

MEMORANDUM

DATE: May 22, 2003

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on May 15, 2003, in Washington, D.C. At its meeting, the Advisory Committee approved three proposed amendments, removed two proposals from its study agenda, and agreed to continue to study several other proposals. Detailed information about the Advisory Committee's activities can be found in the minutes of the May 15 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

Pursuant to the request of the Standing Committee, the Advisory Committee has not forwarded proposed amendments to the Standing Committee in a piecemeal fashion, but instead has collected proposed amendments to present to the Standing Committee at one time. The last group of proposed amendments to the Appellate Rules were published in August 2000 and took effect in December 2002. The Advisory Committee now seeks the Standing Committee's approval to publish another group of proposed amendments in August 2003.

A. Rule 4(a)(6)

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 Advisory Committee proposes 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. That issue has been cast into doubt by the 1998 restyling of the Appellate Rules. Prior to 1998, it was clear that a party was precluded from moving to reopen the time to appeal a judgment only when the party received formal notice of that judgment under Civil Rule 77(d). Under restyled Rule 4(a)(6), it appears that *some* kind of notice, in addition to Civil Rule

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77(d) notice, precludes a party from later moving to reopen, but the rule does not make clear *what* kind of notice qualifies. The proposed amendment to Rule 4(a)(6) would restore pre-1998 clarity on this issue.

The Advisory Committee also proposes to amend Rule 4(a)(6) to specify what type of notice triggers the 7-day period to move to reopen the time to appeal. As the Committee Note discusses, a four-way circuit split has developed over this issue. The proposed amendment would provide that only written notice triggers the 7-day period, and the Committee Note would define “written” broadly to include, for example, notice observed by checking a court docket or a website.

The Advisory Committee unanimously approved this amendment at our May 2003 meeting.

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16 written notice of the entry from any source,

17 whichever is earlier;

18 ~~(B) the court finds that the moving party was~~

19 ~~entitled to notice of the entry of the judgment~~

20 ~~or order sought to be appealed but did not~~

21 ~~receive the notice from the district court or~~

22 ~~any party within 21 days after entry; and~~

23 (C) the court finds that no party would be

24 prejudiced.

25 * * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered.

Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

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

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

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

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the

moving party to receive “*such* notice” — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive “*the* notice.” And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from “the *clerk* or any party,” both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from “the *district court* or any party.”

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

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

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

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

Courts had difficulty agreeing upon what type of “notice” was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep’t of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, “the quality of the communication [had to] rise to the functional equivalent of written notice.” *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be

deemed “the functional equivalent of written notice” if they were sufficiently “specific, reliable, and unequivocal.” *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only “actual notice,” which, presumably, could have included oral notice that was not “the functional equivalent of written notice.” *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received “from the district court or any party,” *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

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

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

During the 1998 restyling of the Appellate Rules, the phrase “Washington’s Birthday” was replaced with “Presidents’ Day.” The Advisory Committee has 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.”

13 challenged judgment or order, or the circuit clerk's
14 principal office.

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Committee Note

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

Rule 45. Clerk’s Duties

1 **(a) General Provisions.**

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3 **(2) When Court Is Open.** The court of appeals is
4 always open for filing any paper, issuing and
5 returning process, making a motion, and entering
6 an order. The clerk’s office with the clerk or a
7 deputy in attendance must be open during business

8 hours on all days except Saturdays, Sundays, and
9 legal holidays. A court may provide by local rule
10 or by order that the clerk's office be open for
11 specified hours on Saturdays or on legal holidays
12 other than New Year's Day, Martin Luther King,
13 Jr.'s Birthday, ~~Presidents' Day~~ Washington's
14 Birthday, Memorial Day, Independence Day, Labor
15 Day, Columbus Day, Veterans' Day, Thanksgiving
16 Day, and Christmas Day.

17 * * * * *

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

The Advisory Committee proposes 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.

The Advisory Committee unanimously approved this amendment at our November 2002 meeting.

