ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, DC
April 18, 2005

Agenda for Spring 2005 Meeting of
Advisory Committee on Appellate Rules
April 18, 2005
Washington, D.C.

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March 28, 2005
Projects

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Thomas S. Ellis III	D	Virginia (Eastern)	2003	2006
Randy J. Holland	JUST	Delaware	2004	2007
Mark I. Levy	ESQ	Washington, DC	2003	2006
Stephen R. McAllister	ACAD	Kansas	2004	2007
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Sanford Svetcov	ESQ	California	1999	2005
Patrick J. Schiltz Reporter	ACAD	Indiana	1997	Open

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March 28, 2005
Projects

Advisory Committee on Appellate Rules
Table of Agenda Items — March 2005

FRAP Item	Proposal	Source	Current Status
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04
00-08	Amend FRAP 4(a)(6) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04

FRAP Item	Proposal	Source	Current Status
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Standing Committee returned to Advisory Committee for further study 06/04; referred to Federal Judicial Center for study
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved by Advisory Committee 04/04 Approved by Standing Committee 06/04 Approved by Judicial Conference 09/04

FRAP Item	Proposal	Source	Current Status
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study Discussed and retained on agenda 11/04
02-17	Amend FRAP 32 to eliminate local rule variations regarding contents of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study Discussed and retained on agenda 11/04
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04
04-04	Amend FRAP 25(a) to authorize courts to mandate electronic filing.	Hon. John W. Lungstrum (D. Kan.) on behalf of CACM	Awaiting initial discussion Draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 11/04
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion
05-02	Amend FRAP 35 and 40 to replace page limits with word limits.	Roy H. Wepner, Esq.	Awaiting initial discussion
05-03	Amend FRAP 5 in light of Bankruptcy Abuse Prevention and Consumer Protection Act.	Bankruptcy Rules Committee	Awaiting initial discussion

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Minutes of Fall 2004 Meeting of
Advisory Committee on Appellate Rules
November 9, 2004
Miami, Florida

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, November 9, at 8:30 a.m., at the Wyndham Grand Bay Coconut Grove Hotel in Miami, Florida. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

II. Approval of Minutes of April 2004 Meeting

The minutes of the April 2004 meeting were approved.

III. Report on June 2004 Meeting of Standing Committee

Judge Alito reported that, at its June 2004 meeting, the Standing Committee gave final approval to all of the proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"), with one exception. Those proposals were subsequently approved by the Judicial Conference and now are awaiting Supreme Court action.

The exception was proposed Rule 32.1 on the citation of unpublished opinions. Judge Alito reported that the Standing Committee had returned the proposal to this Advisory Committee for further study. Judge Alito said, and Prof. Coquillette agreed, that the decision of the Standing Committee did not signal a lack of support for the proposal. Rather, given the strong opposition to the proposal expressed by many commentators, and given that some of the claims of those commentators can be tested empirically, the Standing Committee wanted to ensure that every reasonable step is taken to gather information before it makes a final decision on the proposal.

Judge Alito announced that Dr. Reagan and his colleagues at the FJC had already designed a study, with input from Judge David F. Levi (Chair of the Standing Committee), Judge Alito, Prof. Coquillette, and Prof. Schiltz. Judge Alito distributed a description of the study and the survey instruments that will be used in the study. At Judge Alito's invitation, Dr. Reagan then described his intended research and answered questions from Committee members.

Mr. Rabiej said that the AO was also conducting research to assist the Standing Committee and Advisory Committee in their consideration of Rule 32.1. In particular, the AO is trying to determine whether citation rules correlate with either disposition times or the percentage of appeals disposed of without published opinions. To date, Mr. Rabiej said, the AO has not found much evidence of a correlation.

Judge Alito thanked Dr. Reagan and Mr. Rabiej for the assistance of their offices.

IV. Action Items

A. Item No. 03-10 (new FRAP 25.1 — electronic filing/privacy protections)

Judge Alito took up Item No. 03-10 out of order so that Prof. Daniel J. Capra, who joined the meeting via speaker phone, could lead the discussion. Prof. Capra is the Reporter to the Advisory Committee on Evidence Rules and is serving as the Lead Reporter to the E-Government Subcommittee.

Prof. Capra said that the E-Government Act of 2002 requires the federal courts to make most of their files accessible electronically and requires the advisory committees to propose amendments to the rules of practice and procedure to address the privacy and security concerns that will be raised when court files become available over the Internet. Prof. Capra said that the Standing Committee had appointed the E-Government Subcommittee to coordinate the efforts of the advisory committees to develop such rules. The first task of the Subcommittee was to come up with a template that reflected the major policy decisions that had already been made by the Committee on Court Administration and Case Management ("CACM") and that the advisory committees could then use in drafting amendments to their respective sets of rules.

Prof. Capra said that the most important policy decision made by CACM was that "public should remain public" — meaning that anything that has traditionally been available to the public at the courthouse should continue to be available to the public over the Internet. Remote electronic access will mean, though, that information that in the past would have been stored deep in the bowels of a courthouse will now be readily available to anyone with a computer and an Internet connection. For that reason, CACM has decided that particularly sensitive information — such as Social Security

numbers — should be redacted from all filings, so that the information no longer appears in either paper or electronic court files. Such redaction will, among other things, protect against identity theft. At the same time, CACM has recognized that there must be a limited number of exceptions to the redaction requirement, such as when redacting a filing would be extremely burdensome.

Reflecting these decisions, the current template provides as follows:

First, certain information will be redacted from *all* filings — paper and electronic. For example, parties will be required to redact from all filings the first five digits of Social Security numbers.

Second, some filings will be exempt from the redaction requirement, but will be available to the public over the Internet. In these cases, the privacy interests that would be protected by redaction are outweighed by the inconvenience that redaction would cause to the court and parties. For example, in a civil or criminal forfeiture proceeding, the number of the financial account that is the subject of the proceeding would not have to be redacted from filings.

Third, some filings will be exempt from the redaction requirement and will not be available to the public over the Internet (although the filings will continue to be available to the public at the courthouse). Filings in Social Security appeals are likely to receive this treatment. Requiring redaction of personal information from such filings would impose a significant burden on the government, both because of the high volume of Social Security appeals, and because those appeals involve a great deal of sensitive information.

Finally, parties will continue to be able to seek court permission to file documents under seal. Nothing will have to be redacted from a document filed under seal, for the obvious reason that such a document will not be available either at the courthouse or electronically. If a sealed document is later "unsealed," sensitive information will first have to be redacted.

Prof. Capra concluded his remarks by mentioning three issues that had been raised at the recent meetings of the Civil Rules Committee and the Criminal Rules Committee. First, the Civil Rules Committee decided that immigration cases should be treated like Social Security cases — that is, they should be exempt from the redaction requirement and protected from remote electronic access. Second, the Criminal Rules Committee decided that habeas proceedings should be exempt from the redaction requirement, but should be accessible over the Internet. Finally, both the Civil and Criminal Rules Committees noted the special problem of trial exhibits. In some district courts, trial exhibits are not filed, and thus will be neither available electronically nor subject to the privacy provisions of the Civil and Criminal Rules. When an appeal is brought, those trial exhibits will be filed with the court of appeals, and thus may become available electronically. The Appellate Rules Committee will have to address such filings.

Judge Alito asked Prof. Schiltz if he had anything to add to Prof. Capra's remarks. Prof. Schiltz said that, to date, the proposed rules that he had been drafting had directly incorporated the decisions being made by CACM and the other advisory committees. For example, if one of the other committees decided that financial account numbers should be redacted, draft Appellate Rule 25.1 provided the same. If one of the other committees decided that Social Security appeals should be exempt from both the redaction requirement and remote electronic access, then draft Rule 25.1 provided similar exemptions.

Prof. Schiltz said that he was now inclined to believe that the Appellate Rule should be drafted differently. Instead of trying to keep up with changes in the Civil or Criminal Rules, the Appellate Rule should take a "dynamic conformity" approach. In other words, the Appellate Rule should simply incorporate by reference the privacy provisions of the Civil and Criminal Rules. One way the Appellate Rule could do this is by providing that whatever privacy rules applied to a case before it was appealed will continue to apply to the case on appeal. In appeals from district courts, the Civil or Criminal Rules would apply. In administrative proceedings, the privacy rules of the agency would apply. Another way the Appellate Rules could do this is to provide that, for purposes of the privacy rules, a case filed in the court of appeals will be treated as though it had been filed in the district court — and thus that the Civil and Criminal Rules will apply to the same extent that they apply in district-court cases.

Prof. Schiltz said that everyone seems to agree that privacy issues are of more concern to the trial courts than to the courts of appeals and that the issues should therefore be addressed primarily by CACM and the Bankruptcy, Civil, and Criminal Rules Committees. It would be difficult for the Appellate Rules Committee to continually amend Appellate Rule 25.1 to keep up with changes to the other rules of practice and procedure. Moreover, gaps would develop, as "conforming" changes to the Appellate Rule would often lag behind changes to the Bankruptcy, Civil, and Criminal Rules. The Appellate Rule should adopt the other rules by reference, so that changes to the other rules are automatically reflected in the Appellate Rule.

After a brief discussion, the Committee agreed that the policy choices should be left to CACM and the other advisory committees, and that the Appellate Rules should not differ substantively from the Bankruptcy, Civil, or Criminal Rules. The Committee also agreed that, if Prof. Schiltz can find a way to implement it, the "dynamic conformity" approach would work well. Prof. Schiltz said that he would try to draft a "dynamic conformity" rule for the Committee to consider at its April 2005 meeting. Among issues that the Committee will need to consider are how to handle: (1) review of agency actions (given that most agencies do not have privacy rules), (2) mandamus and similar proceedings (which are brought directly in the courts of appeals), and (3) trial exhibits (some of which, as described above, are not filed until a case is appealed).

Most of the remainder of the Committee's discussion focused on the decision of the Civil Rules Committee to exempt immigration cases from the redaction requirement and to forbid remote electronic access to the files in such cases. One member defended the decision, arguing that the government does

not have the resources to redact those files, and pointing out that members of the public will have the same access to those files that they do now (that is, access at the courthouse, but not over the Internet). Other members questioned whether filings in immigration cases contained enough sensitive information to warrant such treatment. Both Prof. Coquillette and Prof. Capra acknowledged that the exemption for immigration cases is controversial and faced an uncertain future.

Ms. Waldron raised two issues that may need further consideration by the Civil or Criminal Rules Committee. First, aliens who are subject to deportation sometimes file habeas petitions to challenge their detention. Will those cases be treated as habeas cases or as immigration cases? Second, prisoners sometimes file *pre-trial* habeas petitions. Should those be exempt from the redaction requirement, as would "typical" habeas proceedings under the Criminal Rules Committee's proposal?

Judge Alito thanked Prof. Capra for his assistance to the Committee and said that, at the Committee's April 2005 meeting, the Committee will hopefully be able to approve a "dynamic conformity" rule for publication.

B. Item No. 97-14 (FRAP 46(b)(1)(B) — "conduct unbecoming" standard)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Item No. 97-14 encompasses a group of proposals ranging from, on one extreme, enacting a comprehensive "Federal Rules of Attorney Conduct" to, on the other extreme, tinkering with the "conduct unbecoming" standard of Rule 46(b)(1)(B). This item was added to the study agenda of the Appellate Rules Committee — and similar items were added to the study agenda of other advisory committees — in 1997 at the request of the Standing Committee.

Two developments provided the impetus for the Standing Committee's request. First, the Standing Committee's "Local Rules Project" found that the district courts had implemented as part of their local rules a large number of provisions governing the professional conduct of attorneys — provisions that were, on the whole, vague, confusing, and conflicting. Those provisions not only conflicted with each other, but often conflicted with the rules imposed by the states. Second, the Clinton Justice Department and several state courts were involved in a heated controversy over the interpretation and enforcement of Model Rule 4.2. Some states had interpreted Model Rule 4.2 to prohibit attorneys working for law enforcement agencies from having ex parte contacts with the employees of organizations that were under criminal investigation. The Department sought to use the Rules Enabling Act process to enact rules that would protect federal law enforcement agents from this broad interpretation of Model Rule 4.2 (as well as from broad interpretations of other rules, such as Model Rule 3.8).

The Reporter recommended that Item No. 97-14 be removed from the Committee's study agenda. The item has been dormant for a long time. For a number of reasons — including the presidential election of 2000 and change in administrations; the September 11 attacks and resulting reordering of federal law enforcement priorities; and changing personnel in the Department of Justice — the Department has not been able to give Item No. 97-14 sustained attention. The subcommittee established by the Standing Committee to coordinate work on this issue has not met since 2000, and this Committee has not even received an update since April 2001.

Prof. Coquillette said that he agreed with the recommendation. He said that it is unlikely that this issue will be a high priority for the Justice Department in the next year or two. In addition, when the Department again takes up this issue, it may try for a legislative solution rather than a rules-based solution.

A member moved that Item No. 97-14 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Item No. 99-06 (FRAP 33 — impact of settlements on bankruptcy proceedings)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Item No. 99-06 was added to the Committee's study agenda in 1999 at the request of the bankruptcy judges of the Fourth Circuit. Those judges expressed concern that Appellate Rule 33 — which authorizes an appellate court to order the parties to engage in a settlement conference and provides that the court may "enter an order . . . implementing any settlement agreement" — did not incorporate the notice provisions of Bankruptcy Rules 9019(a) and 7041. Those rules contain provisions designed to protect against the debtor cutting a "sweetheart" deal with one creditor to the detriment of other creditors or the bankruptcy estate. Under Bankruptcy Rule 9019(a), any proposed settlement affecting a bankruptcy estate must be approved by the bankruptcy court after notice of the proposed settlement is given to all of the creditors. And, under Bankruptcy Rule 7041, a complaint objecting to the discharge of a debtor cannot be dismissed at the request of the plaintiff alone; rather, the bankruptcy court must approve the dismissal after notice is given to the trustee.

The concerns of the Fourth Circuit bankruptcy judges were referred by this Committee to the Bankruptcy Rules Committee. After discussing this matter at two meetings, the Bankruptcy Rules Committee decided to recommend that this Committee remove Item No. 99-06 from its study agenda. The Bankruptcy Rules Committee is unaware of any evidence that the problem identified by the Fourth Circuit bankruptcy judges has actually materialized. To the contrary, in the experience of those who serve on the Bankruptcy Rules Committee, when a settlement that might affect the rights of absent creditors is reached on appeal of a bankruptcy case, the court of appeals will remand the case to the

district court with instructions to remand the case to the bankruptcy court, so that the bankruptcy court can ensure compliance with Bankruptcy Rules 9019(a) and 7041.

A member moved that Item No. 99-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(a) the United States;

(b) a United States agency;

(c) a United States officer or employee sued in an official capacity; or

(d) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

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Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which extended the 60-day period to respond to complaints to such cases. The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or~~

~~agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time:. a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

The Reporter reminded the Committee that, at its April 2004 meeting, it had tentatively approved the Justice Department's proposal that Rules 4(a)(1)(B) and 40(a)(1) be amended to make clear that the extended time periods apply in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions that occurred in connection with duties that he or

she performed on behalf of the United States. The Committee asked the Reporter to take a close look at the amendments and Committee Notes proposed by the Department, make appropriate stylistic changes, and present a final version at this meeting.

The Reporter said that he had rewritten the amendments to comply with the style conventions and to ensure that the text of the amendments will better match up with the text of restyled Civil Rules 12(a)(2) and (3). The Reporter also said that he had shortened the Committee Notes.

Mr. Letter said that the Department supported the revised amendments and Notes and had only two minor suggestions with respect to the Note to the amendment to Rule 4(a)(1)(B). First, the Department would like to replace the phrase "which extended the 60-day period to respond to complaints to such cases" with the phrase "which specified an extended 60-day period to respond to complaints in such cases." Second, the Department would like to insert the words "the Solicitor General to" in the last sentence of the rule, after "additional time to" and before "decide whether to file an appeal." By consensus, the Committee agreed to the changes.

A member moved that the amendments to Rules 4(a)(1)(B) and 40(a)(1) be approved for publication. The motion was seconded. The motion carried (unanimously).

E. Item No. 04-04 (FRAP 25(a) — authorize courts to mandate electronic filing)

The Reporter introduced the following proposed amendment and Committee Notes:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that

the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 25(a)(2)(D).

The Reporter said that CACM has asked that the rules of appellate, bankruptcy, civil, and criminal procedure be amended on an expedited basis to authorize the federal courts to use their local rules to force parties to file all documents electronically. CACM believes that mandatory electronic filing will achieve significant cost savings for the federal courts. CACM also points out that many bankruptcy courts and district courts are already requiring electronic filing, and that many more are likely to follow suit. It would be best for all if the national rules would authorize what the federal courts apparently are going to do anyway.

The Reporter said that the proposed amendment to Rule 25(a)(2)(D) and accompanying Committee Note are identical to amendments that have already been approved by the Bankruptcy Rules Committee and Civil Rules Committee at their meetings earlier this fall. The Standing Committee hopes that this Committee will follow suit, as the Standing Committee would like to expedite consideration of these amendments as follows: The amendments will be published for comment on November 15, 2004. The comment period will expire on February 15, 2005. The advisory committees will consider the comments and give final approval to the amendments at their spring 2005 meetings. The Standing Committee will consider the rules at its June 2005 meeting, and the Judicial Conference will consider them in September 2005.

Members expressed several concerns about the proposal. Members were concerned that mandatory electronic filing could pose a hardship for some litigants, and wondered whether the national rules should be amended to protect such litigants. Other members expressed concern about the lack of uniformity that would result from the amendments, with some courts requiring electronic filing, others allowing but not requiring electronic filing, and still others forbidding electronic filing. And almost all members agreed that they would not support an amendment that would force courts to accept electronic filings.

The Reporter said that he shared the concerns of the members, and that he had been among those who had unsuccessfully objected to considering CACM's proposal on an expedited basis. But he also reminded the Committee that, at this point, the Committee is being asked only to approve the proposal for publication. The Committee's concerns can be revisited in April, when the Committee will have the benefit of public comment on the rule. The Reporter also reminded the Committee that the rule would merely give courts the option to require electronic filing; it would not force any court to accept any electronic filing or forbid any court from requiring paper filings. Finally, the Reporter said that, although uniformity is important, it is also sometimes important to allow courts to experiment and gain experience that can inform later national rulemaking. This is particularly true in the area of technology. Mr. Rabiej added that, in the districts that have already implemented mandatory electronic filing, both the courts and the parties have been very happy with the results.

