respect to a class certification claim. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1979). In Geraghty, the Supreme Court stated that the "right" to have a class certified "is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." Id. at 403. Therefore, the Court held that even a party whose claim has become moot may appeal a ruling denying class certification so long as the named representative will fairly and adequately protect the interests of the class. Id. at 406.

If the proper focus is whether the person filing a notice of appeal will fairly and adequately protect the interests of the class, as to an appeal from a ruling denying class certification it may be appropriate for the attorney seeking to represent the class to bring the notice of appeal. Once a class is certified, however, and the focus shifts to the merits of the claim, someone eligible to press the class claims must act as representative.

The portion of the published rule in question deals generally with notices of appeal in class actions and not simply with appeals from class certification rulings. Unless there is to be a distinction between the two types of appeals, Article III may require that at least one person qualified to appeal be named in the notice of appeal. This question should be discussed by the committee. If the conclusion is that a person qualified to bring the appeal should be specified, the draft should be revised.

The sentence in question could be revised to state:

1 In class actions, whether or not the class has been
2 certified, it shall be sufficient for the notice to name as
3 representative of the class one person qualified to bring
4 the appeal.

List of Commentators
Proposed Amendment to Fed. R. App. P. 3(c)
and Conforming Amendments to Fed. R. App. P.
15 and to Forms 1, 2, and 3

Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Honorable Ruth Bader Ginsburg
United States Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 3(C)

Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook notes that the proposed amendment clarifies the level of specificity needed to identify the parties taking an appeal so that any lawyer who reads the rule can file an effective notice of appeal. However, Judge Easterbrook notes that the clarity achieved by the change would come at the expense of parties whose lawyers do not read the rule and thus fail to follow it. He suggests that a different approach be adopted. Unless there is evidence that such an approach causes prejudice to other parties or disrupts the administration of the courts, Judge Easterbrook advocates adopting a rule that will protect meritorious claims to the greatest extent possible. He suggests amending Rule 3(c) along the line of Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals.

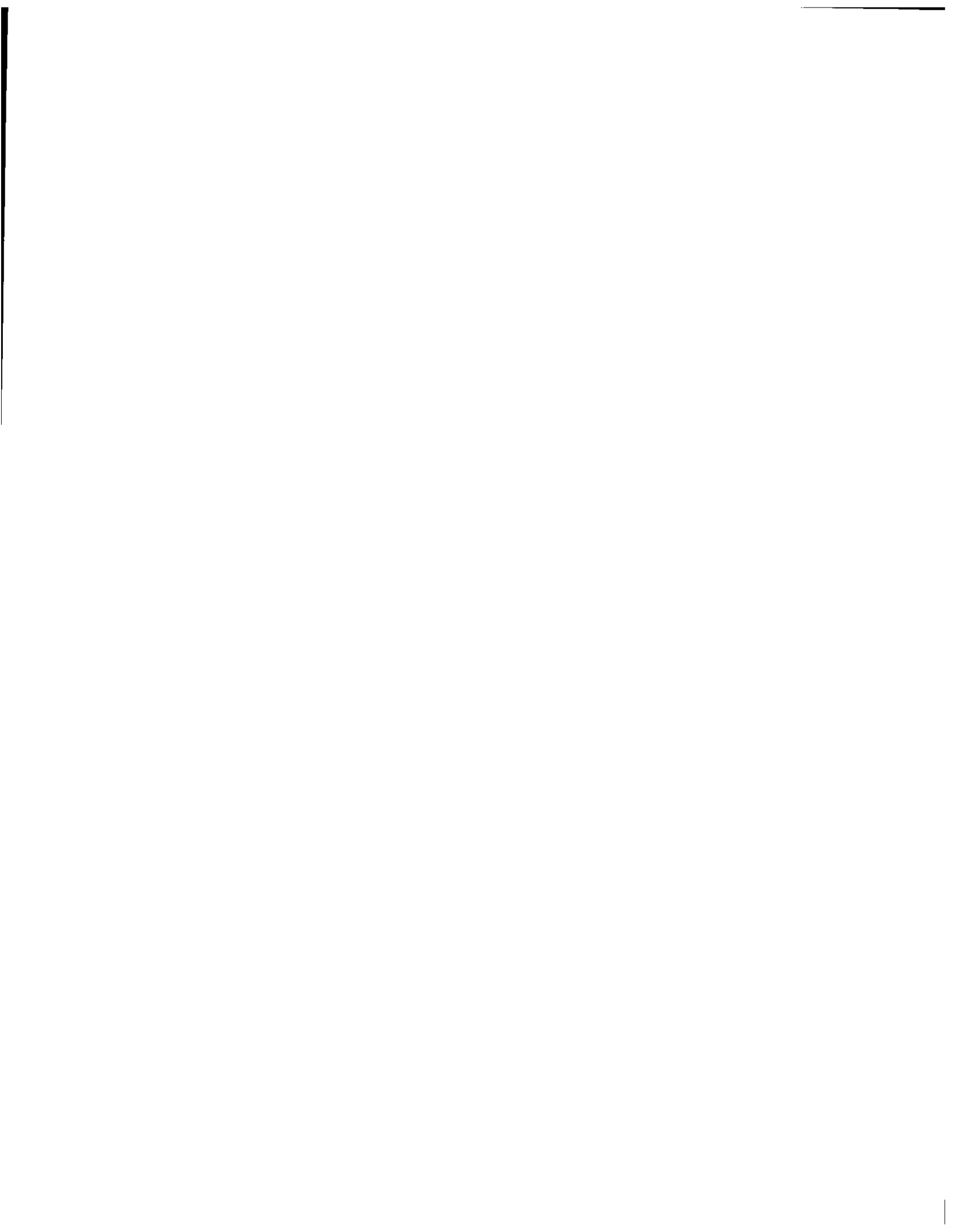
Judge Easterbrook favors the amendments to Rule 15, because it makes sense to require identification - for the first time in *any* court - of the persons contesting an administrative decision.

Honorable Ruth Bader Ginsburg
United States Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Judge Ginsburg questions the adequacy of that portion of the amendment dealing with class actions. She suggests that the rule should require the designation of at least one person qualified to take the appeal.

Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named in the body of a notice of appeal and not in the caption because the caption may be used as a matter of course.





REVISED AGENDA
Meeting of the Advisory Committee on Appellate Rules
April 30, 1992

I. Gap Report

Consideration of comments on items published August 1992:

- item 86-10 and 86-26, amendment of Rules 4(a)(4) and 4(b) regarding the need for a new notice of appeal after disposition of post-trial tolling motions;
- item 86-25, amendment of Rule 28 to require a statement of the standard of review in briefs;
- item 88-10, amendment of Rule 34(c) deleting the requirement that an opening argument shall include a statement of the case;
- item 88-13, amendment of Rule 35(a) to provide that a majority of judges eligible to participate in a case shall have the power to grant in banc review;
- item 89-2, amendment of the filing rules in light of the Supreme Court's decision in Houston v. Lack (amendments to Rule 3(d), 4(c), and 25);
- item 90-5, technical amendment of Rule 10(b)(3); and,
- item 91-1, changing "magistrate" to "magistrate judge" in all rules (amendments to Rules 3.1 and 5.1).

II. Requests from the Standing Committee:

- A. Item 92-1. The Standing Committee asked the Advisory Committees on Civil and Appellate Rules to draft amendments to the national rules requiring uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules.
- B. Item 92-2. The Standing Committee would like to dispense with the need to follow the full procedures (publication, comment, etc.) whenever a typographical or clerical error gives rise to the need to amend a rule. The Standing Committee has asked each of the Advisory Committees to consider the possibility of amending their rules to authorize such changes.
- C. The Standing Committee would like a report from each of the Advisory Committees about the desirability of developing a numbering system that would eliminate the duplication of numbers from one set of rules to another. The report is due next November. At the April meeting we will have a preliminary discussion, with further discussion to follow in the fall.
- D. Item 90-4. The Standing Committee approved publication of the proposed amendments to Rules 3(c), 15(a) and Forms 1, 2, and 3 on an expedited basis because of the importance of the Torres problem which those

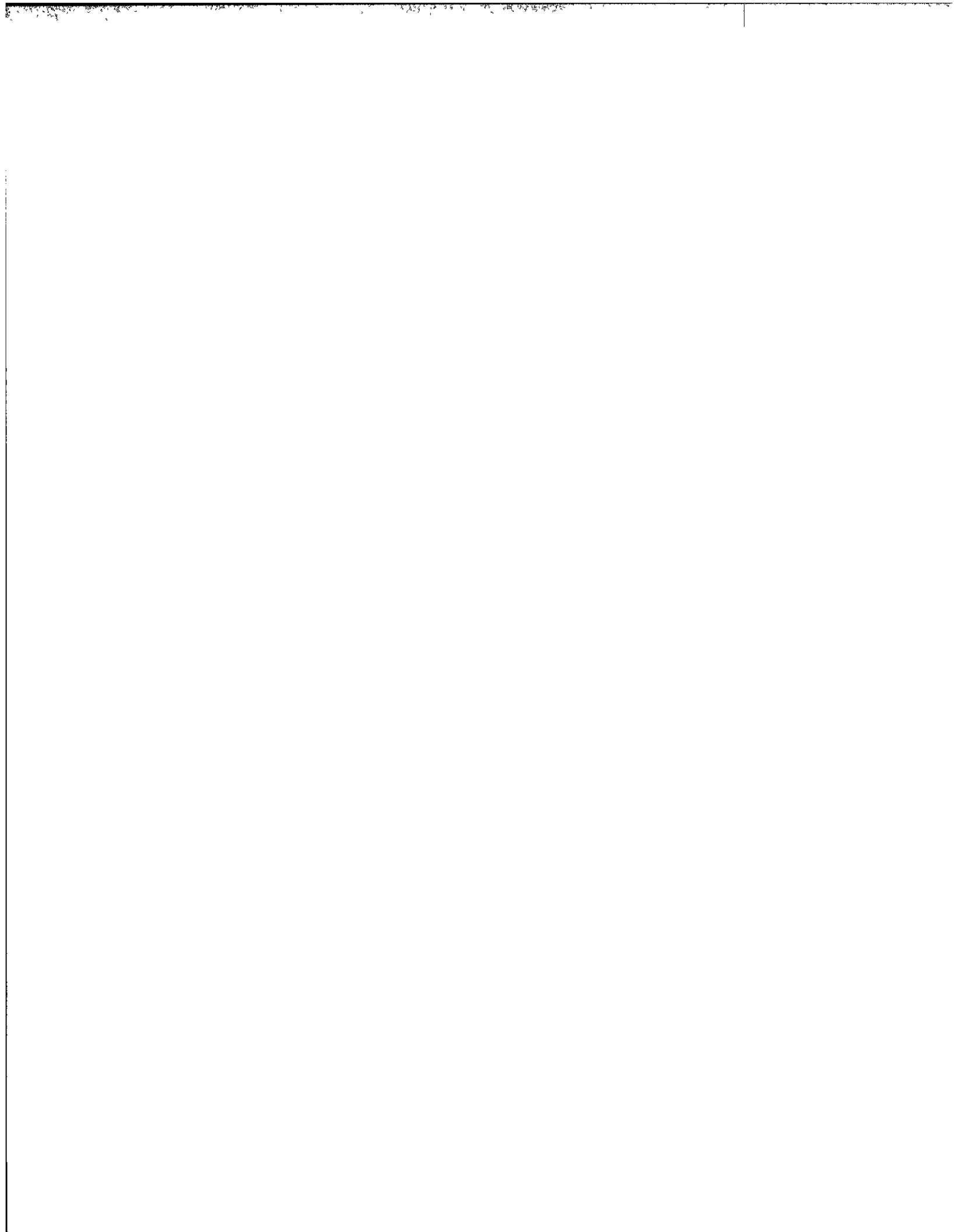
changes address. However, the Standing Committee requested that the Advisory Committee revisit the question of whether a procedure analogous to that in Supreme Court Rule 12.4 would be a better approach because it would both deal with the Torres problem and preserve as many appeals as possible.

III. Action Items

- A. Items 89-5 and 90-1, amendment of Rule 35 to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus toll the period in which a petition for certiorari may be filed.
- B. Item 91-5, rule to authorize use of special masters in the courts of appeals.
- C. Item 91-27, amendment of all the appellate rules that require the filing of copies of a document to authorize local rules that require a different number of copies.
- D. Item 91-22, amendment of Rule 9 regarding the type of information that should be presented to a court.
- E. Item 91-14, amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.
- F. Item 91-11, amendment of Rule 42 regarding the authority of clerks to return or refuse documents that do not comply with national or local rules.
- G. Item 91-4, amendment of Rule 32 regarding typeface.

IV. Discussion items:

- A. Item 86-23 regarding the ten day period within which an objection to a magistrate's report must be filed and the difficulty that prisoners have in meeting that time schedule.
- B. Item 91-7 regarding appeal of remand orders.
- C. Item 91-6 regarding allocation of word processing equipment costs between producing originals and producing "copies."
- D. Item 91-17 regarding the publication of opinions.
- E. Eleventh Circuit's response to the Local Rules Project.



MINUTES OF THE APRIL 30, 1992
MEETING OF THE
ADVISORY COMMITTEE ON APPELLATE RULES

The meeting was chaired by Hon. Kenneth F. Ripple. The following committee members attended: Hon. Danny J. Boggs, Mr. Donald F. Froeb, Hon. Cynthia H. Hall, Hon. E. Grady Jolly, Hon. James K. Logan, and Hon. Stephen F. Williams. Mr. Robert Kopp attended as the Solicitor General's representative. Hon. Robert E. Keeton, Chair of the Standing Committee on Rules of Practice and Procedure, was present. Mr. Joseph F. Spaniol, Jr. - the Committee Secretary, Hon. Dolores K. Sloviter - liaison member from the Standing Committee, and Mr. Thomas Strubbe - liaison from the clerk's committee, were also present. Mr. John Rabiej, Ms. Judy Krivit, and Ms. Ann Rustin - all of the Administrative Office - attended, as did Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple called the meeting to order at 9:00 a.m. in the sixth floor conference room of the Administrative Office.

I. GAP REPORT

Judge Ripple began the meeting with a consideration of the draft Gap Report. In August 1991, the Standing Committee published proposed amendments to nine appellate rules. The period for public comment on those amendments ended February 15, 1992. Public hearings on the amendments had been scheduled for December 4, 1991, in Chicago, but were cancelled for lack of interest.

The draft Gap Report included summaries of all of the comments received. The Advisory Committee's task was to review the comments and consider whether to amend the draft rules in light of the comments. The Reporter had prepared suggested changes for the Committee's consideration.

- A. Item 86-10 and 86-26, amendment of Rules 4(a)(4) and 4(b) to eliminate the need for a new notice of appeal after disposition of posttrial tolling motions and
Item 89-2, amendment of the filing rules in light of the decision in Houston v. Lack.

Rule 4

The suggested amendments to Rule 4 serve two main purposes: 1) to eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending, and 2) to "codify" the Supreme Court's decision in Houston v. Lack, holding that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system, with postage prepaid, on or before the filing date. No comments were submitted regarding proposed Rule 4(c), dealing with inmate filings. Several commentators had suggestions for improving Rule 4(a)(4).

The Committee discussion revealed concern about the breadth of the proposed rule. The Committee had just spent a considerable amount of time reviewing recommended "style" changes and recognized that the line between style and substance can be rather elusive. The ability to make changes essential to conform with statutory changes without full procedures also raised concern. Changing "magistrate" to "magistrate judge" with less formality than is currently required was seen as appropriate. However, every time the bankruptcy code is amended, sweeping changes need to be made to the bankruptcy rules. There was consensus that such changes should not be made without observing the full procedures. The proposed rule made no distinction between the two situations.

Because of the hour some members of the Committee had already left and there was no longer a quorum. Judges Williams, Jolly, and Ripple suggested that it might be helpful to insert the word "technical" at the beginning of line 5, before the word "changes." Mr. Kopp expressed the opinion, that even with that amendment, the rule was too broad.

C. Item 90-4, amendment of Rules 3(c), 15(a), and Forms 1, 2, and 3 in light of the Torres opinion.

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear an appeal of a party not properly identified as an appellant and that the phrase "et al." is insufficient to identify an unnamed party as an appellant. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant.

Judge Ripple briefly reviewed the history of the proposed amendments. At the Advisory Committee's December 1991 meeting, the Committee approved draft amendments essentially requiring a notice of appeal to name each appellant, with an exception for class actions. Because of the importance of the Torres problem, the Standing Committee approved immediate publication of the proposed amendments at the January 1992 meeting. The Standing Committee further approved shortening the usual six month publication period to three months. Although the Standing Committee had expedited the process for the Advisory Committee's draft, the Standing Committee had requested that the Advisory Committee review its draft and consider developing an alternative that would better preserve the right to an appeal on the merits.

Public hearings on the amendments were scheduled for April 8, 1992, but were canceled due to lack of interest. Because the publication period would not end until mid-May, Judge Ripple informed the Committee that it would be necessary to hold a telephone conference to finalize the Committee's decision on the proposals.

The reporter had prepared summaries of the public comments received thus far. One of the commentators was Judge Easterbrook from the Seventh Circuit, whose comments

included an alternative draft modeled upon the Supreme Court's rule. The Supreme Court's rule essentially provides that once any party brings an appeal, all other litigants are parties to the appeal.

Judge Boggs indicated that he favored the Easterbook suggestion. He stated that he prefers administrative inconvenience to having a party lose the right to appeal because an attorney failed to include the party's name.

Judge Logan stated that there may be some difficulties translating the Supreme Court's rule to the courts of appeals. However, he noted that prior to the Supreme Court's decision in Torres any lack of specificity did not seem to cause problems.

Judge Williams indicated that he would like to work toward a draft that generally tries to save appeals. A party could clear up any uncertainty by demanding that a lawyer state who the lawyer represents.

Judge Jolly stated that there are two sides to the problem -- a client who may suffer because a lawyer mistakenly omits the client's name from a notice of appeal, and an appellee who has a right to know who is bringing the appeal and on what grounds. A rule requiring that each appellant be named gives a lawyer clear and simple directions.

Discussion of the drafts based upon the Supreme Court rule revealed several problems. The drafts attempt to resolve the problem of the lost appellant by providing, in essence, that, once any party brings an appeal, all other litigants are parties to the appeal as appellees. It leaves to the court of appeals the task of sorting out those who actually have an interest in being active parties in the appellate litigation. It also requires the court of appeals to realign the parties for purposes of briefing schedules, etc.

Mr. Kopp suggested using the published rule as an interim solution. The Committee may not be able to come up with a workable alternative before the Standing Committee's June meeting. Until a better solution is achieved, the published rule would provide clarity.

Judge Ripple pointed out that the published rule has not elicited much comment; that may be some indication that a rule requiring each appellant to be named is not controversial.

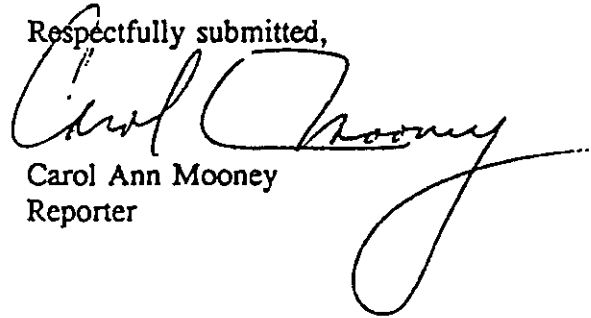
One of the commentators had suggested that with regard to class actions, the rule should require a notice of appeal to name at least one person qualified to take the appeal. The committee members present agreed and approved the following language:

In class actions, whether or not the class has been certified, it shall be sufficient for the notice to name as representative of the class one person qualified to bring the appeal.

Final work on the amendments would have to await the close of the comment period. Judge Ripple indicated that he would contact the Committee members to set up a telephone conference in May.

Judge Ripple thanked the members of the Committee for their hard work and the meeting adjourned at 4:45 p.m.

Respectfully submitted,

A handwritten signature in cursive script that reads "Carol Ann Mooney". The signature is written in black ink and is positioned to the right of the typed name.

Carol Ann Mooney
Reporter



MINUTES OF THE MAY 26, 1992
TELEPHONE CONFERENCE OF THE
ADVISORY COMMITTEE ON APPELLATE RULES

The conference call began at 2:00 p.m. Eastern Standard Time. The conference was chaired by Judge Kenneth F. Ripple. The following Committee members participated: Judge Danny J. Boggs, Judge Cynthia H. Hall, Judge E. Grady Jolly, Judge James K. Logan, Chief Justice Arthur McGiverin, and Judge Stephen F. Williams. Mr. Robert Kopp participated on behalf of the Solicitor General. Mr. Joseph F. Spaniol, Jr., the Committee Secretary, participated. Mr. Thomas F. Strubbe, the liaison from the clerks of the courts of appeals, also participated.

The purpose of the telephone conference was to complete the Advisory Committee's deliberations about the "Torres" amendments. The period for public comment had concluded and the members of the Committee had all had an opportunity to review the comments. The Committee's task was to approve rules for submission to the Standing Committee. Judge Ripple began the conference by reviewing the history of the Advisory Committee's discussions and of the steps taken by the Standing Committee, including its expedited publication of the proposed amendments and the request that the Advisory Committee consider alternative solutions.

Judge Ripple also reviewed his May 21, 1992, memorandum to the Advisory Committee in which he attempted to reconcile the division of opinion among the members of the Committee concerning the solution to "the Torres problem." He noted that the central problem is to balance sensibly the very real concerns of definiteness, certainty, and ease of administration, with the possibility of inadvertent and excusable loss of appellate rights. The memorandum presented an alternate draft. The new draft retains the requirement that a notice of appeal name the party or parties taking the appeal but allows that requirement to be satisfied in a number of ways. Although the new draft allows an attorney to simply state that a notice is filed on behalf of "all plaintiffs" (or "the plaintiffs," or "plaintiffs A, B, et al.," or "all of the plaintiffs except ...") any ambiguity caused by an attorney's use of such shorthand designations would be rectified by a new requirement in Rule 12 that an attorney file a statement naming each party represented on appeal by that attorney. The draft also states that dismissal of an appeal should not occur when it is "otherwise clear from the notice" that the party intended to appeal.

Judge Jolly stated that the proposal to amend Rule 12 prompted another idea. He continues to like a clear rule that requires a notice of appeal to list the name of each appellant; the problem with such a rule is its harshness. His suggestion was to eliminate the sentence allowing an attorney to use shorthand methods of indicating the persons bringing the appeal and to reinsert the language in the published draft stating that use of such terms as "et al." is insufficient. However, he further suggested inserting a statement that failure to name a party in a notice of appeal is not fatal if the party is named in the docketing statement. In

other words, his suggestion was to provide a second chance to include an appellant's name.

Judge Williams pointed out that Judge Jolly's alternative still has a sudden death consequence; the alternative only provides a second chance to catch an error. In reality, this might only slightly reduce the risk of inadvertent omission.

Judge Boggs stated that he was comfortable with Judge Jolly's intent but he thought that the suggestion produced an odd result. A notice of appeal, the jurisdictional document, initially would not be effective to bring appeal for a party, but later -- after the filing of a docketing statement -- it could be.

Judge Logan pointed out the difference between the use of the representation statement in Judge Ripple's draft and Judge Jolly's suggestion. In Judge Ripple's draft, the representation statement provides clarification. Under Judge Jolly's suggestion, the representation statement would cure a jurisdictional defect.

Judge Hall indicated that she favors the draft. She stated that she had no sense that the clerk's office provides assistance to lawyers filing appeals.

Chief Justice McGiverin stated his preference for the published rule. If, however, the Committee consensus is to follow a different approach, he favored Judge Ripple's new draft.

Mr. Kopp stated that he favored Judge Ripple's draft but would omit lines 20-22 (providing that an appeal should not be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice."). He also recommended that the representation statement be filed with the docketing statement.

Judge Logan agreed that it would be helpful if the representation statement were filed with the docketing statement.

Mr. Strubbe pointed out that several circuits do not have docketing statements.

Judge Ripple suggested that the rule could require an attorney to file a representation statement within 10 days unless a circuit requires it at a different time. With regard to Mr. Kopp's suggestion to eliminate lines 20-22, Judge Ripple stated that his intent was to give motions panels some discretion to avoid unduly harsh results.

Judge Williams indicated that he preferred to retain lines 20-22. He observed that lines 20-22 create a reasonableness standard for interpreting the words "such terms" (on line 8).

Judge Logan moved that the Committee vote on Rule 3(c) independently of Rule 12. The motion was seconded. In the discussion following the motion, Mr. Kopp reiterated his opposition to lines 20-22 and moved to delete them. His motion failed for want of a second.

The voted on Judge Logan's motion to approve the new draft of Rule 3(c) passed by a vote of seven in favor and one opposed.

The discussion then turned to Rule 12. Judge Logan made a motion that the draft should be amended to make it possible for a court to include the representation statement as part of the docketing statement, or to have it filed simultaneously with the docketing statement. Judge Hall seconded the motion. It was approved unanimously. The Committee asked the Chair and the Reporter to work out language.

Mr. Spaniol suggested that at line 7 of the draft the words "on appeal" should be inserted after the word "represented." It was so moved and seconded and the motion was approved unanimously.

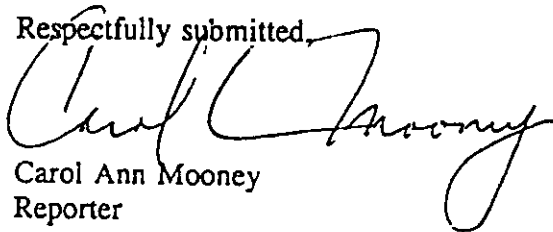
Mr. Spaniol also asked whether an attorney would be required to file a representation statement even if the attorney represented only one party. The Committee consensus was it would be simpler to always require a statement.

A motion was made to approve Rule 12 as amended. The motion was seconded and passed unanimously.

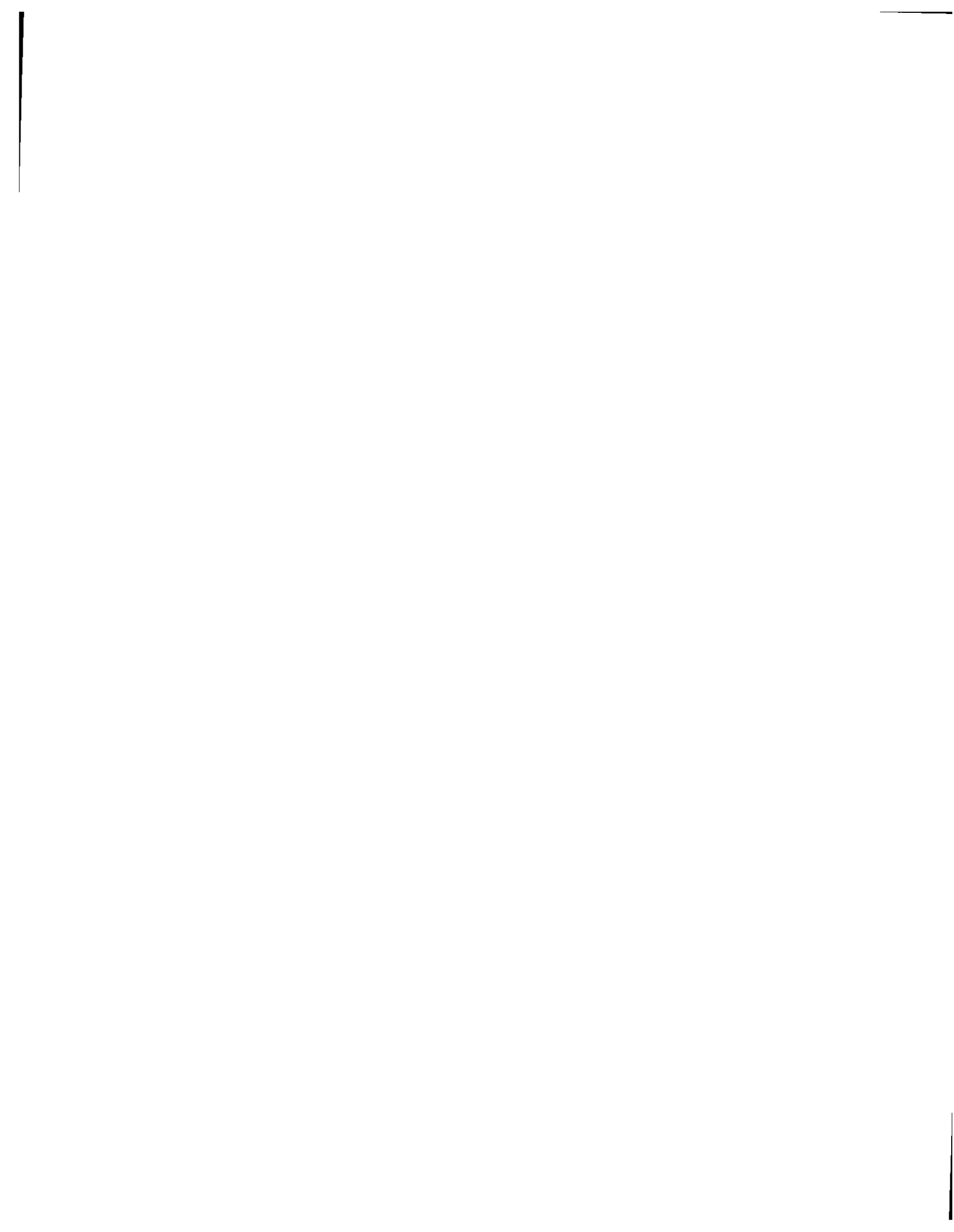
The reporter told the Committee that there had been no adverse comments on published Rule 15 and that two of the commentators who opposed the naming requirement in Rule 3 supported it in Rule 15. Because the filing of a petition under Rule 15 is the first filing in any court, the Committee consensus was that it should retain the naming requirement in that rule without adding the shorthand references authorized in Rule 3. A motion was made and seconded to approve Rule 15 as it was published. The motion passed unanimously.

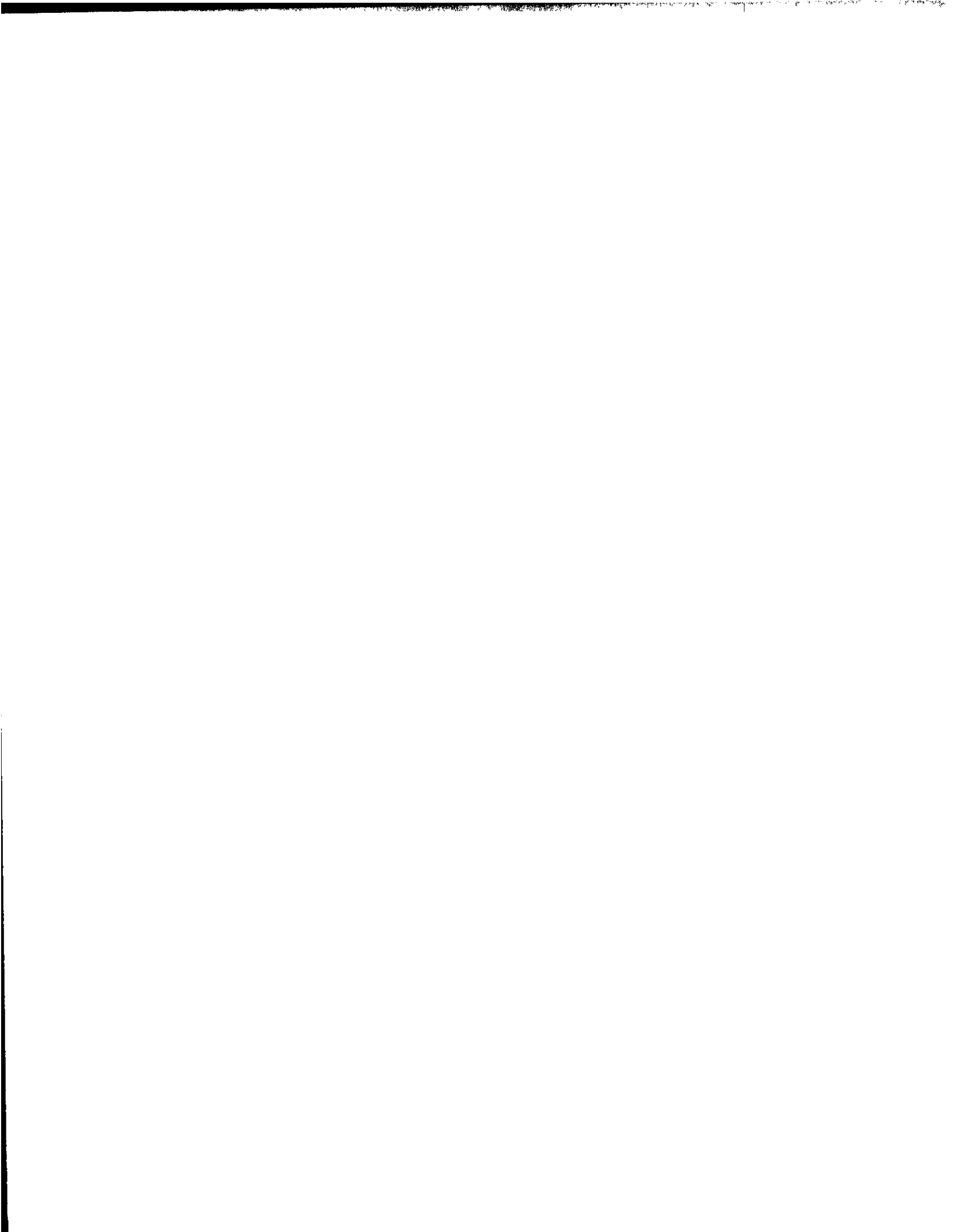
The conference concluded at 2:45 p.m.

