MEMORANDUM

DATE: **May 14, 2004**

TO: **Judge David F. Levi, 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 April 13 and 14, 2004, in Washington, D.C. The Committee approved all of the proposed amendments that had been published for comment in August 2003, including the controversial rule regarding the citation of unpublished opinions. The Committee also removed three items from the Committee's study agenda, tentatively approved one item for publication, and, at the request of the E-Government Subcommittee, discussed a draft rule intended to protect private information in court filings.

Detailed information about the Advisory Committee's activities can be found in the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") were published for comment in August 2003.

The comments received by the Advisory Committee were unusual in several respects. First, we received an extraordinarily large number of comments: 513 written comments were submitted, and 15 witnesses testified at a public hearing on April 13. By contrast, a much more extensive set of proposed amendments published in August 2000 attracted 20 written comments and no requests to testify. Second, the overwhelming majority of the comments — about 95

percent — pertained *only* to proposed Rule 32.1 (regarding the citing of unpublished opinions). Third, most of the comments on Rule 32.1 came from 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. Fourth, the vast majority of the comments on Rule 32.1 — about 90 percent — 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, and many letters were identical or nearly identical copies of each other.

Because of the unusual nature of the public comments, I will report on them somewhat differently than we have reported on public comments in the past. With respect to every proposed rule except Rule 32.1, I will provide the following: (1) a brief introduction; (2) the text of the proposed amendment and Committee Note, as approved by the Committee; (3) a description of the changes made after publication and comments; and (4) a summary of each of the public comments. With respect to proposed Rule 32.1, I will provide the same information, except that I will not individually summarize each of the 513 written comments and each of the 15 statements given at the public hearing. Instead, I will summarize the major arguments made for and against adopting Rule 32.1, and then I will identify all those who supported or opposed the rule.

As I noted, the Advisory Committee approved all of the proposed amendments for submission to the Standing Committee. Modifications were made to most of the proposed amendments and Committee Notes, but, in the Committee's view, none of the modifications is substantial enough to require republication.

A. Rule 4(a)(6)

1. 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 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 and to resolve a four-way circuit split over what type of notice triggers the 7-day period to bring such a motion.

2. Text of Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[*]

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to

[*] New material is underlined; matter to be omitted is lined through.

reopen is entered, but only if all the following conditions are satisfied:

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

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier;

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

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

* * * * *

Committee Note

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

Rule 4(a)(6) has been amended to specify more clearly what type 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 type 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 substantive change has been made. As amended, the subdivision will preclude

a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. 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. 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* type 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 type 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) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g.*, *Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of

written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). 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, 304-05 (2d Cir. 1999)).

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

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, an appeal cannot 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, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

3. Changes Made After Publication and Comments

No change was made to the text of subdivision (A) — regarding the type of notice that precludes a party from later moving to reopen the time to appeal — and only minor stylistic changes were made to the Committee Note to subdivision (A).

A substantial change was made to subdivision (B) — regarding the type of notice that triggers the 7-day deadline for moving to reopen the time to appeal. Under the published version of subdivision (B), the 7-day deadline would have been triggered when "the moving party receives or observes written notice of the entry from any source." The Committee was attempting to implement an "eyes/ears" distinction: The 7-day period was triggered when a party learned of the entry of a judgment or order by reading about it (whether on a piece of paper or a computer screen), but was not triggered when a party merely heard about it.

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. After considering the public comments — and, in particular, the comments of two committees of the California bar — the Committee decided that subdivision (B) could do better on both counts. The published standard — "receives or observes written notice of the entry from any source" — was awkward and, despite the guidance of the Committee Note, was likely to give courts problems. Even if the standard had proved to be sufficiently clear, district courts would still have been left to make factual findings about whether a particular attorney or party "received" or "observed" notice that was written or electronic.

The Committee concluded that the solution suggested by the California bar — using Civil Rule 77(d) notice to trigger the 7-day period — made a lot of 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, for the reasons described in the Committee Note, using Civil Rule 77(d) as the trigger will not unduly delay appellate proceedings.