A member moved that the proposed amendment to Rule 25(a)(2)(D) be approved for publication. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item Nos. 02-16 & 02-17 (FRAP 28 & 32 — inconsistent local rules on briefs and covers of briefs)

Judge Alito reminded the Committee that Item Nos. 02-16 and 02-17 arose out of complaints by the ABA Council of Appellate Lawyers about variations in local circuit rules regarding briefs and covers of briefs. The Committee discussed the ABA's concerns at length at its November 2003 meeting. At that meeting, Judge Levi warned the Committee that any proposed changes to briefing requirements were likely to be resisted by members of the Judicial Conference. He said that the Conference was unlikely to be persuaded simply by arguments that national uniformity is important or that a particular change is thought by a majority of the Committee to be a good idea. Rather, if a proposed change to Rule 28 is to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the change — for example, evidence that two-thirds of the circuits have already adopted the change — and the organized bar will have to get behind the change.

Members of the Committee agreed with Judge Levi. The Committee voted to table further discussion of Item Nos. 02-16 and 02-17 and to request the FJC to collect further information for the Committee. Specifically, the Committee asked the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28 and to try to learn the reason for each variation and assess the degree to which each variation is enforced in practice.

After an exhaustive study, Ms. Leary and the FJC produced a comprehensive report entitled, "Analysis of Briefing Requirements in the United States Courts of Appeals." The report was included under Tab V-A in the Committee's agenda book. Judge Alito thanked Ms. Leary for her excellent work and invited her to discuss that work with the Committee.

Ms. Leary told the Committee that the information compiled in the FJC's report came from a close review of local rules, standing orders, practitioner guides, and the like, as well as from questionnaires sent to every circuit executive. Ms. Leary said that she found that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in Rule 28. She said that over half of the courts of appeals impose seven or more such requirements. Ms. Leary then reviewed in detail the findings described in her report.

Judge Alito again thanked Ms. Leary for her work and suggested to the Committee that, before it dug into the details of the report, the Committee should discuss a fundamental underlying question: Should this Committee undertake a major effort to bring about uniformity — or near-uniformity — in briefing requirements, recognizing that such an effort would take a great deal of time and energy and likely be met with strong resistance from circuit judges? Or should this Committee instead try to marginally improve uniformity by enacting "pinpoint" changes and by encouraging the circuits to revoke unnecessary local rules?

Several members addressed Judge Alito's question. Some expressed deep frustration with the numerous local rules on briefs, arguing that they substantially undermine the central purpose of the rules of practice and procedure. A lawyer should be able to read the Appellate Rules and know how to file a brief in any federal court of appeals. No lawyer should have to wade through pages of local rules, practitioner guides, internal operating procedures, and standing orders every time he wants to file a brief. Nor should any attorney have to deal with the constant frustration of being told by the clerk that he must file a corrected brief because he failed to follow an obscure or picayune local rule. These local variations waste the time of attorneys and the money of clients. Some members also argued that many of the local variations appear to accomplish little, but rather seem to be in place for no better reason than "we've always done it this way." The bottom line for some members is that the local rules on briefing create considerable hardship for practitioners and little or no corresponding benefit for judges.

Other members responded in several ways:

First, some members argued that bringing about uniformity in briefing would be impossible. Rightly or wrongly, the circuits feel very strongly about their local rules on briefing, and any attempt by the Committee to sweep away those local rules is doomed to fail. It would be unwise to invest a great deal of time and effort in an endeavor that is likely to do nothing but provoke the ire of the circuit judges.

Second, in the view of some members, the desire of circuits to impose their own rules on briefing is reasonable. Circuits vary substantially in the size and nature of their caseloads, in the number and geographical dispersion of their judges, in their local legal cultures, and in many other ways. Circuits must operate differently, and the differences in briefing requirements reflect that fact.

Third, some members argued that experimentation with briefing should be encouraged, especially in an era of rapidly changing technology, communications, transportation, and the like. The experiences of the circuits with various rules and practices can help inform this Committee's consideration of proposed changes to Rule 28.

Finally, some members expressed skepticism about the degree to which local rules on briefing create a hardship. Most attorneys practice in only one circuit, and most of those who practice in multiple circuits work for large organizations (such as the Department of Justice) or large law firms. Such lawyers should have little problem finding and following local rules on briefing. Moreover, the Committee cannot possibly wipe out all local rules on all subjects, and thus, no matter what the Committee does, lawyers will still have to read and follow local rules. It's just a fact of life that, when an attorney files a brief in a circuit, the attorney needs to follow the local rules of that circuit — just as it's a fact of life that, when an attorney files a brief in a state court, the attorney needs to follow the local rules of that county or judicial district.

After a lengthy discussion, the Committee reached a consensus on the following:

1. The Committee will not undertake a major effort to bring about uniformity or near-uniformity in briefing requirements. Although members disagree about the importance of uniformity in this area, all agree that uniformity is not achievable.

2. The Committee will continue to be open to proposals to amend Rule 28 to implement specific practices that have proven helpful.

3. In an effort to bring about more uniformity, Judge Alito will mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the rules identified by Ms. Leary and, where possible, to revoke those rules or make them more consistent with Rule 28. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

Several members suggested that the problem here may be one of awareness — of circuits not fully appreciating just how many local rules they've implemented, how difficult those rules are for practitioners to locate and piece together, and how many ways those rules differ from Rule 28 and the rules of other circuits. Circuits may welcome the information contained in Ms. Leary's report and welcome the opportunity to review their local rules in light of that information.

Prof. Coquillette supported the Committee's decision. He said that the Standing Committee would rather use persuasion than compulsion to increase uniformity in this area. He also said that the Local Rules Project demonstrated that persuasion can be effective.

One member raised the possibility that Ms. Leary's study and Judge Alito's letter could be expanded to include rules regarding appendices. Other members argued against such an expansion. At the November 2003 meeting, the Committee agreed that it would take no action with respect to appendices. There is enormous variation among local circuit rules regarding appendices; indeed, no two circuits have the same rules. Bringing about substantially more uniformity would require just about every circuit to make significant changes to its local practices. These local practices are deeply rooted, and judges feel strongly about them. The Committee is wiser to focus on the issue of briefs, where there is more uniformity to begin with, and where progress toward still more uniformity can realistically be achieved.

A member said that, while he supported the notion of using persuasion rather than rulemaking, he preferred to wait until the controversy over proposed Rule 32.1 is resolved before raising this issue with the circuits. The Committee agreed. By consensus, the Committee agreed that the Reporter, with the help of a couple of Committee members, should prepare a draft letter that can be reviewed by the Committee at its April 2005 meeting. Mr. Letter and Mr. Levy volunteered to work with the Reporter on the draft letter.

B. Item No. 04-01 (FRAP 5(c) et al. — replace page limits with word limits)

Judge Alito invited the Reporter to introduce this item.

The Reporter reminded the Committee that, at its last meeting, a member asked to add to the Committee's study agenda the proposal that all of the page limitations in FRAP be replaced with word limitations. The Reporter said that this is the third time in the seven years that he has served as Reporter that this proposal has appeared on the Committee's study agenda and that the proposal has been informally discussed on at least a couple of additional occasions. Every time the idea has been floated — most recently, in April 2002 — the Committee has unanimously decided not to proceed with it. The reasons that Committee members have given for not proceeding with word limitations include the following:

1. There is no compelling reason to replace page limitations with word limitations. The clerks have not complained about the page limitations; to the contrary, the clerks have consistently said that the page limitations work fine and should not be disturbed. Attorneys have also not complained about the page limitations.

2. The clerks strongly prefer page limitations because they are easy to enforce. A clerk can tell at a glance whether a paper exceeds 20 pages. By contrast, word limitations are difficult to enforce. A clerk cannot tell at a glance whether a paper exceeds 7,500 words; such a limitation can be enforced only by counting words, and no clerk has time to count words.

3. Clerks are able to enforce the type-volume limitation on briefs only because parties are required to file a certificate of compliance. For word limitations to work, then, FRAP would have to be amended not just to replace every page limitation with a word limitation, but to require that a certificate of compliance be filed with every document subject to a word limitation, such as every petition for rehearing. That would add thousands of pages to the files of attorneys and courts, and it would add substantially to the workload of clerks, who would often have to contact attorneys and ask them to supply missing certificates.

4. If the Committee replaced page limitations with word limitations, and the Committee required that compliance with the new word limitations be certified, then the Committee would also have to decide whether to amend the appendix of forms to include certificates of compliance similar to Form 6. If the Committee did so, the Committee would further have to decide whether to amend various rules to provide that the use of the new forms "must be regarded as sufficient to meet the requirements" of the various word limitations, as Rule 32(a)(7)(C)(ii) provides with respect to the type-volume limitation on briefs.

5. Word limitations and other restrictions (such as restrictions regarding typeface and type styles) were imposed on briefs because abuses were a real problem. The clerks have consistently asserted that abuses are not a problem with regard to motions, rehearing petitions, and other documents. And, as noted above, clerks have also consistently said that the abuses that do exist are better controlled through page limitations than through word limitations.

For all of these reasons, the Committee has several times in the past seven years declined to proceed with suggestions that the page limitations in FRAP be replaced with word limitations. The Reporter recommended that the Committee again remove this proposal from its study agenda.

A member disagreed. He said that word limitations present several advantages over page limitations. First, they reduce gamesmanship. Second, they allow attorneys to use larger typeface. And third, they make it easier to edit papers. Trying to meet page limitations sometimes requires attorneys to continue to cut words, move text in and out of footnotes, turn the "widow/orphan" feature on and off, and experiment with other measures until the page breaks fall just right.

Other members opposed changing all of the page limitations into word limitations. In their view, word limitations offer, at best, only minor improvements and do not justify making extensive changes to FRAP — especially changes that are opposed by the clerks who would have to enforce word limitations.

Mr. Rabiej said that it may become easier to enforce word limitations as electronic filing becomes commonplace. A clerk could simply run a word-count program on a document. Others disagreed, point out that some formats (e.g., PDF) do not have word-count features and that running a word-count program on every document would be inconvenient for clerks, especially as some words in the document (e.g., the words in the signature block) would have to be excluded from the count.

A member moved that all of the page limitations in FRAP be replaced by word limitations. The motion was seconded. The motion failed (2-5).

By consensus, the Committee agreed to remove Item 04-01 from the Committee's study agenda.

C. Items Awaiting Initial Discussion

1. Item No. 04-02 (FRAP 12(b) — timing of representation statement)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was placed on the study agenda at the request of Mr. Dennis R. Cookish, a pro se litigant. Mr. Cookish is concerned that, under Rule 12(b), a party can be required to file a representation statement with the court of appeals before the notice of appeal filed with the district court has been transferred to the court of appeals. Thus, the court of appeals can receive a representation statement regarding a case before the court of appeals even knows that the case exists. Mr. Cookish suggests that clerks be required to notify the parties when a case is transferred to or docketed by the court of appeals, and that parties have 10 days to file a representation statement after receiving that notice.

Ms. Waldron said that she had informally surveyed the other circuit clerks about Mr. Cookish's concern, and the clerks do not think that it is a problem. It is true that the circuit clerks occasionally receive representation statements for cases that have not yet been transferred from the district court. But the clerks' offices simply hold those statements until the papers arrive, perhaps after confirming with the district clerk that a notice of appeal has been filed. Ms. Waldron said that, to the extent that the circuit clerks have a problem with representation statements, it is with the fact that they are often not filed at all and the clerk must nag the parties to submit them.

A member moved that Item No. 04-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

2. Item No. 04-03 (FRAP 4(a)(4)(A)(iii) — tolling effect of Civil Rule 54 motions)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was added to the Committee's study agenda at the request of Judge Ronald Gilman, writing in *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). In *Wikol*, the parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman, author of the Sixth Circuit's opinion, reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).

Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committees consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A).

The Reporter said that, in light of *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (which held that a judgment is final and appealable even if a motion for attorney's fees is pending), this Committee and the Civil Rules Committee essentially have three options if they wish to address the problem raised by *Wikol*:

First, the Committees could decide that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion for attorney's fees is always treated like a timely Rule 59 motion for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the Committees could decide that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion is never treated like a timely Rule 59 motion. Under this approach, a Rule 54 motion would not toll the time to appeal, and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Finally, the Committees could decide to maintain the "hybrid" approach. Under this approach, a default rule is established — at present, the default rule is that a motion for attorney's fees under Rule

54 is not treated like a Rule 59 motion — but then the district court is given authority to make exceptions to the default rule. At present, Civil Rule 58(c)(2) gives district courts authority to "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." To solve the *Wikol* problem, though, the rules would have to be amended to impose a deadline by which a district court must act. For example, a deadline could be patterned after Criminal Rule 35(a), under which a court has authority to correct a sentence within seven days after the sentence is imposed, but loses such authority after the seventh day.

The Committee discussed the options described by the Reporter. Most Committee members said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would always be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits would always have to be brought together with the appeal on the fees. In the experience of Committee members, appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason. A decision on fees can be much more difficult than a decision on the merits. District court judges often do not want to have to make a decision on fees until they know for certain that the decision on the merits will stand. Also, once the appeal on the merits is over, parties often settle the fees dispute.

Most Committee members also said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would never be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits could never be brought together with the appeal on the fees. Members pointed out that the Federal Circuit has held that, in patent infringement cases, appeals on the merits must always be packaged together with appeals on the fees. Sometimes there is good reason to present the appellate court with the merits and the fees in the same appeal.

In sum, Committee members favor maintaining the current hybrid approach, under which the assumption is that the appeals will proceed separately, unless the district court orders otherwise. Committee members believe, however, that a time limit should be added to Civil Rule 58(c)(2) so that the *Wikol* facts are not repeated. Item No. 04-03 should be referred to the Civil Rules Committee, so that it can consider approving such an amendment.

A member moved that Item No. 04-03 be referred to the Civil Rules Committee, along with the recommendation of this Committee that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business

There was no additional old business or new business.

Member David M. Bernick was unable to participate in the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small for Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor David A. Schlueter, Reporter
Professor Sara Sun Beale, Consultant
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Patrick F. McCartan, former member of the committee, and John S. Davis, Associate Deputy Attorney General, also participated in the meeting. Associate Deputy Attorney General Christopher A. Wray made a presentation on behalf of the Department of Justice on the second day of the meeting. Attorneys Elizabeth J. Cabraser and Melvyn R. Goldman participated in a panel discussion on the second day. Professor R. Joseph Kimble participated by telephone in the committee's discussion of the report of the Advisory Committee on Civil Rules.

VII. Dates and Location of Spring 2005 Meeting

The Committee will next meet on April 18 and 19, 2005, in Washington, D.C.

VIII. Adjournment

The Committee adjourned at 12:30 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 13-14, 2005
San Francisco, California
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 13 and 14, 2005. The following members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Member David M. Bernick was unable to participate in the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

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INTRODUCTORY REMARKS

Judge Levi reported with regret that the term of committee member Patrick McCartan had expired. He noted that Mr. McCartan had made many major contributions to the work of the committee over the course of the past six years, and he presented him with a framed certificate of appreciation signed by the Chief Justice. Mr. McCartan expressed his appreciation for the honor, and he emphasized that serving on the committee had been one of the highlights and great privileges of his professional career.

Judge Levi welcomed and introduced Mr. Kester as a new member of the Standing Committee and Professor Beale as the next reporter to the Advisory Committee on Criminal Rules. He added that the Standing Committee would honor Professor Schlueter at its next meeting for his long and distinguished service as reporter to the criminal rules committee over the past 17 years.

Judge Levi noted with particular sadness the recent death of Judge H. Brent McKnight, whom he praised as an outstanding member of the Advisory Committee on Civil Rules and a wonderful human being. He pointed out that Judge McKnight had been responsible for heading the committee's efforts in producing new Admiralty Rule G, which brings together in one place the key procedures governing civil forfeiture actions.

Judge Levi also reported that John Rabiej had recently been honored by election to membership in the American Law Institute.

He noted that the major team effort to restyle the civil rules for public comment was nearing an end, and a complete package of restyled rules would soon be ready for publication. He described the contributions of the many participants as incredible, and he said that special thanks were due to the members of the Style Subcommittee (Judge Murtha, Dean Kane, and Judge Thrash), the chair of the Advisory Committee on Civil Rules (Judge Rosenthal), the chairs of the two subcommittees of the civil rules committee (Judges Kelly and Russell), the committee reporters and consultants (Professors Kimble, Cooper, Marcus, and Rowe and Mr. Spaniol), and the staff (Messrs. McCabe, Rabiej, and Deyling).

Judge Levi reported that two important decisions had helped to assure the success of the project. First, he said, the committee had decided to avoid making any substantive changes in the rules and to use a high standard to make sure that changes affect only style, and not substance. Second, he noted, it had been agreed that the Style Subcommittee would have the final word on matters of pure style, but the civil rules committee would have the final word as to whether a particular change is substantive or affects substance. He pointed out that some members of the bar may be concerned when they see changes in familiar language, but, he emphasized, the advisory committee believes that no changes have been made to the substance of the rules. He predicted that the reformatting,

reorganization, modernization, and sheer readability of the rules will be a very pleasant surprise for users.

Judge Levi reported that the Judicial Conference at its September 2004 session had approved all the recommendations of the committee without discussion. He also briefly described some of the proposed amendments that had been published for comment in August 2004, noting that they will be presented to the committee for final approval at its next meeting. He reported that the Advisory Committee on Civil Rules had just conducted the first of three public hearings on the proposed electronic discovery rules amendments and pointed out that there had been a huge amount of public interest.

Judge Levi also mentioned two potential future projects under consideration by the advisory committees. The first would address the way that time is described in the different federal rules. It would take a broad look at all the various time provisions to make sure that they are realistic and internally consistent. The second potential project would address certain overlaps and conflicts between the civil rules and the evidence rules.

Judge Levi reported that the civil and evidence advisory committees had reviewed the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. ___, 124 S.Ct. 2531 (2004), invalidating a state court sentence because it had violated the defendant's Sixth Amendment right to jury trial in that aggravating factors enhancing the defendant's sentence had been found by the court, and not found by a jury or admitted by the defendant. He said that the advisory committees had been considering the need to amend the federal rules if the Supreme Court were to invalidate the federal sentencing system and to require fact-finding by juries.

On January 12, 2005 — the day before the committee meeting — the Supreme Court issued its decision in *United States v. Booker and United States v. Fanfan,* ___ U.S. ___, 125 S. Ct. 738 (2005). Copies were provided to the members, and they offered their initial personal reactions to the opinions. They agreed that the Court had retained the federal sentencing guidelines in place, but had made them advisory in nature, rather than mandatory. Judge Levi noted that the result was very satisfactory to the judiciary and mirrored the proposed recommendations of a special five-judge *Blakely/Booker/Fanfan* working group, comprised of the chair and two members of the Criminal Law Committee, himself, and Judge Robert Hinkle of the evidence rules committee.