Respectfully submitted,



Carol Ann Mooney
Reporter





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

Agenda E-19
(Appendix A)
Rules
September, 1992

ROBERT E. KEETON
CHAIRMAN

JOSEPH F. SPANIOL, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

TO: Honorable Robert E. Keeton, Chair, and Members of the
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Kenneth F. Ripple, Chair
Advisory Committee on Appellate Rules *KFR*

DATE: June 2, 1992

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

1. Proposed amendments to Federal Rules of Appellate Procedure 3, 3.1, 4, 5.1, 10, 25, 28, and 34, approved by the Advisory Committee on Appellate Rules at its April 30, 1992 meeting. These proposed amendments were published in August 1991. A public hearing was scheduled for December 4, 1991 in Chicago, Illinois but was canceled for lack of interest. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee recommends withdrawing the proposed amendments to Rule 35 but requests that the Standing Committee approve the other published rules, in their amended form, and send them to the Judicial Conference. Part A of this report includes the amended rules. Part B identifies and discusses the primary criticisms and suggestions; it also explains the changes made in the text or notes after publication; and it discusses any disagreement among the Advisory Committee members concerning the changes. Part C is a summary of the written comments received.
2. Proposed amendments to Federal Rules of Appellate Procedure 3(c), 12, and 15, approved by the Advisory Committee on Appellate Rules by telephone conference after its April 30 meeting. Proposed amendments, dealing with the Torres problem, were published under expedited procedures in February 1992 for a three month

period. The Advisory Committee has reviewed the written comments and now suggests different changes in Rule 3(c), proposes a new subdivision for Rule 12, and suggests style changes in Rules 3(c) and 15(a) and (e). Part D of this report contains the revised rules; it also discusses the major criticisms and suggestions made by the commentators; it explains the changes made in the rules and notes after publication; and, it discusses any disagreement among the Advisory Committee members concerning the approach taken in the revised draft. Part E is a summary of the written comments received.

3. Proposed amendments to Federal Rules of Appellate Procedure 35, and 47. These proposals were approved at the Advisory Committee's April 30th meeting and the Advisory Committee requests the Standing Committee's approval of them for publication. If approved, these new proposals could be published along with the proposed amendments approved for publication by the Standing Committee at its January, 1992 meeting (proposed amendments to Appellate Rules 25, 28, 38, 40, and 41). Part F of this report contains the draft amendments to Rules 35 and 47. Part F also contains proposed amendments to Federal Rule of Appellate Procedure 6(b)(2)(i); these amendments conform Rule 6 to the Rule 4(a)(4) amendments.

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

PROPOSED AMENDMENTS - FED. R. APP. P. 3(c) & 15(a) & (e)
Issues and changes
Revised drafts

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear the appeal of a party not properly identified as an appellant and that the phrase "et al.," is insufficient to identify an unnamed party as an appellant. Id. at 318. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant. A rule change is important because of the current confusion among the courts of appeals.

Because of the importance of the Torres problem, at its January 1992 meeting, the Standing Committee approved immediate publication of the proposed amendments to Fed. R. App. P. 3(c) and 15(a) and (e), as well as Forms 1, 2, and 3. Because the Standing Committee believes that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms only for three months rather than the usual six months. (Although subpart (e) of Rule 15 is not related to the Torres question, publication of all the suggested amendments to Rule 15 at one time was approved.) Public hearings were scheduled for April 8, 1992, but were canceled due to lack of interest.

The published drafts require that each appellant be "named" in the notice of appeal, except in class actions. Although the Standing Committee approved publication of the draft amendments to Rules 3 and 15, the Standing Committee requested that the Advisory Committee continue to explore other alternatives that might better preserve as many appeals as possible.⁵

⁵ A special note accompanying the published rules states: The Committee, after receiving public comment, may explore other variations of the proposed amendment here submitted and may recommend a modified amendment without asking for further public comment. Accordingly, the Committee welcomes suggestions of other means to identify appellants in a notice of appeal.

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

There has been a division of opinion among the members of the Advisory Committee regarding the best way to resolve "the Torres problem."

At the December 1991 meeting a majority of the Advisory Committee supported the published draft -- requiring that each appellant be named -- because it is definitive. The naming requirement allows both the court and all parties to know precisely who is taking the appeal. Consequently, the rule is easy to administer. Naming also requires each litigant to make an explicit choice about taking an appeal. Arguably, the draft resolves the ambiguity of the present rule by telling lawyers and litigants that shorthand methods will not suffice.

The published draft accomplishes these goals by incurring costs, costs that some of the Advisory Committee consider unacceptable. The greatest is the possibility that the right of appeal will be lost because of an inadvertent omission of a party's name. One can also argue that a requirement that a notice of appeal list all names will simply be overlooked by a practicing lawyer because in all other filings with a district court after the complaint such terms as "et al." are sufficient.

For these reasons, some members of the Advisory Committee have opposed the approach taken in the published draft and have favored alternatives that would make it harder for a party to lose a right to appeal through mistaken nomenclature. One such alternative, explored briefly at the Committee's December meeting and in more depth at its April meeting, attempts to resolve the problem of the lost appellant by providing, in essence, that once any party brings an appeal all other litigants are parties to the appeal. Drafts prepared by both Judge Easterbrook and Professor Mooney, modeled on Supreme Court Rule 12.4, were considered at the Advisory Committee's April meeting.

The Supreme Court model leaves to a court of appeals the task of sorting out those parties who actually have an interest in being active in the appellate proceeding. It also requires that a court of appeals realign the parties for purposes of briefing schedules, etc. The clerks of the courts of appeals met in late February and discussed the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. The clerks and chief deputies unanimously agreed that given the volume in the courts of appeals, this task would be a formidable one. It is this volume problem that may make the analogy to the Supreme Court's practice limp. Because most petitions for certiorari are denied,

the Supreme Court needs to deal with the realignment problem in only a relatively few cases. Nevertheless, the Advisory Committee agrees that some administrative cost incurred to save an appeal is salutary. Indeed, in its work on Rule 4(a)(4), it settled on an approach that creates some administrative costs in order to ensure that appeals are not lost through inadvertence.

Following the close of the comment period, the Advisory Committee had a telephone conference to discuss the comments and to attempt to reconcile the two differing viewpoints. Two of the seven commentators opposed the approach taken in the published draft; the other five commentators offered suggestions for refining the draft. The Committee tried to balance sensibly the very real concerns of definiteness, certainty, and ease of administration against the possibility of inadvertent and excusable loss of appellate rights. As a result, it proposes new amendments to Rule 3(c) and to Rule 12.

1 Rule 3. Appeal as of Right--How Taken

2 * * *

3 (c) Content of the Notice of Appeal.-- The A notice of
4 appeal ~~shall~~ must specify the party or parties taking the
5 appeal by naming each appellant either in the caption or the
6 body of the notice of appeal. An attorney representing more
7 than one party may fulfill this requirement by describing
8 those parties with such terms as "all plaintiffs," "the
9 defendants," "the plaintiffs A, B, et al.," or "all
10 defendants except X." A notice of appeal filed pro se is
11 filed on behalf of the party signing the notice and the
12 signer's spouse and minor children, if they are parties,
13 unless the notice of appeal clearly indicates a contrary
14 intent. In a class action, whether or not the class has

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

15 been certified, it is sufficient for the notice to name one
16 person qualified to bring the appeal as representative of
17 the class. A notice of appeal also must ~~shall~~ designate
18 the judgment, order, or part thereof appealed from, and
19 ~~shall~~ must name the court to which the appeal is taken. An
20 appeal ~~shall~~ will not be dismissed for informality of form
21 or title of the notice of appeal, or for failure to name a
22 party whose intent to appeal is otherwise clear from the
23 notice. Form 1 in the Appendix of Forms is a suggested form
24 for a notice of appeal.

Committee Note

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1980). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

- 1 **Rule 12. Docketing the Appeal; Filing a Representation**
2 **Statement; Filing of the Record**
3 * * *
4 **(b) Filing a Representation Statement.--Within 10 days**
5 **after filing a notice of appeal, or at such other time**
6 **designated by a court of appeals, the attorney who filed the**
7 **notice of appeal must file with the clerk of the court of**
8 **appeals a statement naming each party represented on appeal**

9 by that attorney.

10 ~~(b)~~ (c) Filing ...

Committee Note

Note to new subdivision (b). This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file a statement indicating all parties represented on the appeal by that attorney. Although the notice of appeal is the jurisdictional document and it must clearly indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Changes Since Publication

Obviously the new draft is significantly different from the published draft. The new draft makes it clear that naming each appellant is the surest way to perfect an appeal on behalf of each of them; however, the draft gives an attorney representing more than one party flexibility to use general descriptive terms, as long as the notice makes it clear who intends to appeal. The companion amendment to Rule 12, requiring a representation statement, is intended to assist the court of appeals and the other parties in identifying the individual appellants.

Two commentators suggested that the rule should require listing the names of the parties in the body of the notice and that naming parties in the caption should not be sufficient. The draft continues to provide that naming in the caption is sufficient. It would create an unnecessary trap to treat the names in the caption as insufficient.

A provision is added to the rule dealing with pro se appellants. A notice of appeal filed by a pro se appellant is

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

sufficient to perfect an appeal on behalf of the signer's spouse and minor children if they are parties, unless the notice indicates a contrary intent.

With regard to class actions, the published rule provided that it would be sufficient for a notice to indicate that it is filed on behalf of the class. The revised draft requires that the notice name one person qualified to bring the appeal as representative of the class.

No substantive changes are made in Rule 15. Only two comments were submitted regarding Rule 15; both support the approach taken in the draft which requires that a petition for review or enforcement of agency orders name each party seeking review. Both comments were from persons who oppose the naming requirement in Rule 3. They support the naming requirement in Rule 15 principally because the notice is the first document filed with any court. The Committee note accompanying subdivision (a) is amended because it previously stated that subdivision (a) was a conforming amendment to Rule 3(c). Style changes are made in Rule 15, consistent with the changes recommended by the Style Subcommittee in other rules.

Only one minor change is made in the published forms even though substantive changes have been made in Rule 3(c), and Forms 1 and 2 are governed by Rule 3(c). The published forms indicate that each appellant/petitioner should be named in the body of the notice of appeal. Although that requirement has been relaxed in Rule 3, naming remains the preferred method and the published amendments to the forms remain appropriate. However, because Rule 3(c) authorizes alternative means an asterisk and footnote referring the reader to Rule 3(c) have been added to Forms 1 and 2.

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹

Rule 3. Appeal as of Right--How Taken

* * * * *

1 (c) Content of the Notice of Appeal.--
2 The A notice of appeal shall ~~shall~~ must specify
3 the party or parties taking the appeal by
4 naming each appellant in either the
5 caption or the body of the notice of
6 appeal. An attorney representing more
7 than one party may fulfill this
8 requirement by describing those parties
9 with such terms as "all plaintiffs," "the
10 defendants," "the plaintiffs A, B, et
11 al.," or "all defendants except X." A
12 notice of appeal filed pro se is filed on
13 behalf of the party signing the notice and
14 the signer's spouse and minor children, if
15 they are parties, unless the notice of

¹New matter is underlined; matter to be omitted is lined through.

APPELLATE RULES

16 appeal clearly indicates a contrary
17 intent. In a class action, whether or not
18 the class has been certified, it is
19 sufficient for the notice to name one
20 person qualified to bring the appeal as
21 representative of the class. A notice of
22 appeal also must ~~↑ shall~~ designate the
23 judgment, order, ~~↑~~ or part thereof appealed
24 from, ~~↑~~ and ~~shall~~ must name the court to
25 which the appeal is taken. ~~Form 1 in the~~
26 ~~Appendix of Forms is a suggested form of a~~
27 ~~notice of appeal.~~ An appeal ~~shall~~ will
28 not be dismissed for informality of form
29 or title of the notice of appeal, or for
30 failure to name a party whose intent to
31 appeal is otherwise clear from the notice.
32 Form 1 in the Appendix of Forms is a
33 suggested form for a notice of appeal.
34 (d) ~~Service of~~ Serving the Notice of
35 Appeal. - The clerk of the district court

36 shall serve notice of the filing of a
37 notice of appeal by mailing a copy thereof
38 to each party's counsel of record (apart
39 from the appellant's), ~~of each party other~~
40 ~~than the appellant,~~ or, if a party is not
41 represented by counsel, to the party's
42 last known address, ~~of that party,~~ and the
43 The clerk of the district court shall
44 ~~transmit~~ forthwith send a copy of the
45 notice ~~of appeal~~ and of the docket entries
46 to the clerk of the court of appeals named
47 in the notice. The clerk of the district
48 court shall likewise send a copy of any
49 later docket entry in the case to the
50 clerk of the court of appeals. When an
51 ~~appeal is taken by~~ a defendant appeals in
52 a criminal case, the clerk of the district
53 court shall also serve a copy of the
54 notice of appeal upon the defendant,
55 either by personal service or by mail

56 addressed to the defendant. The clerk
57 shall note on each copy served the date ~~en~~
58 ~~which~~ when the notice of appeal was filed
59 and, if the notice of appeal was filed in
60 the manner provided in Rule 4(c) by an
61 inmate confined in an institution, the
62 date when the clerk received the notice of
63 appeal. ~~Failure of t~~ The clerk's failure
64 to serve notice ~~shall~~ does not affect the
65 validity of the appeal. Service ~~shall be~~
66 is sufficient notwithstanding the death of
67 a party or the party's counsel. The clerk
68 shall note in the docket the names of the
69 parties to whom the clerk mails copies,
70 with the date of mailing.

* * * * *

COMMITTEE NOTE

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme

Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily

APPELLATE RULES

burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward.

Note to subdivision (d). The amendment requires the district court clerk to send to the clerk of the court of appeals a copy of every docket entry in a case after the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4), which provides that when one of the posttrial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the

disposition of the motion becomes effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a posttrial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Sending copies of all docket entries after the filing of a notice of appeal should provide the courts of appeals with the necessary information.

**Rule 3.1. Appeals from a Judgments Entered by
a Magistrates Judge in a Civil Cases**

1 When the parties consent to a trial
2 before a magistrate judge under pursuant
3 ~~to~~ 28 U.S.C. § 636(c)(1), ~~an appeal from a~~
4 ~~judgment entered upon the direction of a~~
5 ~~magistrate shall~~ any appeal from the
6 judgment must be heard by the court of
7 appeals ~~pursuant to~~ in accordance with 28
8 U.S.C. § 636(c)(3), unless the parties, ~~in~~
9 ~~accordance with 28 U.S.C. § 636(e)(4),~~
10 consent to an appeal on the record to a
11 district judge of the district court and
12 thereafter, by petition only, to the court



U.S. Department of Justice

Civil Division, Appellate Staff
601 D St , NW, Rm. 9106
Washington, D C. 20530-0001

DNL

Douglas 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: 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 Moore's 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
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.**

* * *



V-C



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DNL

Douglas N. Letter
Appellate Litigation Counsel

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March 11, 2004

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Re: Proposed Amendments to FRAP 4(c)(1)

Dear Patrick:

As you know, the Committee received a proposal for an amendment to FRAP 4(c)(1) concerning timely appeals by prison inmates. Professor Philip Pucillo had recommended an amendment to that rule because the Circuits have not applied it consistently. I asked for time to consult various United States Attorney's office to see what the Government's experience has been with this rule.

I have learned that our U.S. Attorney's offices have not found this matter to be a significant issue at this point in their practices. I note that our primary concern is to try to solve any problem through a means that requires the least amount of scarce judicial and Justice Department resources. On this point, several U.S. Attorney's offices have indicated that it normally takes less time and resources for the Government to respond to prisoner filings than it would to engage in an inquiry, with a hearing, about whether or not there has been a timely filing.

If it can be implemented as a practical matter, we think the best solution might be that each correctional institution would have some form of simple system under which a prison official stamps on the envelope the date it was received from the prisoner for mailing through its mailing system, and by signature confirms that date. Such a system would seem preferable to a requirement for the prisoner to swear an affidavit, in part because we do not think such a sworn statement serves as much of an actual deterrent for incarcerated persons to claim falsely that they timely delivered matters for mailing. (For example, we know of instances in which an inmate swears that an item was presented for mailing on a particular date, but the item is not actually received in the post office until weeks later.)

We do think it makes sense for FRAP 4(c)(1) to be clarified so that it is understood that no affidavit from an inmate is needed if the envelope or pleading makes clear that it was timely placed

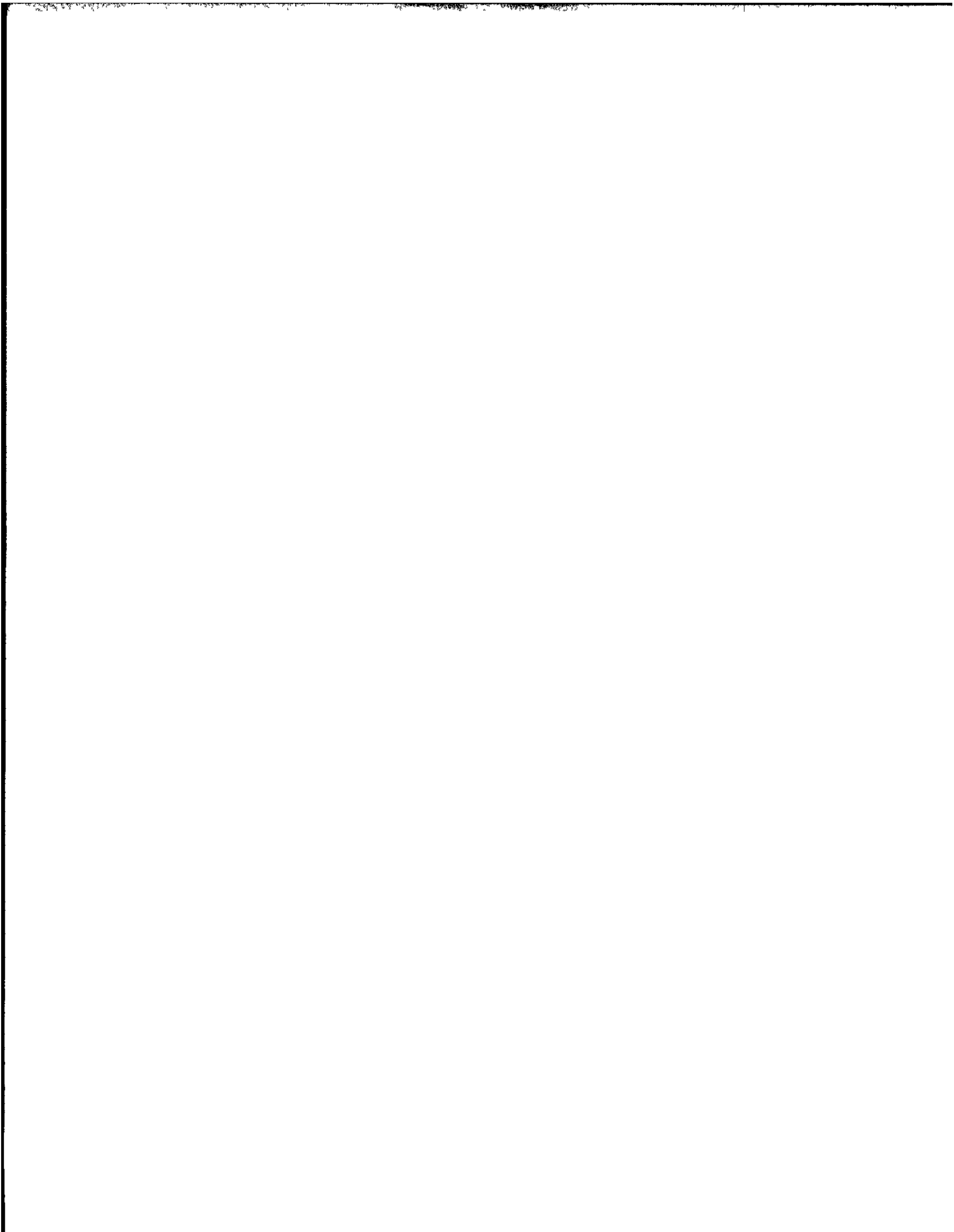
in the institution's legal mailing system. Thus, inmate affidavits should not come into play unless the relevant institution has no legal mailing system, or its system does not provide a proper date-stamping mechanism. Possibly a new rule could read something like the following: "If the institution does not have a system designed to process legal mail, the inmate must show that he has deposited the notice of appeal in the internal mail system on or before the last day for filing by attaching a document to the notice of appeal stating the date on which the mail was deposited and stating that first-class postage was prepaid. That document must be in the form of a declaration in compliance with 28 U.S.C. 1746 or a notarized statement."

I hope these comments are helpful to the Committee.

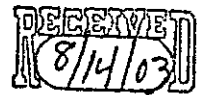
Sincerely,

A handwritten signature in black ink that reads "Douglas N. Letter". The signature is written in a cursive style with a large initial "D".

Douglas N. Letter
Appellate Litigation Counsel



03-08



03-AP-C



AVE MARIA
SCHOOL OF LAW

August 7, 2003

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

Dear Mr. McCabe:

Please refer this proposal for amendment to Rule 4(c)(1) of the Federal Rules of Appellate Procedure to the Advisory Committee on Appellate Rules.

Rule 4(c)(1), which was enacted to codify the "prisoner mailbox" rule first pronounced by the Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988), provides:

If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Fed. R. App. P. 4(c)(1).

The focus of this proposal is the Rule's concluding sentence, which concerns the showing of "timely filing" through submission of either a § 1746 declaration or a notarized statement. The apparent basis of this provision is Rule 29.2 of the Supreme Court Rules. See Fed. R. App. P. 4(c), 1993 Advisory Committee Note ("The language of the amendment is similar to that in Supreme Court Rule 29.2"). The relevant portion of Rule 29.2 provides:

If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid.

As the Advisory Committee Note indicates, Rules 4(c)(1) and 29.2 have similar language. They each mention a § 1746 declaration or a notarized statement setting forth the date of deposit and stating that first-class postage has been prepaid. However, the Rules differ in one significant respect: it is clear that an inmate must submit one of the mentioned documents to receive the benefit of Rule 29.2, but it is not so clear whether he must do so to receive the benefit of Rule 4(c)(1). See Fed. R. App. P. 4(c)(1) ("Timely filing *may* be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.") (emphasis added). Rule 4(c)(1) arguably does nothing more than create a "safe harbor" for those inmates who submit a § 1746 declaration or a notarized statement containing the requisite content. The Advisory Committee Note provides no explanation as to why the Committee took this particular approach.

In a perfect world, each and every inmate would be astute enough to take advantage of Rule 4(c)(1)'s "safe harbor" by attaching a § 1746 declaration or a notarized statement to his notice of appeal. It would then be simple for a court of appeals to verify that the inmate deposited the notice in the institution's internal mail system on or before the last day for filing. Unfortunately, however, inmates routinely neglect to accompany their notices with either of the mentioned documents, leaving the courts of appeals to determine on a case-by-case basis whether the inmate will nevertheless receive the benefit of the Rule.

Because Rule 4(c)(1) provides the courts of appeals with no guidance on how to proceed in the absence of a § 1746 declaration or a notarized statement, it is not surprising that divergent approaches have emerged, including several within the same circuit. The Sixth and Eighth Circuits, construing the submission of a § 1746 declaration or a notarized statement as mandatory, have dismissed appeals on the basis that the inmate failed to satisfy his burden of establishing the existence of appellate jurisdiction. See *United States v. Streck*, Nos. 01-6087, 01-6089, 2003 WL 1518639 (6th Cir. Mar. 20, 2003) (unpublished disposition); *Portia v. Norris*, 251 F.3d 1196 (8th Cir. 2002). The consistent practice of the Fourth Circuit, on the other hand, is to remand to the district court for factual findings regarding whether the inmate complied with Rule 4(c)(1). See, e.g., *United States v. Propst*, No. 03-6282, 2003 WL 21652692 (4th Cir. July 15, 2003) (unpublished disposition).

Another approach, employed by both the Eighth and Tenth Circuits, is to forgive the absence of a § 1746 declaration or a notarized statement when other evidence demonstrates that the inmate timely deposited his notice of appeal in the prison mail system. See *Sulik v. Taney County*, 316 F.3d 813, 814 (8th Cir. 2003) (postmark on envelope containing notice of appeal); *Fleenor v. Scott*, No. 01-6233, 2002 WL 725450 (10th Cir. Apr. 25, 2002) (unpublished disposition) (prison mail log); *United States v. Bailey*, No. 99-6250, 2000 WL 309296 (10th Cir. March 27, 2000) (unpublished disposition) (certificate of service).

In an effort to bring about some uniformity, the Committee might consider prescribing a standard approach for the courts of appeals to follow when an inmate seeking the benefit of Rule 4(c)(1) fails to include a § 1746 declaration or a notarized statement with his notice of appeal. A preferable course, however, would be to amend Rule 4(c)(1) to make abundantly clear that an inmate will not receive the benefit of the Rule in that circumstance. Not only would this revision bring Rule 4(c)(1) in conformity with Rule 29.2 of the Supreme Court Rules, it would preserve judicial resources that would otherwise be expended to determine the relevant date upon which the inmate deposited his notice of appeal in the institution's mail system. The burden that the amendment would impose upon an inmate (compelling him to supply a § 1746 declaration or a notarized statement with each appeal) is minimal.

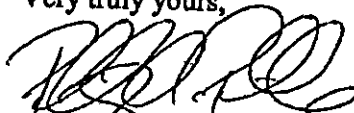
Below is proposed language incorporating the proposed amendment for the Committee's consideration:

If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. ~~If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first class postage has been prepaid. To receive the benefit of this rule, the inmate must:~~

(A) attach to the notice a notarized statement or declaration in compliance with 28 U.S.C. § 1746, either of which must set forth the date of deposit and state that first-class postage has been prepaid; and

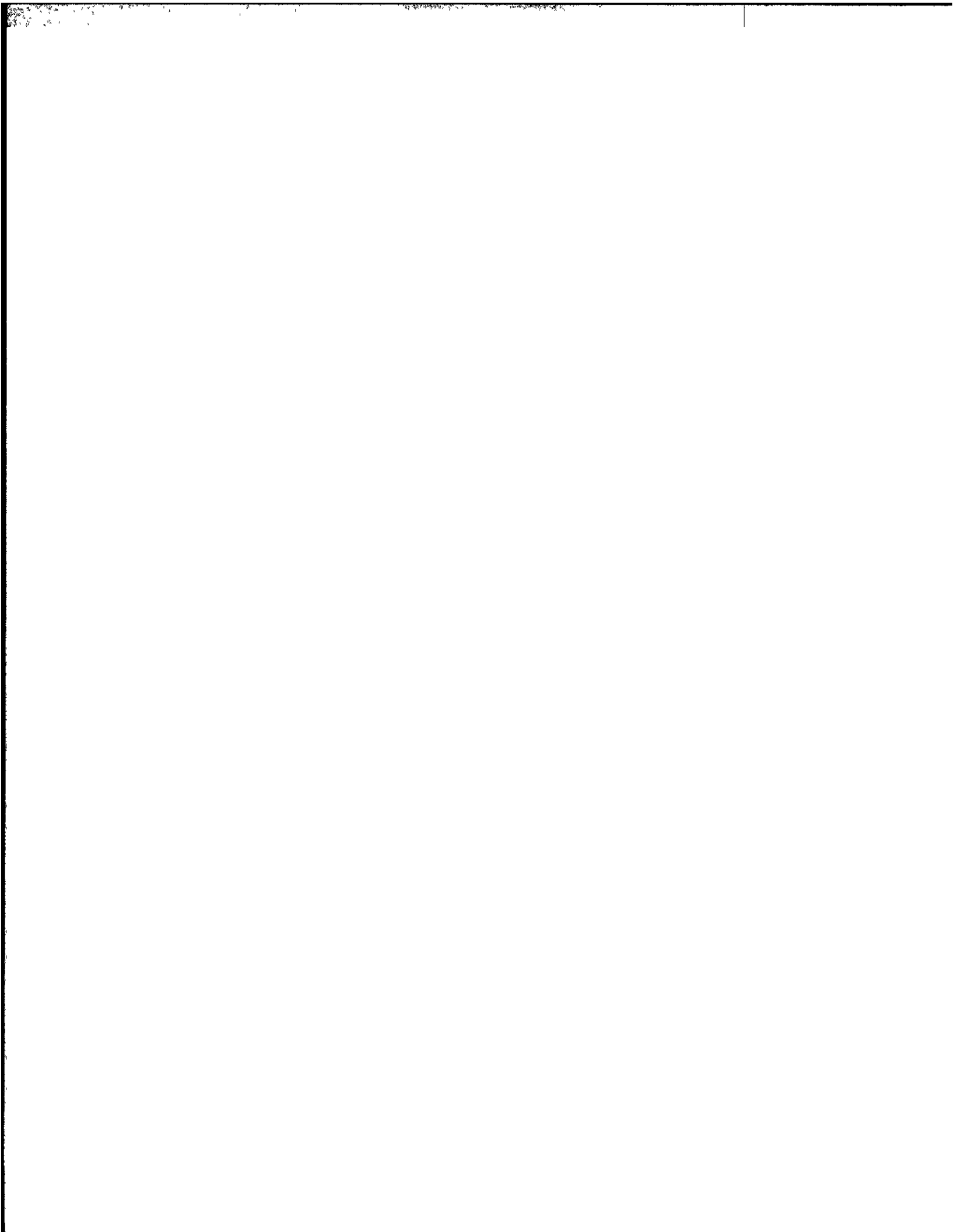
(B) use the system designed for legal mail, if the institution has one.

Very truly yours,



Philip A. Pucillo
Assistant Professor of Law





PUBLISH

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FEB 12 2004

PATRICK FISHER

Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FERNANDO CEBALLOS- MARTINEZ,

Defendant - Appellant.

No. 02-2273

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D. Ct. No. CR-01-1155 JC)**

Submitted on the briefs:*

Alonzo J. Padilla, Assistant Federal Public Defender, Albuquerque, New Mexico, for
Plaintiff-Appellant.

David C. Iglesias, United States Attorney, and David N. Williams, Assistant United
States Attorney, Office of the United States Attorney, Albuquerque, New Mexico, for
Defendant-Appellee.

Before **TACHA**, Chief Circuit Judge, **McKAY**, and **McCONNELL**, Circuit Judges.

*After examining the briefs and the appellate record, this three-judge panel has
determined unanimously that oral argument would not be of material assistance in the
determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The
case is therefore ordered submitted without oral argument.

TACHA, Chief Circuit Judge.

Defendant Fernando Ceballos-Martinez seeks to appeal his sentence imposed by the district court. Because Mr. Ceballos-Martinez's notice of appeal fails to comport with Fed. R. App. P. 4(c)(1), we lack subject-matter jurisdiction to consider this appeal.

Therefore, we DISMISS.

I. Background

A federal grand jury indicted Mr. Ceballos-Martinez on one count of possessing with intent to distribute more than 500 grams of cocaine, to which he pleaded guilty. Mr. Ceballos-Martinez seeks to appeal the determination of the length of his sentence. The district court, however, received Mr. Ceballos-Martinez's notice of appeal, which he personally filed while in prison, five days after the deadline for filing such a notice. Moreover, his notice of appeal failed to include a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement setting forth the date he deposited his notice of appeal with prison officials and that he pre-paid first-class postage for his filings.

Mr. Ceballos-Martinez argues that the district court's receipt of his notice of appeal five days after the filing deadline is timely under the "prisoner mailbox rule."¹ See Fed. R. App. P. 4(c)(1). In response, the government argues that we lack subject-matter jurisdiction to entertain this appeal under Fed. R. App. P. 4(c)(1).²

¹Mr. Ceballos-Martinez and the government briefed the underlying merits of this appeal as well. Because we dismiss for lack of subject-matter jurisdiction, we do not reach these issues.

² The government argues that Mr. Ceballos-Martinez may not employ the prisoner mailbox rule at all because he was not technically pro se at the time of filing. Rather than reaching that issue, we decide today that, even assuming that he was pro se, Mr. Ceballos-Martinez failed to prove timely compliance as required by Fed. R. App. P. 4(c)(1).

II. Discussion

“Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (internal quotations omitted). “The filing of a timely notice of appeal is an absolute prerequisite to our jurisdiction.” *Parker v. Bd. of Pub. Utils.*, 77 F.3d 1289, 1290 (10th Cir. 1996). Moreover, the party claiming appellate jurisdiction bears the burden of establishing our subject-matter jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). Here, we have subject-matter jurisdiction only if Mr. Ceballos-Martinez’s notice of appeal comports with the provisions of Fed. R. App. P. 4(c)(1).

The Rule states:

[1] If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution’s internal mail system on or before the last day for filing. [2] If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. [3] Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. Fed. R. App. P. 4(c)(1).