Rule 27. Motions

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2 **(d) Form of Papers; Page Limits; and Number of Copies.**3 **(1) Format.**

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

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26 must be at least one inch on all four sides.
27 Page numbers may be placed in the margins,
28 but no text may appear there.
29 (E) Typeface and type styles. The document
30 must comply with the typeface requirements
31 of Rule 32(a)(5) and the type-style
32 requirements of Rule 32(a)(6).

33 * * * * *

Committee Note

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

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

The Appellate Rules say very little about briefing in cases involving cross-appeals. This omission has been a continuing source

of irritation for judges and attorneys, and most courts have filled the national 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 Advisory Committee proposes 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 practices of a large majority of circuits.

The Advisory Committee unanimously approved these amendments at our November 2002 meeting.

Rule 28. Briefs

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(c) Reply Brief. The appellant may file a brief in reply to

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the appellee's brief. ~~An appellee who has cross-~~

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~~appealed may file a brief in reply to the appellant's~~

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~~response to the issues presented by the cross-appeal.~~

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Unless the court permits, no further briefs may be filed.

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A reply brief must contain a table of contents, with page

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references, and a table of authorities — cases

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

12 * * * * *

13 ~~(h) Briefs in a Case Involving a Cross-Appeal.~~ If a cross-
14 appeal is filed, the party who files a notice of appeal first
15 is the appellant for the purposes of this rule and Rules
16 30, 31, and 34. If notices are filed on the same day, the
17 plaintiff in the proceeding below is the appellant. These
18 designations may be modified by agreement of the
19 parties or by court order. With respect to appellee's
20 cross-appeal and response to appellant's brief, appellee's
21 brief must conform to the requirements of Rule
22 28(a)(1)-(11). But an appellee who is satisfied with
23 appellant's statement need not include a statement of the
24 case or of the facts. [Reserved]

25 * * * * *

Committee Note

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

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

Rule 28.1. Cross-Appeals

- 1 **(a) Applicability.** This rule applies to a case in which a
2 cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2),
3 and 32(a)(7)(A)-(B) do not apply to such a case, except
4 as otherwise provided in this rule.
- 5 **(b) Designation of Appellant.** The party who files a notice
6 of appeal first is the appellant for the purposes of this
7 rule and Rules 30 and 34. If notices are filed on the
8 same day, the plaintiff in the proceeding below is the

9 appellant. These designations may be modified by
10 agreement of the parties or by court order.

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

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

15 **(2) Appellee’s Principal and Response Brief.** The
16 appellee must file a principal brief in the cross-
17 appeal and must, in the same brief, respond to the
18 principal brief in the appeal. That appellee’s brief
19 must comply with Rule 28(a), except that the brief
20 need not include a statement of the case or a
21 statement of the facts unless the appellee is
22 dissatisfied with the appellant’s statement.

23 **(3) Appellant’s Response and Reply Brief.** The
24 appellant must file a brief that responds to the
25 principal brief in the cross-appeal and may, in the

- 26 same brief, reply to the response in the appeal.
- 27 That brief must comply with Rule 28(a)(2)–(9) and
- 28 (11), except that none of the following need appear
- 29 unless the appellant is dissatisfied with the
- 30 appellee’s statement in the cross-appeal:
- 31 (A) the jurisdictional statement;
- 32 (B) the statement of the issues;
- 33 (C) the statement of the case;
- 34 (D) the statement of the facts; and
- 35 (E) the statement of the standard of review.
- 36 (4) **Appellee’s Reply Brief.** The appellee may file a
- 37 brief in reply to the response in the cross-appeal.
- 38 That brief must comply with Rule 28(a)(2)–(3) and
- 39 (11). That brief must also be limited to the issues
- 40 presented by the cross-appeal.

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

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

50 **(e) Length.**

51 (1) **Page Limitation.** Unless it complies with Rule
52 28.1(e)(2) and (3), the appellant’s principal brief
53 must not exceed 30 pages; the appellee’s principal
54 and response brief, 35 pages; the appellant’s
55 response and reply brief, 30 pages; and the
56 appellee’s reply brief, 15 pages.