Professor Capra pointed out that he had served as the reporter for the special working group and had conducted research for it. He noted that his review of all district-court decisions following *Blakely* had revealed that federal district judges were in fact continuing to adhere to the federal guidelines, had imposed sentences within the prescribed ranges of the guidelines in about 90% of the cases, and were carefully

explaining their reasons for departures. He added that research had shown that appellate review had worked effectively in those state-court systems that use advisory sentencing guidelines. He concluded that the advisory-guidelines system left by *Booker/Fanfan* would be workable, but he questioned whether Congress would leave it in place for the long run.

Professor Capra noted that, in light of *Booker/Fanfan,* there was no need to change FED. R. EVID. 1101 to make the evidence rules applicable in sentencing, or to make other changes in the evidence rules generally. Judge Bucklew said that the Advisory Committee on Criminal Rules would consider the need for changes in the criminal rules at its next meeting, but it did not appear at first glance that major changes would be needed. Judge Levi added that the Criminal Law Committee would take the lead for the Judicial Conference in developing substantive positions and legislative options.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 17-18, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2004 session had approved the committee's proposed victim allocution amendments to FED. R. CRIM. P. 32 (sentencing and judgment). He noted, though, that the committee had been aware of pending legislation that would provide a broader array of rights to victims than the proposed rule. As soon as the legislation was enacted, he said, the amendments were withdrawn by pre-arrangement. Mr. Rabiej noted that it is the responsibility of the Department of Justice under the legislation to alert victims as to the times and places of various court proceedings. He added that the Advisory Committee on Criminal Rules was examining the legislation to determine whether any other changes were needed in the criminal rules.

Judge Levi pointed out that the legislation contains an extraordinary appellate provision under which victims may seek mandamus on an expedited basis to enforce their rights and receive a determination by a single appellate judge within 72 hours. It was pointed out by the participants that the provision is inconsistent with existing statutes and rules. Mr. Rabiej said that Congressional staff had been alerted to the deficiencies of the provision, but they had not corrected them.

Mr. Rabiej reported that legislation enacted in the wake of 9/11 had amended FED. R. CRIM. P. 6 directly to permit grand jury information to be shared with foreign officials. But, he said, the statutory provision had been superseded by the restyled body of criminal rules. He explained that the Administrative Office had advised Congressional staff of the supersession problem and had drafted an amendment to correct it. But, he said, the language actually used by Congressional staff was not fully consistent with the restyled rules.

Mr. Rabiej reported that legislation had passed the House of Representatives in the last Congress that would amend FED. R. CIV. P. 11 (pleas) to require a court to impose sanctions for every violation of the rule. The bill, however, died because the Senate did not act on it. He noted, moreover, that similar legislation had been introduced in the last several Congresses and had been opposed by the judiciary. He added that the legislation was likely to be reintroduced again in the 109th Congress, and the committee had asked the Federal Judicial Center to conduct a new, follow-up survey of federal judges on the operation of the current rule.

Mr. Rabiej reported that legislation had been introduced to amend FED. R. CRIM. P. 11 to require a judge to make specific findings that a sentence imposed pursuant to a plea agreement reflects the "seriousness of the actual offense behavior." He said that the Administrative Office had written to the House Judiciary Committee opposing the provision, and it had been deleted during a mark-up session.

Mr. Rabiej noted that the Sunshine in Litigation Act of 2003, among other things, would regulate confidentiality provisions in settlement agreements. He reported that the Federal Judicial Center had conducted an exhaustive study of all sealed settlement cases in the federal courts and had concluded that sealed settlements are rare and do not present a problem. He said that the Center's report had been sent to Senator Kohl, sponsor of the legislation.

Mr. Rabiej reported on a technical problem with the portion of the federal rules website that allows the public to submit comments or request a hearing directly through the website. He noted that the system had worked well in the past, but for some reason it stopped receiving comments and requests in late 2004. As a result, he said, a notice had been placed on the site informing the public of the defect and extending the comment period.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects undertaken by the Federal Judicial Center. (Agenda Item 4)

He reported briefly on research requested by the Advisory Committee on Appellate Rules. He described the Center's work in evaluating the possible impact of permitting citation of unpublished appellate opinions in the courts of appeals under proposed FED. R. APP. P. 32.1. He noted that the Center was conducting both a study of actual cases and a survey of judges and attorneys.

Judge Alito noted that the study was quite sophisticated and was aimed at ascertaining whether a policy that permits citation of unpublished opinions increases the time of judges and leads to a decrease in the number of precedential opinions. He also pointed out that the Administrative Office was conducting a statistical survey of median disposition times and any other pertinent events that might show workload impact, such as the number of cases decided by summary decisions. Up to this point, he said, there was no sign that there had been any changes in disposition times or in the number of summary dispositions in the circuits permitting citation of unpublished opinions.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachment of December 13, 2004. (Agenda Item 5)

Judge Alito reported that the advisory committee was not seeking approval of any amendments. But, he said, it was continuing to consider various proposed amendments to the appellate rules that would eventually be presented to the Standing Committee as a package, rather than in piecemeal fashion.

Informational Items

FED. R. APP. P. 4(a)(1)(B) and FED. R. APP. P. 40(a)(1)

He noted that the advisory committee at its last meeting had approved amendments to FED. R. APP. P. 4(a)(1)(B) (appeal of right — when taken) and FED. R. APP. P. 40(a)(1) (petition for panel rehearing). They would make it clear that the additional time the government is given to file an appeal or a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued either in an individual capacity or an official capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. He explained that additional time is given the Department of Justice to accommodate its internal review procedures.

FED. R. APP. P. 28 and 32

Judge Alito reported that complaints had been received from the bar regarding the many variations among local circuit rules as to requirements for briefs. As a result, he said, the advisory committee had asked the Federal Judicial Center to conduct a comprehensive study of local briefing requirements. He noted that the Center's report was excellent, and it documented that there is a great deal of local rulemaking in this area and considerable diversity in practice among the circuits.

The report, he said, showed that some of the local-rule requirements contradict FED. R. APP. P. 28 (briefs). But, he observed, achieving complete uniformity would be very difficult, particularly since the circuits feel very strongly about their local rules on this topic. He added, though, that the advisory committee would try to promote more uniformity by proposing some discrete changes in Rule 28 from time to time, by encouraging improvements in local rules, and by trying to make it easier for lawyers to ascertain the local requirements.

Professor Schiltz pointed out that the local briefing requirements are scattered among local rules, internal operating procedures, manuals, and other sources. He said that the advisory committee would pursue getting these various materials posted on the Internet, and it would try to pinpoint certain changes for potential inclusion in the national rules.

One member complained that local rule requirements for briefs appear to be proliferating, change frequently, are generally confusing, and can be a snare for attorneys. Other participants added that many of the variations are not justified, and some urged the rules committees to be more active in promoting national uniformity. Others pointed out, however, that the Rules Enabling Act specifically authorizes local rulemaking, and it is no simple task to determine whether a particular local provision is actually in conflict with the national rules.

Professor Coquillette pointed out that the 1988 amendments to the Rules Enabling Act vested oversight of local appellate court rules in the Judicial Conference and gave it authority to abrogate local circuit court rules that conflict with the national rules. He suggested that the Advisory Committee on Appellate Rules might be asked to take another look at whether, as a matter of policy, it would be appropriate to preempt local rulemaking by the individual courts of appeals in certain, specific areas, while leaving other areas open to local procedural variations.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 1, 2004. (Agenda Item 6)

Amendments for Publication

FED. R. BANKR. P. 1014

Judge Small reported that the advisory committee had approved for publication in August 2005 a proposed amendment to FED. R. BANKR. P. 1014 (dismissal and change of venue) recommended by the joint Venue Subcommittee of the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee. The problem, he said, is that large cases are often filed in the wrong district. The proposed amendment would explicitly allow a court on its own motion to initiate a change of venue. He pointed out that most bankruptcy judges believe that they have that authority now, but some do not. Professor Morris added that the committee note to the proposed amendment attempts to make it clear that the rule does not grant any new authority to a court, but merely recognizes existing authority and provides a requirement for notice and a hearing.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. BANKR. P. 3007

Judge Small reported that the last sentence of current FED. R. BANKR. P. 3007(a) (objections to claims) states that if an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it "becomes" an adversary proceeding. He pointed out that there are serious problems with this language, including problems of issue preclusion. He said that the proposed amendment would eliminate the problematic sentence and make it clear in a new subdivision (b) that a party asking for relief of the type that requires an adversary proceeding must actually file an adversary proceeding. The party could no longer simply include the demand for relief in its objection to claim.

Professor Morris pointed out that an adversary proceeding generally asks for positive relief, unlike an objection to a claim. In addition, he said, an adversary proceeding requires the filing of a complaint and service of a summons, but an objection to claim does not. Finally, he observed, a court can always consolidate matters for processing.

The committee without objection approved the proposed amendment for publication by voice vote.

Amendment for Final Approval

FED. R. BANKR. P. 7007.1

Judge Small reported that the proposed amendment to FED. R. BANKR. P. 7007.1 (corporate ownership statement) would correct an oversight in the rule. The rule, which took effect on December 1, 2003, currently states says that a party must file the required corporate ownership statement with its "first pleading." But, he said, the rule does not go far enough. The time for filing the statement should be when the party files its first paper in a case — whether or not it is a "pleading." Accordingly, the proposed revised language would be broadened to specify that the statement must be filed with a party's "first appearance, pleading, motion, response, or other request addressed to the court."

Judge Small pointed out that the advisory committee was asking the Standing Committee to approve the change without publication because it is a technical amendment comporting with the original intention of the drafters of the rule. Professor Morris added that the proposed amendment would make the rule almost identical to the counterpart provision in the civil rules, FED. R. CIV. P. 7.1.

Judge Levi pointed out that the proposed amendment did not require immediate implementation, and he suggested that it might be better to provide an opportunity for the public to comment on it. The committee concurred.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Items

FED. R. BANKR. P. 2002(g), 9001(9), and 9036

Judge Small reported that several proposed amendments to the bankruptcy rules had been published in August 2004, with a comment deadline of February 15, 2005. He noted that three of the amendments could have positive budget effects for the courts and should be processed on an expedited basis. He pointed out that the proposals had been studied at length, were not controversial, and had received no public comments following publication.

Judge Small explained that the proposed amendment to FED. R. BANKR. P. 2002(g) (addressing notices) would permit a creditor to make arrangements with a "notice

provider" to receive all its court notices, either electronically or by mail, at an address specified by the creditor. Proposed FED. R. BANKR. P. 9001(9) (definitions) would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors. FED. R. BANKR. P. 9036 (notice by electronic transmission), as amended, would eliminate the requirement that the sender of an electronic notice obtain confirmation that the notice has been received. He pointed out that many Internet providers do not provide for confirmation of receipt. Thus, many entities are unable to take advantage of electronic noticing. The revised rule, he said, would encourage creditors to sign up for centralized noticing, particularly electronic noticing. In addition to the benefits accruing to creditors themselves, the change would save considerable mailing and administrative expenses for the courts.

He said that the proposed amendments would be expedited by having the Advisory Committee on Bankruptcy Rules vote on them by e-mail ballot right after the end of the public comment period. The Standing Committee in turn would poll its members by e-mail in time to present the amendments to the Judicial Conference at its March 2005 meeting. If the Conference approves them, the amendments would be transmitted immediately to the Supreme Court, which could act on them by May 1, 2005. The rules could then take effect by operation of law on December 1, 2005 — one year sooner than usual.

One member expressed some concern about the problem of a creditor not receiving a notice, and he asked the advisory committee to consider adding a provision to the rule at a later date that would address the issue.

FED. R. BANKR. P. 4002(b)

Judge Small reported that the advisory committee had published proposed amendments to FED. R. BANKR. P. 4002(b) (duties of the debtor) that would require the debtor to bring certain documents to the § 341 meeting of creditors. He said that the advisory committee would present the amendments for final approval at the June 2005 Standing Committee meeting.

Judge Small explained that the Executive Office for United States Trustees had initiated the proposal. In its proposal, the Executive Office would have required the debtor to bring a great many documents to the § 341 meeting. But, he pointed out, the recommendation had attracted substantial opposition from consumer bankruptcy attorneys, and more than 80 negative comments had been received by the advisory committee before the matter was even on its formal agenda.

He noted that a special subcommittee had been appointed to review the proposal, and it had conducted a conference with interested parties and made recommendations to the full committee. The full advisory committee then studied the proposal and approved a shortened list of required documents for the debtor to bring to the meeting, *i.e.*, picture identification, a pay stub or other evidence of current income, the most recent federal income tax return, and statements of depository and investment accounts.

He added that the committee had received a detailed comment from a bankruptcy judge who recommended expanding the list of documents. He noted that the judge had asked to testify at the hearing, but withdrew his request and stood on his written statement when informed that the hearing had been cancelled for lack of other witnesses.

Finally, Judge Small reported that the advisory committee would consider additional rules proposals from the Venue Subcommittee, and it would seek permission to publish them at the June 2005 Standing Committee meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of December 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. CIV. P. 5.1 and 24(c)

Judge Rosenthal reported that the advisory committee was recommending final approval of proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) . She noted that the rule had been published in August 2003, and it had attracted little comment and no criticism. The advisory committee, she said, further polished the rule at its last meeting, and the revisions made since publication did not require republication.

She explained that both 28 U.S.C. § 2403 and FED. R. CIV. P. 24(c) (intervention) require a court to certify to the Attorney General of the United States, or the attorney general of a state, when the constitutionality of a federal or state statute affecting the public interest is drawn into question and the pertinent government is not a party to the proceeding. But, she pointed out, the requirement has often been ignored, largely because court employees are simply unaware of it.

She said that the proposed new rule had been initiated by the Department of Justice, which had recommended two principal rule changes. First, the Department

suggested that the existing certification requirement be moved from Rule 24(c) and placed in a new Rule 5.1, immediately following FED. R. CIV. P. 5 (service) to emphasize its importance. Second, the notice to the attorney general should be strengthened by adding to the requirement of court certification a new requirement that the party who challenges the constitutionality of a statute also notify the appropriate attorney general.

She noted that some concern had been expressed in the advisory committee over the new notice requirement placed on parties challenging a statute. But, she added, the Department of Justice had convinced the committee that notice by the court alone has been insufficient to protect the government's interests. Moreover, experience in the several states imposing the same notice requirement has shown that no undue burdens are placed on the challenging party.

Judge Rosenthal pointed out that, as published, the rule would have required the court to set a time not less than 60 days for the government to intervene. Following the comment period, though, the advisory committee modified the provision to state that unless the court sets a later time, the attorney general may intervene within 60 days after notice is filed or the court certifies the challenge, whichever is earlier. The court, moreover, may extend the time on its own motion.

In addition, the committee moved language up from the committee note to the text of the rule to make it clear that before the time to intervene expires, the court may reject the constitutional challenge, but it may not enter a final judgment holding the statute unconstitutional. Thus, the court can reject unsound challenges quickly, grant interlocutory relief, continue pretrial activities, and conduct other proceedings to avoid delay.

Judge Rosenthal explained that the rule also provides for service on the attorney general by certified or registered mail or by electronic notice to an address designated by the attorney general. She said that no such addresses are currently in place, but they would likely be established by the Department of Justice in the near future. Finally, she pointed out, the rule clarifies that if a party fails to give notice, it does not forfeit a challenge to a constitutional right.

One member noted that the new rule is broader than the statute and the current rule, which govern challenges only to statutes "affecting the public interest." Judge Rosenthal replied that the advisory committee had deliberately broadened the scope of the reporting requirement to make sure that notice is given in every case in which a challenge is made to a statute. She noted that the expansion tracked the language of the counterpart provision in the appellate rules, FED. R. APP. P. 44.

One member expressed concern that the rule did not provide for a sanction against a party who fails to notify the attorney general. It was pointed out, though, that judges have adequate authority under the rules to deal with non-compliance. In addition, it was noted that a party challenging the constitutionality of a statute cannot effectively obtain the relief requested until the government enters the case. Another member expressed concern as to the internal consistency of the language of the proposed rule and asked the advisory committee to take another look at it before it is published.

Judge Small added that the new rule had implications for the bankruptcy rules because the current FED. R. CIV. P. 24 is incorporated in adversary proceedings by virtue of FED. R. BANKR. P. 7024. He said that the bankruptcy advisory committee would consider the matter at its next meeting and make appropriate recommendations to the Standing Committee in June 2005.

The committee approved the proposed new rule and proposed amendment for final approval by voice vote with two objections.

Proposed Style Revisions for Publication

Judge Rosenthal reported that the advisory committee was recommending that Rule 23 and Rules 64-86 be added to the list of restyled rules previously approved for publication by the Standing Committee. She explained that the advisory committee had made a number of further style changes in the rules previously approved for publication, consistent with the directions of the Standing Committee to continue polishing the document and to pick up minor errors and inconsistencies.

She added that three more non-controversial "style-substance" amendments would be included as part of the publication package, along with the "style-substance" amendments previously approved for publication by the Standing Committee. She pointed out that the package would also include a memorandum prepared by Professor Kimble explaining the key style conventions adopted by the committee. That document would give readers an appropriate context by which to judge the revisions.

Accordingly, she asked the Standing Committee to approve the entire package of restyled civil rules for publication, subject to final review for typographical errors, formatting, cross-references, and the like. She suggested that if members had any additional suggestions, they would be considered by the advisory committee during the public comment period.

Judge Rosenthal reported that the committee would schedule public hearings before the end of the comment period. She added that Professor Cooper had written an

excellent law review article on the style project that deserved attention — *Restyling the Civil Rules: Clarity Without Change,* 79 NOTRE DAME L. REV. 1761 (Oct. 2004)

The committee without objection approved the proposed style package for publication by voice vote.

Informational Items

Judge Rosenthal reported that proposed class action fairness act legislation would be re-introduced in the new Congress, be considered by the Senate early in February 2005, and proceed directly to the Senate floor without a hearing. The bill would then be taken up by the House Judiciary Committee.

She reported that on January 12, 2005, the day before the Standing Committee meeting, the advisory committee had conducted the first of three public hearings on the proposed electronic-discovery amendments. She noted that many of the participants in the Standing Committee meeting had attended the hearing, and a full transcript would be made public. She said that the committee continues to receive a heavy volume of written comments on the proposed amendments, and many more comments were expected before the February 15, 2005, comment deadline.

Judge Rosenthal noted that the advisory committee would meet in April 2005 to consider all the comments and testimony. At that time, she said, the committee would decide whether to proceed with the published changes, whether to republish any amendments, and whether to send proposals on to the Standing Committee for final approval.

She noted that the advisory committee had set forth in the agenda book the various future projects that it was considering, including: (1) a suggestion by the Department of Justice that the committee clarify how indicative court rulings should be handled; (2) a proposal to amend FED. R. CIV. P. 48 to deal with jury polling; and (3) a suggestion to improve the practice of taking depositions under FED. R. CIV. P. 30(b)(6). The committee, she said, had also been asked to consider possible changes in the pleading rules and the summary judgment rule. She pointed out that the committee had deferred action on these various substantive matters until completion of the style project.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachment of December 2, 2004. (Agenda Item 8)

Informational Items

Judge Bucklew reported that the advisory committee had no action items to present to the Standing Committee. She noted that amendments to five criminal rules had been published for public comment in August 2004 and explained that they were noncontroversial and had attracted only one comment.