Mr. Ceballos-Martinez’s notice of appeal lacks a declaration in compliance with 28 U.S.C. § 1746 or notarized statement setting forth the notice’s date of deposit with prison officials and lacks a statement that first-class postage was pre-paid. The jurisdictional question we must address, then, is whether Mr. Ceballos-Martinez’s notice of appeal, even though it fails to include the above referenced provisions, complies with the congressional mandate that “[t]imely filing *may* be shown by a declaration . . . or notarized statement[.]” *Id.* (emphasis added). In other words, we must decide whether Mr. Ceballos-Martinez may prove the date of deposit and pre-payment of postage by

means other than a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement.

We note that the Rules of Appellate Procedure are replete with examples of Congress using “must” to denote necessity and “may” to denote permissiveness. *Compare* Fed. R. App. P. 4(b)(1)(A) (“[A] defendant’s notice of appeal *must* be filed”) (emphasis added) *with* Fed. R. App. P. 4(a)(5)(A) (“The district court *may* extend the time to file”) (emphasis added). Given this distinction, reading the third sentence of the Fed. R. App. P. 4(c)(1) in isolation could lead one to believe that the Rule only lists two of the many ways in which a pro se prisoner *may* prove timely compliance. We reject this myopic approach to statutory construction.

The principle that we must interpret statutes and rules of procedure based on their plain language, *see Watt v. Alaska*, 451 U.S. 259, 265 (1981), does not require that courts wear blinders to the context in which a word or sentence is used. Instead, rightly understood, this rule requires us to interpret Congress’s choice of words in the context that it chose to use them. *See United States v. Bishop*, 412 U.S. 346, 356 (1973) (“We continue to recognize that context is important in the quest for [a] word’s meaning”). Therefore, in holding that “may” does not reflect a congressional intent to render the declaration and notarization provisions of the Rule permissive, we look to the context of the Rule as a whole, our case law, and any absurd results that would flow from a contrary interpretation.

First, when placed into the context of Fed. R. App. P. 4(c)(1) as a whole, we find that “may,” as used in the last sentence of the Rule, references a choice between the means of proving compliance—not an option to ignore the provisions of the third sentence altogether. The Rule has the following structure. The first sentence establishes the mailbox rule itself (i.e., a notice of appeal is timely filed if given to prison officials prior to the filing deadline). The second sentence is written as a conditional statement, stating that if the prison has a legal mail system, then the prisoner must use it as the

means of proving compliance with the mailbox rule. The third sentence applies to those instances where the antecedent of the second sentence is not satisfied (i.e., where there is not a legal mail system). Hence, we read the third sentence in the context of the preceding sentence. As such, the third sentence—instead of absurdly requiring a prisoner to use a nonexistent legal mail system pursuant to the provisions of the second sentence—provides that a prisoner “may” file an appropriate declaration or notarized statement with his notice of appeal in lieu of documenting the time of deposit by way of the legal mail system. Thus, when read in context, “may” does not reflect a congressional intent to render the provisions of the third sentence permissive; rather, “may” references Congress’s intent to allow prisoners a filing option for those cases where a legal mail system is not available.

Second, at least one court of appeals interprets Fed. R. App. P. 4(c)(1) as we do, and our review of the law finds no contrary interpretations. The Eighth Circuit holds that the declaration and notarization provisions of the Rule are mandatory in those instances where the prison lacks a legal mail system. *See Grady v. United States*, 269 F.3d 913, 918 (8th Cir. 2001) (“We have discerned that the prison mailbox rule, as codified in Rule 4(c) . . . , consist[s] of two requirements. A prisoner must have actually deposited his legal papers with the warden by the last day for filing with the clerk. And the prisoner must at some point attest to that fact in an affidavit or notarized statement.”).³

Third, interpreting the requirements of the Rule’s third sentence as mere suggestions would render large portions of Fed. R. App. P. 4(c)(1) meaningless and run contrary to established caselaw. For example, under such a permissive interpretation of the Rule, a defendant could file an affidavit attesting under penalty of perjury that he filed his notice of appeal by the required date, and yet not attest that he paid first-class postage

³ While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal.

on his filings. If “may” reduces the requirements of the Rule’s last sentence to mere suggestion, a reviewing court could not refuse to accept the attestation. Thus, in this hypothetical, even though the attestation lacks the first-class-postage-attestation requirement of Rule 4(c)(1), the prisoner would simply be exercising his right to prove compliance in an alternate form. This permissive interpretation of the Rule would render its specific requirements mere surplusage, contrary to a cardinal canon of statutory construction. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute [Because] this rule [is] a cardinal principle of statutory construction . . . a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant[.]”) (internal quotations omitted) (citations omitted). Furthermore, such an interpretation would produce results contrary to established case law. *See United States v. Smith*, 182 F.3d 733, 735 n.1 (10th Cir. 1999) (refusing to grant a pro se prisoner benefit of the prison mailbox rule because his filing “did not, as required, ‘state that first-class postage has been prepaid.’”) (citing Fed. R. App. P. 4(c)(1)). In light of these considerations, we read Fed. R. App. P. 4(c)(1) to provide the mandatory method by which a pro se prisoner, who does not have access to a legal mail system, proves compliance with the mailbox rule. If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice’s date of deposit with prison officials and attest that first-class postage was pre-paid.

As we noted above, Mr. Ceballos-Martinez’s notice of appeal has neither a declaration of compliance nor a notarized statement. Further, he failed to affirm that he pre-paid first-class postage for any of his filings. Because we find that Mr. Ceballos-Martinez failed to employ the methods provided by Congress to establish compliance with the mailbox rule, we dismiss for lack of subject-matter jurisdiction.

At first blush, our holding may appear to be in tension with established law dictating that we liberally construe a pro se litigant’s pleadings, *see White v. Colorado*,

82 F.3d 364, 366 (10th Cir. 1996), and that we interpret procedural rules in favor of “deciding cases on the merits as opposed to dismissing them because of minor technical defects[.]” *Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 119 F.3d 847, 848 (10th Cir. 1997). Although these principles run deep, we have never interpreted them to give litigants—even pro se litigants—*carte blanche* to disregard congressionally established procedural rules. *See, e.g., Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (citing cases for principle that pro se parties must “follow the same rules of procedure that govern other litigants”) (internal citations omitted). Indeed, we have required pro se prisoners to adhere to the dictates of Fed. R. App. P. 4(c)(1). *See, e.g., Smith*, 182 F.3d at 735 n.1 (10th Cir. 1999) (“Although [Defendant] is a pro se inmate purporting to have filed his notice of appeal within the prison’s internal mail system . . . , we do not apply the . . . pro se prisoner mailbox rule because [his] declaration of a timely filing did not, as required, ‘state that first-class postage has been prepaid.’”) (quoting Fed. R. App. Pro. 4(c)(1)).

Moreover, the rule that we liberally interpret filings by pro se parties is less persuasive in the context of Rule 4(c)(1) because Congress adopted the Rule 4(c)(1) knowing full well that it would apply exclusively to pro se parties. Nevertheless, rather than draft leniency into the Rule, Congress provided two specific methods to prove timely compliance. Because Congress chose this route, we cannot graft onto the Rule additional methods of proving timely compliance. Therefore, in hewing faithfully to the specific requirements of Rule 4(c)(1), we do nothing more than recognize that failure to comply with a jurisdictional mandate deprives this Court of jurisdiction to consider the merits of an appeal. *See Parker*, 77 F.3d at 1290.

III. Conclusion

Because Congress has delineated the methods in which a party may prove timely compliance with Fed. R. App. P. 4(c)(1), and because Mr. Ceballos-Martinez has not complied with those requirements, we DISMISS his appeal for lack of subject-matter

jurisdiction.

V-D



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March 9, 2004

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Re: Proposed Amendments to FRAP to Clarify Time Limits for Filing Notices of
Appeal and Petitions for Rehearing

Dear Patrick:

As you know, the Government had proposed to the FRAP Committee rule changes to clarify the applicable period for filing notices of appeal and petitions for rehearing in civil cases in which a United States officer or employee, sued in an individual capacity for acts or omissions that occur in the performance of his official duties, is a party. The FRAP Committee raised questions about the potential overbreadth and application of the earlier proposed amendments, and tabled further discussion of the changes to allow me time to redraft its proposed amendments. In response to those questions, I wish to propose the following amendments, which are more limited in scope and application and, I believe, meet the Committee's expressed concerns.

Rules 4(a)(1) and 40(a)(1), respectively, establish the time in which a notice of appeal and a petition for rehearing in a civil case must be filed. Each rule provides an extended filing time for appeals in which the United States, its agency, or officer is a party. See FRAP 4(a)(1) (30 days extended to 60); FRAP 40(a)(1) (14 days extended to 45). Neither rule, however, specifies whether this extended time also applies to appeals in which a United States officer or employee is sued in an individual, rather than official, capacity for acts or omissions occurring within the performance of his official duties.

The rationale for providing an extended filing time in appeals in which the Government is a party applies equally to appeals in which a United States officer or employee, sued in his individual capacity in connection with the performance of his official duties, is a party. When an officer or employee is sued in his individual capacity for acts or omissions performed within the scope of his employment, the individual may request representation from the Government. See 28 C.F.R. § 50.15. If the individual requests representation, the United States must decide whether to represent him, and if it does represent him, must go through the same processes that are involved in any other

appeal to which the United States is a party and which warrant the extended filing time for notices of appeal and petitions for rehearing.

Federal Rule of Civil Procedure 12(a)(3) has already been amended for this same reason. See FRCP 12(a)(3) (extending time in which to answer complaint to sixty days for cases in which the United States, its agency, or its officer or employee, either in an official or individual capacity, is a party). Our proposed amendments to the FRAP would maintain consistency between the district and appellate court rules, and would provide the Government with sufficient time to file notices of appeal or petitions for rehearing in Bivens appeals.

FRAP 4(a)(1) provides that in a civil case, a notice of appeal generally must be filed with the district court within thirty days after the judgment or order appealed from is entered. See FRAP 4(a)(1)(A). However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." FRAP 4(a)(1)(B). This extended time for filing a notice of appeal in cases in which the United States is a party recognizes the Government's need to review the case, determine whether an appeal is warranted, and secure approval from the Office of the Solicitor General.

FRAP 40(a)(1) states that "a petition for panel rehearing may be filed within 14 days after entry of judgment," unless this time is altered by court order or local rule. "But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment * * * ." Ibid. The forty-five day period, "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Rule 40, Advisory Committee Notes, 1994 Amendment.

Although the extended filing times in Rules 4 and 40 clearly apply to appeals involving a federal officer sued in his official capacity, neither rule explicitly extends these filing times to appeals in which a United States officer or employee is sued in his individual capacity for actions that occur in the performance of his official duties. As a result, the proper deadline by which to file a notice of appeal or petition for rehearing is an issue that frequently arises in Bivens appeals. Clarification of the rules would allow the Government to take advantage of the extended filing times intended for appeals in which the United States participates. Currently, out of an abundance of caution, the Government's practice in Bivens appeals is to file notices of appeal within thirty days or seek extensions of the fourteen day limit for petitions for rehearing to avoid any possibility of litigation over timeliness.

The same rationale for providing an extended deadline in Rules 4 and 40 to appeals in which "the United States or its officer or agency is a party" supports an extended deadline to appeals in which the United States may participate because of its representation of an officer or employee sued in his individual capacity. See 28 C.F.R. § 50.15(a) (federal officer or employee sued in individual capacity is eligible for representation when his actions "reasonably appear to have been performed within the scope of the employee's employment" and representation is in the interest of the United States). When a United States officer or employee is sued in his individual capacity for acts or

omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Office of the Solicitor General. Therefore, we recommended to the FRAP Committee that Rules 4 and 40 be amended to clarify that the extended filing deadline for a notice of appeal or petition for rehearing applies not only to any appeal in which the United States or its officer or agency is a party, but also to any appeal in which a federal officer or employee, sued in his individual capacity for acts or omissions occurring in the performance of his official duties, is a party.

We explained that such amendments would maintain consistency between the FRAP and the Federal Rules of Civil Procedure, governing district court matters. Federal Rule of Civil Procedure 12(a) sets forth the relevant periods in which a defendant must serve an answer to a complaint in district court. FRCP 12(a) provides that the default period is twenty days, but that, when "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity" is the defendant, the period is extended to sixty days. Similar to the current versions of FRAP 4 and 40, FRCP 12, prior to an amendment in 2000, provided that "[t]he United States or an officer or agency thereof" was entitled to sixty days to file an answer; the former version of the rule did not specify whether this extended time to file also applied to a case in which the defendant was a United States officer or employee sued in his individual capacity for acts performed within the scope of his employment. In the year 2000, however, Rule 12(a)(3)(B) was added to remedy this situation.

Rule 12(a)(3)(B) provides that the extended sixty day period applies to a suit against "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The rationale for adopting this amendment was that in cases involving a United States officer or employee, sued in his individual capacity for actions arising out of the performance of his official duties, "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee." FCRP 12, Advisory Committee Notes, 2000 Amendment. Moreover, "[i]f the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." *Ibid.*

Therefore, because the Federal Rules of Civil Procedure have been amended to clarify that an extended filing time for the United States, its agencies, or officers should also apply to district court filings by a United States officer or employee sued in his individual capacity for actions occurring in the performance of his official duties, our proposed amendments to FRAP 4 and FRAP 40 would be consistent with the rules governing the district courts. To further this purpose of consistency, the amending language we proposed is the same as that used in FRCP 12(a)(3)(B) (e.g., "officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States").

In response to questions raised by the Committee about the potential overbreadth and

application of our proposed amendments, we have narrowed the scope of our proposed amendments to FRAP 4 and FRAP 40 to clarify that the extended periods in which to file a notice of appeal or petition for rehearing will apply to those suits against a federal officer or employee in his individual capacity only where the officer or employee is sued for acts or omissions occurring in connection with the performance of his official duties. Because a federal officer or employee's right to request representation is generally triggered by any allegation that the individual's acts or omissions occurred within the scope of his employment, see 28 C.F.R. § 50.15, additional time for filing an appeal or petition for rehearing is warranted whenever an action asserts individual liability based on acts or omissions that may have occurred in connection with the performance of official duties. However, as recognized by the Committee, no additional time for filing an appeal or petition for rehearing is appropriate when a federal employee or official is sued for purely private actions. Accordingly, we have clarified the language of our proposed amendments to limit their scope.

Attached are our proposed amended versions of Rules 4 and 40, along with explanatory committee notes. We believe these amendments will clarify application of the extended filing deadlines to appeals in which a United States officer or employee, sued in his individual capacity for acts or omissions that occurred in connection with his official duties, is a party, thereby providing the Government with sufficient time to file notices of appeal or petitions for rehearing in Bivens appeals.

Sincerely,

A handwritten signature in black ink that reads "Douglas N. Letter". The signature is written in a cursive, slightly slanted style.

Douglas N. Letter
Appellate Litigation Counsel

Rule 4. Appeal as of Right – When Taken**(a) Appeal in a Civil Case.****(1) Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) The notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered when:

(i) the United States or its officer or agency is a party, or

(ii) an officer or employee of the United States, sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, is a party.

* * *

Committee Note

Rule 4(a)(1)(B) is amended to clarify that the sixty day period for filing a notice of appeal also applies when an officer or employee of the United States, sued in his individual capacity for acts or omissions occurring in connection with the performance of his official duties, is a party. When a United States officer or employee is sued in his individual, rather than official capacity, for acts or omissions which may have been performed within the scope of his employment, the United States needs adequate time to determine whether to provide government representation to the officer or employee. If the United States decides to provide the officer or employee with representation, the

amended rule recognizes that the Solicitor General, as in any other case where the United States is a party, needs time to conduct a review of the case to determine whether an appeal is warranted.

The new language conforms to that in Federal Rule of Civil Procedure 12(a)(3)(B), which provides that "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States" shall have sixty days in which to file an answer to a complaint. This subsection was added to clarify that in actions "assert[ing] individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States," the United States has sixty, rather than thirty, days to file an answer to a complaint. See FRCP 12, Advisory Committee Notes, 2000 Amendment. The Committee's rationale for adopting 12(a)(3)(B) was that "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in action against the United States, a United States agency, or a United States officer sued in an official capacity." See *ibid.*

A federal officer's or employee's right to request representation is generally triggered by an assertion of individual liability based on acts or omissions occurring within the scope of his employment. See 28 C.F.R. § 50.15. Thus, similar to Federal Rule of Civil Procedure 12(a)(3)(B), an extended time period is warranted for filing an appeal whenever an action asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States.

DRAFT

Rule 40. Petition for Panel Rehearing**(a) Time to File; Contents; Answer; Action by the Court if Granted.**

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, any party may seek rehearing within 45 days after entry of judgment, unless an order shortens or extends the time, if:

(A) the United States or its officer or agency is a party, or

(B) an officer or employee of the United States, sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, is a party.

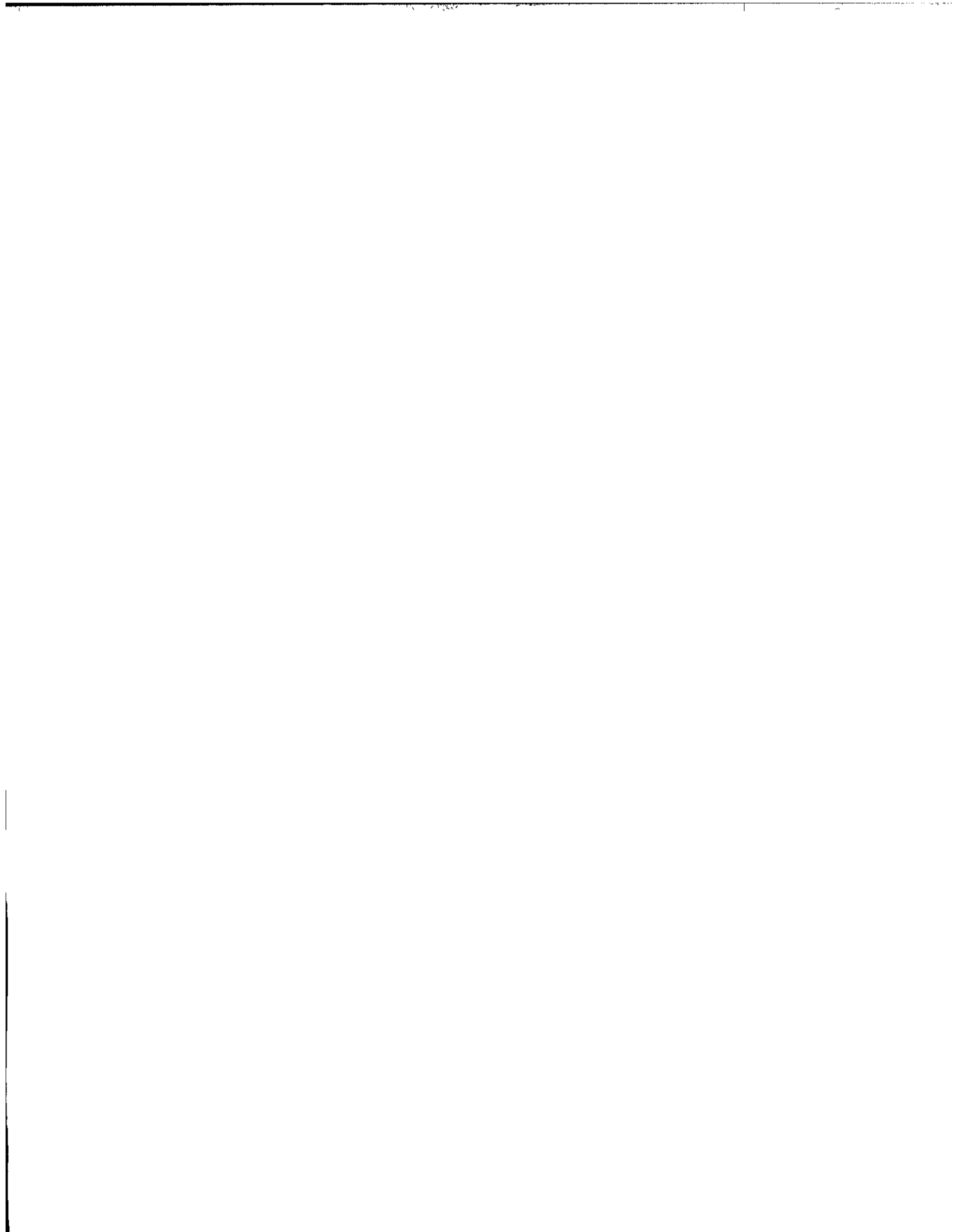
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Committee Note

Rule 40(a)(1) is amended to clarify that when an officer or employee of the United States, sued in his individual capacity for acts or omissions occurring in connection with the performance of his official duties, is a party, the time within which any party may seek rehearing is forty-five days from entry of judgment. When the United States provides the officer or employee with representation, the amended rule recognizes that the Solicitor General, as in any other case where the United States is a party, needs time to conduct a review of the case to determine whether to seek rehearing.

The amended rule is also intended to conform with amended language in Rule 4(a)(1)(B). The extended forty-five day period for rehearing in civil cases involving the United States is

"analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, [and] recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." See Rule 40, Advisory Committee Notes, 1994 Amendment. Rule 4(a)(1)(B) is similarly amended to clarify that the extended time for filing a notice of appeal in civil cases involving the United States applies equally to suits where a United States officer or employee, sued in his individual capacity for acts or omissions occurring in connection with the performance of his official duties, is a party.





03-09

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October 15, 2003

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Re: Proposed Amendments to FRAP to Clarify Time Limits for Filing Notices of
Appeal and Petitions for Rehearing

Dear Patrick:

I am writing because the Solicitor General wishes to propose to the FRAP Committee rule changes to clarify the applicable period for filing notices of appeal and petitions for rehearing in civil cases in which a United States officer or employee sued in an individual capacity is a party. These proposed amendments would also conform the FRAP to the Federal Rules of Civil Procedure, which have already been amended to make a similar clarification regarding suits against federal officials in their individual capacities.

Rules 4(a)(1) and 40(a)(1), respectively, establish the time in which a notice of appeal and a petition for rehearing in a civil case must be filed. Each rule provides an extended filing time for appeals in which the United States, its agency, or officer is a party. See FRAP 4(a)(1) (30 days extended to 60); FRAP 40(a)(1) (15 days extended to 45). Neither rule, however, specifies whether this extended time also applies to appeals in which a United States officer or employee is sued in an individual, rather than official, capacity.

The rationale for providing an extended filing time in appeals in which the Government is a party applies equally to appeals in which a United States officer or employee sued in his individual capacity is a party. When an officer or employee is sued in that capacity, the United States must decide whether to represent him, and, if it does represent him, must go through the same processes involved in any other appeal to which the United States is a party and which warrant the extended filing time for notices of appeal and petitions for rehearing.

Federal Rule of Civil Procedure 12(a)(3) has already been amended for analogous reasons. See FRCP 12(a)(3) (extending time in which to answer complaint to sixty days for cases in which the United States, its agency, or its officer or employee, either in an official or individual capacity, is a party). Our proposed amendments to the FRAP would maintain consistency between the district and appellate court rules and would provide the Government with sufficient time to file notices of appeal or petitions for rehearing in Bivens appeals.

1. FRAP 4(a)(1) provides that in a civil case, a notice of appeal generally must be filed with the district court within thirty days after the judgment or order appealed from is entered. See FRAP 4(a)(1)(A). However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." FRAP 4(a)(1)(B). This extended time for filing a notice of appeal in cases in which the United States is a party recognizes the Government's need to review the case, determine whether an appeal is warranted, and secure approval from the Solicitor General.

FRAP 40(a)(1) states that "a petition for panel rehearing may be filed within 14 days after entry of judgment," unless this time is altered by court order or local rule. "But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment * * * ." Ibid. The forty-five day period, "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Rule 40, Advisory Committee Notes, 1994 Amendment.

2. Although the extended filing times in Rules 4 and 40 clearly apply to appeals involving a federal officer sued in his official capacity, neither rule explicitly extends this filing time to appeals in which a United States officer or employee is sued in his individual capacity. As a result, the proper deadline by which to file a notice of appeal or petition for rehearing is an issue that frequently arises in Bivens appeals. Clarification of the rules would allow the Government to take advantage of the extended filing time intended for appeals in which the United States participates. Currently, out of an abundance of caution, the Government's practice in Bivens appeals is to file protective notices of appeal within thirty days or petitions for rehearing within fifteen days to avoid any possibility of litigation over timeliness.

3. The same rationale for providing an extended deadline in Rules 4 and 40 to appeals in which "the United States or its officer or agency is a party" supports an extended deadline in appeals in which a United States officer or employee sued in an individual capacity is a party. When a United States officer or employee is sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Solicitor General. Therefore, we recommend that Rules 4 and 40 be amended to clarify that the extended filing deadline for a notice of appeal or petition for rehearing applies to any appeal in which the United States, its agency, or its officer or

employee, sued either in an official or individual capacity, is a party.

4. Such an amendment would also maintain consistency between the FRAP and the Federal Rules of Civil Procedure, governing district court matters. FRCP 12(a) sets forth the relevant periods in which a defendant must serve an answer to a complaint in district court. It provides a default period of twenty days, except that, when "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity" is the defendant, the period is extended to sixty days. Similar to the current versions of FRAP 4 and 40, FRCP 12, prior to an amendment in 2000, provided that "[t]he United States or an officer or agency thereof" was entitled to sixty days to file an answer; the former version of the rule did not specify whether this extended time to file also applied to a case in which the defendant was a United States officer or employee sued in his individual capacity. In the year 2000, however, Rule 12(a)(3)(B) was added to remedy this situation.

FRCP 12(a)(3)(B) provides that the extended sixty day period applies to a suit against "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The rationale for adopting this amendment was that in cases involving a United States officer or employee sued in his individual capacity, "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee." FRCP 12, Advisory Committee Notes, 2000 Amendment. Moreover, "[i]f the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." *Ibid.*

Therefore, because the Federal Rules of Civil Procedure have been amended to clarify that an extended filing time for the United States, its agencies, or officers should also apply to district court filings by a United States officer or employee sued in his individual capacity, our proposed amendments to FRAP 4 and FRAP 40 would be consistent with the rules governing the district courts. To further this purpose of consistency, the amending language we propose is the same as is used in FRCP 12(a)(3)(B) (e.g., "officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States").

Attached are our proposed amended versions of Rules 4 and 40, along with explanatory committee notes. We believe these amendments will clarify application of the extended filing

deadlines to appeals in which a United States officer or employee sued in his individual capacity is a party, thereby providing the Government with sufficient time to file notices of appeal or petitions for rehearing in Bivens appeals.

Sincerely,

A handwritten signature in cursive script that reads "Douglas N. Letter". The signature is written in black ink and is centered on the page.

Douglas N. Letter
Appellate Litigation Counsel

Rule 4. Appeal as of Right – When Taken**(a) Appeal in a Civil Case.****(1) Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer, employee, or agency is a party, including an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

* * *

Committee Note

Rule 4(a)(1)(B) is amended to clarify that the sixty day period for filing a notice of appeal also applies when an officer or employee of the United States sued in his individual capacity is a party. When a United States officer or employee is sued in his individual, rather than official capacity, and the United States provides the officer or employee with representation, the amended rule recognizes that the Solicitor General, as in any other case where the United States is a party, needs time to conduct a review of the case to determine whether an appeal is warranted.

The new language corresponds to that in Federal Rule of Civil Procedure 12(a)(3)(B), which was added to clarify that in actions "assert[ing] individual liability of a United States officer or

employee for acts occurring in connection with the performance of duties on behalf of the United States," the United States has sixty, rather than thirty, days to file an answer to a complaint. See FRCP 12, Advisory Committee Notes, 2000 Amendment. The Committee's rationale for adopting 12(a)(3)(B) was that "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in action against the United States, a United States agency, or a United States officer sued in an official capacity." See ibid.

DRAFT

Rule 40. Petition for Panel Rehearing**(a) Time to File; Contents; Answer; Action by the Court if Granted.**

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer, employee, or agency is a party, including an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

* * *

Committee Note

Rule 40(a)(1) is amended to clarify that when an officer or employee of the United States, sued in his individual capacity, is a party, the time within which any party may seek rehearing is forty-five days from entry of judgment. When a United States officer or employee sued in his individual capacity is a party, and the United States represents the officer or employee, the United States, as in all other cases in which it is a party, needs additional time to review the case and determine whether to seek rehearing.

The amended rule is also intended to conform with amended language in Rule 4(a)(1)(B). The extended forty-five day period for rehearing in civil cases involving the United States is "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, [and] recognizes that the Solicitor General needs time to conduct a

thorough review of the merits of a case before requesting a rehearing." See Rule 40, Advisory Committee Notes, 1994 Amendment. Rule 4(a)(1)(B) is similarly amended to clarify that the extended time for filing a notice of appeal in civil cases involving the United States applies equally to suits where a United States officer or employee, sued in his individual capacity, is a party.

As with the amendment to Rule 4(a)(1)(B), the amended language of Rule 40(a)(1) corresponds to Federal Rule of Civil Procedure 12(a)(3)(B), which was added to clarify that in actions "assert[ing] individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States," the United States has sixty, rather than thirty, days to file an answer to a complaint. See FRCP 12, Advisory Committee Notes, 2000 Amendment. The Committee's rationale for adopting 12(a)(3)(B) was that "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in action against the United States, a United States agency, or a United States officer sued in an official capacity." See ibid.

V-E-1

MEMORANDUM

DATE: February 17, 2004
TO: Advisory Committee on Appellate Rules
FROM: Patrick J. Schiltz, Reporter
RE: Item No. 03-10

Section 205 of the E-Government Act of 2002 (Public Law 107-347) requires every federal court to maintain a website (§ 205(a)) and to make specific information available through that website, including “[a]ccess to docket information for each case” (§ 205(a)(4)), “[a]ccess to the substance of all written opinions issued by the court” (§ 205(a)(5)), and “[a]ccess to documents filed with the courthouse in electronic form” (§ 205(a)(6)). The Act also provides that “each court shall make any document that is filed electronically publicly available online” (§ 205(c)(1)), and the Act authorizes a court to “convert any document that is filed in paper form to electronic form” (§ 205(c)(1)). Any document that is so converted must “be made available online” (§ 205(c)(1)).

The Act thus establishes broad access to documents that are filed in or converted to electronic form, but the Act recognizes that access cannot be unlimited. The Act provides that documents that “are not otherwise available to the public, such as documents filed under seal, shall not be made available online” (§ 205(c)(2)). Moreover, the Act directs that the Rules Enabling Act process be used to “prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically” (§ 205(c)(3)(A)(i)). These privacy rules are to “provide to the extent practicable

for uniform treatment of privacy and security issues throughout the Federal courts” (§ 205(c)(3)(A)(ii)), and those charged with drafting such rules — including this Committee — are instructed to “take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security” (§ 205(c)(3)(A)(iii)).

Except as I have already described, the Act contains only one specific directive about the privacy rules. The Act provides that:

To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which . . . shall be either in lieu of, or in addition[] to, a redacted copy in the public file (§ 205(c)(3)(A)(iv).)

This last provision was included in the Act at the insistence of the Department of Justice, and over the objection of the Judicial Conference. The Department and the Conference have subsequently negotiated a compromise agreement and have jointly proposed legislation to amend this last provision to implement that compromise agreement. That legislation is pending in Congress

Background materials — including the full text of § 205 of the E-Government Act of 2002 and information about the “best practices” of various states — are attached to this memorandum. I will not summarize those materials further.

In response to the Act’s directive that the Rules Enabling Act process be used to implement privacy rules, Judge David F. Levi, the Chair of the Standing Committee, appointed an E-Government Subcommittee chaired by Judge Sidney A. Fitzwater. The Subcommittee includes liaisons from each of the five Advisory Committees (Judge John G. Roberts, Jr.,

represents this Committee), as well as liaisons from other Judicial Conference committees. The Reporters to the Advisory Committees serve as consultants to the Subcommittee.

The Subcommittee met on January 14 in Scottsdale, Arizona. The minutes of that meeting are attached. As you will see, the Subcommittee reviewed the significant amount of work that has already been done on privacy-related issues by the Committee on Court Administration and Case Management (“CACM”). That work culminated in CACM issuing model local rules regarding access to electronic files in civil and criminal cases.

At its January meeting, the Subcommittee agreed after much discussion that work on privacy-related amendments to the rules of practice and procedure would proceed as follows:

1. Prof. Daniel J. Capra, Reporter to the Evidence Rules Committee, and Lead Reporter to the E-Government Subcommittee, will draft a “template” privacy rule patterned after the model rules drafted by CACM.

2. That template will be provided to the Reporters to the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Each of those Reporters will then use the template to draft privacy amendments to his respective set of rules. Those amendments will follow the template as closely as possible.

3. The Advisory Committees will consider these draft amendments at their Spring 2004 meetings and provide input to the Chairs and Reporters.

4. In the summer of 2004 — most likely in connection with the June meeting of the Standing Committee — the Chairs and Reporters will confer about the draft amendments and the reactions of the Advisory Committees to those amendments. The Chairs and Reporters will

attempt to work out any problems that have been identified and to modify the draft amendments so that they are as consistent as possible.

5. At their fall 2004 meetings, the Advisory Committees will be asked to approve privacy amendments for publication. If all Advisory Committees do so, the Standing Committee will consider those amendments at its January 2005 meeting. If problems arise and one or more Advisory Committees do not approve amendments, those Advisory Committees will be asked to approve amendments at their spring 2005 meetings, and the Standing Committee will take up the matter at its June 2005 meeting. In any event, the goal is to publish all privacy amendments for comment in August 2005.