For these reasons, the Committee amended subdivision (B) so that the 7-day deadline will be triggered only by notice of the entry of a judgment or order that is served under Civil Rule 77(d). (Corresponding changes were made to the Committee Note.) The Committee does not believe that the amendment needs to be published again for comment, as the issue of what type of notice should trigger the 7-day deadline has already been addressed by commentators, the revised version of subdivision (B) is far more forgiving than the published version, and it is highly unlikely that the revised version will be found ambiguous in any respect.

4. 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.

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

1. Introduction

During the 1998 restyling of the Appellate Rules, the phrase "Washington's Birthday" was replaced with "Presidents' Day." The Advisory 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 proposes to amend Rules 26(a)(4) and 45(a)(2) to replace "Presidents' Day" with "Washington's Birthday."

2. Text of Proposed Amendments and Committee Notes

Rule 26. Computing and Extending Time

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

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday,

~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

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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

(a) General Provisions.

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(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.

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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.

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3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

4. 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.

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

1. Introduction

The 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 allotted.

2. Text of Proposed Amendment and Committee Note

Rule 27. Motions

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

(1) **Format.**

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

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

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

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all

four sides. Page numbers may be placed in the margins, but no text may appear there.

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

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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.

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3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

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

1. 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 proposes to add a new Rule 28.1 that will 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 now limit the appellee's principal and response brief to 14,000 words, new Rule 28.1 will limit that brief to 16,500 words.

2. Text of Proposed Amendments and Committee Notes

Rule 28. Briefs

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(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court

permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

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(h) Briefs in a Case Involving a Cross-Appeal. ~~If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement~~

~~need not include a statement of the case or of the facts.~~

[Reserved]

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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

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

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day,

the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

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

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

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

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the

principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

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

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

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

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

reply brief, 30 pages; and the appellee's reply brief, 15 pages.

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

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

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

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

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

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

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

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

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

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

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

Committee Note

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

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

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 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 28.1(f), the cross-reference to Rule 31 is no longer necessary. In Rule 31 and in all rules other than Rules 28.1, 30, and 34, references to an "appellant" refer both to the appellant in an appeal and to the cross-appellant in a cross-appeal, and references to an "appellee" refer both to the appellee in an appeal and to the cross-appellee in a cross-appeal. Cf. Rule 31(c).

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. For purposes of determining the maximum length of an amicus curiae's brief filed in a case involving a cross-appeal, Rule 29(d)'s reference to "the maximum length authorized by these rules for a party's principal brief" should be understood to refer to subdivision (e)'s limitations on the length of an appellant's principal brief.

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

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

(a) Form of a Brief.

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

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

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

3. Changes Made After Publication and Comments

The Committee adopted the recommendation of the Style Subcommittee that the text of Rule 28.1 be changed in a few minor respects to improve clarity. (That recommendation is described below.) The Committee also adopted three suggestions made by the Department of Justice: (1) A sentence was added to the Committee Note to Rule 28.1(b) to clarify that the term "appellant" (and "appellee") as used by rules other than Rules 28.1, 30, and 34, refers to both the appellant in an appeal and the cross-appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Rule 28.1(d) was amended to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae. (3) A few words were added to the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief.

4. 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 filling 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:

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

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

E. New Rule 32.1

1. Introduction

The Committee proposes to add a new Rule 32.1 that will 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 will 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.

2. Text of Proposed Amendment and Committee Note

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict 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.

(b) Copies Required. If a party cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order,

judgment, or disposition with the brief or other paper in which it is cited.

Committee Note

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

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

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an unpublished opinion as binding precedent is constitutional. *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*, 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. Rule 32.1 addresses only 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 on 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 a party hopes that it will influence the court as, say, the opinion of another court of appeals or a district court might. 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.

Parties seek to cite unpublished opinions in another context in which parties do not argue that the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an

argument by pointing to the presence or absence of a substantial number of unpublished opinions on a particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most no-citation rules do not clearly address the citation of unpublished opinions in this context.