Three of the five amendments, she said, would allow the government to transmit documents to the court by "reliable electronic means" — FED. R. CRIM. P. 5(c)(3) (initial appearance); FED. R. CRIM. P. 32.1(a) (revocation or modification of probation or supervised release); and FED. R. CRIM. P. 41(d) and (e) (search and seizure). The proposed amendment to FED. R. CRIM. P. 40 (arrest for failing to appear in another district) would fill a gap in the rule and allow a magistrate judge to set conditions of release for a person who fails to appear. The proposed amendment to FED. R. CRIM. P. 58 (petty offenses and other misdemeanors) would eliminate a conflict with FED. R. CRIM. P. 5.1 (preliminary hearing) and clarify the advice that a magistrate judge must give at an initial appearance in a petty offense or misdemeanor case.

Judge Bucklew reported that the advisory committee had a number of important matters on the agenda for its April 2005 meeting. Among other things, the members would consider a proposed new FED. R. CRIM. P. 49.1 (privacy in court filings) to implement the E-Government Act's requirement that federal rules be promulgated to meet privacy and security concerns raised by posting court files on the Internet. She said that the advisory committee should be able to forward a rule to the Standing Committee in June 2005 for publication.

Judge Bucklew reported that the advisory committee at its last two meetings had discussed a proposal from the American College of Trial Lawyers for rule amendments to address problems that the college perceives with implementation of the government's duties under *Brady v. Maryland* to turn over exculpatory evidence to the defendant. She said that one proposal under consideration would call for the government to provide information to the defendant 14 days before trial. But, she cautioned, the Department of Justice was likely to oppose any amendment codifying *Brady*. Professor Schlueter added that discussions are sensitive and on-going, and it was very unlikely that any proposal would be submitted to the Standing Committee in June 2005.

Judge Bucklew reported that the advisory committee was looking closely at the *Booker/Fanfan* case to determine what changes might be needed in the criminal rules. She also pointed out that the committee would look again at FED. R. CRIM. P. 6 (grand jury) to see whether additional changes are needed in light of the recent 9/11 statute. She added that the committee would also look at FED. R. CRIM. P. 11 (arraignment and plea)

to consider the need for an amendment to require a judge to make a finding on the record that a plea agreement recognizes the seriousness of the defendant's behavior.

She reported that the advisory committee had approved proposed amendments to FED. R. CRIM. P. 41 (search and seizure) to provide procedures for tracking device warrants, noting that magistrate judges have said clearly that they would like additional guidance in this area. She explained that the Standing Committee had approved the proposed rule at its June 2003 meeting and had forwarded it to the Judicial Conference. But the amendments were later deferred and have been in limbo ever since. She said that the advisory committee would like to know their status and whether the committee should proceed further. She noted that a recent poll of the magistrate judges had shown that there was still strong support for the amendments.

Judge Levi explained that the amendments had been deferred after the September 2003 Judicial Conference meeting at the request of the deputy attorney general. Assistant Attorney General McCallum reported that the Department of Justice's Criminal Division was looking into the matter and would present its definitive view to the committee soon. Judge Bucklew added that the advisory committee could take up the matter at its April 2005 meeting.

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee at its last two meetings had considered the Department of Justice's proposal to amend FED. R. CRIM. P. 29 (motion for judgment of acquittal) to require a judge to defer ruling on a motion to acquit until after the jury returns a verdict. The committee, she said, failed to approve the proposal, but the members stood ready to reconsider the issue. She pointed out that they had read the supplemental materials submitted by the Department to the Standing Committee.

Mr. Wray presented the government's position and emphasized the importance of the matter to the Department. He explained that Rule 29 authorizes a judge to grant a verdict of acquittal either before or after the return of a jury verdict. The main problem, he said, is that the Double Jeopardy Clause of the Constitution precludes an appeal by the government when a trial judge grants an acquittal before return of a verdict. He explained that the committee note to the 1994 revision of Rule 29 encouraged judges to await the jury's verdict before ruling on an acquittal motion. He noted, too, that the Supreme Court has stated that it is preferable for trial judges to await the jury's verdict before granting an acquittal.

Mr. Wray pointed out that the proposal to amend Rule 29 was fully supported by the leadership of the Department of Justice, but the impetus for the change was coming from the ground up — from front-line prosecutors. He stressed that a pre-verdict

acquittal is an anomaly under the rules. It may be the only action of a trial judge that is both dispositive and unappealable. Moreover, he said, a pre-verdict acquittal overrules the conscience of the community, as expressed through the action of a jury of citizens. And it may result in significant injustice in a given case.

Mr. Wray suggested that the advisory committee may not have been aware of the extent of the problem, and he acknowledged that the Department may not have been as persuasive as it could have been. But, he said, the supplemental materials submitted by the Department make the case for a change. He noted, for example, that the numbers alone are significant, even though statistics in this area are inherently imperfect and underinclusive. He pointed out that over a four-year period, there had been 259 Rule 29 judgments of acquittal. Of that total, 72% had been granted before the jury returned a verdict — not the preferred method under Rule 29. About 70% of these pre-verdict acquittals had disposed entirely of the prosecution, rather than just certain counts in a multi-count case.

He suggested that it cannot be determined whether these cases had been decided correctly because appellate review had been precluded by the trial judges' actions. But, he said, there is strong reason to suspect that a significant number of the pre-verdict acquittals had been erroneous and would have been reversed on appeal. He noted that the Department appeals about 60% to 70% of post-verdict acquittals, and about one published opinion a month reverses a trial judge's post-verdict action. He added that there is no reason to suppose that pre-verdict acquittals are less likely to be erroneous because they are often entered in the heat of trial.

Mr. Wray explained that the standards for granting an acquittal are stringent. The trial judge must assess the evidence in the light most favorable to the government and resolve all inferences and credibility questions in favor of the government. Then, an acquittal should be granted only if no rational trier of fact could find the defendant guilty beyond a reasonable doubt. Obviously, he argued, that is not the standard that some judges had used. He proceeded to describe the facts of some specific cases in which the Department believed that district judges had committed serious error by granting an acquittal before verdict.

He emphasized that the problem had to be fixed, but he added that there may be more than one way to address the problem by rule. He explained that the Department was not asking the Standing Committee to choose one particular solution, but was merely telling the committee that the status quo is unacceptable and should be remedied by the advisory committee. He suggested that providing the government an appellate remedy would be a modest response to an immodest problem.

He referred to Judge Levi's proposal made at the last advisory committee meeting to allow a judge to enter a pre-verdict judgment of acquittal, but only on condition that the defendant waive double jeopardy protection and permit an appeal by the government. He noted that this particular solution would allow judges to cull out individual defendants and counts in appropriate cases and protect the rights of both the defendant and the government. He said that Department attorneys had considered the proposal and found that, on balance, it was a good one. He added in response to a question that the defendant's waiver of double jeopardy protection appeared to be constitutional.

Judge Bucklew reported that the advisory committee would be pleased to take another look at the matter, and she suggested that part of the committee's problem with the proposal had been a lack of persuasive information. Judge Levi said that the advisory committee, not the Standing Committee, is the right body to draft a proposed rule. He suggested, moreover, that it would be inappropriate for the Standing Committee to tell the advisory committee that a rule should be published or to ask it to draft a particular rule. Rather, he said, the advisory committee, as the body with the relevant expertise, should be asked to consider the best formulation for a rule that would address the problems identified by the Department of Justice and then to make a separate recommendation as to whether that rule should be published for public comment. At its next meeting, then, the Standing Committee would have all the information it needs to make appropriate decisions on the matter.

He noted that the Advisory Committee on Criminal Rules had been very interested in the Department's proposal to defer acquittals until after verdict, and it had at first voted to proceed with an amendment to Rule 29. But, he added, the committee became concerned about deferring verdicts in hung-jury, multiple-count, and multiple-defendant cases. He said that the hung-jury problem had inspired his alternate suggestion that a pre-verdict acquittal might be conditioned on the defendant's waiver of double jeopardy rights. In essence, the proposal would offer the defendant a choice. If a defendant wants the judge to consider a pre-verdict acquittal, he or she must be willing to preserve the government's right to appeal. He noted that the advisory committee's reporter, Professor Schlueter, had reduced the proposal to text form, and it appears workable.

One member said that the waiver proposal looked very promising and should be pursued by the advisory committee. He added that the Standing Committee should express its sense that the advisory committee should seriously considering bringing forward a rule. Another member emphasized the advisory committee should document the analysis behind its recommendations and its reasons for chosing one alternative over another.

In light of the committee discussion, Judge Levi restated his suggestion and recommended that the advisory committee be asked to: (1) consider an amendment of Rule 29 as a serious topic that deserves further consideration; (2) formulate the best way to deal with the problems identified by the Department of Justice and draft the best rule and committee note; and (3) recommend to the Standing Committee whether that rule and note should be published for public comment. The advisory committee, he said, could then consider the matter at its spring meeting, and the Standing Committee would have all the information it needs to consider the proposal at its June 2005 meeting.

The Department of Justice representatives agreed to this course of action, and they expressed their commitment to resolving the matter through the rulemaking process.

The committee by voice vote without objection approved Judge Levi's proposal to the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of December 10, 2004. (Agenda Item 9)

Informational Items

Judge Smith reported that the advisory committee had not held a separate autumn meeting, but had decided, instead, to conduct a meeting immediately following the Standing Committee meeting. He noted that proposed amendments to four evidence rules had been published for comment.

He said that the advisory committee had been surprised by the lack of public comment to date on the proposed amendments to FED. R. EVID. 408 (compromise and offers to compromise). Among other things, the use of statements and conduct during civil settlement negotiations would not be barred when offered in a later criminal case. He pointed out that the Department of Justice had asked for a broader rule, but the committee was proposing a compromise rule that allows use of comments made at settlement negotiations, but not the settlement itself.

He reported that the proposed change to FED. R. EVID. 609(a)(2) (impeachment by evidence of conviction of a crime) deals with the automatic impeachment of a witness by evidence that he or she has been convicted of a crime of "dishonesty or false statement." He explained that the amendment permits the mandatory admission of evidence of conviction only when it "readily can be determined" that the crime of conviction was one

of dishonesty or false statement, such as by the elements of the crime or by clear information set forth in the indictment or other key document.

Judge Smith said that the proposed amendment to FED. R. EVID. 606(b) (competency of a juror as a witness) would make it clear that testimony by a juror may be used only to prove that the verdict reported by the jury was the result of a clerical mistake. The amendment, thus, rejects some case law that interprets the current rule to allow jurors to be polled as to whether the jury understood the instructions.

Judge Smith noted that a preliminary reading of the *Booker/Fanfan* case shows that the advisory committee will not have to make any changes in the Federal Rules of Evidence. But, he added, the committee will have to wait to see what Congress does in the wake of the case. He added that the advisory committee had also decided not to proceed on any rules issues that may be impacted by the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), barring the use of "testimonial" hearsay against a criminal defendant in the absence of cross-examination. The committee, instead, will monitor case law development under *Crawford.*

Professor Capra said that a suggestion had been received recommending an amendment to FED. R. EVID. 803(8) (hearsay exception for public reports) to ensure that federal statutory standards are incorporated into the admissibility requirements of the rule. He noted that public records are considered presumptively trustworthy, and the courts do not seem to be having any difficulty in applying Rule 803(8). He added that the advisory committee would consider the suggestion at its January 2005 meeting.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater reported that the Technology Subcommittee had met in January 2004 and had prepared a template for the advisory committees to use in drafting rules to implement the E-Government Act of 2002. The statute requires that federal rules be issued to address the privacy and security concerns raised by posting court files on the Internet. He pointed out that the subcommittee had revised the template to incorporate views expressed by the advisory committees and some suggestions by the Department of Justice. Professor Capra added that working from a single template fosters the mandate of the E-Government Act that the federal rules be as uniform as possible.

Professor Capra reported that the goal was to have rules amendments presented by the advisory committees to the Standing Committee at its June 2005 meeting, so that they could be published in August 2005. He explained that the basic decisions reflected in the template had been derived from the extensive work of the Court Administration and Case Management Committee, which had conducted several public hearings and had

determined that the best policy for the Judicial Conference to adopt was a general rule that "public is public," *i.e.,* that all case papers publicly available at the courthouse should also be made available on the Internet. But, he cautioned, certain specific categories of sensitive personal information would have to be redacted.

He noted that the Court Administration and Case Management Committee had spent a great of time discussing which sensitive information should be redacted. The Technology Subcommittee and the advisory committees, he said, had made a few additions to the policy to implement some requirements of the E-Government Act and to meet some concerns of the Department of Justice. He explained that the resulting template is necessarily complex, and it categorizes four different kinds of document filings: (1) documents that must be redacted; (2) documents exempt from the redaction requirement, such as administrative agency records; (3) social security and immigration appeals, for which public access will be restricted to the courthouse; and (4) documents filed under seal. He noted that the template states that a court by order in a case may limit or prohibit remote electronic access to a particular document in order to protect against disclosure of private or sensitive information.

Professor Schiltz reported that the proposal to be considered by the Advisory Committee on Appellate Rules states that documents in the appellate courts should be treated in the same manner that they are treated in the court below.

PROPOSED TRANSNATIONAL PROCEDURES

Dean Kane led a panel discussion of the American Law Institute's transnational procedure project with Professor Hazard and distinguished San Francisco attorneys Elizabeth Cabraser and Melvyn Goldman. Dean Kane noted that Professor Hazard was the only American co-reporter on a project that developed a set of procedural rules drawn from both civil-law and common-law systems for use in handling commercial contests. The results of the project, she said, had been approved recently by the Institute. She asked Professor Hazard first to describe some provisions in the proposed rules, and then she asked Ms. Cabraser and Mr. Goldman to respond.

Professor Hazard noted at the outset that the transnational project had been started about 10 years ago with intense consultation by lawyers from many parts of the world. It was conceived as a procedure for commercial cases involving sophisticated lawyers and clients. But, he said, the rules could also be used in other categories of cases. And, he added, they are generally compatible with the American system and with jury trials. They include provisions dealing with notice, the right of participation, judicial management of proceedings, and full consultation by advocates.

Four of the ideas embraced in the rules, he said, could potentially be adapted for use in the federal court system: (1) more focused discovery; (2) fact pleading; (3) written statements of witnesses in lieu of oral testimony for direct examination; and (4) motions demanding proof.

1. With regard to discovery, Professor Hazard pointed out that the U.S. has the broadest discovery system in the world. In general, a party must — on demand and at its own expense — turn over to a requesting party any evidence it has that may lead to admissible evidence. Elsewhere in the world, on the other hand, discovery requests must be more specific. A producing party's obligation, moreover, extends only to relevant evidence. Other countries, he noted, are mindful of the problem of relevant evidence residing in the hands of an opposing party, but release of that type of evidence is usually governed by substantive law.

   He said that the present federal rule dealing with document discovery had been adopted in contemplation of the exchange of a dozen or so documents, before the use of copying machines and computers. He questioned whether the sheer quantity of documents today makes a difference that calls for a rule change. He added that one interesting consequence of the enormous discrepancy between U.S. and foreign document production rules is that some foreign companies initiate litigation in the United States just to get broad discovery that they can use in a dispute back home.

2. Professor Hazard pointed out that the federal rules authorize notice pleading. But other countries and many U.S. states require a complainant to set forth specific facts at the outset. He suggested that most good plaintiff's lawyers already use fact pleading, even in the federal courts, because they want the court to understand their case from the outset. He explained that the proposed transnational rules require the complaint to set forth the relevant facts in reasonable detail and to describe with sufficient specification the available evidence to be offered in support of the allegations.

3. Professor Hazard explained that the transnational rules provide that in a nonjury trial a written statement by a witness is a necessary predicate to the testimony of that witness. This is contrary to U.S. procedure, where direct testimony is taken orally. Under the transnational rules, the first submission is a written statement prepared by the lawyer setting out what the testimony of a particular witness is going to be. Then an examination of the witness follows — either by the judge in civil law countries, or by the lawyers in common law countries. Thus, the oral testimony of the witness is essentially cross-examination.

4. Fourth, the transnational rules provide for a motion demanding proof, a sort of streamlined version of a summary judgment motion. Typically, he said, a summary judgment motion is made by a defendant arguing that the plaintiff lacks proof as to key elements of the case. The movant has to attach details to show that there is considerable proof that a particular issue is not subject to proof by the opposing party. Instead, he said, why not have a motion demanding proof? That way, the movant does not have the full burden of establishing that there cannot be proof on a particular issue.

Ms. Cabraser said that the federal and state procedural rules work very well in many cases, but they do not work well in others, nor do they always provide protection for litigants against bad practices. Parties, she said, can make litigation unjustifiably expensive and combative.

She suggested that the proposed transnational rules may work very well in commercial disputes, which usually involve litigation among equals. But, she added, much litigation in the American courts is among parties who are not equal. For example, she said, most countries do not have the highly developed tort law of the U.S., nor do they provide the same level of access for ordinary citizens. The courts of the U.S. follow a different national ethos and provide regulation through the litigation process.

With regard to the cost of producing documents, she said, the system should not place most of the cost of production on the plaintiffs. Judges, she pointed out, have authority to assess costs against requesting parties in appropriate cases.

She said that in her own individual cases, the same defendant has produced the same documents several times in past cases. But she must ask for them again in each new case, thereby adding costs to the defendant and running up transactional costs. She suggested that it might helpful if there were a rule or protocol in the complex litigation manual enabling a defendant to identify documents previously discovered and placing the burden on the plaintiff to get them.

With regard to fact pleading, she said that plaintiffs should be required to set forth the facts in a clear manner. It helps both the pleader and the court, and it avoids the need for status conferences to find out what the case is about. She noted that she personally provides the same level of detail in federal complaints that she does in her state court complaints

She suggested that a motion demanding proof could work in both sophisticated and simple cases, especially where there are a limited number of documents. She said that summary judgment had become unmanageable in complex cases, and it leads to

production of a huge volume of documents. She suggested that the concept of a motion demanding proof should be tried.

Mr. Goldman said that discovery, especially electronic discovery, is completely out of hand. He noted that civil cases are rarely tried, yet the parties in the end have to bear the cost of wasteful discovery.

He pointed out that effective case managament is the appropriate reform. He said that a judge should take over a case from the first conference and identify the claims, defenses, issues, and evidence on both sides. The judge, he said, will learn quickly what discovery is needed and will tailor it to the circumstances of the particular case. Staged discovery, for example, would be particularly appropriate.