As directed by the Subcommittee and Judge Alito, I have prepared a draft privacy amendment to the Appellate Rules for your consideration. I want to draw your attention to three issues:

1. I considered two options for the placement of these privacy provisions: incorporating them as a new subsection (5) to Rule 25(a) or setting them forth in a new Rule 25.1. As you will see, I decided on the latter. I did this because I feared that, given the length of the privacy provisions, sticking them in Rule 25(a) would make Rule 25 ungainly. I also did this in order to draw attention to the provisions, which will take practitioners some getting used to. That said, I could easily redraft the provisions as a new Rule 25(a)(5).

2. At the Subcommittee meeting, we talked about the possibility that the Appellate Rules could simply incorporate by reference the privacy provisions of the Civil and Criminal Rules. The Appellate Rules could provide, for example, that "In an appeal in a civil case, the parties

must comply with Federal Rule of Civil Procedure xx,” or that “In an appeal in a criminal case, the parties must comply with Federal Rule of Criminal Procedure xx.”

I rejected this approach for a couple of reasons. First, I generally dislike incorporating other rules by reference; as much as possible, I think that an appellate practitioner should be able to find the rules that govern appellate proceedings in the Appellate Rules. Second, we have talked at great length about the difficulty of distinguishing “civil” appeals from “criminal” appeals; this approach would aggravate that problem. Finally, many proceedings are neither appeals in civil cases nor appeals in criminal cases; those proceedings include, for example, petitions to review agency orders under Rule 15 or petitions for extraordinary relief under Rule 21. The privacy provisions of the Appellate Rules must apply to those proceedings as well.

On balance, it seems to me preferable to adopt a straightforward rule that would apply to all appellate proceedings — whether civil, criminal, or something else — and that would simply list the information that should be redacted. That list would include everything that must be redacted in civil cases under the Civil Rules and everything that must be redacted in criminal cases under the Criminal Rules. I do not believe that there will be major differences between the Civil Rules and the Criminal Rules, but, even if there are, I don’t think that combining their provisions into a single Appellate Rule will cause any harm.

3. Finally, drafting the rule was made more complicated by the fact that CACM has suggested a number of changes to the Capra template, and the Style Subcommittee has thoroughly rewritten the template. At this point, each Advisory Committee is being left to decide for itself to what extent the recommendations of CACM and the Style Subcommittee should be adopted. (Again, the Chairs and Reporters will compare notes in June.) To assist this

Committee in that endeavor, I have attached three documents: (a) “Template Drafted By Prof. Capra”; (b) “CACM’s Comments on Capra Template”: and (c) “Capra’s Responses to CACM’s Comments.”

You will see that, in drafting a proposed Rule of Appellate Procedure, I have used the Style Subcommittee’s version of the template and generally agreed with the substantive suggestions made by CACM. My reasoning was as follows:

a. I agree with CACM that we should strike the Judicial Conference provision. You may recall that when we were in the process of amending Rule 26.1 (regarding corporate disclosure statements), this Committee proposed a similar “Judicial Conference” provision. That provision was strongly opposed by the commentators and by members of the Standing Committee and the other Advisory Committees — even though it was arguably narrower than the one in Prof. Capra’s template. I also do not think that we should enshrine "interim rules" in the rules of practice and procedure. That reference is unnecessary (in that the interim rules to which it refers already have the force of law by virtue of § 205(c)(3)(B)(1)) and confusing (in that those same interim rules will “cease to have effect” as soon as the rule referring to them becomes law).

b. As CACM notes, Judicial Conference policy is to exclude the files in Social Security appeals from being accessible online. Unless this Committee strongly disagrees with that policy, it seems to me that the policy should be reflected in the rule.

c. Like CACM, I would be inclined to remove the seven principles from the Note, both because inclusion of the principles is somewhat confusing (in that the typical practitioner may wonder what force these “general principles” have and how they relate to the rule) and because it lengthens the Committee Note for no compelling reason

d. Finally, I think that adding at the end of the Note the sentence suggested by CACM would be helpful. It seems to me that the sentence suggested by CACM is as much implied by the text of the rule as the sentence that precedes it.

These are, of course, merely my recommendations. I can easily redraft the proposed rule to take into account whatever the Committee decides.

1 **Rule 25.1 Privacy in Court Filings**

2 (a) **Limits on Disclosing Personal Identifiers.** If a party includes any of the
3 following personal identifiers in an electronic or paper filing, the party is limited
4 to disclosing:

- 5 (1) only the last four digits of a person's social-security number;
- 6 (2) only the initials of a minor child's name;
- 7 (3) only the year of a person's date of birth;
- 8 (4) only the last four digits of a financial-account number; and
- 9 (5) only the city and state of a home address.

10 (b) **Exception for a Filing Under Seal.** A party may include complete personal
11 identifiers in a filing if it is made under seal. But the court may require the party
12 to file a redacted copy for the public file

13 (c) **Social-Security Appeals; Access to Electronic Files.** In an appeal involving the
14 right to benefits under the Social Security Act, access to an electronic file is
15 authorized as follows, unless the court orders otherwise:

- 16 (1) the parties and their attorneys may have remote electronic access to any
17 part of the case file, including the administrative record; and
- 18 (2) a person who is not a party or a party's attorney may have remote
19 electronic access to:
 - 20 (A) the docket maintained under Rule 45(b)(1); and
 - 21 (B) an opinion, order, judgment, or other written disposition, but not
22 any other part of the case file or the administrative record.

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Committee Note

This rule is adopted in compliance with § 205(c)(3) of the E-Government Act of 2002 (Public Law 107-347). Section 205(c)(3) requires the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” This rule goes further than the E-Government Act in protecting personal identifiers, as this rule applies to paper as well as electronic filings. Paper filings in many districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore they raise the same privacy and security concerns when filed with the court.

This rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See <http://www.privacy.uscourts.gov/Policy.htm>. The Judicial Conference policy provides that — with the exception of Social Security appeals — documents in civil case files should be made available electronically to the same extent they are available at the courthouse, provided that certain “personal data identifiers” are not included in the public file. Because case files are available over the internet through PACER, they are no longer protected by the “practical obscurity” that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings and by altogether prohibiting electronic access to the files in Social Security cases by members of the general public. (Social Security appeals are unique in their great number, their extensive records, and their focus on medical records and other intensely private information.)

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

TEMPLATE DRAFTED BY PROF. CAPRA

Rule [] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court— whether electronically or in paper – must comply with the following procedures:

(1) Social Security Numbers. If a person’s social security number must be included, the first five numbers must be deleted.

(2) Names of Minor Children. If the name of a minor child must be included, only the child’s initials may be disclosed.

(3) Dates of Birth. If a person’s date of birth must be included, only the year of birth may be disclosed.

(4) Financial-Account Numbers. If a financial-account number must be included, only the last four digits may be disclosed.

(5) Home Address. If a home address must be included, only the city and state may be disclosed.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

(c) Judicial Conference Standards. A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in

most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See <http://www.privacy.uscourts.gov/Policy.htm> The Judicial Conference policy sets forth seven general principles:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
4. Except where otherwise noted, the policies apply to both paper and electronic files.
5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
6. The availability of case files at the courthouse will not be affected or limited by these policies.
7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACERNet, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not

otherwise protected will be made available over the internet through PACERNet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule.

CACM'S COMMENTS ON CAPRA TEMPLATE

Note: Proposed deletions are struck through, additions are in bold, and general comments and explanations are in italics.

Rule [] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court— whether electronically or in paper – must comply with the following procedures:

(1) Social Security Numbers. If a person's social security number must be included, ~~the first five numbers must be deleted.~~ **only the last four digits may be disclosed.** *This change would make (1) parallel with (4)*

(2) Names of Minor Children. If the name of a minor child must be included, only the child's initials may be disclosed.

(3) Dates of Birth. If a person's date of birth must be included, only the year of birth may be disclosed.

(4) Financial-Account Numbers. If a financial-account number must be included, only the last four digits may be disclosed.

(5) Home Address. If a home address must be included, only the city and state may be disclosed.

If HR 1303 is passed by the Senate and signed by the President, we will need to consider whether to include its provisions regarding a party's ability to file a "reference list" of the complete versions of the identifiers and the corresponding shortened versions that the court shall maintain under seal and allow to be amended. This procedure would only apply to documents created by a party so as not to impact the evidentiary value of exhibits. These procedures were agreed to by the Department of Justice.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file

~~(c) **Judicial Conference Standards.** A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public availability of court filings.~~

This is confusing given the statement in (b) above, which is contradictory to the Judicial Conference Policy, yet required by the E-Government Act. In any event, the reference to "interim rules" should be removed because pursuant to Section 205 (c)(3)(B)(i) of the E-Government act, any interim rules cease to be effective once this rule becomes effective. Further, we really do not have any "interim rules" other than the policy itself. Thus, the use of that phrase would likely be confusing to the reader.

If the current exemption for Social Security appeals is to remain part of the rule, such would need to be specifically mentioned in the civil and appellate rules.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in **most many** districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See <http://www.privacy.uscourts.gov/Policy.htm> The Judicial Conference policy sets forth seven general principles:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.
5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
6. The availability of case files at the courthouse will not be affected or limited by these policies.
7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Including all of the 7 principles here may be too much for the Committee Note. A reference to the policy, together with the paragraph that comes after the recitation of the principles may be enough. Also, with the possible changes in access to paper files that may result in some courts due to the operational guidelines that are being developed in the criminal privacy context, principle 6 may no longer be accurate in all courts.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain “personal data identifiers” are not included in the public file. Because case files are available over the internet through PACERNet, they are no longer protected by the “practical obscurity” that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACERNet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. **The responsibility to redact filings rests with counsel and the parties.**

CAPRA'S RESPONSES TO CACM'S COMMENTS

Katie,

I will send the suggestions to all the reporters for their respective Committee meetings in the spring. I wanted to give my observations on the reasoning behind some of the language on which suggestions were made.

1. The reference to Judicial Conference Policy came from suggestions at the meeting that from time to time the Judicial conference may wish-- in the future--to establish certain guidelines in this area. Perhaps a compromise would be an introductory phrase saying, "Except as inconsistent with this rule . . . "

2. We agreed at the meeting to leave social security out of the template. Civil and Appellate will decide how to treat those cases

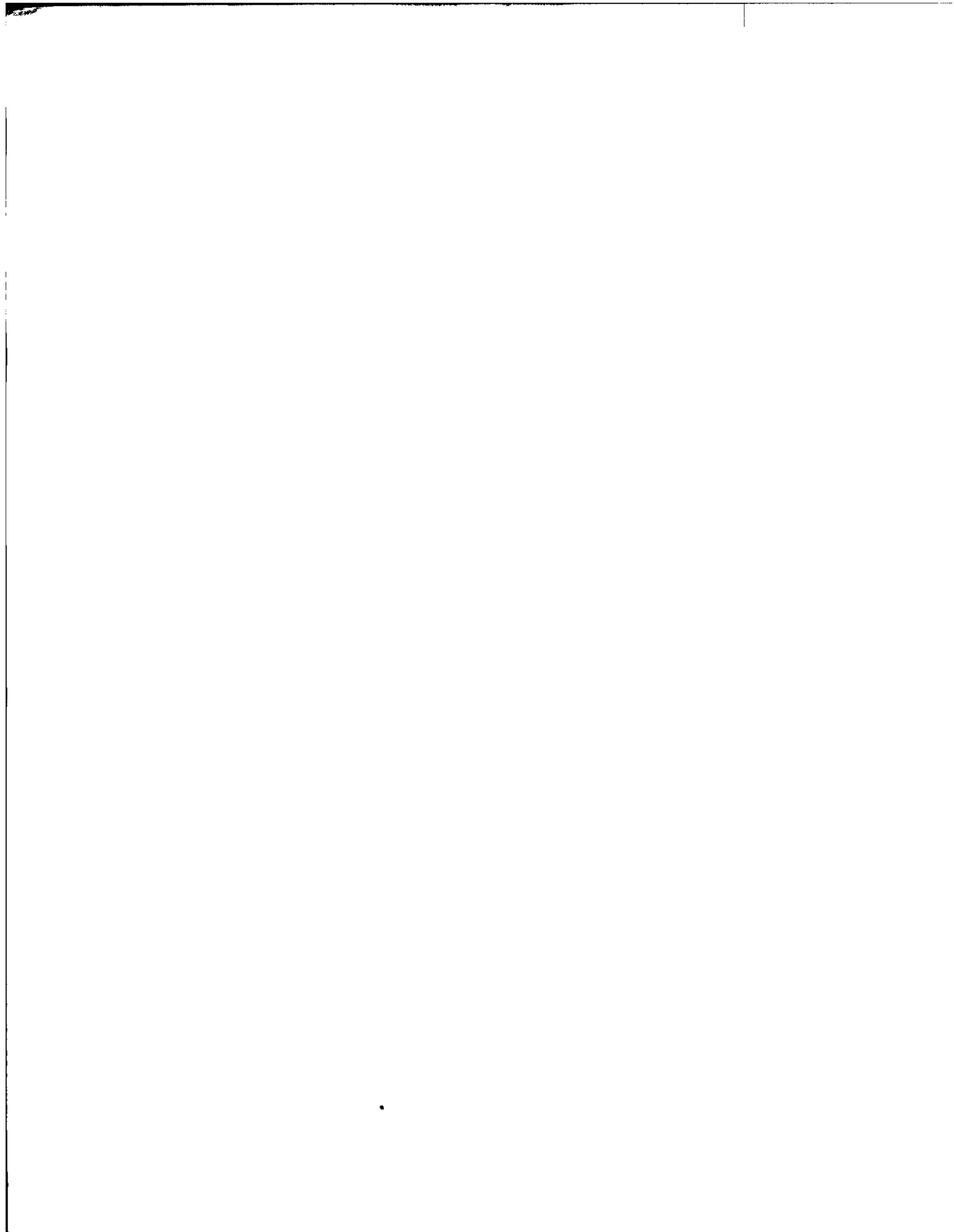
3. We do plan to incorporate the reference list "solution" if it is enacted. I hope that you will keep me apprised of developments.

4. I thought that it would be helpful to practitioners, at least as a starting point, to include all of the general principles in the Committee Note, as they would not be expected to find it elsewhere. I am not sure what the other reporters think, but that will be a topic of discussion at their meetings.

5. I thought the language on responsibility of the parties might be outside the scope of a committee note, as the Standing Committee is currently looking at it. But again, the other reporters might have a different view.

Thanks so much for the comments.

Dan Capra





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Rules Committee Support Office

January 6, 2004

MEMORANDUM TO E-GOVERNMENT SUBCOMMITTEE

SUBJECT: *Materials for January 14 Subcommittee Meeting*

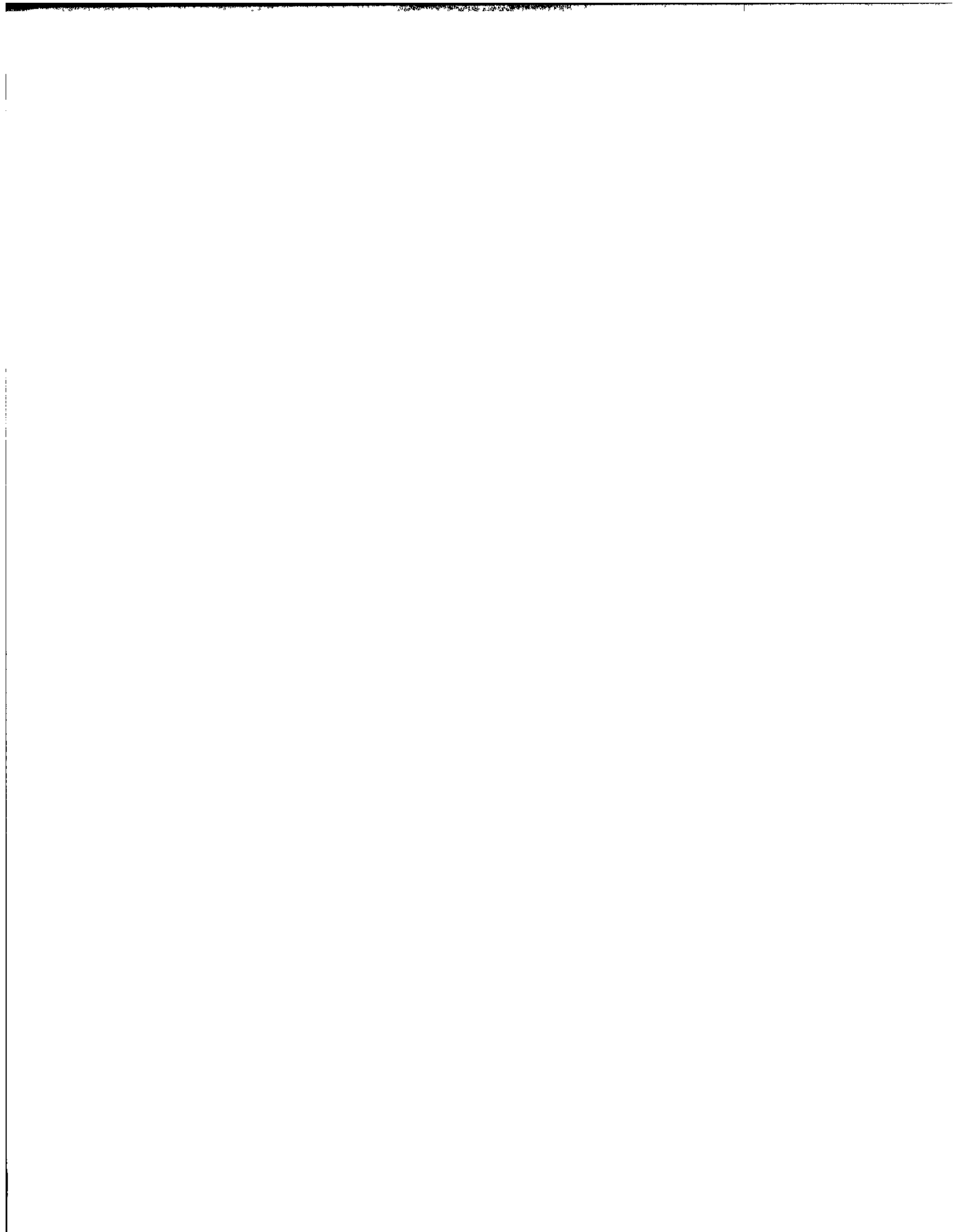
For your information, I have attached background materials for the E-Government Subcommittee meeting. The meeting will be held at 8:30 am on Wednesday, January 14, in the Boardroom at the Hermosa Inn in Scottsdale, Arizona.

Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court must prescribe rules governing the security and privacy concerns arising from public access to electronic case records. The E-Government Subcommittee was formed by Judge David Levi to develop proposed rules for the consideration of the pertinent advisory rules committees and review by the Standing Rules Committee, in accordance with the Rules Enabling Act.

In June 1999, several years before the enactment of the E-Government Act of 2002, the Committee on Court Administration and Case Management (CACM) began a study of privacy issues regarding public access to electronic case files in appellate, civil, bankruptcy, and criminal cases. CACM published proposed privacy policies for public comment. It conducted a series of meetings and public hearings. After extensive work and debate spanning four years, the committee developed a set of recommendations that were adopted by the Judicial Conference as the judiciary's electronic-case-files privacy policy.

The attached materials include:

- Five-page staff memorandum from the Committee on Court Administration and Case Management describing the history of the committee's actions in developing the present Judicial Conference privacy policy regarding public access to electronic case files. The memorandum contains six attachments, including: (1) A chart identifying and summarizing 242 comments submitted on CACM's initial proposed privacy policy. (2) A list of speakers testifying at the public hearing on CACM's proposed privacy policy. (3) CACM's report to the Judicial Conference recommending adoption of a judiciary-wide privacy policy regarding appellate, civil, criminal, and bankruptcy case files. (4) A revised proposed model notice of



E-GOVERNMENT ACT OF 2002

PUBLIC LAW 107-347

SECTION 205

Public Law 107-347
107th Congress

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

E-Government
Act of 2002.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “E-Government Act of 2002”.

44 USC 101 note.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
Sec. 2. Findings and purposes.

TITLE I—OFFICE OF MANAGEMENT AND BUDGET ELECTRONIC
GOVERNMENT SERVICES

- Sec. 101. Management and promotion of electronic government services.
Sec. 102. Conforming amendments.

TITLE II—FEDERAL MANAGEMENT AND PROMOTION OF ELECTRONIC
GOVERNMENT SERVICES

- Sec. 201. Definitions.
Sec. 202. Federal agency responsibilities.
Sec. 203. Compatibility of executive agency methods for use and acceptance of electronic signatures.
Sec. 204. Federal Internet portal.
Sec. 205. Federal courts.
Sec. 206. Regulatory agencies.
Sec. 207. Accessibility, usability, and preservation of government information.
Sec. 208. Privacy provisions.
Sec. 209. Federal information technology workforce development.
Sec. 210. Share-in-savings initiatives.
Sec. 211. Authorization for acquisition of information technology by State and local governments through Federal supply schedules.
Sec. 212. Integrated reporting study and pilot projects.
Sec. 213. Community technology centers.
Sec. 214. Enhancing crisis management through advanced information technology.
Sec. 215. Disparities in access to the Internet.
Sec. 216. Common protocols for geographic information systems.

TITLE III—INFORMATION SECURITY

- Sec. 301. Information security.
Sec. 302. Management of information technology.
Sec. 303. National Institute of Standards and Technology.
Sec. 304. Information Security and Privacy Advisory Board.
Sec. 305. Technical and conforming amendments.

TITLE IV—AUTHORIZATION OF APPROPRIATIONS AND EFFECTIVE DATES

- Sec. 401. Authorization of appropriations.

SEC. 208. FEDERAL COURTS.44 USC 3501-
note.

(a) **INDIVIDUAL COURT WEBSITES.**—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

- (1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.
- (2) Local rules and standing or general orders of the court.
- (3) Individual rules, if in existence, of each justice or judge in that court.
- (4) Access to docket information for each case.
- (5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE.—

(1) UPDATE OF INFORMATION.—The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES.—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS.—

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

(3) PRIVACY AND SECURITY CONCERNS.—(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

Public
information.

Regulations.

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.

Deadlines.
Reports.

(d) **DOCKERS WITH LINKS TO DOCUMENTS.**—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) **COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.**—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking “shall hereafter” and inserting “may, only to the extent necessary,”

(f) **TIME REQUIREMENTS.**—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date.

Deadlines.

(g) **DEFERRAL.**—

(1) **IN GENERAL.**—

(A) **ELECTION.**—

(i) **NOTIFICATION.**—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) **CONTENTS.**—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) **EXCEPTION.**—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

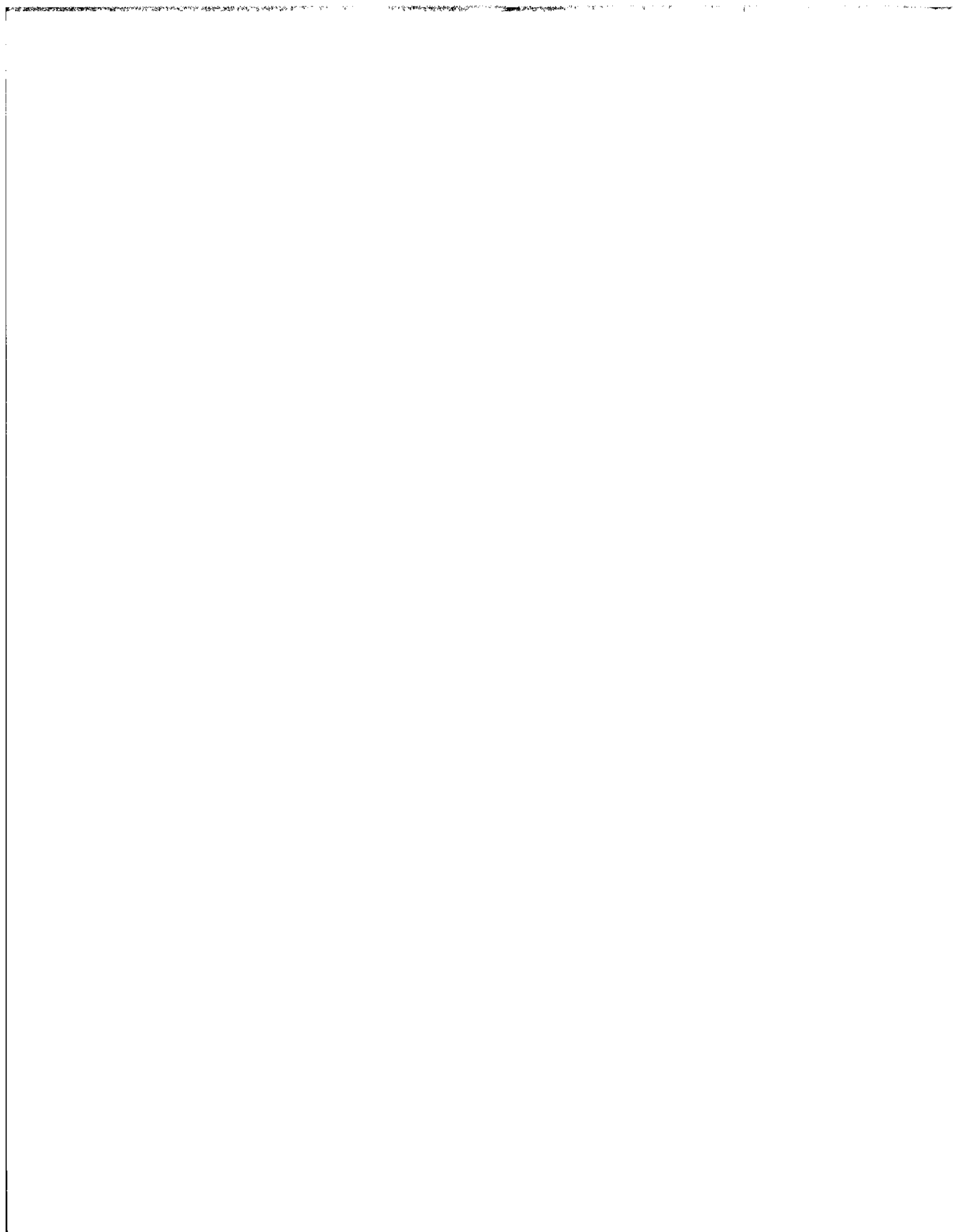
(2) **REPORT.**—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that—

Deadlines.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.





**REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS:
A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS**

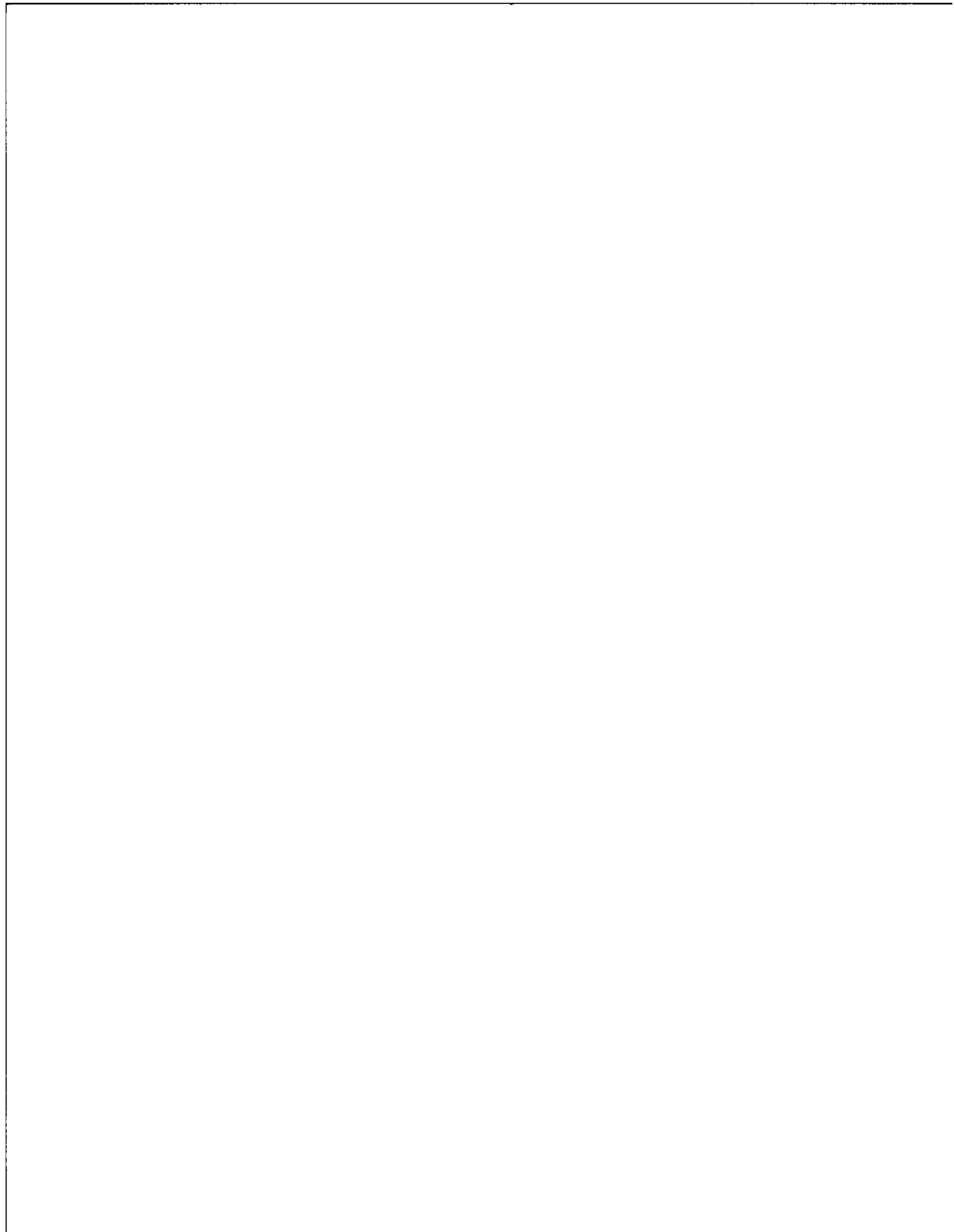
**Prepared for the Court Administration and Case Management Committee
of the Judicial Conference**

May 7, 2003

Federal Judicial Center

*David Rauma
Project Director*

This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to provide research and planning assistance to the Judicial Conference of the United States and its committees. The views expressed are those of the author and not necessarily those of the Judicial Conference, the Committee, or the Federal Judicial Center.



REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS

THE QUESTION AND A SUMMARY OF FINDINGS

The Question Before the Committee and the Purpose of the Report

The Court Administration and Case Management Committee (Committee) recommended to the Judicial Conference of the United States in 2001 that the Conference prohibit remote public access to electronic criminal case files. The Judicial Conference agreed, and agreed that it would reconsider the policy in two years, during which time the Committee would study the implications of allowing remote public access. The Committee asked the Federal Judicial Center (Center) to conduct an evaluation of a pilot project authorizing ten district courts and one circuit court to make available remote public access to electronic criminal case documents. This report summarizes the results of that evaluation, with the purpose of providing information to the Committee as it re-examines the policy prohibiting remote public access to electronic criminal case files.

Summary of Major Findings

Study Design. The pilot project began in the spring of 2002. Ten district courts and one court of appeals were granted exemptions to the Judicial Conference policy that “public remote electronic access to documents in criminal cases should not be available at this time [September 1, 2001].”¹ The Committee selected four additional districts to serve as comparison courts for purposes of this evaluation. These comparison courts had made electronic images available prior to 2001 but were not granted exemptions by the Judicial Conference to continue allowing remote public access during the pilot. The Administrative Office (AO) issued a set of operational guidelines for the pilot courts that specified which documents could not be displayed under any circumstances and what information was to be redacted from all criminal filings (see the Appendix for the exact text of the operational guidelines).

The goal of the pilot project evaluation was to generate answers to a set of questions, agreed to by the Committee, the AO, and Center. The evaluation questions address these areas of concern: (1) what rules and procedures did the courts promulgate for remote public access; (2) what advantages and/or disadvantages are there to parties, judges, and court staff of such access;

¹ JCUS-SEP 01, p. 49

and (3) what harm and potential harm of remote public access to criminal case documents did the Center's evaluation of the pilot program identify? This report is organized around these questions.

In addition to harm or potential harm from remote public access, the Committee asked the Center to study the potential harm posed by online criminal dockets, which contain entries such as hearings, filings of motions, and issuance of orders for a given criminal case. These entries are accompanied by descriptions of the entries, regardless of whether electronic images of documents are available. The question is whether these descriptions can contain harmful information. The Committee selected six additional districts to serve as comparison courts for the supplemental study of docketing information.

The sources of information for this report are: 1) telephone interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys and U.S. Attorneys in the eleven pilot courts and four comparison courts; 2) a survey of district and magistrate judges in the ten pilot district courts; 3) a study of defense attorney location relative to the federal courthouses in the ten pilot district courts; and 4) a study of docket sheets in the six additional comparison courts. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

Modes of Access. The pilot courts' most common means of accessing online case information is PACER (Public Access to Court Electronic Records). Less common is the use of RACER (Remote Access to Court Electronic Records).