Rule 32.1(a) is intended to replace these inconsistent and unclear standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal or state court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of unpublished opinions. For example, a court may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. In an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on which neither Rule 32.1 nor this Note takes any position — they cannot be justified as a policy matter.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could 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, and soon every court of appeals will be required to post all of its decisions — including unpublished decisions — on its website "in a text searchable format." *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.

As the original justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, 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. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if all unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied upon by

judges (again, even in circuits that have imposed no-citation rules). *See, e.g., Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). Unpublished opinions are often read and cited precisely because they can contain valuable information or insights. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about unpublished opinions.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions, because judges know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished decisions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and

there is no evidence that any court has experienced any of these consequences. It is, of course, true that every court is different. But the federal courts of appeals are enough alike, and have enough in common with state supreme courts, that there should be *some* evidence that permitting citation of unpublished opinions results in, say, opinions being issued more slowly. No such evidence exists, though.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand. Because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, 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 a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about the impact on judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to 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 may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which make unpublished opinions widely available at little or no cost.

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, Rule 32.1 abolishes such rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion must provide a copy of that opinion to the court and to the other parties, unless that 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 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. 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, requiring parties to file and serve copies of every unpublished opinion that they cite is unnecessary and burdensome and is an example of a restriction forbidden by Rule 32.1(a).

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3. Changes Made After Publication and Comments

No changes were made to the text of subdivision (b) or to the accompanying Committee Note.

The text of subdivision (a) was changed. The proposed rule, as published, provided that a prohibition or restriction could not be placed upon the citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions." The Committee was trying to accomplish two goals by drafting the rule in this manner: On the one hand, the Committee did not want a court to be able to permit the citation of unpublished opinions as a formal matter, but then, as a practical matter, make such citation nearly impossible by imposing various restrictions on it. On the other hand, the Committee did not want to preclude circuits from imposing general requirements of form or style upon the citation of *all* authorities.

After reflecting on the comments — particularly those of Judge Easterbrook — the Committee concluded that this clause was unnecessary. First, as Judge Easterbrook pointed out, Rule 32(e)[**] was intended to put the circuits out of the business of imposing general requirements of form or style. It is hard to identify a requirement of form or style that could be both endangered by Rule 32.1 and enforced under Rule 32(e). Second, Rule 32.1 is most naturally read as precluding only prohibitions and restrictions on the

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[**]Rule 32(e) provides: "Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

citation of unpublished opinions *as such* — that is, prohibitions and restrictions aimed *exclusively* at the citation of unpublished opinions. A page limit on a brief could be said indirectly to "restrict" the citation of unpublished opinions, but no one is likely to read Rule 32.1 to forbid page limits on briefs.

For these reasons, the "generally imposed" clause was removed, leaving the rule simply to forbid courts from prohibiting or restricting the citation of unpublished opinions. What remained of the subdivision was also restyled so that it is now stated in the active rather than passive voice. The published version of the rule had been written passively — contrary to style conventions — because some Committee members hoped that a passively written rule would be less controversial. That strategy did not work, and all Committee members now agree that the rule should be written in active voice.

The Committee Note accompanying subdivision (a) has been substantially rewritten. The revised Note reflects the changes made in the text of the rule, states more forcefully the normative case for the rule, and responds directly to the major arguments against the rule. It is admittedly an unusual Note, in that it is almost entirely devoted to defending rather than explaining the rule. Such a Note seems advisable, though, given the controversial nature of proposed Rule 32.1.

4. Summary of Public Comments

As I explained in the introduction to this memorandum, I will not summarize all of the testimony that we received about Rule 32.1, nor will I summarize each of the 513 comments that were submitted. Rather, I will describe the major arguments that witnesses and commentators made for and against adopting the proposed rule. I will then describe the 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.