But, he said, early hands-on case management does not take place in the courts where he practices today, except with a handful of trial judges. Instead, he said, the normal practice is to have pro forma case management conferences with pro form orders. He suggested that if there were effective case management, there would be far less discovery and abuse.

He pointed out that judicial case management is clearly contemplated in the federal rules and in the new transnational rules. But it is not happening for a number of reasons. Not all trial judges, he suggested, are suited by temperament to case management. Judges, moreover, see that the vast majority of their cases settle, and they may conclude that hands-on case management is not a good use of their time. And most court systems lack sufficient flexibility to permit judges who are good at case management to take over cases that need management.

As for fact pleading, he asked whether it is designed to provide information to the other side or to serve as a means for filtering out cases that do not belong in the system. The latter, he said, is a laudable goal, but courts rarely dismiss cases for lack of sufficient facts, except in securities cases. He suggested that fact pleading is a gate-keeping mechanism that might work, and it should be explored. But, he added, even under the current rules, good case management is critical, as a judge can ask the parties to plead with more particularity.

Mr. Goldman said that the proposed motion for proof is a fascinating idea, but he doubted that it will come to pass. He said that appropriate use of summary judgment is a way to elicit the proof that parties have in a case. He noted that trial judges have a great deal of flexibility, and he has seen judges ask parties to file a motion for summary judgment. He noted, too, that Rule 56(f) gives a judge discretion to authorize discovery in connection with summary judgment.

Mr. Goldman said that the use of written statements for expert witnesses is an excellent idea and should be the rule. But he did not believe that it would be appropriate for non-expert witnesses. A trial judge, he said, wants to assess the credibility of the witness on direct examination, as well as on cross examination. Judges have a good ear for listening to evidence in person, and they will interject from time to time when they want clarification. But they may not receive the same education from reading written statements.

Professor Hazard noted that in civil law countries, the judge is in control from the moment a case is filed. The new English rules, too, place heavy emphasis on case management. He noted also that the Judicial Panel on Multi-District Litigation has authority to assign a case to a particular judge, and it regularly assigns cases to particularly competent judges. He said that the notion of randomly assigning cases is deeply embedded in the federal court system, but it needs to be reexamined.

Participants suggested that consideration might be given to developing different subsets of rules to deal with different kinds of cases. But both Ms. Cabraser and Mr. Goldman responded that early, effective case management, rather than different rules, is the appropriate answer. The judge, they said, can determine at the first pretrial conference how much time and effort are required in each case.

Ms. Cabraser added that every case should have an early case management conference, without all the requirements of FED. R. CIV. P. 26. A judge should sit with the parties and shape the rules for each individual case. Over time, she said, protocols would develop as to the appropriate procedures to apply in different types of cases. Cases, she said, could be handled without even referring to Rule 26, and discovery disputes would be averted. The judge should have inquisitory powers and broad discretion to make the parties act appropriately. This approach might mean more work for judges at the outset of a case, but it would save them considerable time in the long run, as there would be fewer discovery problems and disputes.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Wednesday and Thursday, June 15-16, 2005, in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe
Secretary

MEMORANDUM

DATE: March 24, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-01

At its June 2004 meeting, the Standing Committee asked the Federal Judicial Center (FJC) and the Administrative Office (AO) to try to determine if there is any empirical evidence that either supports or refutes some of the claims made by those who submitted comments on Rule 32.1. For example, the AO was asked to attempt to determine whether case-disposition times have increased in circuits that have liberalized their rules on the citation of unpublished opinions. Attached are the results of the AO's research. A report from the FJC will be circulated under separate cover.

At its June 2004 meeting, the Standing Committee also asked this Advisory Committee to give thought to a concern that was raised by Chief Justice Charles Wells of the Florida Supreme Court (a member of the Standing Committee). Chief Justice Wells said that some state judges are concerned about the impact that Rule 32.1 would have on state law. Chief Justice Wells made clear that he was not necessarily endorsing those concerns, but merely passing them on. He also did not go into much detail about the nature of these concerns.

If the concern of state judges is that their no-citation rules will be "overridden" by Rule 32.1, then this problem already exists. State judges have neither the power to order litigants not to cite their unpublished opinions in federal court nor the power to order federal courts to forbid parties to cite the

unpublished opinions of state courts. Most federal courts *now* permit parties to cite the unpublished opinions of state courts. Rule 32.1 would not change that.

If, as is more likely, the concern of state judges is that their unpublished opinions will be treated as binding by federal judges, then this concern is not well founded. Even those who agree with Judge Richard Arnold's panel opinion in *Anastasoff v. U.S.*, 223 F.3d 898, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000), do not believe that the constitution requires that the unpublished opinions of *state* courts be treated as binding. Recall that *Anastasoff* rested on an interpretation of the phrase "judicial Power of the United States" in Article III. Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting in a diversity case must respect a state court's determination that its unpublished opinions are not binding precedent on issues of state law. I have consulted several *Erie* experts, and all agree that this is true.

The question is whether it would be prudent to make this point in the Committee Note to Rule 32.1. On the one hand, doing so might assuage the concerns of state judges. On the other hand, the rule is clear — and the Committee Note stresses repeatedly — that the rule addresses only citation, and not the precedential effect of *any* opinion, federal or state. As one of the experts I consulted said, "[T]his concern as to state law cases seems to presume that federal judges cannot read." Another expert that I consulted expressed concern that addressing the *Erie* point in the Committee Note might open the door for litigants to cite the Note in support of arguments that federal courts are required to apply state-law standards on such things as the admission of expert evidence, summary judgment, and directed verdict.

Attached is a draft of Rule 32.1 and the accompanying Committee Note. The draft is identical to the one approved by this Advisory Committee at its April 2004 meeting and considered by the Standing Committee at its June 2004 meeting, except that I have made a few changes to the third paragraph of the Committee Note to address the concern raised by Chief Justice Wells. (I have underlined the section of the paragraph that I have changed.) I leave it to the Committee to decide whether such changes are advisable.

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 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 — federal or state. In particular, it takes no position on whether refusing to treat an unpublished opinion of a federal court 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). (Under

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), of course, a federal court sitting in a diversity case is required to respect state law concerning the precedential effect of state-court decisions on matters of state law.) Rule 32.1 addresses only the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — 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 on 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).

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

February 24, 2005

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Data on Unpublished Opinions*

I have attached charts illustrating the impact of unpublished opinions issued by the nine courts of appeals that permit citation to unpublished opinions on median disposition times. The charts display data on the median disposition time from oral argument to final judgment and from submission to final judgment for the two years before and the two years after a court of appeals adopted a permissive citation policy. Most of the courts adopted the permissive citation policy in the 1990's. We aggregated the data for comparison purposes with year number "3" denoting an idealized year in which the courts adopted the permissive citation policy. Years 1 and 2 reflect the median disposition time for the two years before the courts' policy adoption, while Years 4 and 5 reflect the two years after the courts' policy adoption. The data shows little or no evidence that the adoption of a permissive citation policy impacts the median disposition time in either direction.

The aggregate data for the nine courts of appeals that have adopted a permissive citation policy is shown on the attached charts, followed by charts which break down the data for each of the nine individual courts of appeals. The underlying raw data on the median disposition time is also included.

I have also attached a chart showing the number of "summary" disposition opinions issued by the nine affected courts of appeals for the two years before and the two years after a court of appeals adopted a permissive citation policy. The summary disposition opinions are defined as opinions issued without signature and comment. The Administrative Office collects this category of data and another category of data designated as "written, reasoned, and unsigned, ...

including only those opinions and orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based." The data shows little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions.

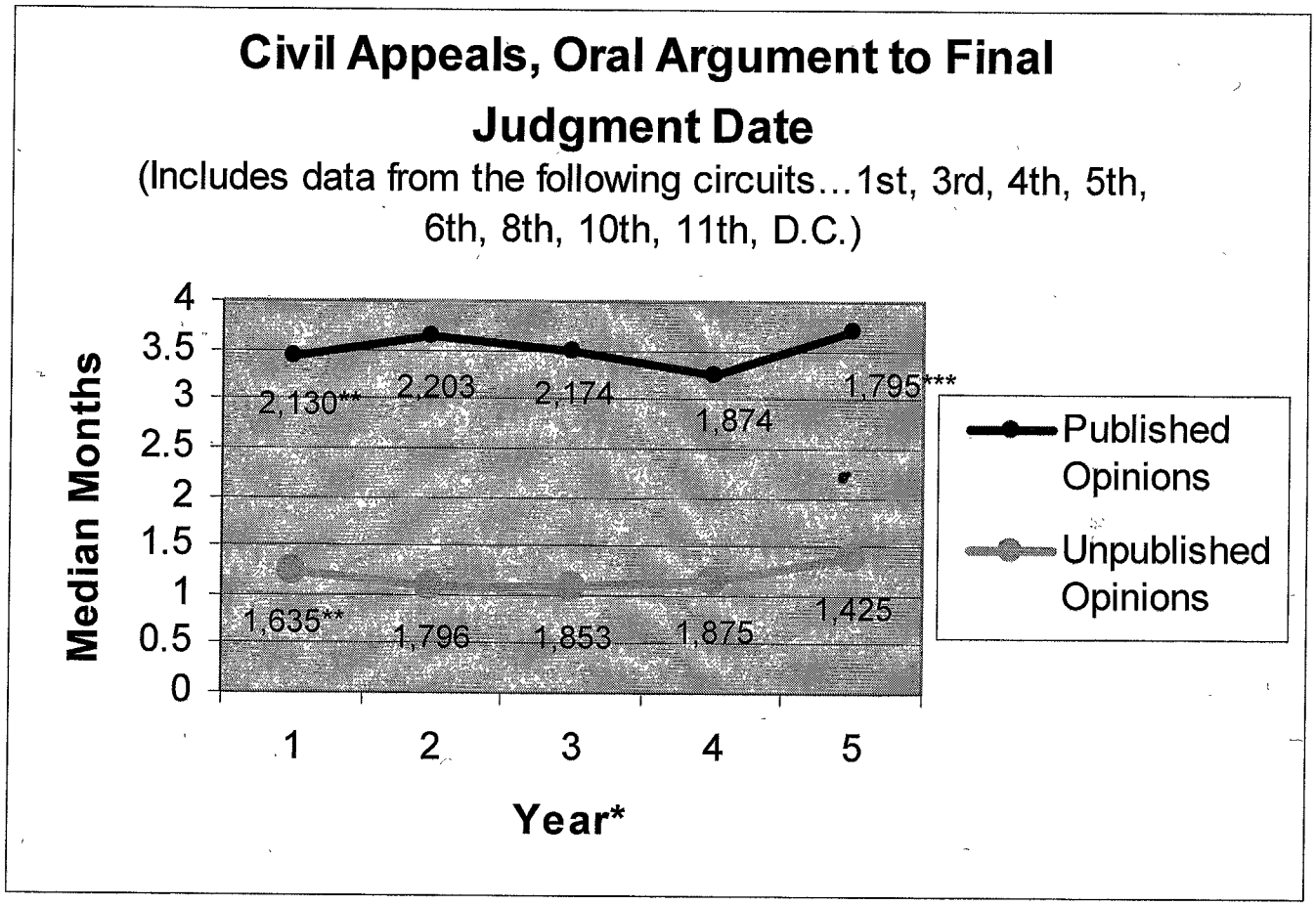
John K. Rabiej

Attachments

cc: Honorable David F. Levi (with attach.)
Professor Daniel R. Coquillette (with attach.)
Peter G. McCabe, Secretary (with attach.)

Median Disposition Time from Oral Argument to Final Judgment in Civil Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions

(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)



Notes:

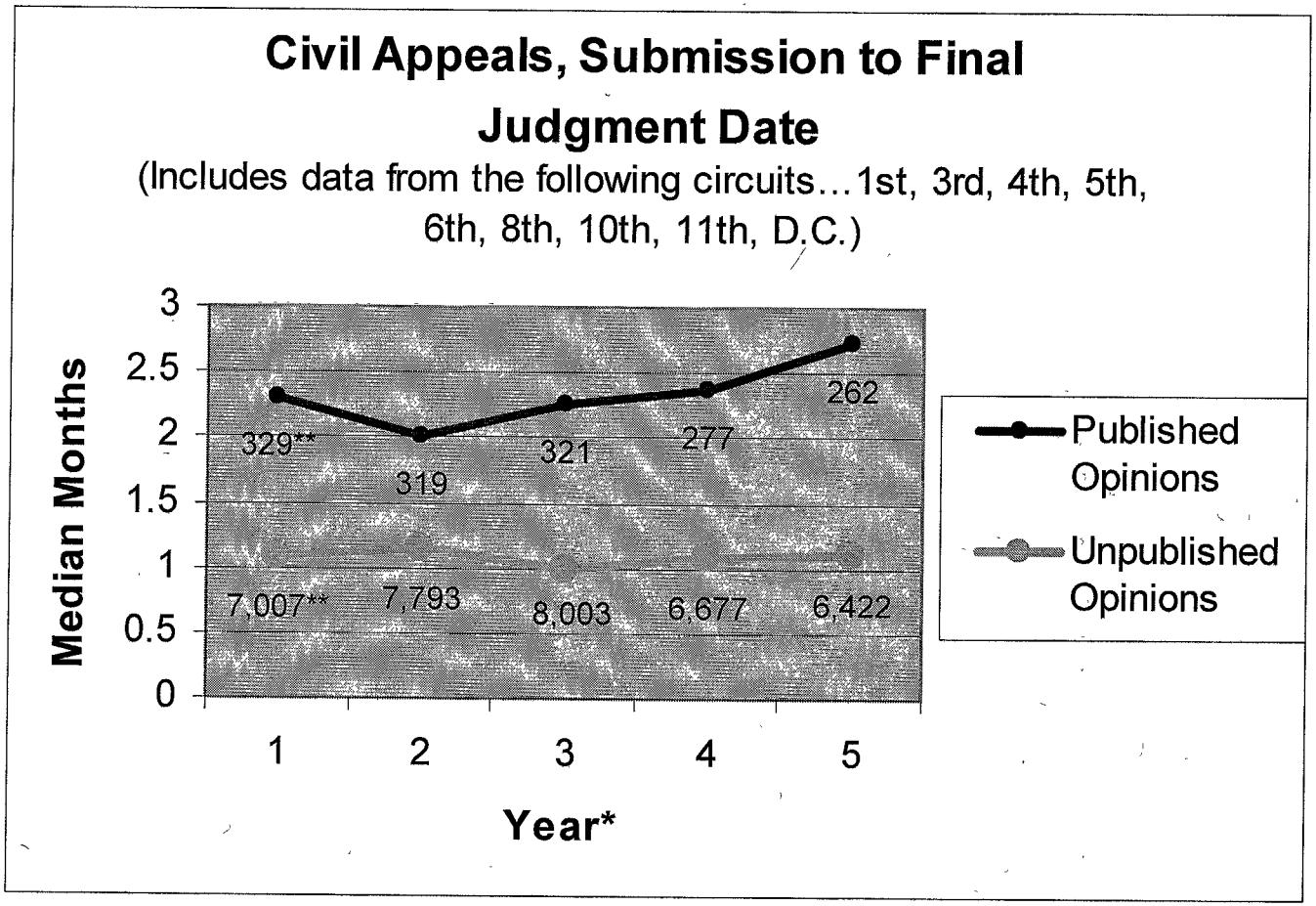
* Data abstracted and aggregated from statistics on the two years preceding and two years following the adoption of a policy permitting citation of unpublished opinions by the courts of appeals. Year 3 denotes idealized year in which the citation policy was adopted.

** Total number of published or unpublished opinions per year.

*** Excludes 322 asbestos appeals in year five (1998) from the Fifth Circuit, because the high median disposition time of 42.2 months for published opinions is aberrant.

Median Disposition Time from Submission to Final Judgment in Civil Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions

(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)



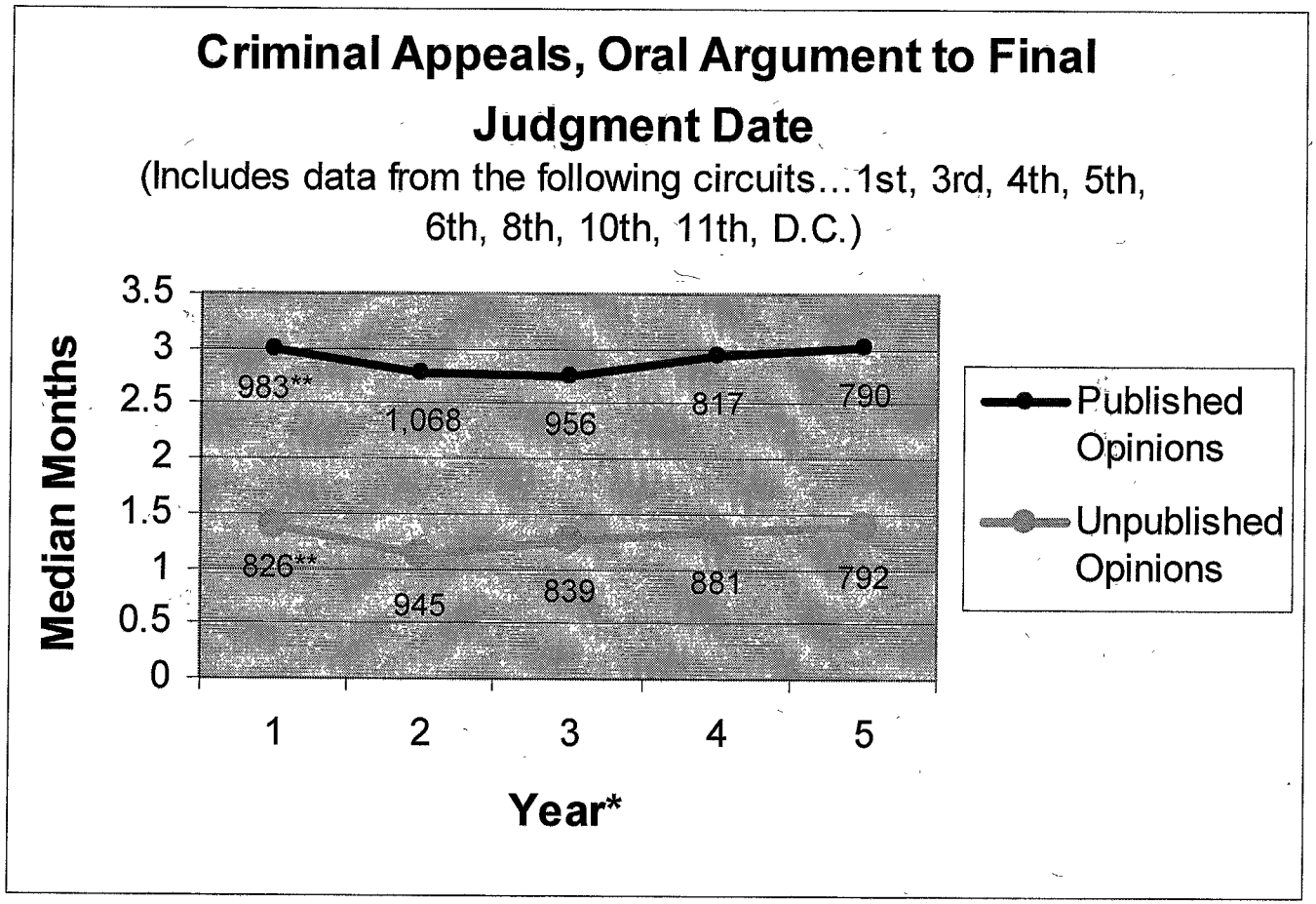
Notes:

* Data abstracted and aggregated from statistics on the two years preceding and two years following the adoption of a policy permitting citation of unpublished opinions by the courts of appeals. Year 3 denotes idealized year in which the citation policy was adopted.