Court Practices. The actual practices of the pilot courts cannot be easily summarized and compared, as these practices vary considerably. Most of the pilot courts had allowed remote public access before the formal pilot program began, and each court had a different set of criminal case documents that it made available in electronic form online. The pilot courts that had offered remote access to criminal case documents before the pilot project sought to conform their practices to the AO's operational guidelines on document availability and redaction, but with varying results. The variation in the adoption of the operational guidelines is most apparent when these practices are considered in terms of the number and types of documents the courts make available via remote public access.

The operational guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents. As respondents in the district courts often noted, the prohibited documents were not made available

online before the pilot project and, therefore, posed no implementation issues for the pilot district courts.

The pilot district courts that make a limited subset of other criminal case documents available online adopted the operational guidelines with few or no reported problems. Respondents in the district courts with greater numbers of documents available online often reported concerns about the operational guidelines and the need to balance competing demands of document availability (to meet the needs of users), document redaction, and monitoring of guideline compliance by filing parties. Several of the courts with more extensive online offerings found that they had to make changes in their practices to comply with the operational guidelines. These changes included one or more of the following: changes to document formats, special document scanning procedures, exemptions to the redaction rules, and removal of certain documents from remote public access. Virtually every pilot court respondent, however, whether they were judges, clerks, or defense attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: clerks' offices have neither the personnel nor the training and experience to redact each filed document.

The Eighth Circuit reported no problems in implementing the operational guidelines.

Local Rules. None of the pilot courts had instituted new local rules for the pilot project at the time this report was prepared. Some courts had working or advisory groups address the issue of redaction, with input from the U.S. Attorney's office and the defense bar. One court, which makes virtually all unsealed documents available online, turned the task over to its local rules committee. However, that committee did not reach an agreement on a new rule for document availability and redaction, and that court has not implemented the operational guidelines. While this report was being prepared, another of the pilot courts had proposed an amendment to its local rules that specified how identifying information in pleadings and other filed documents would be made available to the court but not to the public.

Advantages/Disadvantages to Parties. Interview respondents in the pilot courts reported four categories of advantages of remote access to parties (and attorneys): access to information; case tracking; organizational/operational benefits; and general public benefits.

Most interview respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from chief judges, clerks, and defense attorneys. Respondents reported few disadvantages of remote public access. The only

disadvantage reported by more than one respondent was the potential misuse of criminal case documents, in the form of identity theft or the identification of cooperating defendants.

Advantages/Disadvantages to Judges and Staff. Respondents reported four categories of advantages to judges and court staff:

- savings of time and money;
- remote access by judges;
- organizational benefits (separate from time and money savings); and
- highlighting of the open and public nature of the court.

Respondents described few disadvantages to the court. Those mentioned fall into three categories:

- the court must take on a gate-keeping function, deciding which documents are available via remote public access;
- the organizational burden of scanning documents and ensuring that only selected documents are available to the public; and
- loss of control over publicly available documents and the information therein.

Sealed Documents. When asked if requests by government or defense attorneys in the pilot courts to seal documents might increase, to prevent document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about requests to seal any portion of a case or the entire case.

Harm. For the period of the pilot project, interview respondents reported no instances of harm resulting from remote public access in any of the pilot courts.²

The majority of the pilot courts and all of the comparison courts made criminal case documents available through remote public access prior to September 2001. For the period before the pilot project, interview respondents reported no verifiable instances of harm resulting from remote public access in any of the pilot court or comparison courts. A CJA Panel attorney in a comparison court reported a threat to a client who was cooperating with the government.

² During the pilot project there was a case of alleged identity theft filed in federal court in the Middle District of Florida, a non-pilot court. The defendants targeted prominent and wealthy individuals who had been charged with crimes in federal court, used the Internet and publicly available federal court records to gather identifying information about these individuals, and with that information, established credit cards and lines of credit. According to investigators, the case does not involve the misuse of documents available via remote public access. The defendants allegedly used PACER to track the progress of their victims' criminal cases, but obtained by mail copies of documents filed in federal courts around the country.

However, the source of the information behind the threat could not be traced directly to remote public access to online documents. The information could have been obtained from other sources that include co-defendants, the online docket (without accessing criminal case documents) and the paper file kept in the clerk's office. This was the only reported incident in any of the comparison courts.

U.S. Attorney Interviews. The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files³ DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Survey Results. The survey results confirmed many of the findings of the interviews. The district and magistrate judges we surveyed saw more advantages than disadvantages to allowing remote public access to criminal case files. This was especially the case with judges who used remote access to electronic criminal case files. When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unlimited remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their district. The response was 100 percent no.

THE REPORT: STUDY CONTEXT AND DESIGN

Context

At its September 2001 meeting, the Judicial Conference adopted recommendations by the Committee concerning remote public access to electronic civil, criminal, bankruptcy and

³ U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

appellate case files. With regard to criminal case files, the Judicial Conference adopted this recommendation:⁴

Public remote electronic access to documents in criminal cases should not be available at this time, with the understanding that the policy will be reexamined within two years of adoption by the Judicial Conference.

At its March 2002 meeting, the Judicial Conference endorsed a recommendation by the Committee to create a pilot project to study the impact of remote public access to electronic criminal case files. The Center conducted the evaluation of the first year of the pilot project, May 2002 to March 2003), under the guidance of the Committee's Subcommittee on Privacy Policy Implementation.

The evaluation was designed to answer five general questions.

1. **Description of Court Practices.** What kinds of documents and information are the courts making available electronically?
2. **Rules.** What rules and procedures have the courts promulgated?
3. **Party Advantages/Disadvantages.** What is the utility of remote public access and electronic filing to parties in criminal cases?
4. **Judge and Staff Advantages/Disadvantages.** What effect does a policy that limits public access have on judges and court staff?
5. **Harm.** Has anyone been harmed or threatened with harm because of information contained in case documents that were obtained through remote public access?

The pilot courts were asked by the AO to implement operational guidelines, which specified that certain documents and certain information could not be made available via remote public access. Consequently, the rules and procedures implemented by the courts largely concern which documents and information are made available and how these restrictions are effected. Therefore, the first two questions will be answered together.

Study Design

The study has four parts that will help answer the evaluation questions: interviews with chief judges, clerks of court, federal defenders, CJA panel attorneys, and U.S. Attorneys in the pilot courts and a set of comparison courts; a survey of district and magistrate judges in the pilot

⁴ JCUS, *supra* note 1.

district courts; a study of defense attorney location relative to the federal courthouse in the pilot district courts; and a study of docket information in a second set of comparison courts. This section describes the pilot and comparison courts and the purposes and data sources for these parts of the study.

Selection of Courts. To answer the study questions, the Committee selected three categories of courts. These categories of courts represent a range of experiences with public access and include courts that are currently making case documents available electronically to the public as well as courts that did so before September 2001. The courts in each category are listed in Table 1. The first category, the Pilot Courts, consists of ten district courts and one court of appeals, to all of which the Judicial Conference granted an exemption to the policy prohibiting remote public access to electronic images of criminal case documents. Nine of the district courts offered remote public access to criminal case documents before September 2001, and as a result have considerable experience with such access. Therefore, these courts can speak to many of the study questions and speak more authoritatively than other courts about the impact of permitting remote public access. Two other courts were added to the list: the District of the District of Columbia and the Eighth Circuit. At the time of the Committee's recommendation, the District of the District of Columbia planned to begin making documents available online and the court of appeals made briefs available online in electronic form before September 2001.

The second category of courts in Table 1 displayed electronic images of criminal case documents prior to September 2001, but were not granted an exemption to the Judicial Conference policy (Comparison Courts, Group I). These courts have prior experience with electronic public access and therefore can speak to many of the study questions. These courts can also speak about the impact of not permitting remote public access to criminal case documents. The third category in Table 1 consists of courts that have never made criminal case documents available online to the public (Comparison Courts, Group II). We used this third set of courts for a study of online criminal dockets (see below).

Table 1

Pilot Courts	Comparison Courts Group I	Comparison Courts Group II
S.D. Cal.	S.D. Iowa	D. Colo.
D. D.C.	W.D. N.C.	M.D. Fla.
S.D. Fla.	W.D. Okla.	S.D. N.Y.
S.D. Ga.	D. Vt.	M.D. Tenn.
D. Idaho		W.D. Va.
N.D. Ill.		W.D. Wisc.
D. Mass.		
N.D. Okla.		
D. Utah		
S.D. W.Va.		
Eighth Circuit		

Interviews. Between September 2002 and April 2003, Center staff conducted interviews in the pilot courts and Group I of the comparison courts. In the pilot courts, the chief judges and clerks of court were interviewed at the beginning of the study and at the end of the study to inquire about changes in court policies or procedures since the first interview. In the pilot district courts, federal defenders⁵ or assistant federal defenders, CJA panel attorneys, and U.S. Attorneys or their designees were interviewed once. In the Group I comparison courts, chief judges, clerks of court, and federal defenders were interviewed once.

For various reasons, not all of these individuals were interviewed in every pilot court. For example, in six of the ten pilot courts and the court of appeals, the chief judge chose not to be interviewed, deferring to the clerk instead. One of the pilot courts does not have a federal defender; the CJA panel attorney representative was interviewed instead. The District of the District of Columbia has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). As a result, only the chief judge of the District of the District of Columbia was interviewed; no other interviews were conducted in that district.

⁵ Several of the pilot district courts have Community Defenders. For purposes of this report, the terms "federal defender" and "defender" will refer to Community Defenders as well as Federal Defenders.

Finally, interviews could not be scheduled with two of the remaining nine U.S. Attorneys by the time this report was prepared.

The interviews dealt with the questions listed earlier: harm, advantages and/or disadvantages to parties, judges, court staff, and the public, court practices, and rules. Respondents were also asked about document availability and redaction and the operational guidelines. A basic set of questions was asked of all respondents, with more in-depth questions tailored to the respondent. For example, chief judges and clerks were asked about court practices and rules; attorneys were asked about their everyday use of remote access. In addition, the interviews in the Group I comparison courts included questions about the impact of ending remote public access to electronic criminal case documents at the conclusion of the pilot study.

Pilot Court Survey. The Center sent a questionnaire to 62 magistrate judges and 133 district judges in the ten pilot district courts. The questions dealt with a subset of the issues covered in the interviews, with a focus on advantages and disadvantages of remote public access, document availability, and redaction. Questionnaires were returned by 32 of the 62 magistrate judges (52 percent) and 64 of the 133 district judges (48 percent). The range of responses from both groups was substantial and we are confident that they are representative of the views of magistrate and district court judges in the pilot courts.

Distance of Attorney Offices from the Federal Courthouse. To better gauge the advantages of remote access to parties, a study was conducted of defense attorneys in a sample of criminal cases filed in the ten pilot district courts during fiscal year 2001. The purpose was to obtain information about: 1) the proportion of cases in which the defense attorney is a private attorney (as opposed to a federal defender), and 2) the location of defense attorneys' offices relative to the federal courthouse. Federal defenders are typically located in or near the federal courthouse, whereas private attorneys may or may not be located in the same city as the courthouse. Remote access to electronic criminal case files is likely to be of greater value to attorneys who do not have easy access to the federal courthouse.

Criminal Docket Sheets. The electronic docket, which is publicly available regardless of whether electronic criminal case documents are available, contains a significant amount of information and entries about a criminal case: initial charges, pretrial release status, final charges, trial information, plea, sentence disposition, and other information. We were especially interested in determining whether there is information in the docket that is potentially harmful, whether to defendants, victims, witnesses, or 3rd parties. The interviews addressed this question, but to supplement the interview data, we undertook a modest analysis of docketing information in the Group II Comparison Courts (see Table 1). Docket sheets were downloaded for a random sample

of 100 cases filed in fiscal year 2001 from each of these six comparison courts. Our examination of the docketed information was guided by information we obtained during the interviews about potentially harmful docket entries.

FINDINGS FROM THE PILOT COURTS

The majority of findings reported in this section come from the interviews with chief judges, clerks, federal defenders and assistant federal defenders, and CJA panel attorneys. As a reporting convention, the term federal defender will refer to both federal defenders and assistant federal defenders,⁶ and defense attorney will refer to both federal defenders and CJA panel attorneys. In general, interview results will not be reported in terms of the numbers or proportions of respondents expressing a view or reporting a piece of information. The number of interviews is too small to give meaning to frequencies, proportions, or percentages. Results from U.S. Attorney interviews are reported separately and any information obtained from U.S. Attorneys is identified as coming from that source.

The Pilot Courts

As context for the discussion of findings, Table 2 gives some information about the pilot district courts. This information is taken from tables published in Judicial Business of the United States Courts.⁷ Note that the range of criminal filings is quite large, from less than 200 to almost 4,000 criminal filings per year.

⁶ See Footnote 5.

⁷ Judicial Business of the United States Courts, 2001 Annual Report of the Director.

TABLE 2
2001 FILINGS IN THE PILOT DISTRICTS

District	Authorized Judgeships^a	Criminal Filings^b	Civil Filings^c
S.D. Cal.	8	3,853	2,618
D. D.C.	15	464	2,958
S.D. Fla.	17	1,841	8,961
S.D. Ga.	3	418	1,128
D. Idaho	2	161	697
N.D. Ill.	22	647	10,340
D. Mass.	13	403	2,884
N.D. Okla.	3.5	121	1,001
D. Utah	5	745	1,158
S.D. W. Va.	5	235	1,253

^a Table X-1A

^b Table D-1

^c Table C-3

Court Practices and Rules

The pilot project began in May 2002 when the pilot courts were sent the AO's operational guidelines on document availability and redaction (see Appendix). Upon receipt of the guidelines, the courts were authorized to allow remote public access to criminal case documents. Six of the eleven pilot courts had never stopped remote public access to criminal case documents. Four of the remaining five courts re-established remote public access (one of these courts had implemented remote access for the U.S. attorney's and federal defender's offices after September 2001). The remaining court, the District of the District of Columbia, has not yet implemented the pilot project because of the time and resources required to do so. This court did not have remote public access before September 2001 and, after the pilot project began, devoted its resources to the implementation of the Case Management and Electronic Case Filing System (CM/ECF). Therefore, this court is not included in the interview results reported here. The court is included in the results of the survey and the attorney distance study.

Mode of Access. The most common means of accessing online case information is PACER. PACER is an electronic public access service available in most federal courts. It allows a user to request information about a particular individual or case in the participating districts. It is supported through the PACER Service Center, the judiciary's centralized registration, billing,

and technical support center. Members of the public can register online for PACER accounts by providing their name, address, phone number, and e-mail address. Users are billed for their usage. The individual courts maintain their own PACER databases.

Nine of the ten pilot courts with access to criminal case documents use PACER, although in three of these courts criminal case documents are accessible only through RACER, an alternative system for requesting case information. RACER does not have a centralized system and can be set up so that it either does or does not require an ID and password. The tenth court uses RACER exclusively.

Court Practices. The guidelines prohibit remote public access to certain documents such as pretrial and presentence investigations, Statements of Reasons, and sealed documents (see the Appendix for a complete list of documents). The guidelines also require the redaction of certain information from all criminal filings: Social Security Numbers, financial account numbers, dates of birth, names of minor children, and home addresses. Redaction is the responsibility of the filing parties, with the possibility of sanctions by the court for failure to comply.

The Eighth Circuit reported no problems implementing the operational guidelines. Attorneys are sent a notice with the guideline information on redaction when a case is docketed. That notice also instructs attorneys not to include Presentence Reports and Statements of Reasons in their briefs.

The pilot district courts described varied experiences implementing the operational guidelines. As respondents often noted, the prohibited documents were not made available online before the pilot project and, therefore, posed no implementation issues for the pilot courts. However, the redaction requirements produced a variety of experiences among the pilot district courts. Several courts reported no problems implementing the redaction requirements. Several other courts described significant problems that had to be resolved before and after the guidelines were put into effect. A chief judge in one pilot district described the redaction requirements as a "disaster" when applied to certain types of pretrial documents (e.g., bail surety documentation) that, of necessity, contain identifying information on the list of information to be redacted. A clerk in another pilot district said that he would have opposed participation in the pilot project had he known about the redaction requirements beforehand. Another pilot district could not reach an agreement about a local rule for redaction and, consequently, never implemented that portion of the operational guidelines. From the beginning of the pilot project to the time this report was prepared, there has been no redaction of documents filed in and available via remote public access from this court.

Based on the interviews and examination of the courts' online dockets, much of the variation in implementation experiences seems to be associated with the number and variety of criminal case documents the district courts make available online. The courts that offer more criminal case documents online tended to report more issues with implementation than did the courts with fewer types of documents available. If there was an effect of the number or variety of documents on the implementation, it may have been enhanced by the fact that document availability was also associated with the number of criminal filings. Courts with larger numbers of filings also tended to offer more documents online. However, any associations should be viewed cautiously in a sample of nine district courts.

There is no typical list of criminal case documents available online among the pilot district courts. At a minimum, a pilot district court might have indictments, informations, motions, orders, and the Judgment and Commitment Order (less the Statement of Reasons). The districts that offer more documents online have, in addition to those cited above, one or more of the following: warrants, supporting documents for bond applications, magistrate information sheets, financial affidavits, petitions in supervised release violation cases, sentencing memoranda, plea agreements, and transcripts. Many of these documents contain information that the operational guidelines require be redacted.

One of the pilot district courts makes every unsealed document publicly available online (except transcripts and documents on the prohibited list). The clerk of this court stated that attorneys rely heavily on the availability of these documents in the course of their work. This court proposed a local rule for redaction, but the local rules committee could not come to an agreement on the rule. A member of the local rules committee was specific in stating that the U.S. attorney's office did not want to redact any of its filings and sought exemptions to any redaction requirements. The committee could not reach agreement and the redaction portion of the operational guidelines had not been implemented at the time this report was prepared.

Another court established a working group to implement the operational guidelines; the group included representatives from the U.S. attorney's office, the federal defender's office, and the local defense bar. This court also has an extensive list of documents available to the public online. The clerk of this court described PACER as a "workhorse" and an important factor in keeping their high volume of criminal cases moving. The court had issued a general order at the beginning of the pilot project that was modeled on the operational guidelines. Based on the working group's efforts, a revised general order was issued, adding a number of documents to the prohibited list that it decided could not be redacted easily.

Somewhere in the middle of these varied experiences is the pilot district that has taken a measured approach to making documents available online. Although it does extensive scanning of documents for internal use, only indictments, informations, and orders are publicly available on the court's web site. A working group, with representatives from the U.S. Attorney's office and the local bar, has met to make decisions about which documents to make available. But, according to the clerk, they have moved slowly, and intentionally so.

Several districts had a more specific implementation matter: 18 USC § 3612(b)(1)(A) requires that a "judgment or order imposing, modifying, or remitting a fine or restitution order of more than \$100 shall include the name, social security account number, and residence address of the defendant." Several courts interpreted this statute as a prohibition on redacting Judgment and Commitment Orders. This interpretation led to various solutions. One district simply blocked the social security number and date of birth with opaque tape before scanning the documents. Another district moved these identifiers to the Statement of Reasons. This same district was also concerned about the identifiers in the petition filed in supervised release violation cases. The clerk did not want to produce two versions of the petition (or of the Judgment and Commitment Order)—redacted and unredacted—and these petitions are now filed under seal. A third district decided to not make Judgment and Commitment Orders available online.

Compliance and Monitoring. The operational guidelines put the responsibility for redaction of criminal filings on the filing parties. Based on the guideline's recommended language for notice to the bar of the pilot project and its redaction requirements (see Appendix), the courts were not obligated to check each document for compliance. In fact, one clerk read the guidelines to mean that the court was not obligated to do anything different than what it had been doing. Apart from the district courts' redaction of internally-generated criminal case documents, the courts did not seem to monitor compliance, or monitor it closely. Several clerks expressed the concern that the volume of documents processed by their courts made monitoring difficult, particularly monitoring of private defense attorneys unfamiliar with the redaction requirements. At the same time, defense attorneys in several districts reported receiving assurances from their respective courts that they would not be sanctioned for inadvertent failures to redact.

Advantages and Disadvantages to Parties

In the interviews, most respondents extolled the advantages of access for attorneys and, to a lesser extent, for defendants and the general public. Defense attorneys were generally very positive about the benefits to them and their staffs of remote access. The advantages cited in the interviews can be grouped generally into four categories: access to information; case-tracking; organizational/operational benefits; and general public benefits.

Access to information. Remote access provides immediate, remote, and simultaneous access to case information and documents, 24 hours a day. In other words, attorneys can access case documents from their offices, any time of the day, regardless of who else might be accessing the documents. Everything—the docket and filed documents—is in one place (depending on the documents a court makes available online). And access to all of the filed cases creates a research tool for attorneys (as well as for law students and academics). These were the most common responses, and they came from judges, clerks, and attorneys. Several respondents noted that this is a form of equal access that helps “level the playing field” for defense attorneys who might be located some distance from the court and for whom trips to the clerk’s office could be burdensome.

Case tracking. With remote access, attorneys, defendants, defendants’ families, and other members of the public can track cases. U.S. attorneys and defense attorneys can check for new filings in their cases, without waiting for documents to be sent to them by the court or by opposing counsel.

Organizational/Operational Benefits. Attorneys can print documents as they are needed or, if documents are not available online, they can determine which documents to request from the clerk’s office. Federal defenders can use online charging documents to assign cases in their offices. In response to questions, the clerk’s office can direct the media to cases online for more information.

General Public. When asked about possible advantages to the public of remote access, the most common response was that it created or reinforced the concept of the courts as an open, public institution. This response came from every type of respondent: chief judges, clerks, and defense attorneys. In fact, this served as the basis for many respondents to state that there should be remote public access to all or most unsealed documents and that as little redaction as possible should take place.

The chief judges, clerks, and defense attorneys cited few disadvantages of remote public access to attorneys, defendants, or to the general public. The only disadvantage cited more than once was harm caused by misuse of documents or the information therein (*e.g.*, identity theft). The most commonly cited concern was identity theft, followed by the identification of and possible harm to cooperating defendants, informants, witnesses, or victims. In a typical criminal case, identifying information about a defendant might be scattered throughout the range of filed documents—indictments and informations, documents in support of bond applications, financial affidavits, and Judgment and Commitment Orders contain or may contain identifying information such as social security numbers, financial account numbers, dates of birth, and home

addresses. As a counterpoint, several respondents stated that criminal defendants do not represent good targets for identity thieves (but see footnote 2). As for cooperating defendants, some respondents were skeptical that documents posed much of a threat. Several respondents said that they assume a defendant is cooperating if a case does not go to trial. One defense attorney said that information about cooperation “gets around the street” and that the last place anyone would look for it is online.

Other disadvantages, each reported by no more than one respondent, are:

- easy access by jurors or witnesses to criminal case documents;
- remote access requires a certain level of technology—a computer, Internet service, and a PACER account—that may be beyond the reach of some individuals; and
- inconsistency within and between districts as to the number and types of documents available—remote public access is no guarantee that certain documents and information are available in this format.

Advantages and Disadvantages to Judges and Court Staff

Only chief judges and clerks of court in the eleven pilot courts were asked about advantages and disadvantages to judges and court staff. They reported advantages that can be grouped into four categories: savings of time and money; remote access by judges; organizational benefits (separate from time and money savings); and enhancements to the public nature of the court.

Savings. Most of the chief judges and clerks discussed the time and money savings to the court of remote public access. These savings stem from the fact that staff spend less time pulling files, making copies of documents, and answering questions. One clerk did point out that these savings are assumed to occur; no empirical assessment of the savings in time and money has been made.

Remote Access by Judges. With remote public access, judges have access to information and documents from their cases regardless of location. If a judge travels to another place of holding court, docket and case file information are still readily available. Remote access is particularly valuable for court of appeals judges, who are located throughout their respective circuits.

Organizational Benefits. Respondents cited several organizational benefits apart from savings of time and money: less traffic in the clerk’s office; errors are more likely to be detected, and detected earlier because attorneys and others have fast and ready access to documents; the media and the general public can be referred to the online docket for answers to questions; scanning of documents facilitates fax notification of attorneys of newly filed documents; and the use of a new technology positions the court to take advantage of future technological changes.

Public Nature of the Court. Many of the chief judges and clerks cited this as an advantage of remote public access. The courts are a public institution, and ready access to information highlights and reinforces that quality.

The chief judges and clerks of court identified few disadvantages to the court of remote public access. Those reported were of three types generally: gate keeping function; organizational; and loss of control over information. Several respondents reported that there were no disadvantages to judges nor to the court of remote public access.

Gate keeping. Remote public access forces the court to make decisions about which documents and what information in those documents the public can and cannot view online.

Organizational. Remote public access requires extra work by the clerk's office, scanning documents and ensuring that the correct documents are made available (*i.e.*, ensuring that sealed documents are not inadvertently made available).

Loss of Control. Once documents are available online, the court no longer has any control over who views them, nor the uses to which they are put.

Harm Resulting From Remote Public Access

The majority of the pilot courts had made documents available online prior to September 2001. These documents were also made available as part of the pilot project, however, the pilot courts were not required to redact the pre-September 2001 documents for the pilot project. These unredacted documents were accessible alongside the redacted documents filed under the operational guidelines of the pilot project. There were exceptions as several courts prohibited access to documents filed during the pilot project that could not be easily redacted (*e.g.*, bond documents, Judgment and Commitment Orders) and, in one district, extended that prohibition to these documents filed before the pilot project. In the majority of pilot districts the documents filed prior to the pilot courts' implementation of the operational guidelines constitute a higher level of risk than do those filed afterwards. Consequently, the availability of both redacted and unredacted documents tests the efficacy of the redaction requirements in the operational guidelines.

For the period of the pilot project, there were no reports of misuse of criminal case documents, nor were there any reports of harm stemming from the availability of these documents via remote public access.

A CJA panel attorney in a Group I comparison court reported threats to a client who had cooperated with the government. However, the source of the information behind the threats

could not be traced directly to online documents (which would have been available in that district before September 2001). The information about this defendant's cooperation could have been obtained from a number of sources that include co-defendants, the online criminal docket (without accessing criminal case documents) and the paper file kept in the clerk's office. Otherwise, for the period prior to the beginning of the pilot projects, there were no documented instances of misuse of online documents nor of harm stemming from their availability online in any of the pilot or comparison courts.

U.S. Attorney Interviews

The views of the U.S. Department of Justice (DOJ) on remote public access are contained in the Department's formal comment to the AO on privacy and public access to electronic case files as to public access to electronic criminal case files⁸ DOJ urges the Judicial Conference to consider during its policy deliberations the potential for harm to individuals or to criminal investigations and prosecutions of widespread public dissemination of criminal case information. Our interviews of U.S. Attorneys or their designees revealed no specific instances of harm to individuals, such as cooperating defendants, from remote public access nor did they report problems with investigations or prosecutions, but the pilot district courts are a small sample of all 94 districts, whose experiences may not be representative of what would happen across all federal districts.

Document Availability and Redaction

The Operational Guidelines. All respondents were asked about the document availability and redaction portions of the operational guidelines. With a few exceptions, respondents agreed with the list of prohibited documents. This result should not surprise, since the documents prohibited by the operational guidelines are treated by the courts as if they were sealed documents. In other words, these documents are not available to the public, even in the clerk's office. The lone exception is the pilot district court that makes Statements of Reasons available to the public. Respondents in that district thought that the Statement of Reasons should not be on the prohibited list. Otherwise, if respondents in the pilot courts proposed changes to the prohibited list, it was to add documents. Proposed additions to the list include: sentencing memoranda by defense attorneys, documents with mental or physical health information, financial statements, CJA vouchers, pretrial diversion information, any document involving departures, grand jury target letters, witness lists, and trial memoranda.

⁸ U.S. Department of Justice, Comments Regarding the Privacy and Security Implications of Public Access to Electronic Case Files, February 2001.

Similarly, most respondents agreed with the list of information to be redacted. Only one respondent, a defense attorney, suggested an addition to that list. This respondent would like to see the entire social security number redacted rather than just the first seven digits. Finally, virtually every respondent, whether they were judges, clerks, or attorneys, agreed that redaction had to be the responsibility of the filing parties. And they were in agreement as to why: the clerk's office does not have the personnel nor the training and experience to redact each filed document. Only the parties will be able to redact reliably the documents they file with the court.

Sealed Documents. Many respondent, especially the attorneys, brought up the issue of sealed documents. Most of the defense attorneys said that, if they were concerned about a document or the information therein, they would request that the document be sealed. When asked if requests by government and/or defense attorneys in the pilot courts to seal documents might increase, to counter document availability via remote access, most respondents were not concerned that it would become a widespread practice. Several defense attorneys said that they rely on judges to make reasonable decisions about the need to seal any portion of a case or the entire case.

FINDINGS FROM THE GROUP I COMPARISON COURTS

The four districts in comparison Group I (see Table 1 above) were selected because they had had remote public access before September 2001, for varying lengths of time, but these courts did not receive exemptions to continue that access as part of the pilot project. The chief judges, clerks, and federal defenders in these districts were interviewed after the pilot project had been in operation for approximately eight months. Since these courts were not participating in the pilot project, there was no need for multiple interviews nor for interviews at the beginning of the pilot project.

Access

These courts ended remote public access to criminal case documents when the Judicial Conference approved the policy prohibiting such access. However, three of the four courts developed alternative systems, through PACER or RACER, to allow the U.S. attorneys, federal defenders, and private defense attorneys to access online the documents for their cases. In these districts, the chief judges and clerks reported no complaints or issues resulting from the end of public access. The fourth district did not develop such a system. The clerk of court in that district reported that the U.S. Attorney's office complained about the lack of access and the federal defender reported that the lack of remote access to documents was an inconvenience.

Findings

The interviews with respondents in the comparison courts echoed those reported in the pilot courts. Respondents reported the same types of advantages and disadvantages of remote public access and the same range of views on document availability and redaction. This is not a surprising result since these courts have some history of remote access. If there was one difference that stood out, it was more ambivalence toward unrestricted remote public access, defined as no restriction on who can have remote public access. Almost half of the respondents were either undecided about unrestricted access or favored access limited to parties. The remainder were in favor of unrestricted remote public access.

SURVEY RESULTS IN THE PILOT COURTS

Advantages and Disadvantages

The mail survey of judges included questions about the advantages and disadvantages of remote public access. Judges were presented with separate lists of advantages and disadvantages and asked, for each item in each list, whether they agreed that it was an advantage or disadvantage, respectively. The lists were drawn from the interviews with chief judges, clerks, federal defenders, and CJA panel attorneys. Figure 1 contains a chart of the percentages of magistrate and district judges, separately, who agreed that each item was an advantage. There is one item missing from the chart. Since no judge agreed that there were no advantages, it is omitted from the chart.

The chart in Figure 1 (see below) shows high rates of agreement with the potential of remote public access. The percentages for district judges range from 82 percent for "attorneys can track cases" to 48 percent for "saves case preparation time." The percentages for magistrate judges tend to be lower, ranging from 88 percent for "attorneys can track cases" to 38 percent for "creates a spirit of public openness." When asked whether they access documents online, 73 percent of the judges reported doing it occasionally or regularly. Figure 2 lists the same advantages, but excludes district and magistrate judges who never use remote access. The percentages increase in virtually every category: judges who use remote access are more likely to see advantages to parties, the clerk's office, the court, and to themselves than judges who never use remote access to criminal case documents.