Please note that Sanford Svetcov, one of two members of the Advisory Committee who oppose Rule 32.1, asked that his dissenting views be communicated to the Standing Committee. A letter from Mr. Svetcov describing his reasons for opposing Rule 32.1 is attached to this memorandum.

a. Summary of Arguments Regarding Substance

i. 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, "Shakespearian 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.

ii. 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."[***] 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 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

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

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. (A 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 horribles" that they claim will be suffered by judges, attorneys, and parties if no-citation rules are abolished.

a. Many of the "horribles" in this parade are the same "horribles" 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.

b. 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."

c. List of Commentators

i. 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) (Chief Judge Walker testified at 4/13 hearing)

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) (Judge Wood testified at 4/13 hearing)

Eighth Circuit

Senior Judge Myron H. Bright (03-AP-047) (Judge Bright testified at 4/13 hearing)

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

Judge Stanley F. Birch, Jr. (03-AP-496)

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) (Chief Judge Mayer and Judge William Curtis Bryson testified at 4/13 hearing)

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. Fred S. McChesney, Northwestern University School of Law (03-AP-507)

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

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

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Seventh Circuit

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Ninth Circuit

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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) (Carter G. Phillips, Esq., testified at 4/13 hearing)

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) (John A. Taylor, Jr., Esq., testified at 4/13 hearing)

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)

ii. Commentators Who Favor Proposed Rule

Federal Circuit Court Judges

Judge Edward R. Becker (CA3) (Judge Becker testified at 4/13 hearing)

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. Barnett testified at 4/13 hearing)

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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James L. Martin, Esq., Wilmington, DE (03-AP-513)

Fourth Circuit

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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

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

Seventh Circuit

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

Eighth Circuit

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

Ninth Circuit

Anonymous (03-AP-238)

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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)

Robert L. Jovick, Esq., Livingston, MT (03-AP-508)

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)

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

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

Organizations

American Bar Association, Chicago, IL (Judah Best, Esq., testified at 4/13 hearing)

American College of Trial Layers, Irvine, CA (William T. Hangley, Esq., and James W. Morris III, Esq., testified at 4/13 hearing)

Association of the Bar of the City of New York and the Association's Committee on Federal Courts, New York, NY (03-AP-464)
Brennan Center for Justice, New York University School of Law, New York, NY (Jessie Allen, Esq., testified at 4/13 hearing)

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; 03-AP-487) (Brian Wolfman, Esq., testified at 4/13 hearing)

Social Security Administration, Baltimore, MD (03-AP-491)

Trial Lawyers for Public Justice and the TLPJ Foundation, Washington, DC (03-AP-406) (Richard Frankel, Esq., testified at 4/13 hearing)

F. Rule 35(a)

1. 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 proposes amending Rule 35(a) to adopt the case majority approach.

2. Text of Proposed Amendment and Committee Note

Rule 35. En Banc Determination

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

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

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

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

* * * * *

Committee Note

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

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had 8 active judges at the time; 4 voted in favor of rehearing the case, 2 against, and 2 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 Pac. 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, 7 of the courts of appeals follow the "absolute majority" approach. *See* 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.

Six 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 First and Third Circuits explicitly qualify 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.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 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.

The case majority approach represents the better interpretation of the phrase "the circuit judges . . . in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard en banc — uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of "the circuit judges . . . in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. 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). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

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3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. The Committee Note was modified in three respects. First, the Note was changed to put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). Second, the Note now clarifies that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d) to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service — disqualified or not — are eligible to participate. Finally, a couple of arguments made by supporters of the amendment to Rule 35(a) were incorporated into the Note.

4. 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.

III. Information Items

At the request of the E-Government Subcommittee, the Advisory Committee discussed a proposed new Appellate Rule 25.1, which would, among other things, require parties to redact certain personal identifiers from court filings and forbid electronic access to most parts of the record in Social Security Act cases. Proposed Rule 25.1 was based on a template drafted by Prof. Capra, which, in turn, reflected a great deal of work done by the Committee on Court Administration and Case Management.

The Advisory Committee expressed a number of concerns about the approach reflected in proposed Rule 25.1. Those concerns are described at pages 48 to 49 of the minutes of our April meeting.