** Total number of published or unpublished opinions per year.

Median Disposition Time from Oral Argument to Final Judgment in Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions

(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)



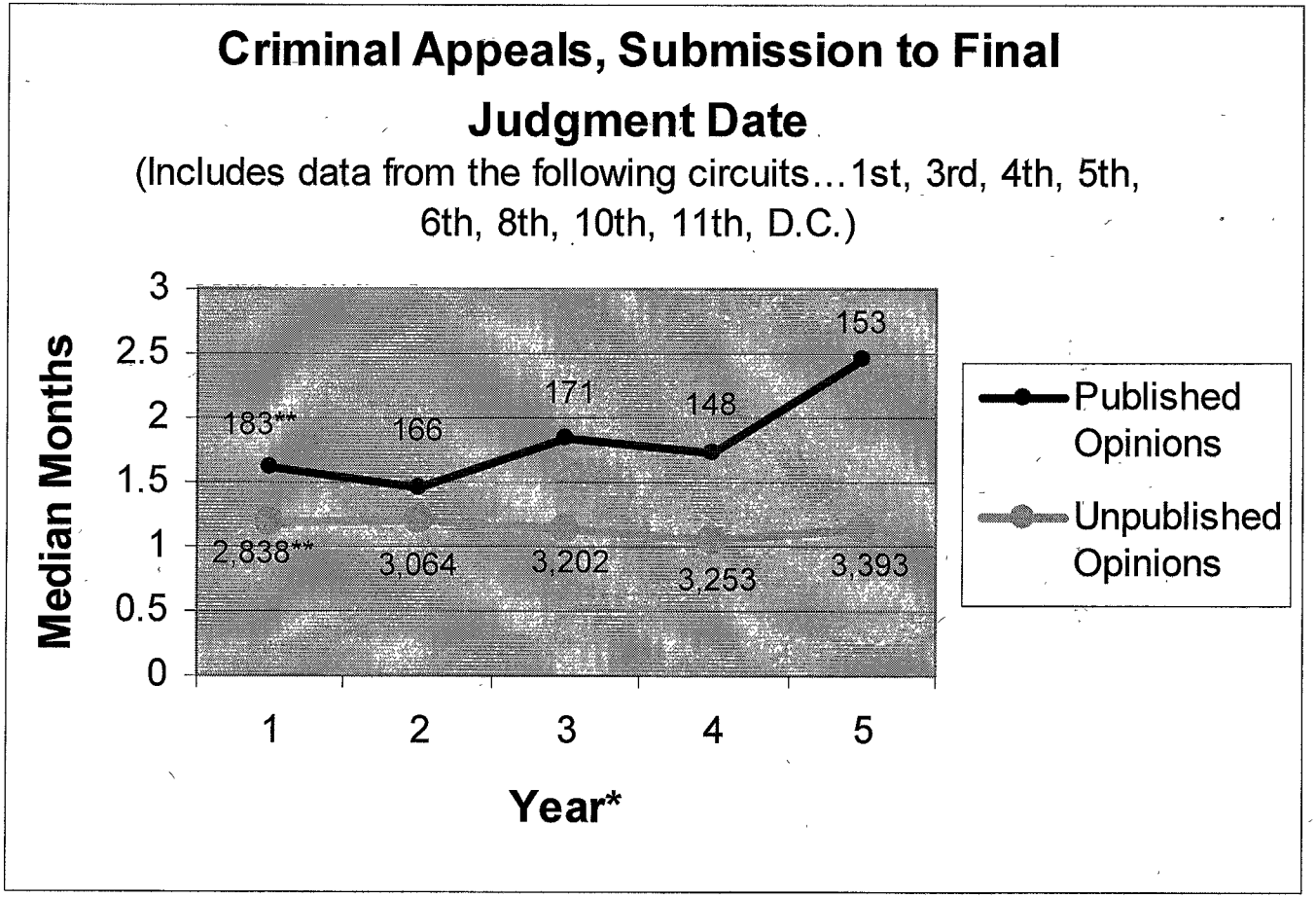
Notes:

* Data abstracted and aggregated from statistics on the two years preceding and two years following the adoption of a policy permitting citation of unpublished opinions by the courts of appeals. Year 3 denotes idealized year in which the citation policy was adopted.

** Total number of published or unpublished opinions per year.

Median Disposition Time from Submission to Final Judgment in Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions

(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)



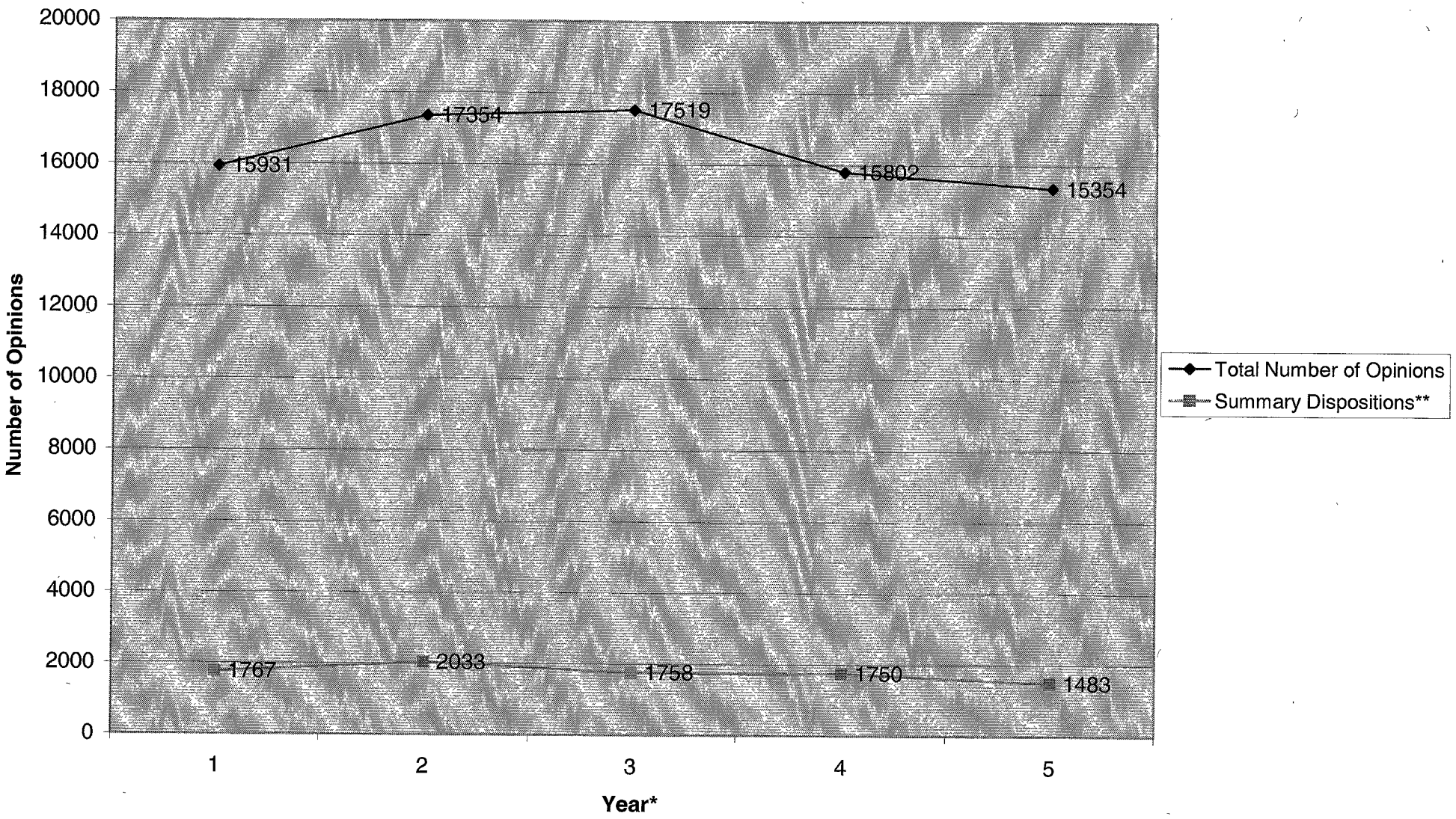
Notes:

* Data abstracted and aggregated from statistics on the two years preceding and two years following the adoption of a policy permitting citation of unpublished opinions by the courts of appeals. Year 3 denotes idealized year in which the citation policy was adopted.

** Total number of published or unpublished opinions per year.

Opinions Issued for 2-Year Period Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions

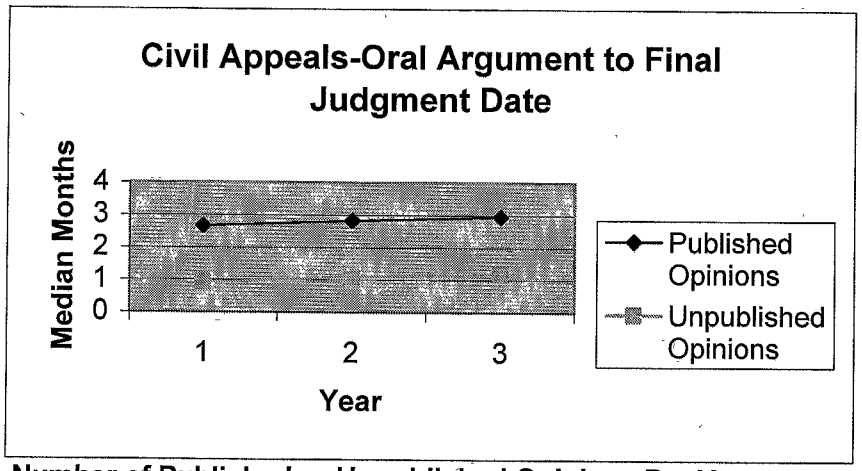
(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)



* Data abstracted and aggregated from statistics on the two years preceding and two years following the adoption of a policy permitting citation of unpublished opinions by the courts of appeals. Year 3 denotes idealized year in which the citation was adopted.

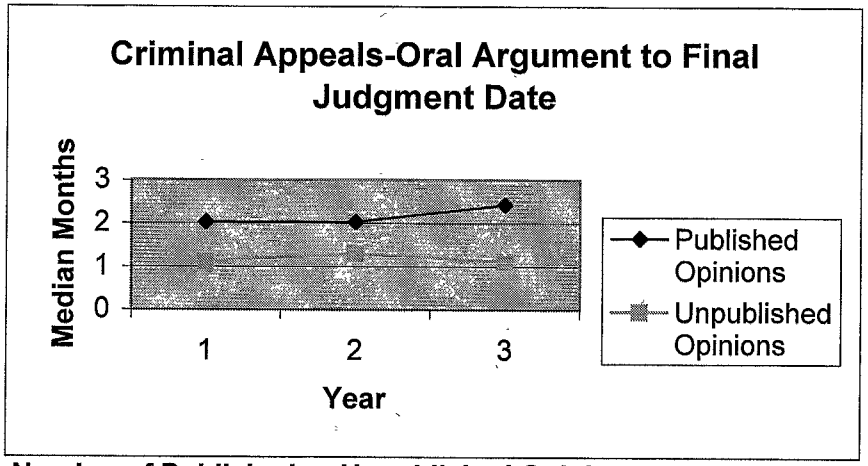
**Issued without signature and comment that do not expound on the law as applied to the facts of each case and do not detail the judicial reasons upon which the judgment is based.

Median Disposition Time for 1st Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



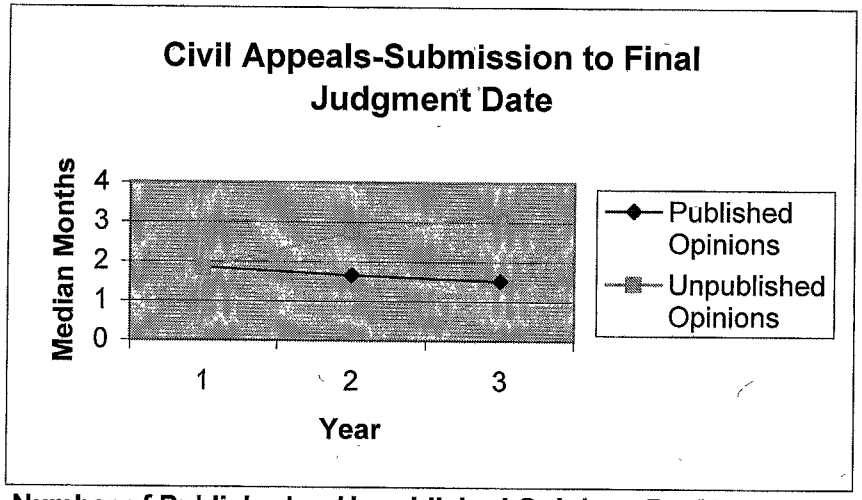
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	200	200	202	No data	No data
U	19	23	28	No data	No data



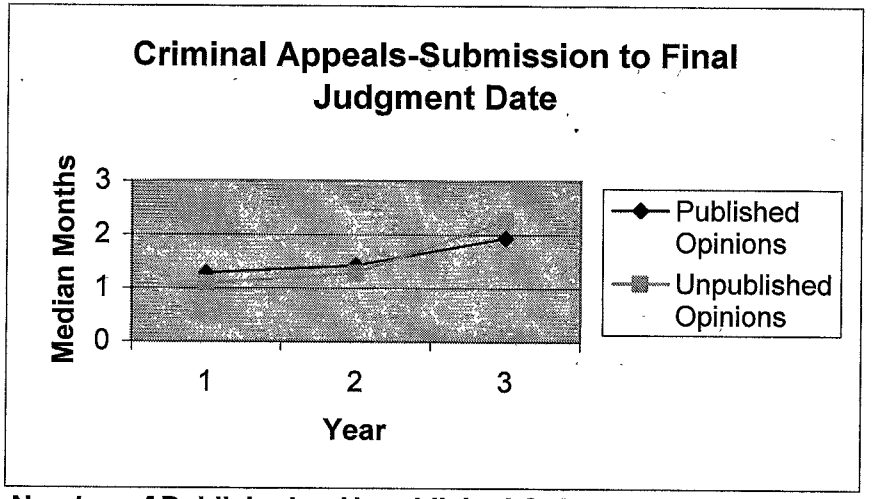
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	80	95	74	No data	No data
U	9	6	13	No data	No data



Number of Published or Unpublished Opinions Per Year:

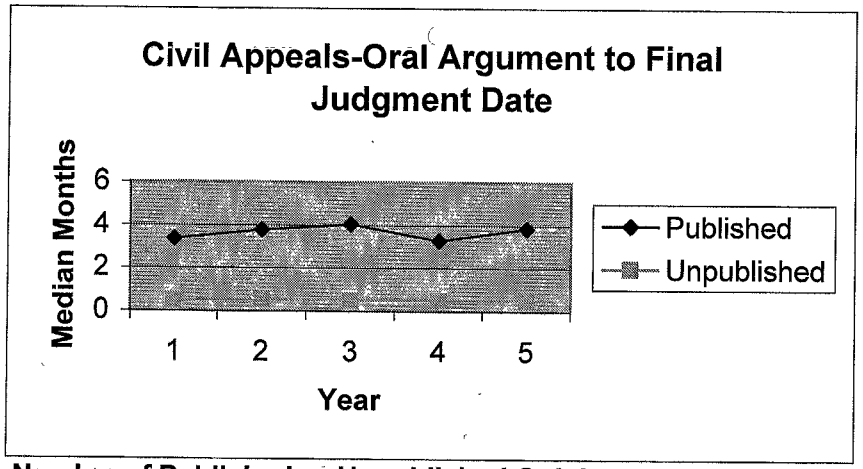
	Year 1	Year 2	Year 3	Year 4	Year 5
P	16	12	26	No data	No data
U	304	150	93	No data	No data



Number of Published or Unpublished Opinions Per Year:

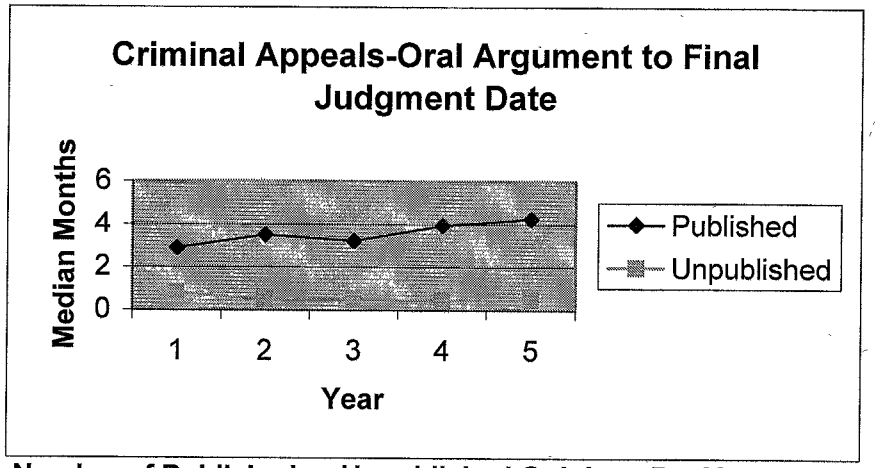
	Year 1	Year 2	Year 3	Year 4	Year 5
P	16	20	6	No data	No data
U	131	75	29	No data	No data

Median Disposition Time for 3rd Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