Figure 1
Advantages of Online Public Access

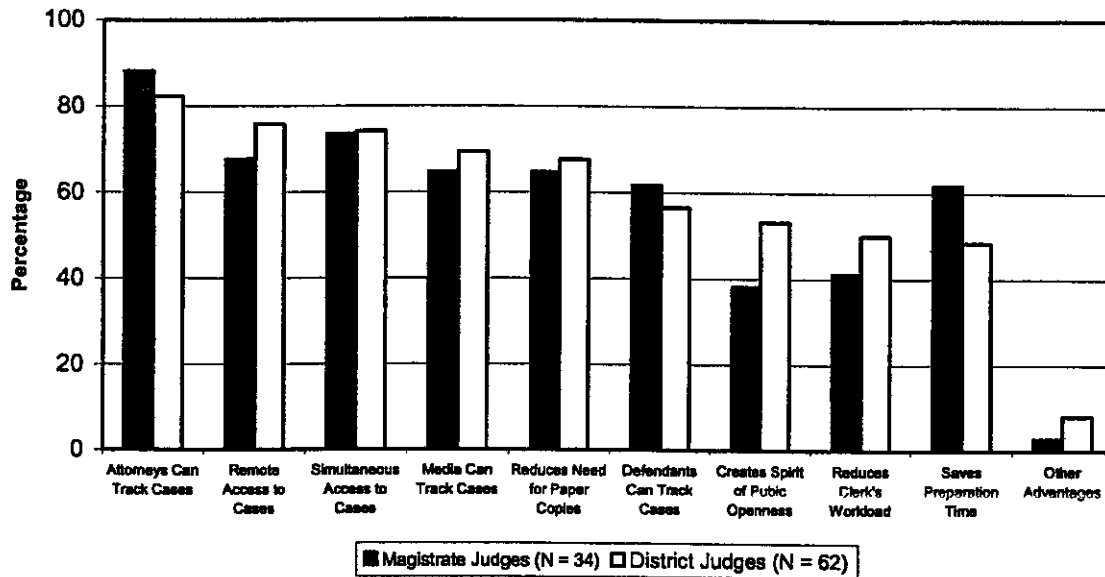
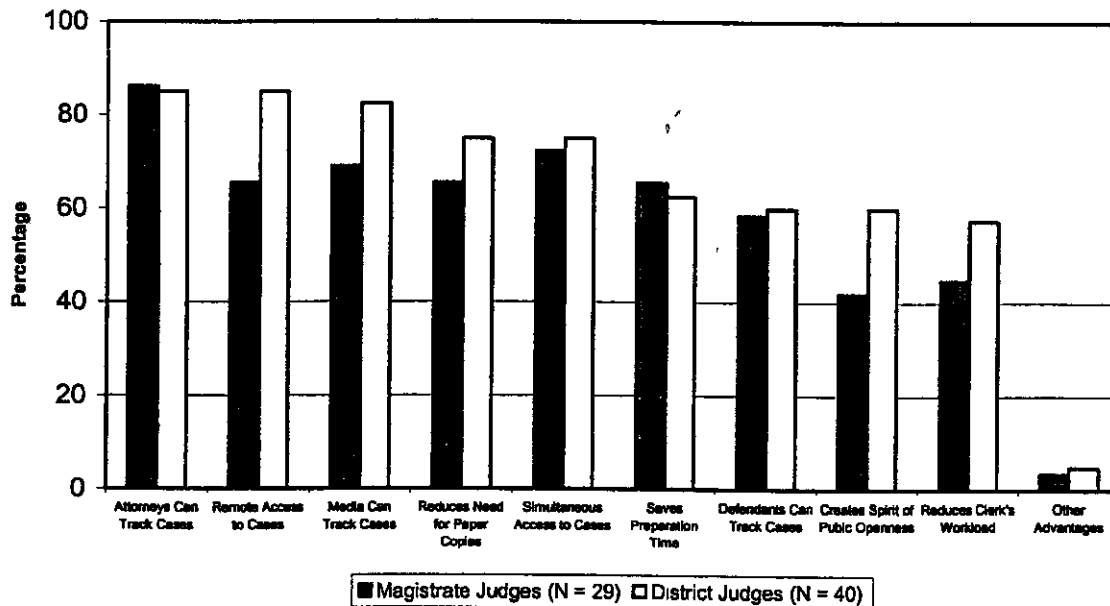


Figure 2
Advantages of Online Public Access
Judges Who Use Online Access



Although high proportions of judges see advantages in remote public access, the chart in Figure 3 shows fewer judges think there are potential disadvantages of remote public access. In Figure 3, the high and low categories are the same for magistrate and district judges: 56 percent and 55 percent for “jurors can access cases,” respectively, and 41 percent and 29 percent for “potential of identity theft,” respectively. Whereas no judges said there were no advantages of remote access, 21 percent of the magistrate judges and 15 percent of the district judges said there were no disadvantages to remote access. Figure 4 lists the same disadvantages, but for judges who use remote access. The results are more mixed than for advantages, but internally consistent. Judges with remote access are as or slightly more likely to see its risks, and therefore more likely to view danger to cooperating defendants and 3rd parties and identity theft as disadvantages. In the other categories of potential disadvantages, judges with remote access are as or less likely to see these as disadvantages.

Figure 3
Disadvantages of Online Public Access

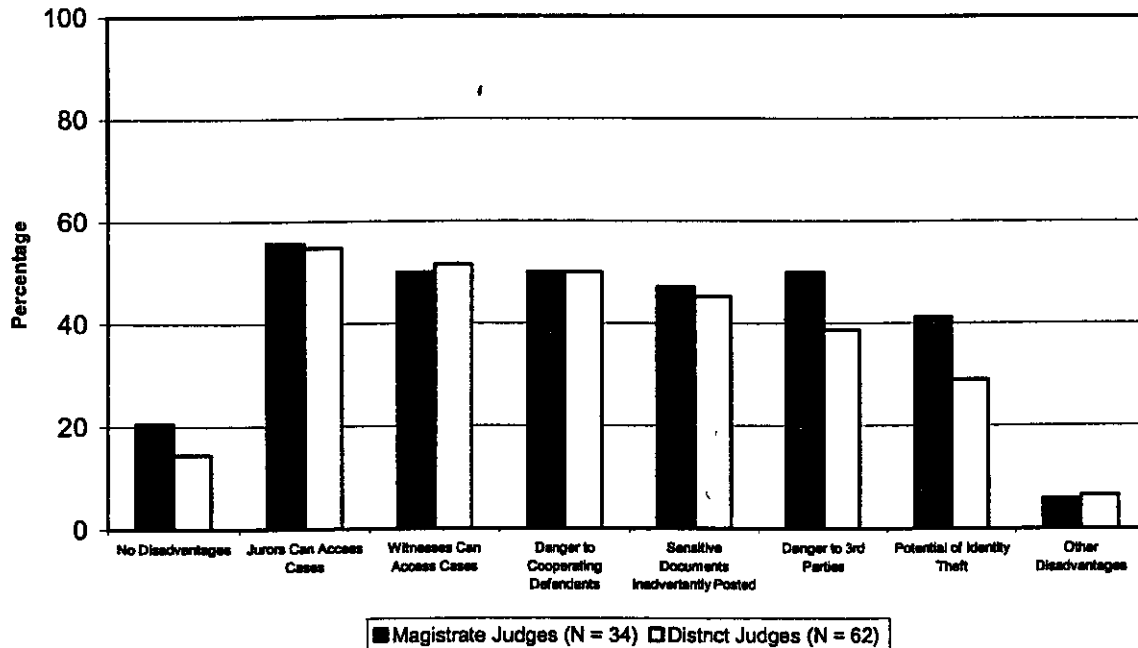
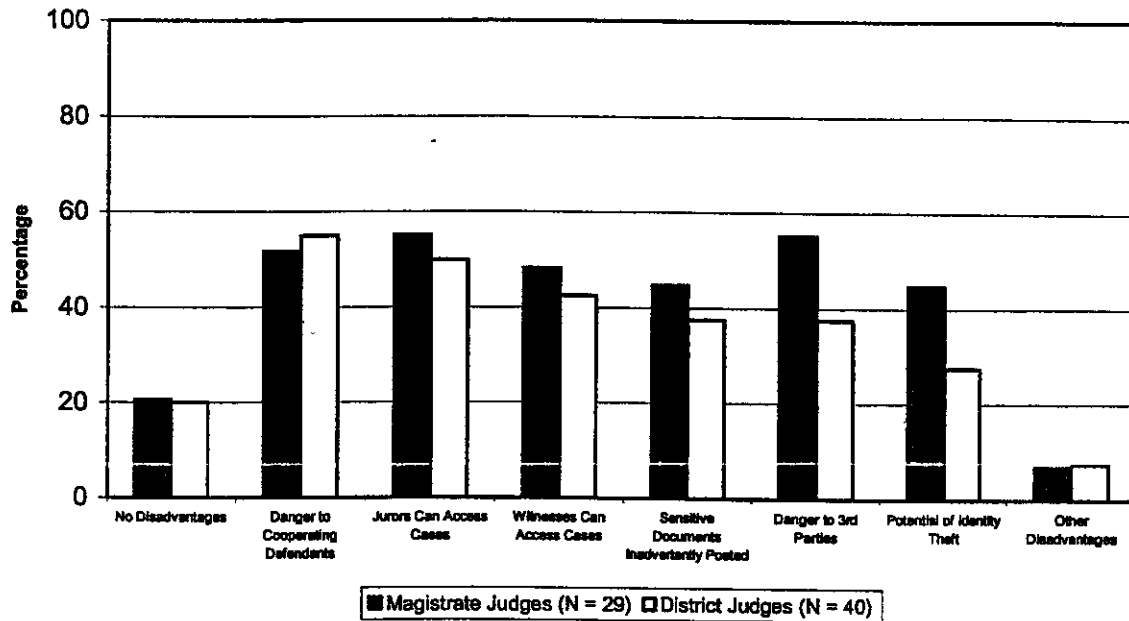


Figure 4
Disadvantages of Online Public Access
Judges Who Use Online Access



Document Availability and Redaction

Judges were asked about the operational guidelines for the pilot project, specifically whether they agreed with list of criminal documents prohibited from remote access and the list of information to be redacted from criminal documents filed with the court. With respect to the documents, 83 percent of the district judges and 88 percent of the magistrate judges agreed with the list. Judges were given an opportunity to name the documents that they would remove from that list; thirteen judges responded and each named the Statement of Reasons in the Judgment and Commitment Order. Seven of these responses were from judges in the pilot district that makes Statements of Reasons available online.

With respect to redacted information, 97 percent of the district judges and 100 percent of the magistrate judges agreed with the list. One judge suggested that “information ... material to a judicial decision” should be exempted from redaction.

When district judges were asked if there were other documents that should be prohibited or information redacted, 27 percent said additional documents should be prohibited and 9 percent said additional information should be redacted. The figures for magistrate judges are 30 percent

and 21 percent, respectively. When asked which documents they would add to the prohibited list, judges gave a variety of responses that ranged from the very general (“any doc[ument] that would endanger the safety or health of others”) to the very specific (“motions to seal”), but with no pattern. There was a similar variety of unpatterned responses as to what additional information should be redacted.

Restrictions on Remote Access

When judges were asked about restrictions on access to criminal case documents, 57 percent of the district judges and 56 percent of the magistrate judges responded that there should be unrestricted remote public access to criminal case documents (excluding sealed documents). Only 4 percent of the district judges and 6 percent of the magistrate judges responded that there should be no public access. Of the remaining judges, 19 percent of the district judges and 24 percent of the magistrate judges indicated that access should be restricted to parties and their attorneys.

Harm

The judges were asked whether, to their knowledge, any harm had resulted from remote public access in their districts. The response was 100 percent no.

ATTORNEY LOCATION IN RELATION TO THE FEDERAL COURTHOUSE

To supplement the interview and survey data, a study was conducted of the location of defense attorneys, both federal defenders and private attorneys, relative to the courthouses in their respective districts. The purpose was to determine whether, based on their distance from the court and the clerk’s office, remote access to criminal case documents presented a real advantage. Distance to the courthouse was measured by the attorneys’ postal Zip Codes, which provides a proximate distance.

Samples of 110 cases were drawn from each of the ten pilot districts. Cases for which addresses were not available were eliminated from the sample, as were a small numbers of cases represented by both federal defenders and private attorneys. If more than one private attorney was listed on the docket, only the first attorney was used. Table 3 contains information about the distribution of the sampled cases for federal defenders and private attorneys.⁹

⁹ The data in Table 3 were weighted to adjust for the fact that a fixed size rather than proportionate size sample was drawn from each district.

Table 3
Attorney Distance to the Courthouse

Attorney	N	Distance to the Courthouse (in Miles)		
		Median	75 th Percentile	90 th Percentile
Federal Defender	382	0.5	0.7	59.3
Private Attorney	649	1.1	16.0	52.2

The median value reported in Table 3 is the mid-point of the distribution of distances to the courthouse—half of the distances are below that value. The 75th and 90th percentiles are similar measures of the distribution of distances—75 percent and 90 percent of the distances are below their respective percentile values. The results show, first, that private attorneys represent more cases than federal defenders. One of the pilot districts—the Southern District of Georgia—has no federal defender; private attorneys represent all cases in this district. If this district is removed from that total, private attorneys still outnumber federal defenders. Second, in the majority of cases, the attorneys are within about one mile of the courthouse. In 75 percent of the cases with a federal defender, that attorney is still located within one mile. But in 75 percent of the cases with a private attorney, the attorney is located within 16 miles of the courthouse. Alternatively, in 25 percent of the cases in their respective categories, federal defenders are located .7 miles or more from the courthouse and private attorneys are located 16 miles or more from the courthouse.

One conclusion to be drawn from this analysis is that the vast majority of defense attorneys are local. Another conclusion is that, given the distances involved, private attorneys can benefit more from remote public access than federal defenders. They are located farther from the courthouse and therefore do not necessarily have ready access to the clerk's office. In the interviews, one federal defender stated that private attorneys gain the most from remote access, for this reason. Two other federal defenders reported that their offices were not in the courthouse, albeit nearby, and that remote access compensated for their more remote location.

FINDINGS FROM THE STUDY OF DOCKET INFORMATION

The final question on which we focused was whether information on the docket sheets could pose a risk to defendants, witnesses, victims, or others, regardless of which criminal case documents are available via remote access. All respondents were asked during the interview about this possibility. The interview information was used to guide a study of this potential risk.

The data source for this study was a sample of docket sheets from the Group II comparison courts.

When asked about the possibility that docket information posed any sort of risk, no interview respondent could name any possibilities except the identification of cooperating defendants. When asked about this possibility, some respondents felt that it was a real risk, but most respondents did not think that the risk would arise solely from docketing information.

How would a cooperating defendant be identified through docketing information? The pilot district courts as well as the Group II comparison courts differ somewhat in how they record information about docket entries. Here are some of the ways in which information about cooperating defendants can be recorded. If the government files a motion for a downward departure based on substantial assistance to the government,¹⁰ for example, there will be entry in the docket describing a government motion, and that motion may be described as a motion by the government for downward departure. If that motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket. The result is a skip in the numbering of docket entries, which can be taken as evidence that a sealed document was filed with the court. If there is a hearing on that motion, it may be sealed and recorded in the docket in a manner similar to that for the motion. Either way, a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant. Regardless of what is or is not sealed, the docket contains information about the original charges and the sentence. These two pieces of information, when compared, may indicate that the defendant received a reduced sentence in exchange for assistance to the government. For example, one defense attorney asserted that he could identify substantial assistance with almost 100 percent accuracy by examining the initial charges, the charges of conviction, the sentencing guideline range for the charges of conviction, and the actual sentence. A defendant rewarded for cooperation will receive a sentence below the guideline range for the charges of conviction, even when that guideline range is proscribed by a mandatory minimum sentence.

Why did interview respondents discount the risk posed by online docketing information? Respondents gave a number of reasons. First, except for sealed documents, any documents filed with the court are available in the clerk's office. Many clerks' offices now have public terminals that access the court's internal system and display not only the docket but also unsealed documents that are not available remotely. No identification is needed to access documents in the clerk's office, and copies may be requested for a fee. Second, remote access requires a computer,

¹⁰ USSG §5K1.2

Internet access, and, in most districts, a PACER account. One defense attorney said that online is the last place he would expect someone interested in detecting cooperation to look. There are alternative sources for this information, including the clerk's office, co-defendants, attorneys, and "word on the street." Third, several respondents made the point that, in multi-defendant cases, cooperation at some level may be the norm. One of these respondents, a defense attorney, said that he assumes cooperation occurred if a defendant in a multi-defendant case did not go to trial. Finally, several respondents argued that a certain level of knowledge and sophistication is required to read and interpret docketing information that does not clearly report that the government moved for a downward departure based on substantial assistance.

A random sample of 100 criminal cases filed in Fiscal Year 2001 was selected from each of the six Group II comparison courts (see Table 1 above) for the docketing information study. The docket sheets for these cases were downloaded and examined. We do not report exact numbers because they would give a false sense of precision. We found sufficient variance in how docket entries are written within and between districts to conclude that the results of the docket study should be viewed cautiously. This result is not limited to these six courts. A clerk in one of the pilot courts felt that periodic reminders to the docketing clerks of the court's guidelines for composing docket entries was a good practice.

The results of docket sheet study from the Group II comparison courts are consistent with the information obtained from interviews. In three of the six districts, we found a few docket entries describing government motions for downward departures, sometimes with a notation that the motion was sealed. But not all of the motions were sealed. In the other districts, we found docket entries that described sealed documents, and sealed hearings on these documents, following a guilty plea and preceding sentencing. In these instances, it would take a sophisticated observer to guess that the defendants were cooperating with the government.

APPENDIX

Operational Guidelines for Courts Participating in the Study of Public Remote Electronic Access to Criminal Case Files

Your court has agreed to participate in a study of remote public electronic access to criminal case file documents. As part of this study, your court will be granted an exemption to the Judicial Conference policy prohibiting remote public access to electronic criminal case files and will be allowed to provide such access, within certain parameters. This document is intended to establish those parameters.

Each court will be allowed to return to the level of remote public access to criminal case files that it was providing before September 19, 2001, the date on which the Judicial Conference adopted the policy prohibiting such access. If your court was not providing remote public access to electronic criminal case file documents at that time, as part of the study, you may provide remote public access to all criminal case file documents, except those documents described below. It is important to note that the Judicial Conference policy on privacy and public access to criminal case files does not prohibit public remote electronic access to orders or opinions.

No court should provide remote public access to the following documents under any circumstances:

- unexecuted warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records; and
- sealed documents

The following personally identifying information should also be redacted by the filing party from all criminal filings as follows:

- Social Security numbers to the last four digits (*e.g.*, redact the Social Security number on a Judgment and Commitment form);
- financial account numbers to the last four digits;
- dates of birth to the year only;
- names of any minor children to initials; and

- the home address of any individual (e.g., victims).

You should make every effort to inform all filers and other court users that documents filed in criminal cases will be available to the general public on the Internet and that the filer has the obligation to redact the specified identifying information from the document prior to filing. It is recommended that you include a notice of electronic availability of criminal case file documents on your court's website, in the clerk's office and through the normal means used by your court to disseminate critical information to the bar and the public. Such notice might state:

Please be informed that this court is participating in a pilot program pursuant to which, for a limited period of time, certain documents filed in criminal cases will be electronically available to the general public via the Internet.

You should not include certain types of sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case in which it is filed. If sensitive information must be included, certain personal and identifying information, e.g., Social Security numbers, financial account numbers, dates of birth and the names of minor children, must be redacted in the document.

Counsel is strongly urged to share this information with all clients so that an informed decision about the inclusion, redaction and/or exclusion of certain information may be made. It is the sole responsibility of counsel, the parties, and any other person preparing or filing a document to be sure that the document complies with this redaction requirement. The clerk will not review each document for redaction. Counsel, the parties and any other person preparing or filing a document are cautioned that failure to redact personal identifiers and/or the inclusion of irrelevant personal information in a document or exhibit filed with the court may subject them to the full disciplinary and remedial power of the court.

Thank you for agreeing to participate in this study regarding public remote electronic access to criminal case files. Your assistance and experiences will provide valuable information that will make it possible to assess the current state of electronic access to criminal case file information and to develop appropriate levels of access to this information in the future. If you have any questions regarding this document or your participation in the study, please contact Katie Simon, Attorney-Advisor, Court Administration Policy Staff via e-mail at Katie_Simon@ao.uscourts.gov, phone at 202-502-1560, or fax at 202-502-1022.







JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

Memorandum of Action

**Executive Committee
United States Judicial Conference**

CAROLYN DINEEN KING
CHAIRMAN, EXECUTIVE COMMITTEE

(713) 250-5750
(713) 250-5050 FAX
CDKING@CA5.USCOURTS.GOV

June 17, 2003

The Executive Committee took action by mail ballot concluded June 17, 2003, on the following matters:

(1) E-Government Act of 2002

Subsection 205 of the E-Government Act of 2002 (Public Law No. 107-347) mandates the development of national rules addressing the protection of personal identifying information and states that the Judicial Conference may issue interim guidance pending the development of formal rules. An earlier version of the legislation did not require the development of formal rules and allowed the Judicial Conference to establish its own rules to protect privacy and security concerns relating to court records. With Conference endorsement, a bill has been introduced in the House of Representatives, H.R. 1303, 108th Congress, that is consistent with the earlier version of the legislation. At the request of the Department of Justice, which apparently favored the use of formal rules, markup of H.R. 1303 was delayed, and staff of the House Judiciary Committee requested that the judiciary and the Department of Justice work together to find a solution agreeable to both. To that end, Administrative Office staff and DOJ staff developed a compromise proposal to which both sides agreed.

The Committee on Court Administration and Case Management endorsed the joint proposal and, because markup of the bill was imminent, sought its approval by the Executive Committee on behalf of the Judicial Conference. By mail ballot concluded on June 17, 2003, the Executive Committee approved the joint proposal, a copy of which is attached.

(2) The Proposed Involuntary Bankruptcy Improvement Act of 2003

On June 10, 2003, the House passed H.R. 1529 (108th Congress), the Involuntary Bankruptcy Improvement Act of 2003, which was introduced by Representative F. James Sensenbrenner, Jr. (R-WI). The legislation would amend section 303 of the Bankruptcy Code to require a bankruptcy court, on motion of an individual involuntary debtor (1) to expunge from court records the petition and all records and references relating to the petition, if the petition initiating the case is false or contains any materially false, fictitious, or fraudulent statement; and (2) to permit a bankruptcy court to enter an order prohibiting all credit reporting agencies from issuing a consumer report containing information relating to the individual debtor's dismissed involuntary bankruptcy case.

While recognizing the laudable intent of the legislation (*i.e.*, to prevent the victim's credit rating and reputation from being harmed), the Bankruptcy Committee believed that this goal would best be achieved if the court were to retain tangible proof of the bad faith filing and subsequent dismissal, to assist with any subsequent prosecution and help reinstate the victim's pre-petition credit rating. Because Senate consideration of the legislation could occur at any time, the Bankruptcy Committee asked the Executive Committee to consider the matter on an expedited basis on behalf of the Conference.

The Executive Committee, by mail ballot concluded on June 17, 2003, approved the recommendation of the Bankruptcy Committee that the Judicial Conference express concern regarding legislation that would expunge case records in an involuntary bankruptcy case filed in bad faith against an individual and instead support a policy and procedure to retain case records upon dismissal of such cases with a notation, flag, or other means to signal to the public the nature of the dismissal.

Carolyn Dineen King

Committee: Gregory W. Carman
Joel M. Flaum
Thomas F. Hogan
D. Brock Hornby
Boyce F. Martin, Jr.
Leonidas Ralph Mecham
John M. Walker, Jr.

Attachment

June 20, 2003

Joint Proposal of Judicial Conference and Department of Justice
for Amendment of Section 205 of the E-Government Act

Change subsection (c)(3) of the E-Government Act of 2002 to read as follows:

(3) Privacy and security concerns.--

(A) (i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) (I) Except as provided in subclause (II), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.

(II) Such rules may require the use of appropriate redacted identifiers in lieu of such protected information in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response--

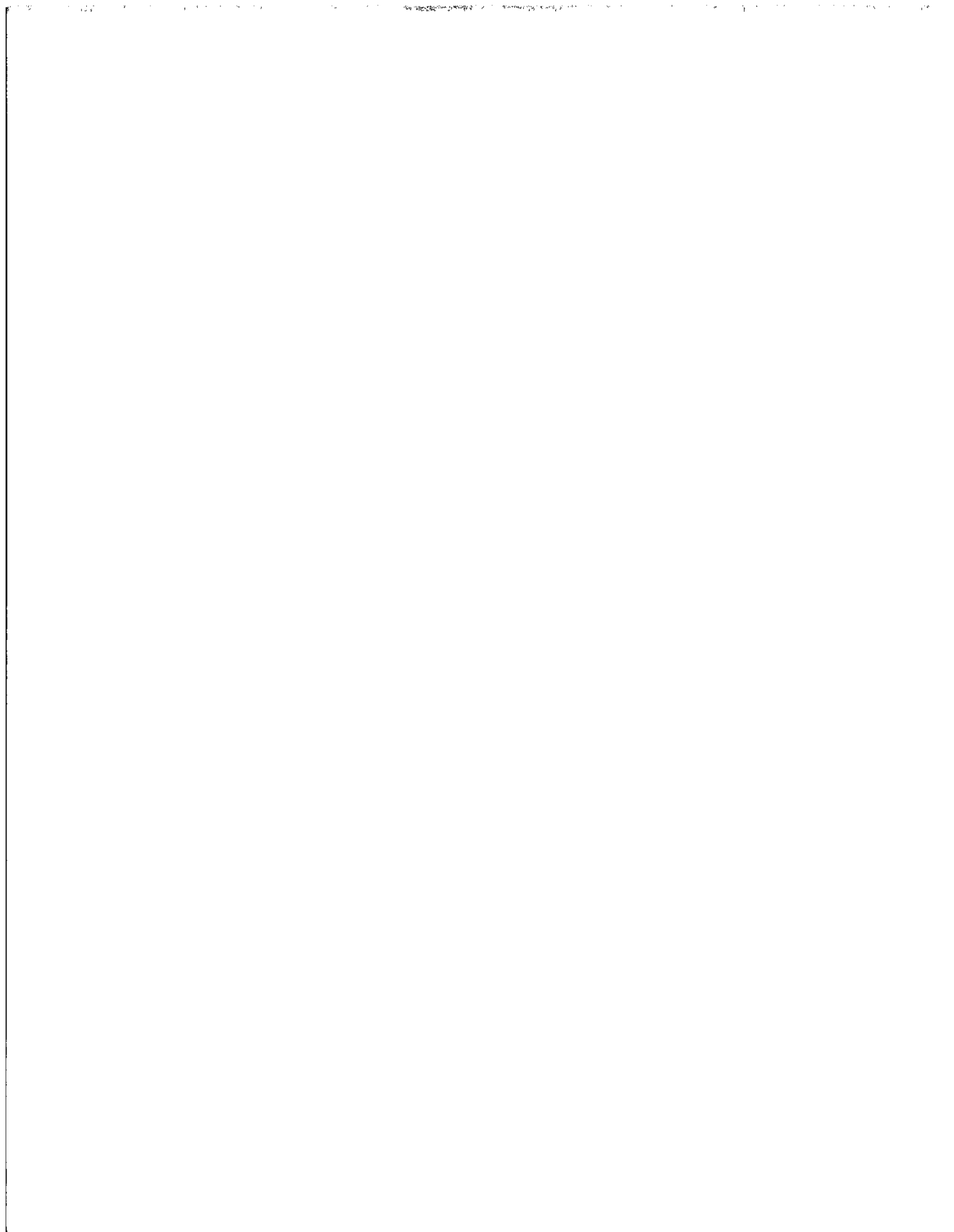
(aa) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that (i) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case and (ii) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

(bb) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

(B) (i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing or electronic conversion shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.



ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: December 15, 2003

FROM: Bob Deyling, Office of Judges Programs

SUBJECT: Rules-based approach to privacy and public access: an initial outline

TO: Judge Fitzwater
Professor Capra

This outline presents potential overall rule topics first, and then reviews some issues regarding specific types of cases. It is not intended to be a rule proposal, but rather, as Prof. Capra suggested, my "insights on what a set of privacy rules might look like."

I. Potential "General" Rule Topics.

A. Scope (and/or Purpose) of Rule(s).

There are several threshold questions to be addressed. Does the rule govern public access to case files? In electronic and/or paper form? Is the rule only about protecting privacy or security interests? Does the rule specify the contents of the public file? Is it directed to the public, the bar, the courts, or all three? Is there a need for separate civil, criminal, bankruptcy, and appellate rules – with parallel general provisions?

The Judicial Conference privacy policy states several "general principles." Some of these may assist the E-Government Subcommittee in determining the appropriate scope of federal rules. These principles, taken directly from the privacy policy, are addressed in greater detail later in this memo:

- There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
- Notice of these policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

- Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
- Except where otherwise noted, the policies apply to both paper and electronic files.
- Electronic access to docket sheets and court opinions will not be affected by these policies.
- The availability of case files at the courthouse will not be affected or limited by these policies.
- Nothing in the policy is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Several state court systems have recently developed public access rules that may be helpful to answer some of the questions posed above. Most state court rules or policies begin with an affirmation or statement of the presumption of public access to court records, and an explanation of the records to which the rules will apply. Some state court rules also list “purposes” of the rule.

B. Definition(s).

Assuming that a federal rule would only address “the case file” – and not judicial branch administrative records as some state rules address – it may be important to define at least the term “case file.” One proposal may be: “The case file (whether electronic or paper) consists of the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include other case-related information, including: non-filed discovery material, trial exhibits that have not been admitted into evidence, and drafts or notes by judges or court staff. Sealed material, although part of the case file, is accessible only by court order.”

Terms defined in state court public access rules include, for example: court record, electronic record, electronic access, case record, administrative record, bulk distribution, compiled information, public, record custodian, and judicial branch record.

C. Information that is not subject to public access because it is not (must not be?) part of the public case file.

In addition to confirming the general presumption of public access to filed material, a federal rule might include a comprehensive list of public access restrictions. One approach would be to list items that are not [or, should not be] part of the public case file. Another approach would be a simple statement that only documents in the public case file are subject to public access (unless sealed, see section D below). The Vermont state court rules and the proposed Indiana state court rules provide particularly comprehensive models.

To develop this section of a rule, it would be helpful to:

- 1) Review and catalog existing statutes, rules, policies and procedures that require, prohibit, or restrict public access to information that is part of the case file or docket.
- 2) Identify and discuss sensitive information that is normally permitted to be placed on the public record, and consider whether there are alternatives that would allow for the protection of privacy interests without adversely affecting the adjudication process. (Alternatives might include presumptive sealing, use limitations, or segregation for use only by litigants or the court);
- 3) Identify gaps in existing statutes, rules, policies and procedures; and
- 4) Identify issues that do not require (or are not appropriate for) a rules-based approach and recommend pursuing solutions to those issues as a complement to the rulemaking process.

D. Information that is filed, but is not available for public access because it must be filed under seal.

This section would confirm that sealed information is not subject to public access. It might also list any items that must be presumptively sealed. In contrast to state courts, which may be required to seal certain categories of cases or sensitive information (for example, family law, mental health, or probate), very few items are presumptively sealed in federal courts. (Note, however, that the CACM subcommittee on implementation of the criminal case file privacy policy may make recommendations concerning the routine need to seal certain criminal case file documents).

Section 205 of the E-Government Act provides for presumptive filing under seal of information that would otherwise be redacted or truncated under the Judicial Conference privacy policy. Thus, the E-Government Act, in effect, amends the Judicial Conference privacy policy to allow a litigant to file unredacted documents under seal. The court may still require the filing of

a redacted document for public access purposes. Section 205 requires that this procedure must be made a part of any national rule. The judiciary has sponsored a bill that would partially amend Section 205 by allowing litigants to file a sealed "reference list" (see section E below) of information that would be protected under the privacy policy. Thus, both sealing requirements and the "reference list" concept would be appropriate topics for federal rules.

E. [H.R. 1303 – a procedure for filing sensitive private information on a sealed "reference list" and/or the use of "sensitive information forms"].

The Judicial Conference supports legislation (H.R. 1303) that would allow litigants to file a sealed "reference list" containing information that otherwise would be subject to the Judicial Conference privacy policy. (Note: The Senate Judiciary Committee Report on H.R. 1303 explains this in greater detail).

Several state courts now require – or new rules will require – the filing of certain sensitive information on special forms that are not subject to routine public access. The Washington state courts, for example, require parties in family law cases to use a "Confidential Information Form" to provide the court with financial account numbers, Social Security numbers, income tax information, telephone numbers and birth dates of children. These forms will be sealed in both the paper and electronic file system. With respect to the federal courts, the "Study of Financial Privacy in Bankruptcy" suggested a similar approach to make selected financial information available only to creditors and other "parties in interest."

There are other potential benefits of the use of reference lists or sensitive information forms. Courts may need to collect information for case management purposes that is not (or should not be) made part of the public record. Rules might provide that information collected on such forms could be used for court purposes only, and/or be made available to the litigants as appropriate.

Related to the rules issue is a technology issue: Certain privacy protections would be easier to implement if court filings were to be created on established electronic forms. For example, private information on bankruptcy schedules might be easier to segregate electronically if the schedules could be filed as database-type forms, allowing some information to become part of the public file while other information to be made available only to parties in interest. This "database" model may have promise with respect to other sensitive information or types of cases.

F. Judges' case-by-case discretionary authority.

Should there be an explicit rule section concerning the discretionary authority of judges to allow or deny public access notwithstanding any new rules? The protection of privacy interests relating to federal court case files, in the absence of specific statutory protections, historically has

been addressed by judges on a case-by-case basis. Except for a few case types, the Judicial Conference privacy policy retains the tradition of case-by-case analysis of privacy issues. That approach may, of course, complement a rule that defines categories of information to be presumptively sealed or maintained separately from the public file.

G. Remote electronic access / courthouse-only access.

The Judicial Conference privacy policy adopts the default presumption that remote electronic public access, if available, will mirror access at the courthouse. But the policy also prohibits electronic public access to Social Security case files and criminal case files (until implementation of the September 2003 Judicial Conference decision permitting access to criminal case files). Moreover, certain personal identifiers either should not be filed, or should be filed only in truncated form.

Most state court rules limit remote electronic access to certain case types or information. The California rules, for example, bar *remote* electronic access to family, criminal, mental health, juvenile, guardianship/conservatorship, and civil harassment proceedings, "because of the personal and sensitive nature of the information parties are required to provide to the court in these proceedings." However, the rules permit electronic access to these records *at the courthouse*. The "Guidelines for Public Access to Court Records," developed by the National Center for State Courts in conjunction with the Conference of Chief Justices and the Conference of State Court Administrators, states: "The nature of certain information in some court records, however, is such that remote public access to the information in electronic form may be inappropriate, even though public access at the courthouse is maintained."

H. Notice of electronic public access.

It may be appropriate for a national rule to address the question of notice to litigants, including the development of a consistent method to provide such notice. The Judicial Conference policy suggests that litigants should be given "notice" of the presumption of public access to documents filed in litigation, and, if appropriate, should be informed that case file documents will be made available on the Internet. CACM has developed a model notice that many courts have adopted. A similar notice has been incorporated into several local rules.