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75 (3) Certificate of Compliance. A brief submitted
76 under Rule 28(e)(2) must comply with Rule
77 32(a)(7)(C).

78 (f) Time to Serve and File a Brief. The appellant's
79 principal brief must be served and filed within 40 days
80 after the record is filed. The appellee's principal and
81 response brief must be served and filed within 30 days
82 after the appellant's principal brief is served. The
83 appellant's response and reply brief must be served and
84 filed within 30 days after the appellee's principal and
85 response brief is served. The appellee's reply brief must
86 be served and filed within 14 days after the appellant's
87 response and reply brief is served, but the appellee's
88 reply brief must be filed at least 3 days before argument,
89 unless the court, for good cause, allows a later filing.

Committee Note

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

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

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

Subdivision (b). Subdivision (b) defines who is the “appellant” and who is the “appellee” in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant “for the purposes of this rule and Rules 30 and 34,” whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule

31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28(f), the cross-reference to Rule 31 is no longer necessary.

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

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

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

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

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

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

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

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

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

1 **(a) Form of a Brief.**

2 * * * * *

3 **(7) Length.**

4 * * * * *

5 **(C) Certificate of Compliance.**

6 (i) A brief submitted under Rules
7 28.1(e)(2) or 32(a)(7)(B) must include a
8 certificate by the attorney, or an
9 unrepresented party, that the brief
10 complies with the type-volume
11 limitation. The person preparing the
12 certificate may rely on the word or line
13 count of the word-processing system
14 used to prepare the brief. The
15 certificate must state either:

Rule 34. Oral Argument

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(d) Cross-Appeals and Separate Appeals. If there is a

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cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party

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is the appellant and which is the appellee for purposes of

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oral argument. Unless the court directs otherwise, a

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cross-appeal or separate appeal must be argued when the

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initial appeal is argued. Separate parties should avoid

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duplicative argument.

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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).

E. New Rule 32.1

The Advisory Committee proposes 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. The Advisory Committee makes this proposal for two reasons:

First, the local rules of the circuits differ dramatically in their treatment of the citation of “unpublished” or “non-precedential” opinions for their persuasive value. Some circuits freely permit such citation, some circuits disfavor such citation but permit it in limited circumstances, and some circuits do not permit such citation under any circumstances. These conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit.

Second, the Advisory Committee believes that restrictions on the citation of “unpublished” or “non-precedential” opinions — the violation of which can lead to sanctions or to formal charges of unethical conduct — are wrong as a policy matter. The Advisory Committee defends its position at length in the Committee Note, so I will say no more about it here.

Needless to say, this is a controversial matter. Many attorneys and bar organizations are strongly opposed to no-citation rules; indeed, Dean Schiltz tells me that no issue has generated more correspondence to the Advisory Committee over the past six years. Although many judges have also expressed their opposition to no-citation rules — in fact, several circuits do not have such rules —

other judges are passionate in defending such rules. If the Standing Committee approves proposed Rule 32.1 for publication, we will undoubtedly receive a substantial number of comments.

I want to stress here — as I have stressed in prior communications to the Standing Committee — that proposed Rule 32.1 is extremely limited. It takes no position on whether designating opinions as “unpublished” or “non-precedential” is constitutional. It does not require any court to issue an “unpublished” or “non-precedential” opinion, nor does it forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as “unpublished” or “non-precedential.” Most importantly, it says nothing whatsoever about the effect that a court must give to one of its own “unpublished” or “non-precedential” opinions or to the “unpublished” or “non-precedential” opinions of another court. The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as “unpublished” or “non-precedential.”

The Advisory Committee approved proposed Rule 32.1 at our May 2003 meeting by vote of 7 to 1, with one abstention.