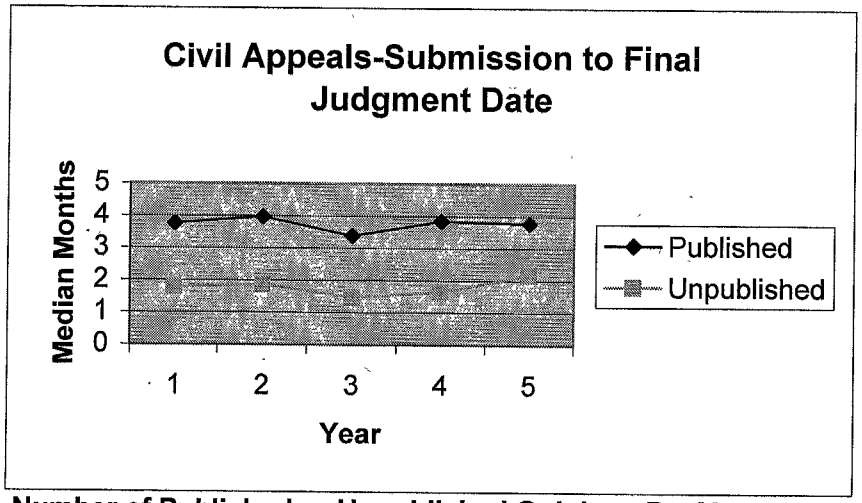
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	177	205	198	172	178
U	178	214	192	208	197



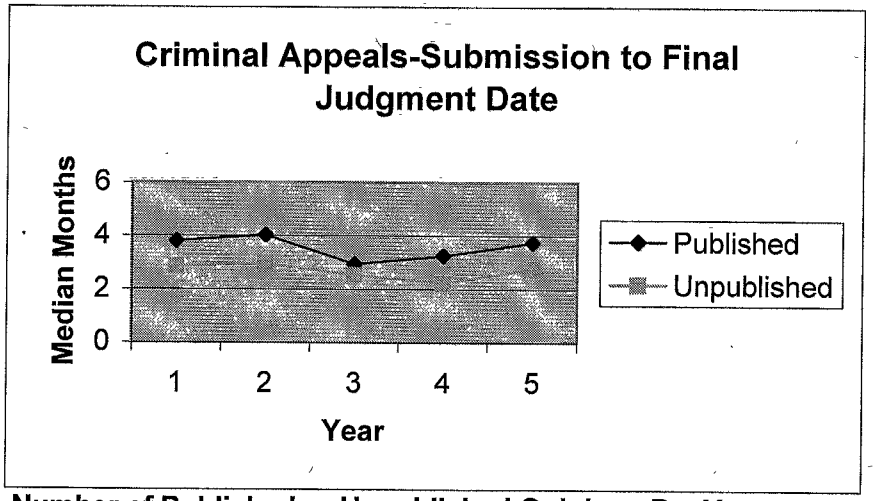
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	71	73	63	36	66
U	54	85	88	65	76



Number of Published or Unpublished Opinions Per Year:

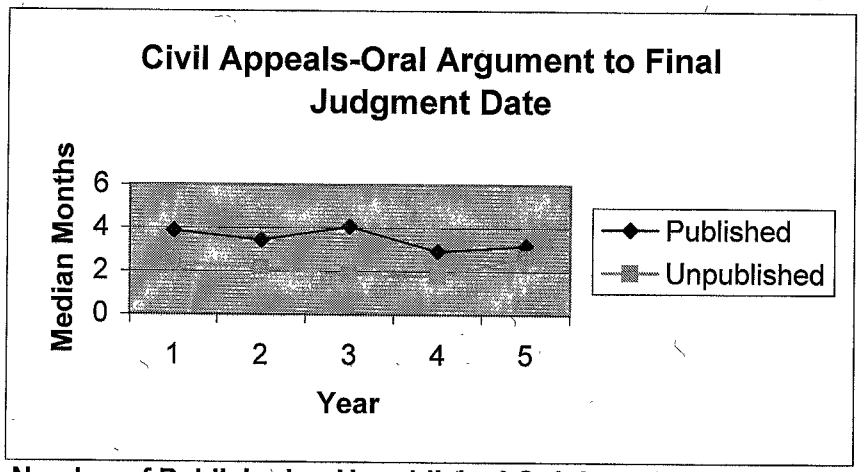
	Year 1	Year 2	Year 3	Year 4	Year 5
P	22	27	42	23	17
U	808	974	899	974	801



Number of Published or Unpublished Opinions Per Year:

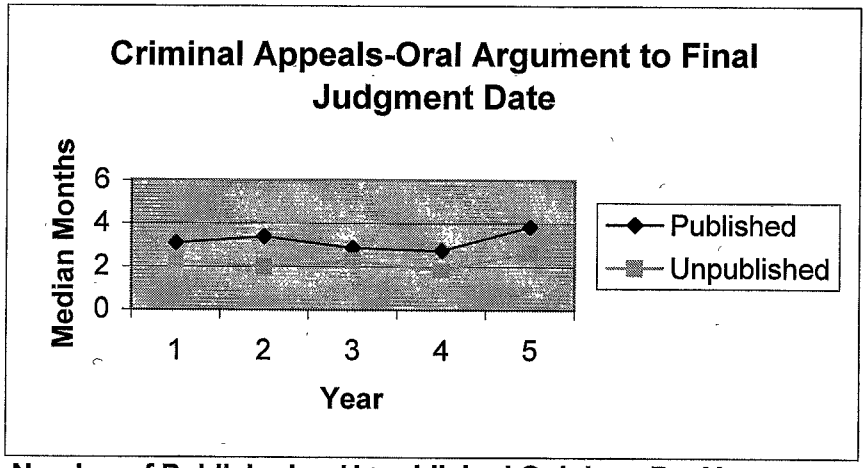
	Year 1	Year 2	Year 3	Year 4	Year 5
P	19	7	12	6	11
U	293	355	331	321	334

Median Disposition Time for 4th Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



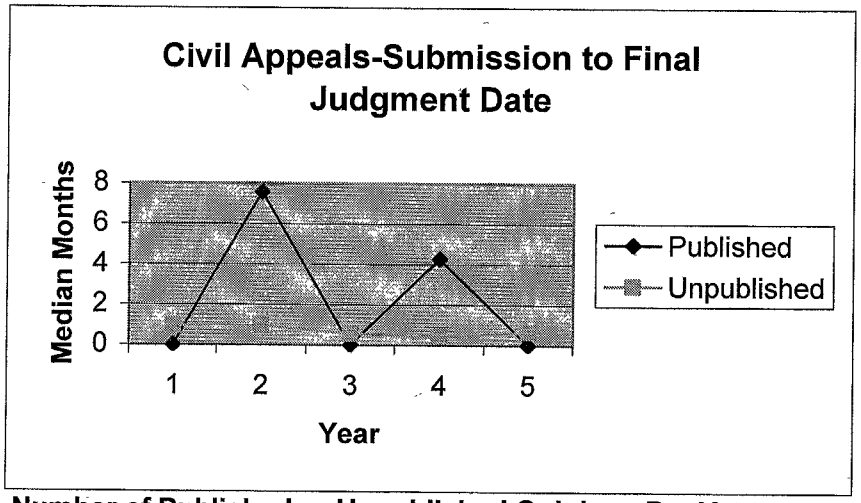
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	203	183	159	169	154
U	278	301	287	291	263



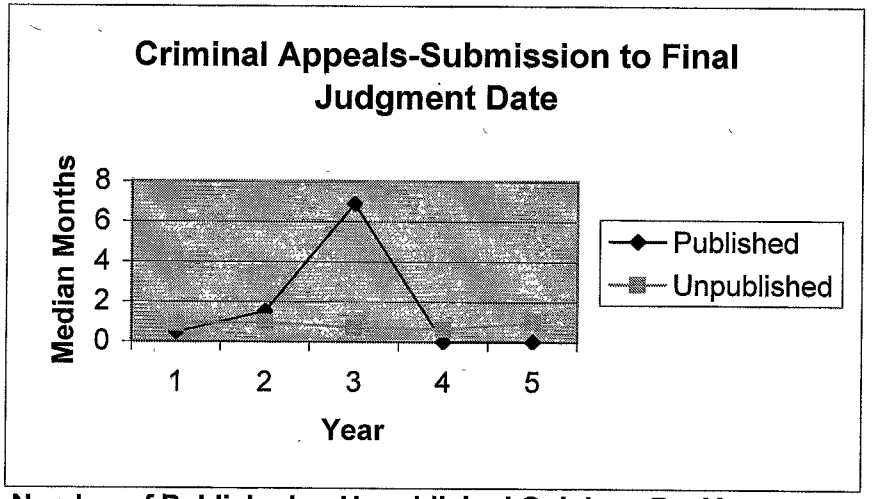
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	98	97	81	66	51
U	168	171	131	98	99



Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	0	3	3	4	0
U	1189	1637	1637	1060	1153

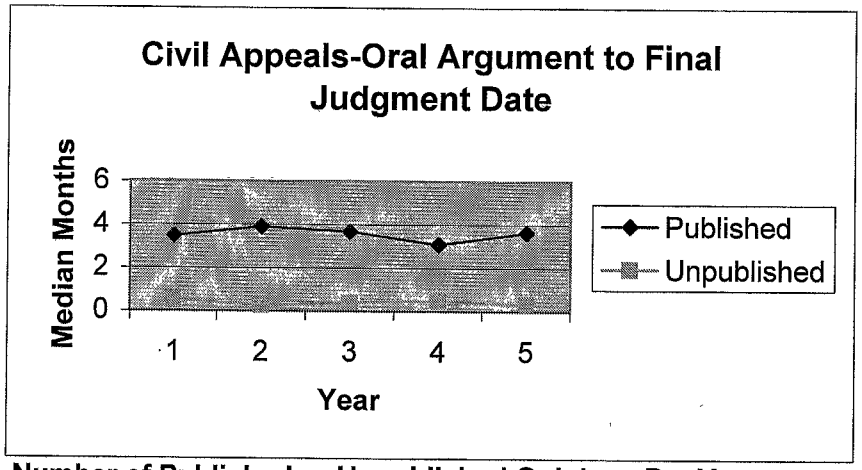


Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	1	2	5	0	0
U	348	376	368	460	552

Median Disposition Time for 5th Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions

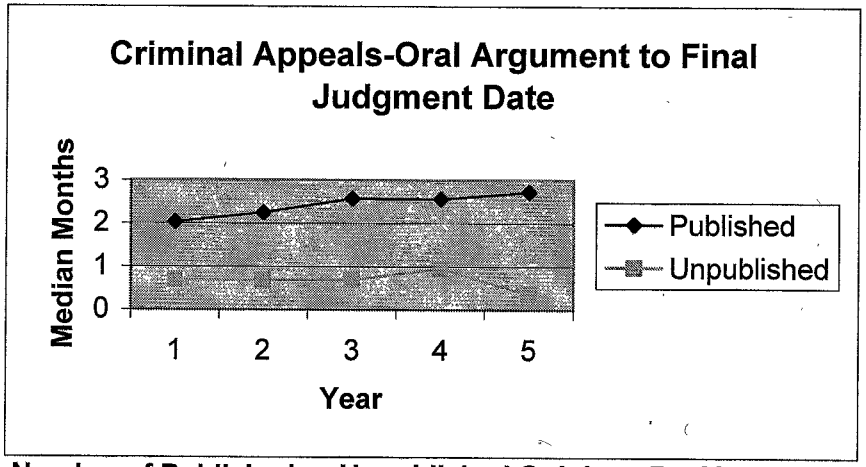
(Excludes Asbestos Cases)



Number of Published or Unpublished Opinions Per Year:

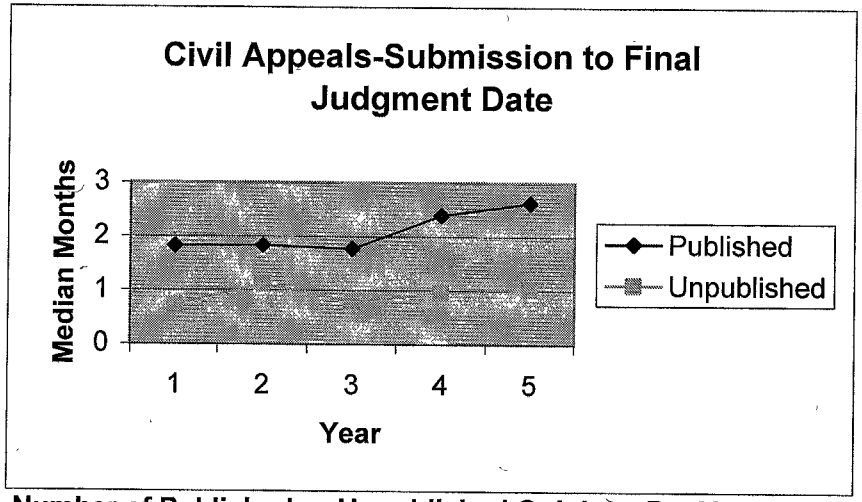
	Year 1	Year 2	Year 3	Year 4	Year 5
P	358	396	409	352	377*
U	238	368	353	340	229

* Excludes 322 asbestos cases (outliers).



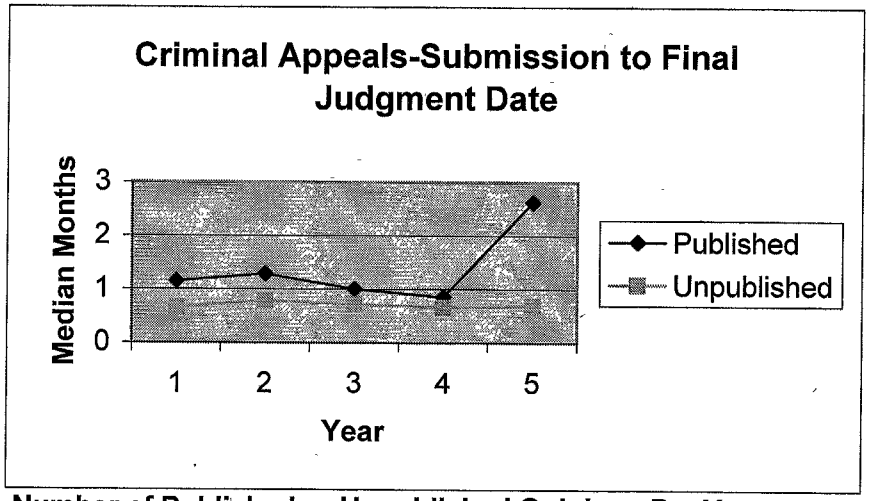
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	168	206	216	227	191
U	93	162	109	177	148



Number of Published or Unpublished Opinions Per Year:

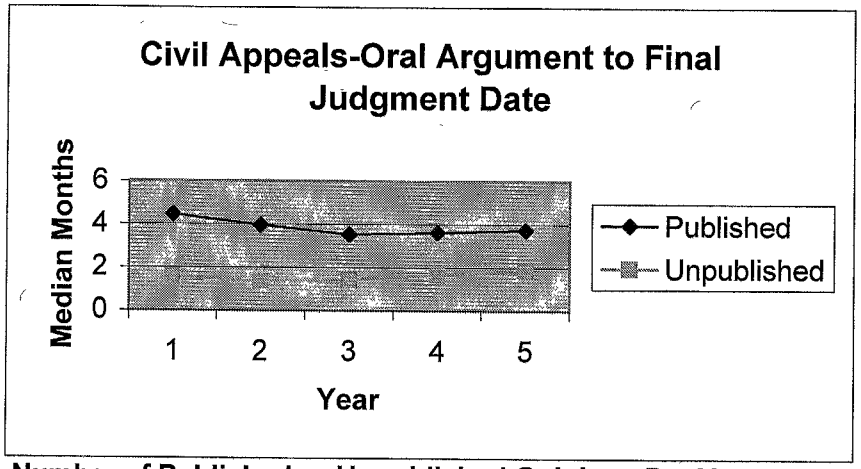
	Year 1	Year 2	Year 3	Year 4	Year 5
P	102	112	85	64	64
U	1625	1596	1753	1186	1265



Number of Published or Unpublished Opinions Per Year:

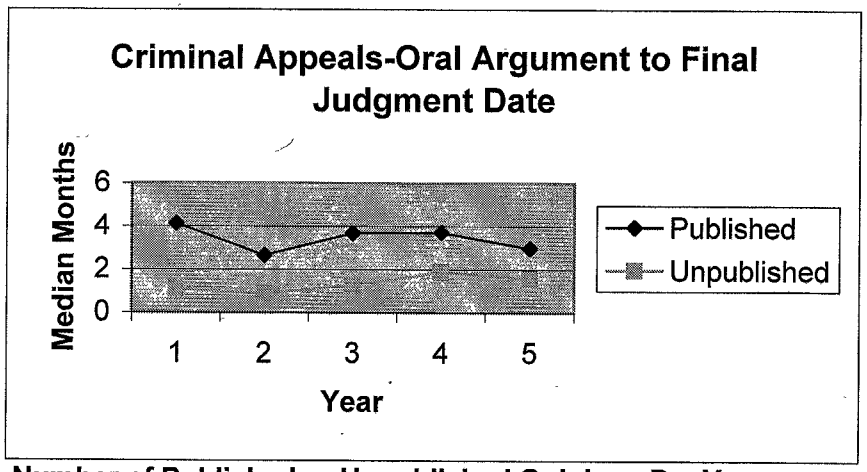
	Year 1	Year 2	Year 3	Year 4	Year 5
P	37	39	40	35	23
U	667	597	697	730	655

Median Disposition Time for 6th Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



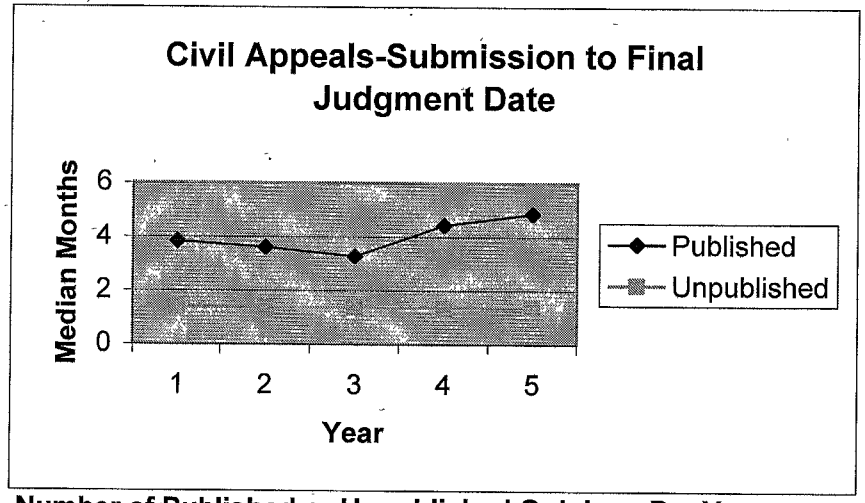
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	221	238	240	244	236
U	435	365	469	428	305