I. Requirements relating to attorneys.

Certain issues relating to the bar may be appropriate for federal rules, while other issues may be implementation issues relating to electronic filing, or matters more appropriate for individual courts to address.

The Judicial Conference privacy policy states that the bar should be educated about access and privacy issues. If rules on access and privacy are developed, the rules should assist attorneys to understand what information is to be filed under presumptive seal or other access restrictions. It may also be appropriate to specify by rule a standard process to remind attorneys how to treat private or sensitive information in the context of electronic filing. One possibility would be to make the access/privacy issue a topic at the first meeting before the judge.

J. Docket sheet and case management information.

Although the Judicial Conference privacy policy states that “electronic access to docket sheets will not be affected by these policies,” docketing practices may affect the development and implementation of federal rules on public access. Some personal identifiers may, for example, appear on the docket itself, either in the caption, docket entries, or other required elements of the docket. Court practices also vary with respect to filing requirements for certain documents, or the timing of filing. This consideration may be especially relevant in criminal cases, where it is the detailed nature of some docket entries – or even the existence of certain entries – that has raised some of the “security” concerns that motivated the (initially) restrictive public access policy for criminal files.

K. Treatment of “bulk” information.

Most state court policies and rules address the topic of access to “bulk” or “compiled” case file data. Such policies usually distinguish between bulk access to public information, which is generally permitted if it does not burden the court, and access to confidential or non-public case file information, which is allowed only subject to significant restrictions.

The E-government Subcommittee may wish to consider whether there is a need to address this issue in federal rules.

II. Potential Case-or-Court-Specific Rule Topics

Civil case files

The Judicial Conference policy provides: “that documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain “personal data identifiers” be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.”

A federal rule might specify additional documents and/or case types that should be sealed, or should be presumed to be protected from unlimited public access (*see* discussion sections C and D above).

Criminal case files

The Criminal Law, Defender Services, and Court Administration and Case Management Committees have formed a subcommittee to determine how to implement the recent Judicial Conference decision to allow remote electronic access to criminal case files. That subcommittee expects to make a recommendation to the Judicial Conference for action at its March 2004 meeting.

Bankruptcy case files

The Judicial Conference privacy policy recommends: "that documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits."

Amendments to the Bankruptcy Rules to implement the Judicial Conference policy became effective December 1, 2003. The suggested amendment to § 107(b)(2) of the Bankruptcy Code has not yet been accomplished.

Other options for rules relating to bankruptcy cases might include segregating certain sensitive information for filing on separate forms (like the "reference lists" contemplated in H.R. 1303) that would be protected from unlimited public access. Information to be filed in this manner might include items that are used only for administration of the estate by the case trustee and/or United States Trustee. The executive branch "Study of Financial Privacy and Bankruptcy" recommended limiting public access to schedules and statements in consumer bankruptcy cases to parties in interest. In developing the privacy policy, however, CACM recommended against limiting public access to such information.

Appellate cases

The privacy policy requires "that appellate case files be treated at the appellate level the same way in which they are treated at the lower level." Privacy issues at the appellate level have been reviewed by a CACM subcommittee chaired by Judge Sandra Lynch. I assisted with that analysis, which identified several issues for further review or monitoring. Those issues include:

1. Considering whether to treat administrative agency case records "in the same manner they were treated by the agency." Doing so would represent, in some situations, a change in current policy or practice because a document may be protected in agency litigation, but would be publicly accessible in federal court litigation. The need to protect private information may be especially relevant with respect to individual benefits cases. The legal principles of the Privacy Act and the Freedom of Information Act, although not directly applicable to the judicial branch, also may support protecting privacy interests in agency records that are filed in federal courts.

2. Continuity of sealing. The Judicial Conference policy includes the implicit assumption that courts of appeals will maintain the sealed status of material sealed at the district court level. That assumption may not apply to certain courts of appeals that have local rules about the need to justify continuation of sealing orders at the appellate level.

3. Treatment of specialized courts. Certain appeals from decisions of the Court of Federal Claims and/or the Court of International Trade may present special access or privacy issues that would affect the Court of Appeals for the Federal Circuit.



ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: December 30, 2003

FROM: Abel J. Mattos

SUBJECT: Background Materials on the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files

TO: Subcommittee on E-Government and Privacy Rules

This memorandum is intended to provide you with general background regarding the process by which the Judicial Conference, on the recommendation of its Committee on Court Administration and Case Management (CACM), developed approved, and is implementing its Policy on Privacy and Public Access to Electronic Case Files.

Historically, courts have made case file documents available at courthouses and, upon request, by mail or other similar delivery to members of the public. In recent years though, both courts and the public (lawyers and nonlawyers alike) have created a demand for the availability of court documents electronically, either on court websites or through the judiciary's Public Access to Court Electronic Records (PACER) system which issues each registered user a login and password that must be entered before case file documents can be accessed. Four years ago, the CACM Committee formed a Privacy Subcommittee to study what implications such electronic public access to case files would have on the privacy interests in the federal court process. The Privacy Subcommittee included four CACM Committee members as well as a member from the Committee on the Rules of Practice and Procedure, the Information Technology Committee, the Bankruptcy Committee, and the Committee on Criminal Law.

The Privacy Subcommittee's work was extensive. In its first year, it held numerous meetings and worked with experts and academics in the privacy arena, court users (including judges, and court clerks) and government agencies. In May 2000, the Privacy Subcommittee presented several initial policy options for the creation of a judiciary-wide electronic access privacy policy. These options were presented to the CACM Committee, and the four liaison committees at their Summer 2000 meetings.

Using the comments received from the Committees, the Privacy Subcommittee further refined the policy options and, in November 2000, produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files." This document was published in the Federal Register and posted on a specially-created website to solicit comments from the public. Over 242 comments were received from a wide variety of interested persons including private citizens, privacy advocacy groups, journalists, attorneys, government agencies, private investigators, data re-sellers and members of the financial services industry. Attachment 1 is a chart that summarizes the comments received. You may access the full text of any comment by visiting the Privacy Policy website at www.privacy.uscourts.gov, clicking on the "comments

received" box and selecting the comment you wish to view.

Subsequently, in March 2001, the Privacy Subcommittee held a public hearing during which individuals representing a wide spectrum of public, private and government interests made oral presentations and answered questions from Privacy Subcommittee members. It was clear from the comments submitted and presentations made, that remote electronic access to public case file information provides numerous benefits. For example, several speakers noted that such access would provide citizens with the opportunity to see and understand the workings of the court system, thereby fostering greater confidence in government. The argument that electronic access "levels the geographic playing field" by allowing individuals not located in proximity to the courthouse easy access to what is already public information was also frequently mentioned. Others noted that providing the same access to this public information through the Case Management/Electronic Case Files (CM/ECF) system by way of PACER as well as at the courthouse would discourage the creation of a "cottage industry" by individuals who could go to the courthouse, copy and scan the information, download it to a private website and charge for access, thus profiting from the sale of public information and undermining restrictions intended to protect privacy. Attachment 2 is a list of the individuals who testified at the hearing. The materials used by members of the Privacy Subcommittee to prepare for this hearing will be available to Subcommittee members upon request.

After much thought and debate, the Privacy Subcommittee recommended to the CACM Committee and the liaison committees the adoption of a uniform, nationwide policy to address issues relating to privacy and public access to electronic case file information. The involved committees endorsed the proposed policy and the CACM Committee recommended it to the Judicial Conference. The Conference adopted the policy in September 2001 (JCUS-SEP/OCT 01, pp. 48-50). Attachment 3 is a copy of the CACM Committee report adopted by the Conference.

The policy contains seven general principles and continues to establish a general privacy and access policy for civil, bankruptcy, criminal and appellate cases separately. For civil case files, the policy is that documents be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

For criminal case files, the policy was that public remote electronic access to documents not be available at this time, with the understanding that the Judicial Conference will reexamine the policy within two years.

For bankruptcy case files, the policy is that documents be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy

change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

For appellate case files, the policy is that documents be treated the same way in which they are treated at the lower level.

Following Conference adoption of the policy, the CACM Committee formed and implementation subcommittee which was further divided into subgroups to focus on the implementation of the policy in civil, criminal and bankruptcy cases. In April 2002, the CACM Committee informed all district courts that the privacy policy for civil cases was to be in effect for all courts that make electronic version or images of documents available to the public on line. The Committee provided the courts with a model notice and guideline for a model local rule to assist in implementing this change for civil cases. These documents are included at Attachment 4.¹

As noted in the policy, implementation for bankruptcy cases required amending the bankruptcy code and official forms and rules. The CACM subgroup on bankruptcy implementation worked with the Advisory Committee on Bankruptcy Rules to draft proposed amendments to the bankruptcy rules and forms. As part of this process, the Advisory Committee on Bankruptcy Rules held a hearing where it received testimony from interested parties, particularly those in the credit industry.

The Committee on Rules of Practice and Procedure endorsed the rules and forms changes

¹ Specific provisions of the E-Government Act of 2002 relating to redaction of person information from court files went into effect on April 16, 2003. The Act's requirements regarding redaction differ from the Judicial Conference policy in that the Act requires that a court allow a party to file an unredacted version of a document under seal and keep that version of the document as the official record. It permits a court to require the filing of a redacted version of the document for inclusion in the public file. The Judicial Conference sought to amend these provisions, as well as the requirement that national rules be developed to address privacy and security concerns. In an effort to achieve this amendment, the Administrative Office negotiated with the Department of Justice, which was the author of the problematic provisions. These negotiations resulted in an amendment that would still require the development of national rules but would also permit the use of a sealed "reference list" for most filings that would contain the complete version of personal identifiers, thereby allowing only the redacted version to be used in public filings while still preserving the evidentiary integrity of a document. This compromise is included in HR 1303, and amendment to the E-Government Act that has passed the House. It is currently with the Senate Committee on Governmental Affairs.

suggested by the Advisory Committee on Bankruptcy Rules and recommended them for approval by the Judicial Conference. The Conference approved the amendments to the rules at its September 2002 session (JCUS-SEP 02, p. 59). The amendments to Rules 1005, 1007, 2002 and 2003 were then approved by the Supreme Court and forwarded to Congress. Congress took no action and the amendments became effective on December 1, 2003. In general, these amendments require only the last four digits of Social Security numbers of debtors to be included in the bankruptcy case file. With these amendments, the policy should be in effect for all bankruptcy cases. In November 2003, the CACM Committee sent a memorandum to all bankruptcy courts informing them that they should be in compliance with the policy by December 1, 2003 and providing them with guidance for a model local rule and notice to assist with implementation. A copy of these documents is Attachment 5.

At the request of the CACM Committee, the Judicial Conference has included in the most recent version of the court improvements bill, the request to amend two sections of Title 11 to allow for further implementation of the privacy policy in bankruptcy cases. The first request is to amend 11 U.S.C. § 107 to explicitly add privacy and security concerns as grounds for sealing information. The second is to amend, 11 U.S.C. § 342(c) require only the last four digits of the number in order to be consistent with the policy and the rules and forms amendments.

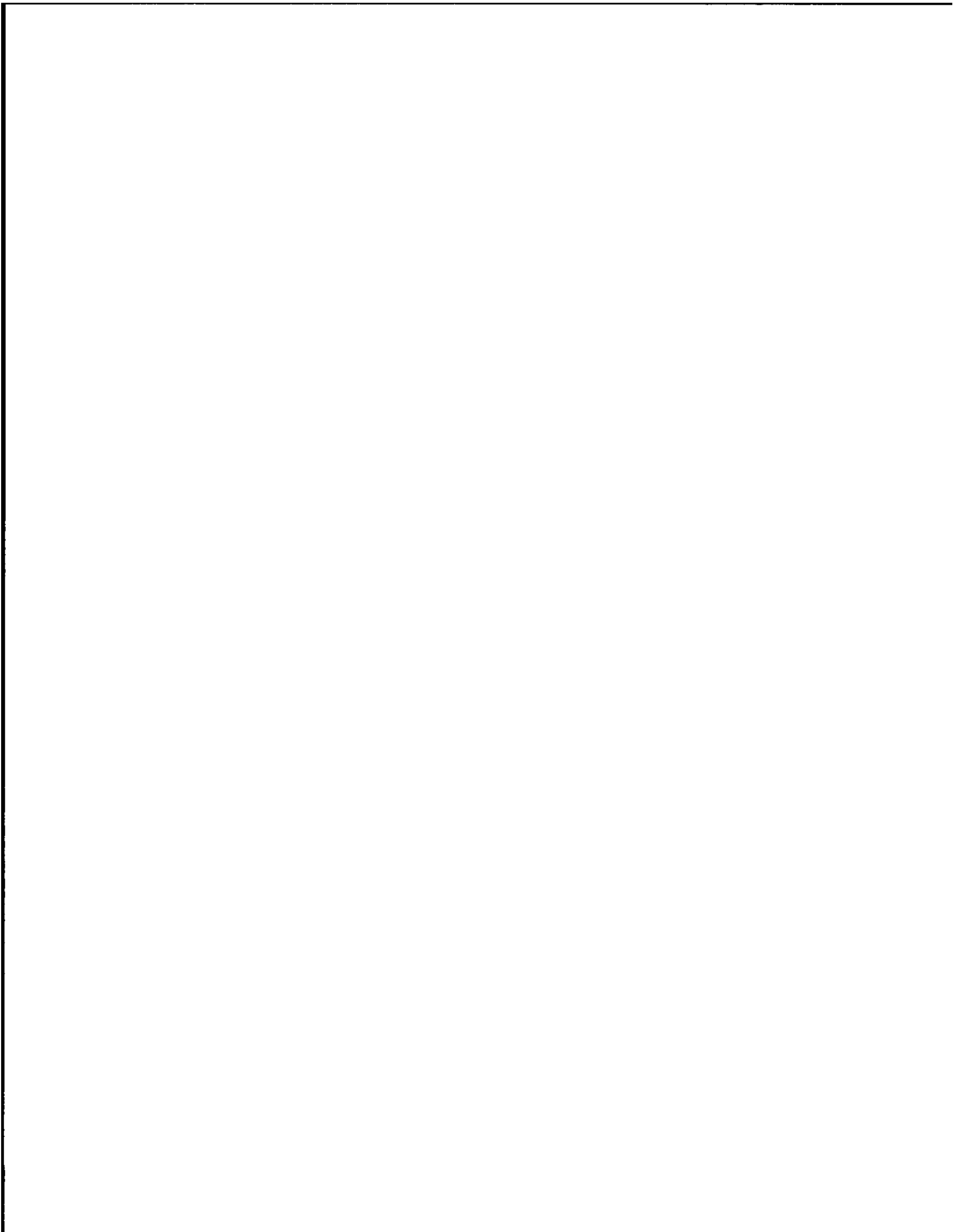
For criminal cases, the implementation subgroup focused on the best way to fulfill the Conference's requirement that the prohibition on criminal access be reexamined within two years. As part of this process, the CACM Committee made two recommendations to the Conference regarding the criminal policy, both of which were adopted in March 2002. The first was the creation of a pilot program to allow selected courts to provide remote public access to criminal case file documents. The Federal Judicial Center was asked to study these courts and provide a report to the Committee on the impact of electronic access to criminal case files. The purpose of the study was not to weigh the benefits versus the possible drawbacks. The potential benefits were well documented in the public feedback received in 2000 and 2001. The study was aimed at ascertaining whether any evidence could be gathered that would confirm or dispel concerns about potential drawbacks, particularly with regard to threats to the personal security of co-operating individuals. The Criminal Law Committee was consulted regarding this study. The second was creation of a "high profile" exception that would permit remote public access to criminal case file information in certain cases. (JCUS-MAR 02, pp. 10-11).

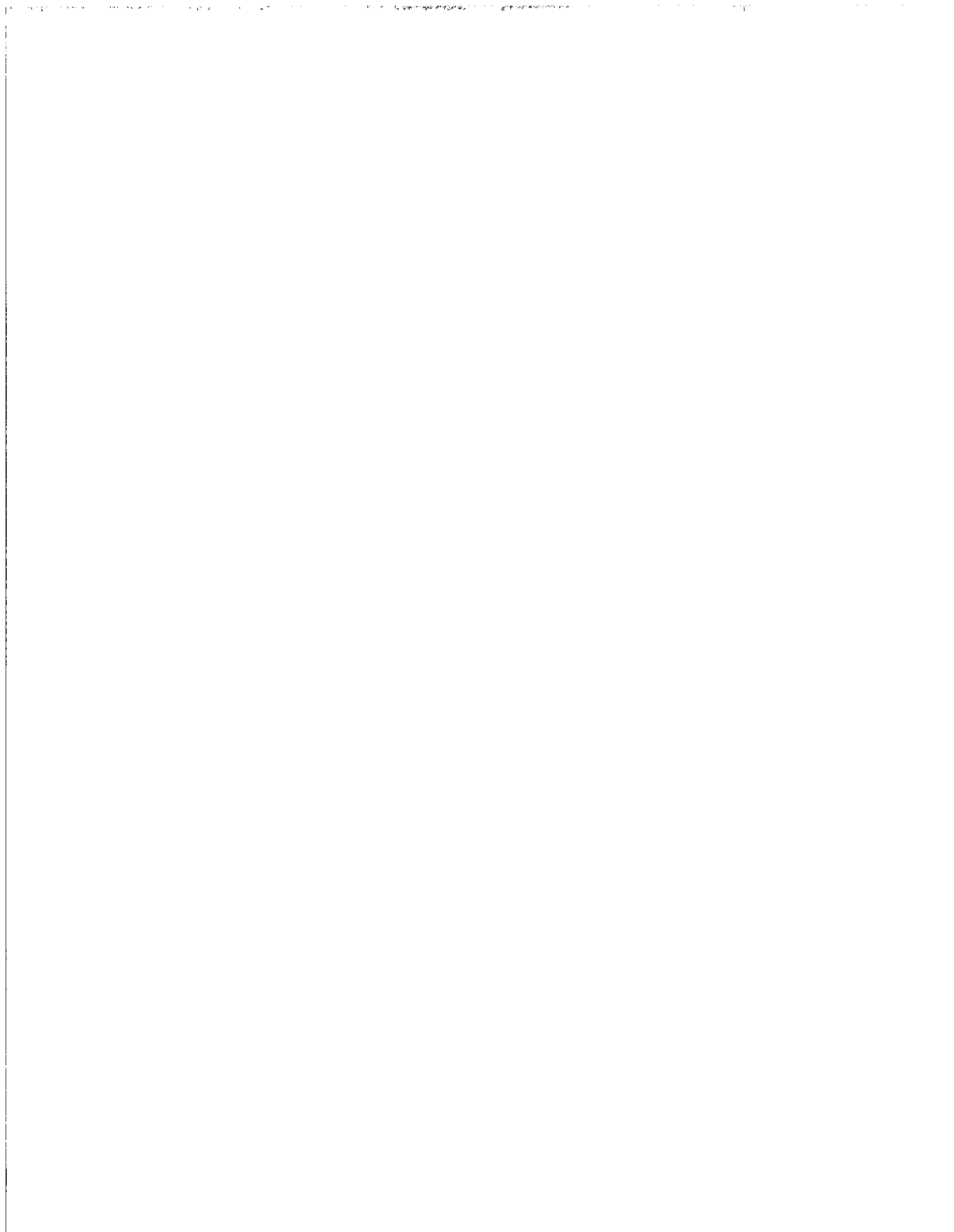
The results of the FJC study were presented to the CACM Committee and the Committee on Criminal Law at their Summer 2003 meetings. It revealed no instances of harm based on the enhanced access and found that the majority of those participating in the study, including judges, court personnel and attorneys, were in favor of the increased access. Nonetheless, some members of the Committee on Criminal Law expressed serious reservations about allowing remote public access to criminal case files. After careful consideration and debate, the CACM

Committee, with the concurrence of the Committee on Criminal Law, recommended that the Conference amend the prohibition on remote public electronic access to criminal case files and permit public access to the same documents electronically as at the courthouse with the requirement that specific personal identifiers be partially redacted by the filer whether the document is filed in paper or electronically. In addition, it was recommended that this amendment not become effective until the Conference approved specific guidance – developed by this Committee, the Committee on Criminal Law, and the Defender Services Committee – for the courts to use in implementing the new policy. The Conference adopted this recommendation. (JCUS-SEP 03, p. _).

To assist in developing this guidance, the Committee established its Criminal Privacy Files Implementation Subcommittee, with members from each of the three participating committees. The subcommittee has conducted several meetings via conference call and has agreed upon a draft of the guidance that would go to the courts regarding implementation of the new criminal case files access policy. The draft guidance was reviewed by the three committees at their Winter 2003 meetings and a copy of the most recent draft is included at Attachment 6. The Subcommittee is now working on drafting a model local rule for public access to electronic criminal case files.

Attachments





E-Government Subcommittee

Minutes of the meeting of January 14, 2004
Scottsdale, AZ

The E-Government Subcommittee (the "Subcommittee") met on January 14, 2004, at the Hermosa Inn in Scottsdale, Arizona.

The following members of the Subcommittee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkle, Liaison from the Evidence Rules Committee
Hon. John G. Roberts, Jr., Liaison from the Appellate Rules Committee
Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon. A. Thomas Small, Liaison from the Bankruptcy Rules Committee
Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee (*ex officio*)
Hon. Jerry A. Davis, Liaison from the Committee on Court Administration and Case Management
Hon. James B. Haines, Jr., Liaison from the Committee on Court Administration and Case Management
Professor Daniel R. Coquillette, Reporter to the Standing Committee (*ex officio*)
Professor Daniel J. Capra, Lead Reporter and Reporter to the Evidence Rules Committee
(*consultant*)
Professor Edward H. Cooper, Reporter to the Civil Rules Committee (*consultant*)
Professor Jeffrey W. Morris, Reporter to Bankruptcy Rules Committee (*consultant*)
Professor Patrick J. Schiltz, Reporter to the Appellate Rules Committee (*consultant*)
Professor David H. Schlueter, Reporter to the Criminal Rules Committee (*consultant*)

The following individuals participated via teleconference:

Hon. Donetta W. Ambrose, Liaison from the Criminal Law Committee
Hon. James S. Gwin, Liaison from the Information Technology Committee
Abel J. Mattos, Administrative Office of the Federal Courts/Committee on Court Administration and Case Management
Katie Simon, Administrative Office of the Federal Courts/Committee on Court Administration and Case Management

Also present were:

Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Professor Steven Gensler, Supreme Court Judicial Fellow
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Al Cortese, Esq.
Brook D. Coleman, Esq.

Welcome and Introduction:

Judge Levi extended a welcome to the Subcommittee and thanked all in attendance for coming. Those attending the meeting introduced themselves.

Business of the Subcommittee Meeting:

Judge Fitzwater welcomed the Subcommittee members and other individuals in attendance. He briefly outlined the charge of the Subcommittee and began by focusing the discussion on where e-government issues have been, where those issues currently stand, and where the Subcommittee should focus going forward. Beginning with where e-government issues have been, Judge Fitzwater explained that an incredible amount of work had already been done by the Committee on Court Administration and Case Management ("CACM"). Judge Fitzwater asked Judge Davis to explain CACM's role and progress on this issue to the Subcommittee.

CACM Report

Judge Davis reported to the Subcommittee that CACM began its involvement in e-government with a study regarding the effect electronic court filings would have on the privacy of litigants and what, if any, policies should be adopted to deal with any privacy issues. During CACM's study, a number of government agencies became involved and provided input to CACM. In the summer of 2000, CACM presented a number of policy options and solicited feedback from court file users. CACM received over 150 comments from a wide spectrum of users (e.g., media, data resellers, financial services) Judge Davis referred the Subcommittee to attachment 1 of the meeting materials, which contained a summary of these comments.

Judge Davis further explained that in March 2001, CACM conducted a public hearing regarding the various policy options. The prior research and this hearing further clarified the fact that there were huge benefits to electronic access to court files. However, it was also clear that there were looming concerns about privacy and how to balance the two.

CACM decided that its recommendations to the Judicial Conference regarding electronic filings would be based on the premise that there should be a consistent and uniform nationwide policy. With that in mind, CACM recommended the following:

- **Civil Cases.** CACM recommended that civil case files be available electronically to the same extent that they are available as paper files. However, CACM made one exception to this recommendation for social security cases. It reasoned that those cases should not be available electronically since there are a high number of such cases, and the cases contain a large amount of private information. Finally, CACM recommended that certain personal identifiers such as social security numbers and names of minor children should not be included in the electronically available civil files.

- Criminal Cases. CACM decided that criminal cases presented more daunting issues since safety concerns regarding informants and other parties may require certain precautions. In order to examine this issue, CACM delayed a position on criminal cases for two years in order to allow for a FJC study to be completed.
- Bankruptcy Cases. CACM determined that it was appropriate to treat bankruptcy cases like civil cases.
- Appellate Cases. Similarly, CACM determined that cases on appeal should be treated as they were at the lower court level.

Judge Davis went on to explain that in the spring of 2002, certain district courts informed CACM that their filings were online. CACM distributed model notice provisions and local rules accordingly. Later that year, the President signed the E-Government Act of 2002, which as the Subcommittee knows, requires the federal courts to put their court files online. Some of the E-Government Act provisions were inconsistent with the model rules that CACM had formulated so CACM modified those provisions to comply.

With respect to the position of CACM on criminal cases, its concerns basically turned on protecting certain vulnerable parties involved in criminal cases. When the FJC completed its study, these concerns did not appear to bear out. The study convinced CACM and others that the benefits of public access outweighed the seemingly low amount of risk to these parties. This position was further reinforced by the commitment of any criminal file access policy to the value of sealing certain sensitive documents from public access.

In fall 2002, CACM recommended to the Judicial Conference that, like civil cases, criminal cases should be available electronically to the same extent that they are publicly available at the courthouse. However, CACM further recommended that this change not go into effect until all aspects of implementation were settled. The model rule was drafted and sent to the Department of Homeland Security and other agencies for their feedback.

Judge Haines added that the bankruptcy courts had been slightly ahead in the process, as they had a rule regarding truncated social security numbers that went into effect this past December. He added that the bankruptcy courts are canaries in the mine on this issue because bankruptcy involves a lot of personal information. This forced the bankruptcy courts to be innovative in how they should balance the concerns of privacy and access. Finally, the bankruptcy courts experienced the implementation issues connected to the recently enacted rule on truncating social security numbers. He advised that, in his opinion, allowing for ample notice and planning had been invaluable to the success of that implementation.

Judge Davis concluded by noting that he had provided only a rough overview of what CACM has done and asked if the Subcommittee members had any questions for him. Finally, he noted that

the key to successful adoption and implementation is to educate the bar regarding these rules and about their role in implementation. Judge Ambrose echoed this assertion and added that another key was to avoid the problem of inconsistency (i.e. what is contained in a criminal case file should be the same from district to district).

The members of the Subcommittee then discussed the CACM recommendations with the members of CACM who were present. Professor Capra asked if consideration had been given to adding to the list of privacy items in a criminal case. Judge Davis responded that CACM had considered adding plea agreements and other similar documents. However, Judge Davis stated that CACM concluded that it should leave those determinations to each of the courts by giving the courts and the attorneys involved the discretion regarding what to seal from the public, if anything. Judge Ambrose pointed out that the initial draft policy did have a list of documents for which public access would not be allowed. But, at the end of the day, CACM determined that a better policy was to keep the list simple and allow the courts to make their own determinations regarding what to seal on a case by case basis.

Section 205(c) of the E-Government Act of 2002 – Potential Amendments:

Professor Capra requested that John Rabiej update the subcommittee regarding the proposed amendments to § 205(c) of the E-Government Act. Mr. Rabiej explained that currently, § 205(c)(iv) states that a party can submit an unredacted version of a filed document if it wishes. The provision mandates that a party would have to submit two copies of a document, one with the private provisions redacted, and one with the full text of the document unredacted. He explained that this provision was made at the behest of the Department of Justice, as the Department felt it was a necessary provision to preserve the integrity of original evidence. The Judicial Conference has opposed this provision and has been working with the DOJ on compromise legislation. The compromise reached would allow parties to file a separately sealed document that contains a complete list of the data that has been redacted in the publicly filed document(s). This “reference list” would not be publicly available, but would be available to the court so that it can take notice of the redacted information. This compromise amendment has passed the House of Representatives and is currently in the Senate Government Reform Committee. The Subcommittee discussed this proposed legislation and how it would affect the rulemaking process.

Court Transcripts:

Professor Capra asked if there had been any developments regarding the treatment of court transcripts within the scope of the E-Government Act. Professor Davis responded that it was the position of CACM that when a transcript is filed with the court, it becomes a part of the case file and should, therefore, be electronically available. CACM’s general policy is to require that the lawyers take on the responsibility for redacting any private information before any document is filed. Ms. Simon added that the Judicial Conference adopted a policy that states that if a transcript is going to be filed electronically, the court reporter must initially provide the transcript to the parties in hard copy. The parties then have to notify the court reporter that they intend to submit redactions within

five days of that hard fling. The parties then have an additional 21 days to submit any such redactions. The transcript is filed electronically once those redactions are made.

Ms. Simon further explained that the Judicial Conference adopted this policy in principle, but has delayed implementation in order to determine the impact, if any, on court reporter income. A pilot program is being conducted to study this impact, but Ms. Simon noted that most of the districts being studied in the pilot program are already complying with the Judicial Conference policy of making transcripts publicly available. Judge Davis pointed out that there will be issues for court reporters in districts where there has not been compliance with the Judicial Conference policy. The Subcommittee agreed that court reporter compensation could be an explosive issue once the transcripts are all electronically available as mandated by the Conference and now the E-Government Act.

General Discussion:

The Subcommittee discussed the general importance of educating the bar with respect to all of these changes. For example, Judge Haines noted that, with respect to transcripts, attorneys need to start thinking about why they are asking personal questions of witnesses during trial (such as home address information). Given the potential availability of this information over the internet once made part of the transcript, lawyers may need to change their standard procedures. In addition, attorneys will need to be educated regarding their responsibility for their client's personal information. Judge Fitzwater asked Judge Small how the bankruptcy courts were handling the recent changes. Judge Small noted that it was early, but that he believed that the changes had been well-received. Judge Small added that he thought the process was going well due in most part to the well-communicated notice of the changes to the bench and bar. The Subcommittee again discussed how to best notify members of the bar regarding these impending changes and policies.

On another note, the representatives from CACM were asked why special provision had been made for Social Security cases, but not for other cases where privacy issues were arguably just as important. Judge Davis responded that the issue had been fiercely debated within CACM and that a compromise had been made primarily because social security cases are solely individual matters involving a government agency. Therefore, the cases require a meaningful amount of personal information to be included in court filings. Judge Davis acknowledged that, as Judge Levi stated, ERISA cases and other similar cases have a high frequency of personal information, but Judge Davis pointed out that the option to seal documents still exists in those cases. Ms. Simon also explained that there are a high number of social security appeals filed, and that requesting the sealing of documents in each case would be burdensome -- while ERISA cases, for example, are not appealed with the same frequency. In addition, Ms. Simon noted that the administrative record involved in social security cases would be too burdensome to scan in electronically for every case since those records are not currently available electronically.

State Law Best Practices Survey:

Judge Fitzwater informed the Subcommittee that Mr. Deyling had conducted an overview of best practices in state courts with respect to privacy and access issues. He asked Mr. Deyling to discuss his findings.

Mr. Deyling stated that following his review of state court practices, he determined that the Subcommittee may want to consider the following issues when drafting rules implementing § 205(c):

- Scope or Purpose Provision. Mr. Deyling noted that several states have a statement regarding the purpose of their privacy provisions -- ranging from succinct statements of purpose to more detailed statements of the public policy governing the rule. Mr. Deyling noted that some state provisions also set out whether the rule should be about privacy, access, or both. Finally, he noted that some states have determined whether the rules are about paper, electronic availability, or both.
- Uniformity. Mr. Deyling observed that notice to the litigants and their attorneys was important and that location neutrality -- whether that be desk vs. courthouse or one district vs. another district -- was pivotal for the success of any privacy and access provision.
- Definitions. Mr. Deyling noted that many states had attempted to define everything in a case file, while other states had defined what was not considered part of the file or had left it ambiguously defined. In addition, some states had provisions that stated that certain categories of documents were presumptively sealed.
- Reference List. Mr. Deyling explained that many states, like the currently proposed national amendment, had a system where the private information at issue could be put in a separate document where it was not accessible to the public.
- Education. Mr. Deyling observed that some states provided attorneys with a list of documents that they should consider attempting to seal.
- Directions to Clerk of Court. Many state court rules provided instructions to the clerk of the court regarding, for example, what goes on the electronically available docket sheet.
- Bulk Information. Mr. Deyling explained that some states had provisions governing the practice of downloading and manipulating bulk information from the court websites.

The Subcommittee discussed Mr. Deyling's presentation regarding best practices in the state courts.

The members of the Subcommittee observed that a fundamental question exists as to whether the rules to be implemented are simply for court records, or whether the scope is expanded to things not filed such as exhibits, judges' notes, etc. However, it was noted that if the Subcommittee starts venturing into this realm as opposed to just determining that what is currently available at the court house to the public should also be available electronically, the Subcommittee is taking on a lot more than what it is charged with doing by virtue of § 205(c). Judge Fitzwater agreed, and noted that § 205(c) speaks to making what is "filed" electronically available; therefore, limiting the spectrum of what any rule should cover. Committee members were in general agreement that any national rule should remain simple and should apply only to court filings that are electronically available over the internet.