Rule 32.1. Citation of Judicial Dispositions

- 1 **(a) Citation Permitted.** No prohibition or restriction may
2 be imposed upon the citation of judicial opinions,
3 orders, judgments, or other written dispositions that
4 have been designated as “unpublished,” “not for

5 publication,” “non-precedential,” “not precedent,” or the
6 like, unless that prohibition or restriction is generally
7 imposed upon the citation of all judicial opinions,
8 orders, judgments, or other written dispositions.
9 **(b) Copies Required.** A party who cites a judicial opinion,
10 order, judgment, or other written disposition that is not
11 available in a publicly accessible electronic database
12 must file and serve a copy of that opinion, order,
13 judgment, or other written disposition with the brief or
14 other paper in which it is cited.

Committee Note

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

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

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

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

that have been *designated* as “unpublished” or “non-precedential” by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

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

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

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

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an “unpublished” opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of “unpublished” opinions, unless that restriction is generally imposed upon the citation of all judicial opinions — “published” and “unpublished.” Courts are thus prevented from undermining Rule 32.1(a) by imposing restrictions only upon the citation of “unpublished” opinions (such as a rule permitting citation of “unpublished” opinions only when no “published” opinion addresses the same issue or a rule requiring attorneys to provide 30-days notice of their intent to cite an “unpublished” opinion). 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).

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

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

Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

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

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of

“unpublished” opinions, it is difficult to believe that permitting a court’s “unpublished” opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own “unpublished” opinions to be cited for their persuasive value, and “the sky has not fallen in those circuits.” Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

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

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

particular “unpublished” opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an “unpublished” opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) (“It is ethically improper for a lawyer to cite to a court an ‘unpublished’ opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to [‘unpublished’ opinions].”). In addition, attorneys will no longer be barred from bringing to the court’s attention information that might help their client’s cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an “unpublished” opinion can now directly bring that “unpublished” opinion to the court’s attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an “unpublished” opinion must provide a copy of that opinion to the court and to the other parties, unless the “unpublished” opinion is available in a publicly accessible electronic database — such as in

Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

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

F. Rule 35(a)

Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits follow three very different approaches when one or more active judges are disqualified. Those approaches are 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), the "case majority" approach (disqualified judges do not count in the base), and the "qualified case majority" approach (disqualified judges do not count in the base, but a majority of all

judges — disqualified or not — must be eligible to participate in the case).

The Advisory Committee unanimously believes that Rule 35(a) should be amended so that all circuits treat disqualified judges in the same manner under 28 U.S.C. § 46(c) and Rule 35(a). The Advisory Committee also unanimously believes that either the absolute majority approach or the case majority approach can be defended as a reasonable interpretation of the statute and the rule. The Advisory Committee was divided 5-3 (with one abstention) on whether Rule 35(a) should be amended to impose the absolute majority approach or the case majority approach. The majority of the Advisory Committee prefer the case majority approach (for the reasons given in the Committee Note), but even those who favor the absolute majority approach believe that amending Rule 35(a) to adopt the case majority approach is preferable to not amending Rule 35(a) at all — that is, to permitting the circuits to continue to follow three very different approaches.

The Advisory Committee unanimously approved this amendment at our May 2003 meeting.

Rule 35. En Banc Determination

- 1 **(a) When Hearing or Rehearing En Banc May Be**
2 **Ordered.** A majority of the circuit judges who are in
3 regular active service and who are not disqualified may
4 order that an appeal or other proceeding be heard or

5 reheard by the court of appeals en banc. An en banc
6 hearing or rehearing is not favored and ordinarily will
7 not be ordered unless:

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

12 * * * * *

Committee Note

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

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner’s claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but

instead simply gave litigants “the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case.” *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, “to devise its own administrative machinery to provide the means whereby a majority may order such a hearing.” *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by “a majority” in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

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

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

active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase “a majority of the circuit judges . . . who are in regular active service” in § 46(c). The federal rules of practice and procedure exist to “maintain consistency,” which Congress has equated with “promot[ing] the interest of justice.” 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach are reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit’s active judges disagree. For example, in a case in which 5 of a circuit’s 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh’g en banc), *rev’d sub nom.*

National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

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