The Subcommittee also discussed whether the rules should list documents that the Subcommittee believes should be sealed. Professor Schlueter noted that the Subcommittee needed to determine for whom these rules were being drafted. He further suggested that perhaps the rules should refer practitioners to the Judicial Conference policy guidelines -- that way, the Subcommittee would not be prescribing attorney conduct, but would be aiding their conversion to this new system. The Subcommittee discussed the advantages of this approach and likened it to current Fed.R.Civ.P. 5. Professor Capra also suggested that the rule could read like the Eleventh Circuit's model rule, which provides some mandatory information that should be redacted, along with suggestions for other information in a note to the rule.

Judge Levi noted that the respective Advisory Committees may have different issues to address, and the focus of the Subcommittee should be to determine how each of the Advisory Committees can efficiently address each of their specific issues and concerns. The Subcommittee members agreed that the Advisory Committees should take a common approach to the extent possible, with variations as necessary to accommodate particular issues that will arise in civil, criminal, bankruptcy, and appellate proceedings.

Finally, the Subcommittee discussed the general commercial interest in court information. Members noted that a number of databases were being created and sold online. Mr. [Gwynn] also noted that the fees obtained from PACER, which included fees paid by these commercial companies, were important to the various courts' information technology budgets.

Access Issues:

The Subcommittee discussed the practical effects of electronic filing on access. Judge Sheindlin asked whether complete versions of redacted documents were available to the judges electronically if they needed to see them. Judge Hinkle stated that on CM/ECF in his district, he has access to the unredacted document, while the public and lawyers do not. Ms. Simon noted that the most recent version of CM/ECF does allow for judges to view redacted and sealed documents in camera via electronic means.

Judge Levi inquired as to whether CACM had reviewed the official forms used, for example,

in judgments. He noted that a practitioner in his district had informed him that the criminal judgment form provided the individual's entire social security number. Judge Davis noted that the forms were generally reviewed. Ms. Simon added that the criminal judgment form had been reviewed in September 2003, and the social security information had been moved to the statement of reason, which is not publicly filed.

The Subcommittee generally discussed the fact that PACER currently provides a gateway to access to these documents via the requirement to pay to use the service. This gateway allows public access to be monitored if necessary to protect privacy interests. The members questioned, however, whether this would always be the case or whether there would be a movement to provide cost-free access.

Template Rule Regarding § 205(c):

The Subcommittee then discussed what the template rule that the advisory committees would modify should look like. Professor Capra noted that CACM had done a lot of really important work and perhaps the rule should build on that foundation. The Subcommittee discussed whether the rule should provide an exhaustive list of categories for redaction, whether the rule should provide a brief list of main categories, and if so, whether reference should be made to further categories via the Judicial Conference policies. A discussion ensued regarding the pros and cons of referencing the Judicial Conference policies, including, but not limited to, a discussion of whether such policies were accessible enough to practitioners.

Members of the Subcommittee further discussed how to approach drafting the rules. Some members suggested that each of the advisory committees should consider what issues are specifically important to them, and draft a rule accordingly. Other members were concerned that this would create four inconsistent rules. Professor Capra suggested that he could draft a template rule that all of the advisory committees could then take and modify as they saw fit. The advisory committees could then compare their versions to be sure that there was not too much variation as between all of the rules. The Subcommittee members agreed with that approach.

The question then turned to timing on the implementation of these rules. The members of the Subcommittee agreed that the advisory committees should review the template rule to be prepared by Professor Capra at their respective spring meetings. They should have their rules finalized for presentation to their advisory committees by their fall 2004 meetings. The Standing Committee can then review the various rules at its January 2005 meeting, or at its June 2005 meeting at the latest. The Subcommittee agreed on this schedule and noted that, barring any problems, the rules would then become effective on December 1, 2007.

The Subcommittee also discussed the possibility that § 205(c) would implicate other rules. For example, in Fed.R Civ.P. 16, the Advisory Committee on Civil Rules may want to consider adding a discussion of § 205(c) to the pre-trial conference phase.

In addition, the Subcommittee discussed whether Fed.R.Civ.P. 11 should be amended to contemplate violations of the privacy/access rules. Judge Davis noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it was better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment.

Finally, Judge Fitzwater reminded each advisory committee of its obligation to continue to consider best practices of the state courts. He encouraged the advisory committees to call on Mr. Deyling and the work he has already done in this area

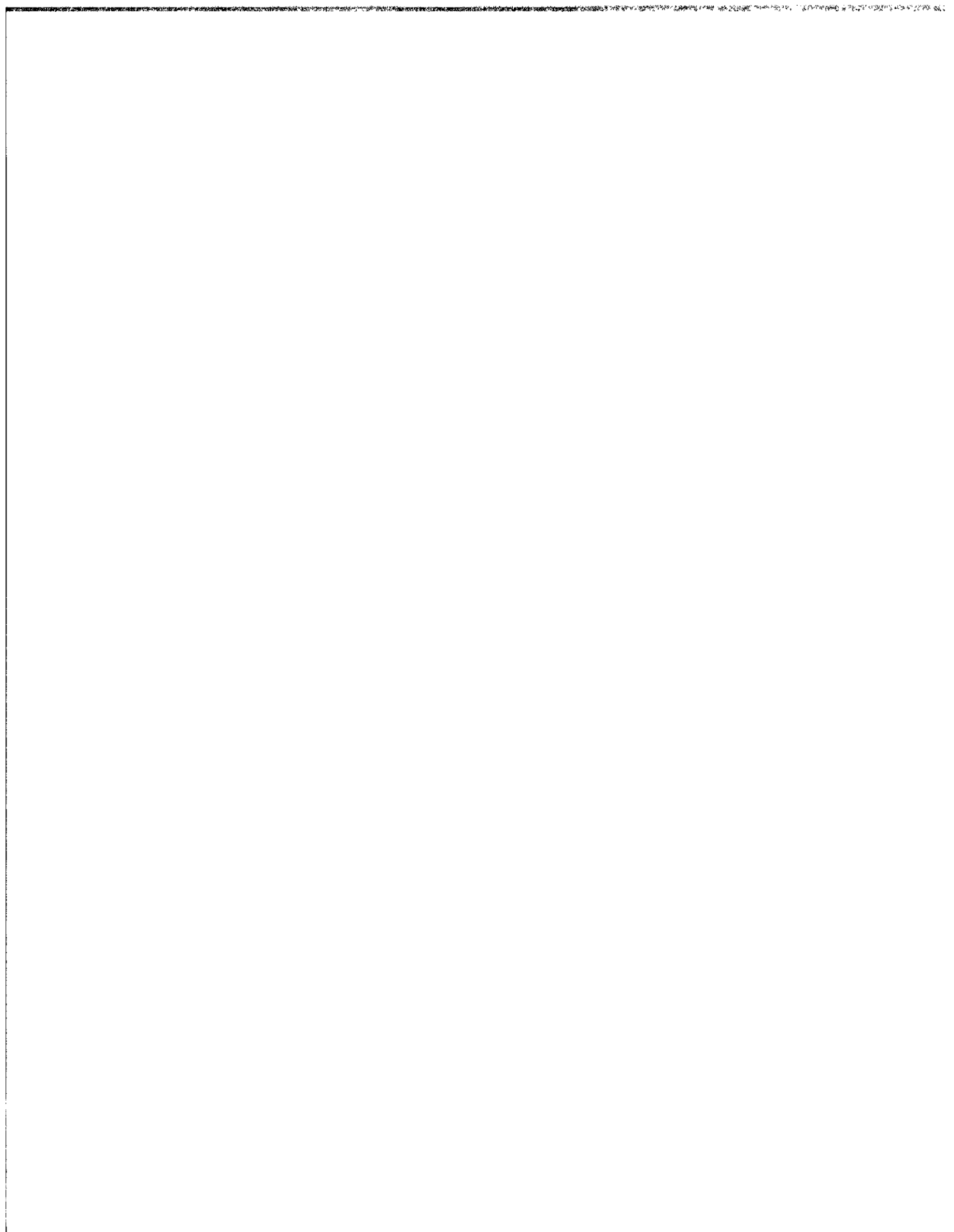
Conclusion of Meeting:

Judge Fitzwater thanked the members of the Subcommittee for their input and thought on these matters. He gave special thanks to the members of CACM, who had worked so hard and provided so much guidance to the Subcommittee on this issue. He reviewed the plan of action for the Subcommittee and adjourned the meeting at 11:30 a.m.

Respectfully submitted,

Brook D. Coleman, Esq.





ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: February 25, 2004

FROM: Robert Deyling, Office of Judge Programs

SUBJECT: State Court Privacy Rules and Policies (excerpts)

TO: Judge Fitzwater
Professor Capra
Professor Coquillette
Professor Cooper
Professor Morris
Professor Schiltz
Professor Schlueter

As you requested at the first meeting of the Subcommittee on E-Government, I have compiled the attached excerpts from state court rules on privacy and public access to court records. I have organized this material by topic, as follows:

- (1) Scope (and/or Purpose) of Rule;
- (2) Definitions
- (3) Information (or documents) not available for public access
- (4) Segregation of information on "sensitive information forms"
- (5) Judicial discretion (and procedures for requesting or denying access)
- (6) Notice (to persons accessing records)
- (7) Remote access / courthouse-only access
- (8) Access to information maintained by the court (including dockets)
- (9) Access to "bulk" information

These excerpts are drawn from the approved state court rules of California, Indiana, Maryland and Vermont, and the proposed rules for the Arizona and Minnesota courts.

	1) Scope (and/or Purpose) of Rule
<p>California</p> <p>Rule 2070; 2071</p>	<p>Rule 2070. Statement of purpose.</p> <p>(a) [Intent]: The rules in this chapter are intended to provide the public with reasonable access to trial court records that are maintained in electronic form, while protecting privacy interests</p> <p>...</p> <p>Rule 2071. Authority and applicability.</p> <p>...(c) [Access by parties and attorneys] The rules in this chapter apply only to access to court records by the public. They do not limit access to court records by a party to an action or proceeding, by the attorney of a party, or by other persons or entities that are entitled to access by statute or California Rules of Court.</p>
<p>Indiana</p> <p>Rule 9(A)</p>	<p>(A) Scope and Purposes.</p> <p>(1) Pursuant to the inherent authority of the Indiana Supreme Court and pursuant to Indiana Code §5-14-3-4(a)(8), this rule governs public access to, and confidentiality of, court records. Except as otherwise provided by this rule, access to court records is governed by the Indiana Access to Public Records Act (Indiana Code §5-14-3-1, et. seq.).</p> <p>(2) The purposes of this rule are to:</p> <ul style="list-style-type: none"> (a) Promote accessibility to court records; (b) Support the role of the judiciary; (c) Promote governmental accountability; (d) Contribute to public safety; (e) Minimize the risk of injury to individuals; (f) Protect individual privacy rights and interests; (g) Protect proprietary business information; (h) Minimize reluctance to use the court system; (i) Make the most effective use of court and clerk of court staff; (j) Provide excellent customer service; and (k) Avoid unduly burdening the ongoing business of the judiciary....

	1) Scope (and/or Purpose) of Rule
<p>Vermont Rule 1, 2</p>	<p>§ 1. Purpose; Construction. These rules govern access by the public to the records of all courts and administrative offices of the Judicial Branch of the State of Vermont, whether the records are kept in paper or electronic form. They provide a comprehensive policy on public access to Judicial Branch records. They shall be liberally construed in order to implement the policies therein.</p> <p>§ 2. Scope.</p> <p>(a) <i>In General.</i> These rules govern access to judicial branch records where the right of access is solely that of a member of the public</p> <p>(b) <i>Specific Right of Access.</i> If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to a member of the public, the record custodian shall act in conformity with the applicable statute, rule or other source of law....</p>
<p>Maryland R 16-1002</p>	<p>Rule 16-1002. General Policy</p> <p>(a) Presumption of Openness Court records maintained by a court or by another judicial agency are presumed to be open to the public for inspection. Except as otherwise provided by or pursuant to these Rules, the custodian of a court record shall permit a person, upon personal appearance in the office of the custodian during normal business hours, to inspect such a record....</p>

	2) Definitions
<p>California Rule 2072</p>	<p>Definitions.</p> <p>(a) [Court record] As used in this chapter, "court record" is any document, paper, or exhibit filed by the parties to an action or proceeding; any order or judgment of the court; and any item listed in subdivision (a) of Government Code section 68151, excluding any reporter's transcript for which the reporter is entitled to receive a fee for any copy. The term does not include the personal notes or preliminary memoranda of judges or other judicial branch personnel.</p> <p>(b) [Electronic record] As used in this chapter, "electronic record" is a computerized court record, regardless of the manner in which it has been computerized. The term includes both a document that has been filed electronically and an electronic copy or version of a record that was filed in paper form. The term does not include a court record that is maintained only on microfiche, paper, or any other medium that can be read without the use of an electronic device.</p> <p>(c) [The public] As used in this chapter, "the public" is an individual, a group, or an entity, including print or electronic media, or the representative of an individual, a group, or an entity.</p> <p>(d) [Electronic access] "Electronic access" means computer access to court records available to the public through both public terminals at the courthouse and remotely, unless otherwise specified in these rules.</p>
<p>Indiana Rule 9(C)</p>	<p>(C) Definitions. For purpose of this rule.</p> <p>(1) "Court Record" means both case records and administrative records.</p> <p>(2) "Case Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency or clerk of court in connection with a particular case.</p> <p>(3) "Administrative Record" means any document, information, data, or other item created, collected, received, or maintained by a court, court agency, or clerk of court pertaining to the administration of the judicial branch of government and not associated with any particular case....</p> <p>(6) "Public access" means the process whereby a person may inspect and copy the information in a court record.</p> <p>(7) "Remote access" means the ability of a person to inspect and copy information in a court record in electronic form through an electronic means.</p> <p>(8) "In electronic form" means any information in a court record in a form that is readable through the use of an electronic device, regardless of the manner in which it was created.</p> <p>(9) "Bulk Distribution" means the distribution of all, or a significant subset of the information in court records in electronic form, as is, and without modification or compilation.</p> <p>(10) "Compiled Information" means information that is derived from the selection, aggregation or reformulation of some of all or a subset of all the information from more than one individual court record in electronic form.</p>

	3) Information (or documents) not available for public access
<p>Maryland</p> <p>R 16-1006,</p> <p>R 16-1007</p>	<p>Rule 16-1006. Required Denial of Inspection – Certain Categories of Case Records</p> <p>Except as otherwise provided by law, these Rules, or court order, the custodian shall deny inspection of: ...</p> <p>(3) In any action or proceeding, a case record concerning child abuse or neglect ...</p> <p>(5) The following case records in criminal actions or proceedings:</p> <ul style="list-style-type: none"> (a) A case record that has been ordered expunged pursuant to Md. Rule 4-508. (b) The following court records pertaining to search warrants: <ul style="list-style-type: none"> (i) The warrant, application, and supporting affidavit, prior to execution of the warrant and the filing of the records with the clerk. (ii) Executed search warrants and all papers attached thereto filed pursuant to Md. Rule 4-601. (c) The following court records pertaining to an arrest warrant: <ul style="list-style-type: none"> (i) A court record pertaining to an arrest warrant issued under Md. Rule 4-212(d) and the charging document upon which the warrant was issued until the conditions set forth in Md. Rule 4-212(d)(3) are satisfied. (e) A pre-sentence investigation report prepared pursuant to Md. Code, Correctional Services Article, § 6-112..... <p>(8) The following case records containing medical information:</p> <ul style="list-style-type: none"> (a) A case record, other than an autopsy report of a medical examiner, that (i) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (ii) contains medical or psychological information about an individual.... <p>(9) A case record that consists of the Federal or Maryland income tax return of an individual....</p> <p>Rule 16-1007. Required Denial of Inspection --Specific Information in Case Records.</p> <p>Except as otherwise provided by law, these Rules, or court order, a custodian shall deny inspection of a case record or a part of a case record that would reveal: ...</p> <p>(3) Any part of the social security or Federal Identification Number of an individual, other than the last four digits....</p>

	3) Information (or documents) not available for public access
<p>Vermont Rule 6</p>	<p>§ 6. Case Records.</p> <p>(a) <i>Policy.</i> The public shall have access to all case records, in accordance with the provisions of this rule, except as provided in subsection (b) of this section.</p> <p>(b) <i>Exceptions.</i> The public shall not have access to the following judicial branch records:...</p> <p>(4) Records of the family court in juvenile proceedings governed by Chapter 55 of Title 33, except as provided in 33 V.S.A. § 5536;</p> <p>(5) Records of the court in mental health and mental retardation proceedings under Part 8 of Title 18, not including an order of the court, except where the court determines that disclosure is necessary for the conduct of proceedings before it or that failure to make disclosure would be contrary to the public interest;</p> <p>(6) A presentence investigation report as provided in Chapter 5 of Title 28 and Rule 32(c) of the Vermont Rules of Criminal Procedure;...</p> <p>(8) Records containing a description or analysis of the DNA of a person if filed in connection with a family court proceeding;</p> <p>(9) Records produced or created in connection with discovery in a case in court, including a deposition, unless used by a party (i) at trial or (ii) in connection with a request for action by the court;</p> <p>(10) Records containing financial information furnished to the court in connection with an application for an attorney at public expense pursuant to 13 V S.A. § 5236(d) and (e), not including the affidavit submitted in support of the application;</p> <p>(11) Records containing financial information furnished to the court in connection with an application to proceed in forma pauperis, not including the affidavit submitted in support of the application;...</p> <p>(13) Any federal, state or local income tax return, unless admitted into evidence;...</p> <p>(15) Records of the issuance of a search warrant, until the warrant is executed and (i) property seized pursuant to the warrant is offered in a proceeding, or is subject to a motion to suppress; or (ii) a person, fetus or corpse searched for pursuant to the warrant has been located;</p> <p>(16) Records of the denial of a search warrant;</p> <p>(17) Records created as a result of treatment, diagnosis, or examination of a patient by a physician, dentist, nurse or mental health professional;</p> <p>(24) Records filed in court in connection with the initiation of a criminal proceeding, if the judicial officer does not find probable cause to believe that an offense has been committed and that defendant has committed it, pursuant to Rule 4(b) or 5(c) of the Vermont Rules of Criminal Procedure;...</p> <p>(29) Records containing a social security number of any person, but only until the social security number has been redacted from the copy of the record provided to the public;</p> <p>(30) Records with respect to jurors or prospective jurors as provided in the Rules Governing Qualification, List, Selection and Summoning of All Jurors;...</p> <p>(32) Any evidence introduced in a proceeding to which the public does not have access; and</p> <p>(33) Any other record to which public access is prohibited by statute.</p>

	<p>4) Segregation of information on “sensitive information forms”</p>
<p>Minnesota [proposed]</p>	<p>Rule 313.01. Definitions. For purposes of this rule, the following definitions shall apply:</p> <p>(10) “Restricted identifiers” shall mean the social security number [and/or employer identification number] and financial account numbers of a party or party’s child.</p> <p>(11) “Financial source documents” means income tax returns, W-2s and schedules, wage stubs, credit card statements, financial institution statements, check registers, as well as other financial information deemed financial source documents by court order.</p> <p>Rule 313.02. Restricted Identifiers.</p> <p>(a) Pleadings and Other Papers Submitted by a Party. No party shall submit restricted identifiers on any pleading or other paper that is to be filed with the court except:</p> <ol style="list-style-type: none"> 1) on a separate form entitled Confidential Information Form (see Form 11 appended to these rules) filed with the pleading or other paper; or 2) on Sealed Financial Source Documents under Rule 313.03. <p>The parties are solely responsible for ensuring that restricted identifiers do not otherwise appear on the pleading or other paper filed with the court. The court administrator will not review each pleading or document filed by a party for compliance with this rule. The Confidential Information Form shall not be accessible to the public</p> <p>(b) Records Generated by the Court. Restricted identifiers maintained by the court in its register of actions (i e., activity summary or similar information that lists the title, origination, activities, proceedings and filings in each case), calendars, indexes, and judgment docket shall not be accessible to the public. Courts shall not include restricted identifiers on their judgments, orders, decisions, and notices except on the Confidential Information Form (Form 11), which form shall not be accessible to the public.</p> <p>Rule 313.03. Sealing Financial Source Documents.</p> <p>Financial source documents shall be submitted to the court for filing under a cover sheet designated “Sealed Financial Source Documents” and substantially in the form set forth as Form 12 appended to these rules. Financial source documents submitted with the required cover sheet are not accessible to the public except to the extent that they are formally admitted into evidence in a hearing or trial. The cover sheet or copy of it shall be accessible to the public. Financial source documents that are not submitted with the required cover sheet and that contain restricted identifiers are accessible to the public, but the court may, upon motion or on its own initiative, order that any such financial source documents be sealed.</p>

	<p>4) Segregation of information on “sensitive information forms”</p>
<p>Arizona [proposed policy]</p>	<p>Sensitive Data</p> <p>1. The courts should protect from remote electronic public disclosure the following sensitive data from case files:</p> <ul style="list-style-type: none"> Social Security Numbers Credit Card Numbers Debit Card Numbers Other Financial Account Numbers Victim contact information (address and phone number) Names of juvenile victims <p>Rule 123(c)(3) already prohibits public access to financial account and social security numbers appearing in administrative files. Every court should review its forms and processes to ensure that this information is not being gathered unnecessarily.</p> <p>2. To protect the data listed in Recommendation Number 1 above, the Supreme Court should develop a sensitive data form and require its use where applicable. The sensitive data form shall be maintained by the clerk as a confidential record accessible by the general public only on a showing of good cause pursuant to the process set forth in Rule 123. Good cause may include access by a media representative for purposes of researching a news story.</p> <p>3. The Supreme Court should educate judges, attorneys and the public that case records are publicly accessible and may be available via the Internet.</p>

	<p>5) Judicial discretion (and procedures for requesting or denying access)</p>
<p>Vermont Rule 2(b) Rule 7</p>	<p>§ 2. Scope.</p> <p>.... (b) <i>Specific Right of Access.</i> If, based on a statute, judicial rule or other source of law, a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to a member of the public, the record custodian shall act in conformity with the applicable statute, rule or other source of law. If a person, or an authorized officer or member of the Executive or Legislative Branch, claims a right of access greater than that available to the public as a whole, but not based on a specific statute or rule, that claim shall be determined by the court administrator for administrative records or the presiding judge of the court involved for case records. In making that determination, the court administrator or judge shall be guided by these rules and any other relevant rules or statutes and shall weigh the special interest of the person or officer or member seeking the record against the interests protected by the restriction on public access. An appeal from such a determination may be made to the Supreme Court.</p> <p>§ 7. Exceptions.</p> <p>(a) <i>Case Records.</i> Except as provided in this section, the presiding judge by order may grant public access to a case record to which access is otherwise closed, may seal from public access a record to which the public otherwise has access or may redact information from a record to which the public has access. All parties to the case to which the record relates, and such other interested persons as the court directs, have a right to notice and hearing before such order is issued, except that the court may issue a temporary order to seal or redact information from a record without notice and hearing until a hearing can be held. An order may be issued under this section only upon a finding of good cause specific to the case before the judge and exceptional circumstances. In considering such an order, the judge shall consider the policies behind this rule. If a statute governs the right of public access and does not authorize judicial discretion in determining to open or seal a record, this section shall not apply to access to that record. ...</p> <p>©) <i>Appeals</i> Appeals from determinations under this section shall be made to the Supreme Court</p>

	<p>5) Judicial discretion (and procedures for requesting or denying access)</p>
<p>Indiana Rule 9(H)</p>	<p>(H) Prohibiting Public Access to Information In Court Records.</p> <p>(1) A verified written request to prohibit public access to information in a court record, may be made by any person affected by the release of the information. The request shall demonstrate that:</p> <ul style="list-style-type: none"> (a) The public interest will be substantially served by prohibiting access; (b) Access or dissemination of the information will create a significant risk of substantial harm to the requestor, other persons or the general public; (c) A substantial prejudicial effect to on-going proceedings cannot be avoided without prohibiting public access, or; (d) The information should have been excluded from public access under section (G) of this rule. <p>The person seeking to prohibit access has the burden of providing notice to the parties and such other persons as the court may direct, providing proof of notice to the court or the reason why notice could not or should not be given, demonstrating to the court the requestor's reasons for prohibiting access to the information. A party or person to whom notice is given shall have twenty (20) days from receiving notice to respond to the request.</p> <p>(2) A court may deny a request to prohibit public access without a hearing. If the court does not initially deny the request, it shall post advance public notice of the hearing. A court may grant a request to prohibit public access following a hearing if the requestor demonstrates by clear and convincing evidence that any one or more of the requirements of (H)(1)(a) through (H)(1)(d) have been satisfied. An order prohibiting public access to information in a court record may be issued by the court having jurisdiction over the record. An order prohibiting public access to information in bulk or compiled records, or in records under the jurisdiction of multiple courts may be issued only by the Supreme Court.</p> <p>(3) The court shall balance the public access interests served by this rule and the grounds demonstrated by the requestor. In its order, the court shall state its reasons for granting or denying the request. If the court prohibits access, it will use the least restrictive means and duration. When a request is made to prohibit public access to information in a court record at the time of case initiation, the request and the case information will remain confidential for a reasonable period of time until the court rules on the request. When a request is made to prohibit public access to information in court records that are already publicly accessible, the information may be rendered confidential for a reasonable period of time until the court rules on the request.</p> <p>(4) This section does not limit the authority of a court to seal court records pursuant to Ind. Code § 5-14-3-5.5.</p> <p><i>[Indiana Rule 9(I) is entitled "Obtaining Access to Information Excluded from Public Access." Its provisions are similar to Rule 9(H) above.]</i></p>

	<p>5) Judicial discretion (and procedures for requesting or denying access)</p>
<p>Maryland R 16-1009</p>	<p>RULE 16-1009. Court Order Denying or Permitting Inspection of Case Record</p> <p>(a) Motion</p> <p>(1) Any party to an action in which a case record is filed, including any person who has been permitted to intervene as a party, and any person who is the subject of or is specifically identified in a case record may file a motion:</p> <ul style="list-style-type: none"> (A) to seal or otherwise limit inspection of a case record filed in that action that is not otherwise shielded from inspection under these Rules; or (B) to permit inspection of a case record filed in that action that is not otherwise subject to inspection under these Rules <p>(2) The motion shall be filed with the court in which the case record is filed and shall be served on:</p> <ul style="list-style-type: none"> (A) all parties to the action in which the case record is filed; and (B) each identifiable person who is the subject of the case record. <p>(d) Final Order</p> <p>(1) After an opportunity for a full adversary hearing, the court shall enter a final order:</p> <ul style="list-style-type: none"> (A) precluding or limiting inspection of a case record that is not otherwise shielded from inspection under these Rules; (B) permitting inspection, under such conditions and limitations as the court finds necessary, of a case record that is not otherwise subject to inspection under these Rules; or (C) denying the motion. <p>(2) In determining whether to permit or deny inspection, the court shall consider:</p> <ul style="list-style-type: none"> (A) if the motion seeks to preclude or limit inspection of a case record that is otherwise subject to inspection under these Rules, whether a special and compelling reason exists to preclude or limit inspection of the particular case record, and (B) if the petition or motion seeks to permit inspection of a case record that is otherwise not subject to inspection under these Rules, whether a special and compelling reason exists to permit inspection <p>(3) Unless the time is extended by the court on motion of a party and for good cause, the court shall enter a final order within 30 days after a hearing was held or waived.</p> <p>(f) Non-Exclusive Remedy</p> <p>This Rule does not preclude a court from exercising its authority at any time to enter an order that seals or limits inspection of a case record or that makes a case record subject to inspection.</p>

	<p>6) Notice (to persons accessing records)</p>
<p>California Rule 2074</p>	<p>Rule 2074. Limitations and conditions ...</p> <p>(c) [Conditions of use by persons accessing records] A court may condition electronic access to its records on (1) the user's consent to access the records only as instructed by the court and (2) the user's consent to the court's monitoring of access to its records. A court must give notice of these conditions, in any manner it deems appropriate. The court may deny access to a member of the public for failure to comply with any of these conditions of use.</p> <p>(d) [Notices to persons accessing records] A court must give notice of the following information to members of the public accessing its electronic records, in any manner it deems appropriate:</p> <ul style="list-style-type: none"> (1) The court staff member to contact about the requirements for accessing the court's records electronically. (2) That copyright and other proprietary rights may apply to information in a case file absent an express grant of additional rights by the holder of the copyright or other proprietary right. The notice should indicate that (A) use of such information is permissible only to the extent permitted by law or court order and (B) any use inconsistent with proprietary rights is prohibited. (3) Whether electronic records constitute the official records of the court. The notice should indicate the procedure and any fee required for obtaining a certified copy of an official record of the court. (4) Any person who willfully destroys or alters any court record maintained in electronic form is subject to the penalties imposed by Government Code section 6201. <p>(e) [Access policy] A court must post a privacy policy on its public-access Web site to inform members of the public accessing its electronic records of the information it collects regarding access transactions and the uses that the court may make of the collected information.</p>

	7) Remote access / courthouse-only access
<p>California</p> <p>Rule 2073</p>	<p>Rule 2073. Public access</p> <p>(a) [General right of access] All electronic records must be made reasonably available to the public in some form, whether in electronic or in paper form, except those that are sealed by court order or are made confidential by law.</p> <p>(b) [Electronic access required to extent feasible] A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so.</p> <ul style="list-style-type: none"> (1) Register of actions (as defined in Gov. Code, § 69845), calendars, and indexes, and (2) All records in civil cases, except those listed in (c). <p>(c) [Courthouse electronic access only] A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may provide remote electronic access only to the records governed by (b)(1)</p> <ul style="list-style-type: none"> (1) Any record in a proceeding under the Family Code, including, but not limited to, proceedings for dissolution, legal separation, and nullity of marriage; child and spousal support proceedings; and child custody proceedings; (2) Any record in a juvenile court proceeding; (3) Any record in a guardianship or conservatorship proceeding; (4) Any record in a mental health proceeding; (5) Any record in a criminal proceeding; and (6) Any record in a civil harassment proceeding under Code of Civil Procedure section 527.6....

	<p>8) Access to information maintained by the court (including dockets)</p>
<p>Minnesota [proposed] R 313.02</p>	<p>Rule 313.02. Restricted Identifiers. (b) Records Generated by the Court. Restricted identifiers maintained by the court in its register of actions (i.e., activity summary or similar information that lists the title, origination, activities, proceedings and filings in each case), calendars, indexes, and judgment docket shall not be accessible to the public. Courts shall not include restricted identifiers on their judgments, orders, decisions, and notices except on the Confidential Information Form (Form 11), which form shall not be accessible to the public.</p>
<p>California Rule 2077</p>	<p>Rule 2077. Electronic access to court calendars, indexes, and registers of actions (a) [Intent] The intent of this rule is to specify information to be included in and excluded from the court calendars, indexes, and registers of actions to which public access is available by electronic means under rule 2073 (b). To the extent it is feasible to do so, the court must maintain court calendars, indexes, and registers of actions available to the public by electronic means in accordance with this rule..... (c) [Information that must be excluded from court calendars, indexes, and registers of action] The following information must be excluded from a court's electronic calendar, index, and register of actions: (1) Social security number; (2) Any financial information; (3) Arrest warrant information; (4) Search warrant information; (5) Victim information; (6) Witness information; (7) Ethnicity, (8) Age; (9) Gender; (10) Government-issued identification card numbers (i.e., military); (11) Driver's license number; and (12) Date of birth.</p>

	9) Access to "bulk" information
<p>California</p> <p>Rule 2073</p>	<p>Rule 2073. Public access</p> <p>...(e) [Access only on case-by-case basis] A court may only grant electronic access to an electronic record when the record is identified by the number of the case, the caption of the case, or the name of a party, and only on a case-by-case basis. This case-by-case limitation does not apply to a calendar, register of actions, or index.</p> <p>(f) [Bulk distribution] A court may provide bulk distribution of only its electronic calendar, register of actions, and index "Bulk distribution" means distribution of all, or a significant subset, of the court's electronic records....</p>
<p>Arizona</p> <p>[policy proposal]</p>	<p>7. Remote electronic access to case information should be afforded on a case-by-case basis only; bulk data should not be electronically accessible via the Internet. Electronic access should be limited to prevent the wholesale downloading of case files or case management databases via the Internet.</p>
<p>Indiana</p> <p>Rule 9(f)</p>	<p>(F) Bulk Distribution and Compiled Information.</p> <p>(1) Upon written request as provided in this section (F), bulk distribution or compiled information that is not excluded by Section (G) or (H) of this rule may be provided.</p> <p>(2) Requests for bulk distribution or compiled information shall be made to the Executive Director of the Division of State Court Administration or other designee of the Indiana Supreme Court. The Executive Director or other designee may forward such request to a court exercising jurisdiction over the records, and in the instance of records from multiple courts, to the Indiana Supreme Court, for further action. Requests will be acted upon or responded to within a reasonable period of time.</p> <p>(3) With respect to requests for case record information not excluded from public access by Sections (G) or (H) of this rule, the request for bulk distribution or compiled information may be granted upon determination that the information sought is consistent with the purposes of this rule, that resources are available to prepare the information, and that fulfilling the request is an appropriate use of public resources. The grant of said request may be made contingent upon the requestor paying reasonable costs of responding to the request....</p> <p><i>[this rule continues with process for obtaining bulk access to information that is excluded from general public access]</i></p>