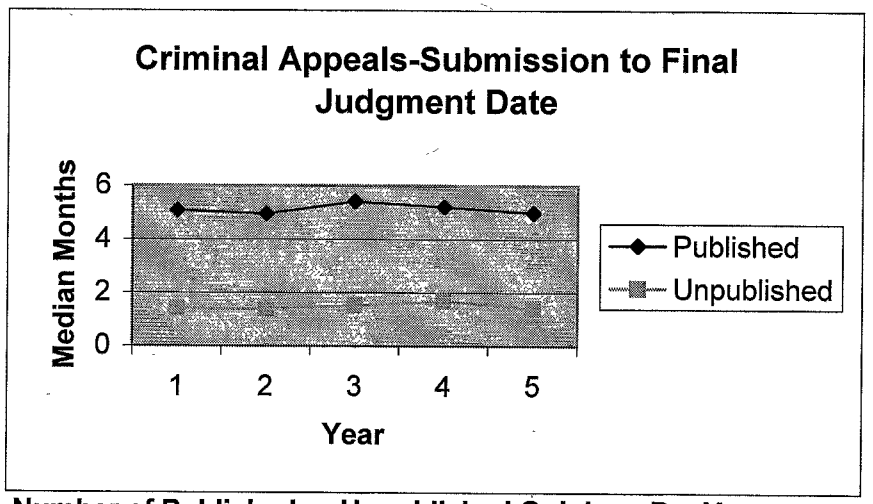
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	75	89	130	108	119
U	222	215	253	216	202



Number of Published or Unpublished Opinions Per Year:

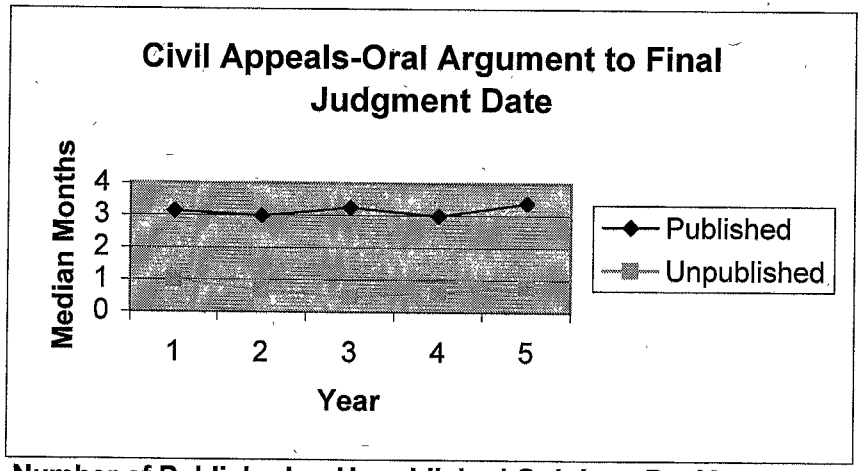
	Year 1	Year 2	Year 3	Year 4	Year 5
P	23	14	32	42	27
U	665	643	820	896	851



Number of Published or Unpublished Opinions Per Year:

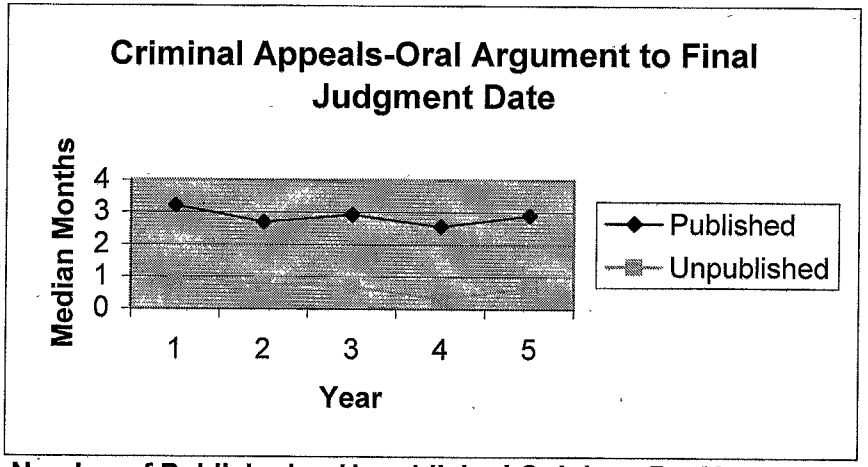
	Year 1	Year 2	Year 3	Year 4	Year 5
P	17	10	24	33	19
U	246	184	260	236	320

Median Disposition Time for 8th Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



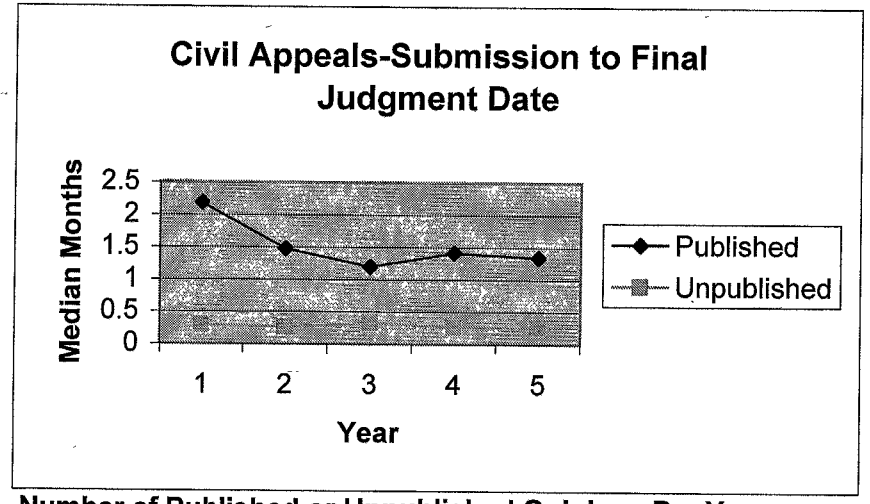
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	468	448	429	363	423
U	92	84	79	93	71



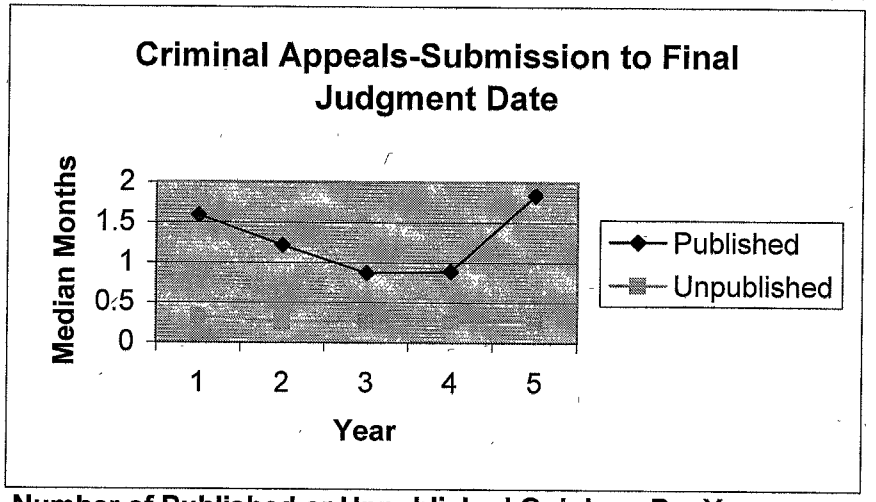
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	197	190	171	153	170
U	30	28	36	40	40



Number of Published or Unpublished Opinions Per Year:

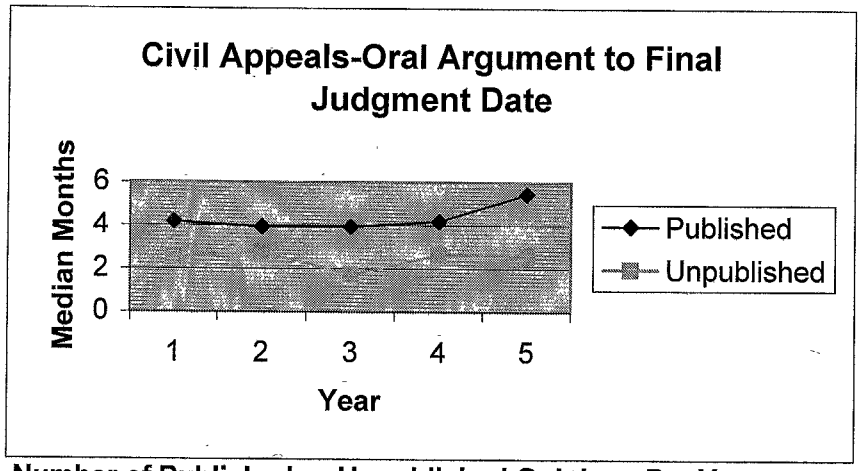
	Year 1	Year 2	Year 3	Year 4	Year 5
P	68	57	52	57	63
U	618	721	604	592	635



Number of Published or Unpublished Opinions Per Year:

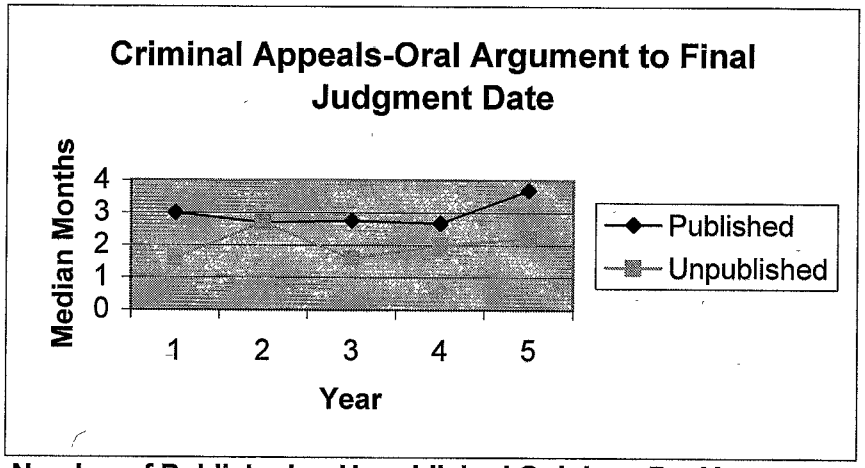
	Year 1	Year 2	Year 3	Year 4	Year 5
P	28	39	28	32	42
U	201	177	175	226	242

Median Disposition Time for 10th Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



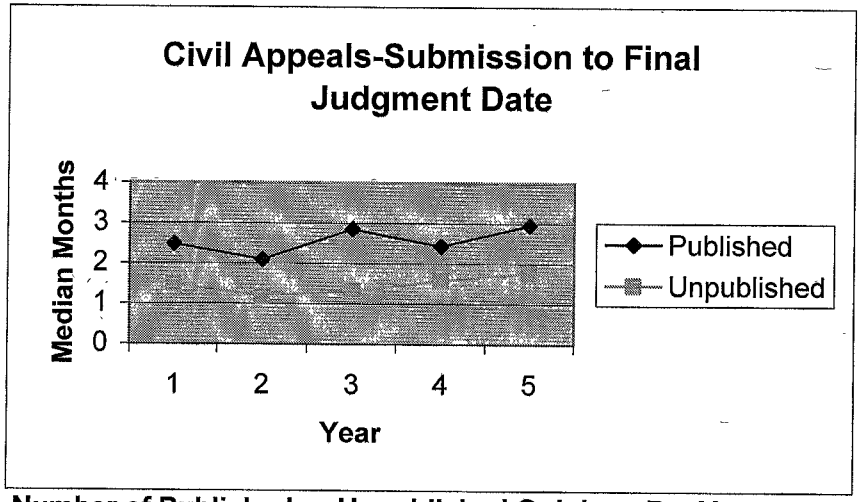
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	160	192	189	210	196
U	95	113	95	146	106



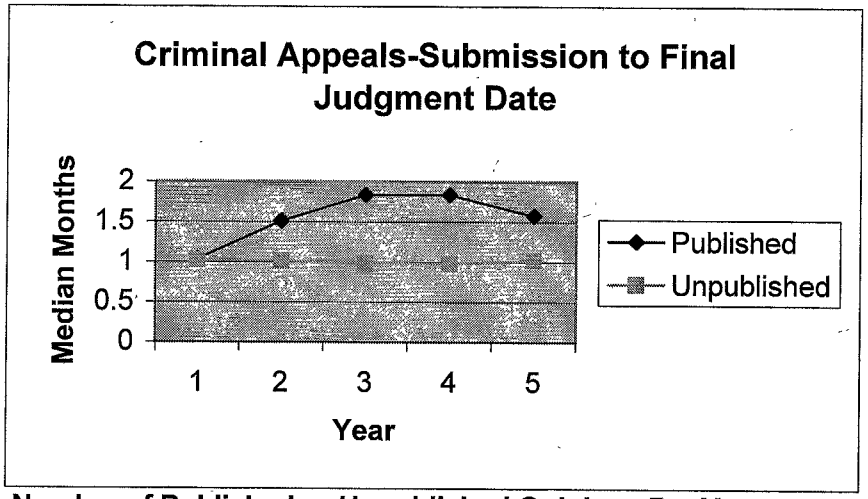
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	83	137	91	84	80
U	44	84	101	98	69



Number of Published or Unpublished Opinions Per Year:

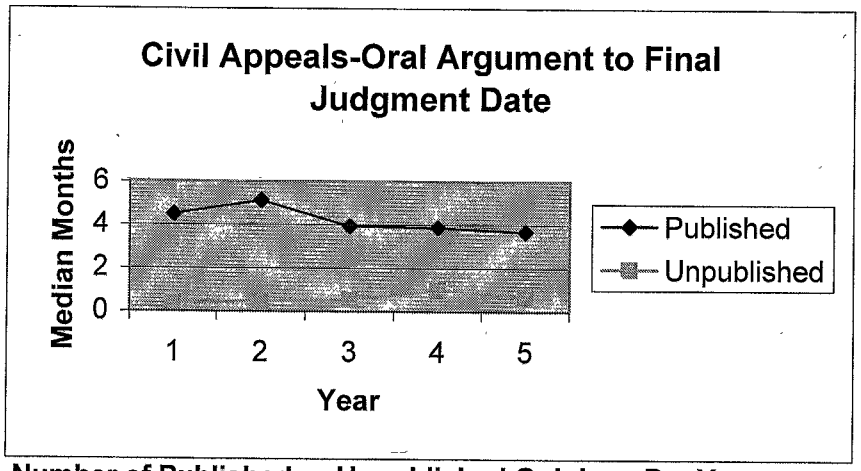
	Year 1	Year 2	Year 3	Year 4	Year 5
P	62	59	56	42	57
U	667	654	670	573	491



Number of Published or Unpublished Opinions Per Year:

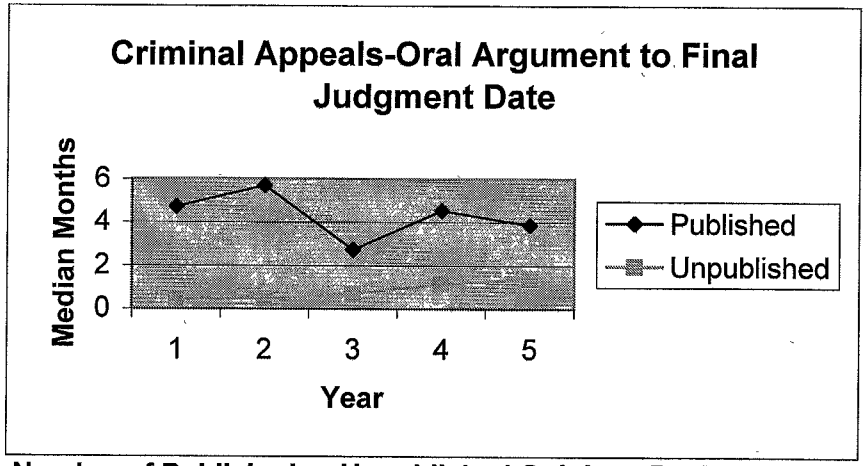
	Year 1	Year 2	Year 3	Year 4	Year 5
P	26	23	25	17	33
U	125	212	207	182	174

Median Disposition Time for 11th Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



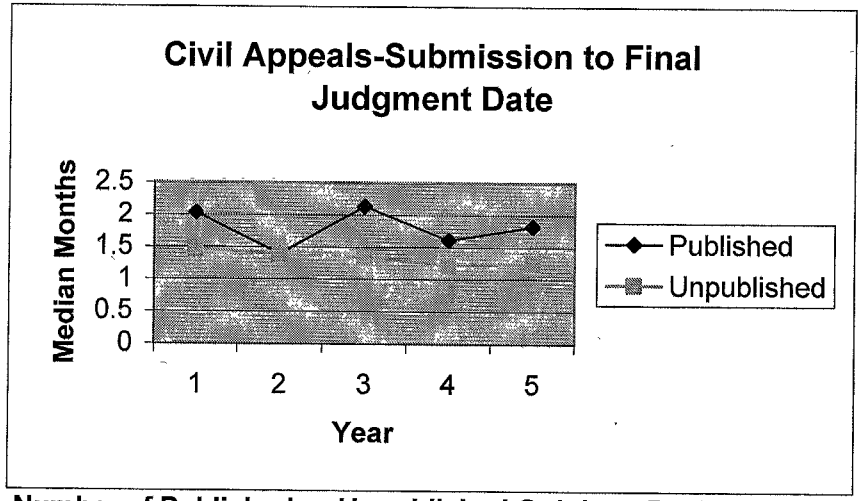
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	243	258	253	263	231
U	285	313	334	346	254



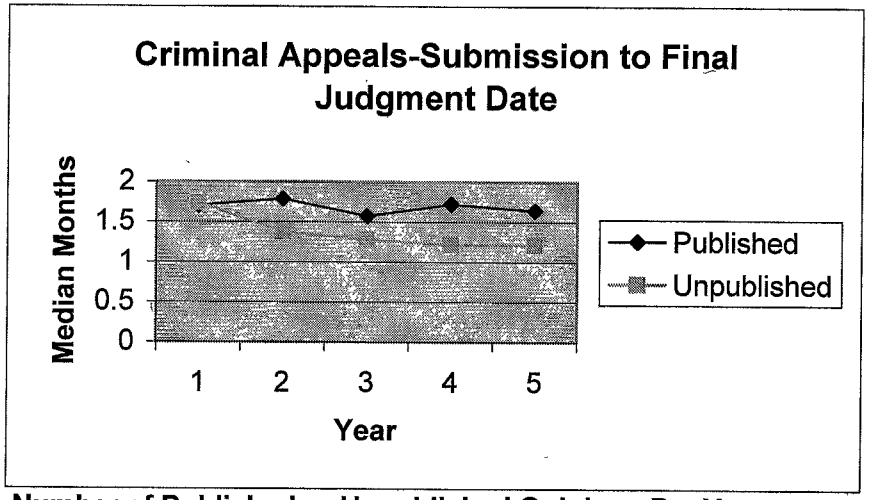
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	182	155	107	116	113
U	202	188	103	178	158



Number of Published or Unpublished Opinions Per Year:

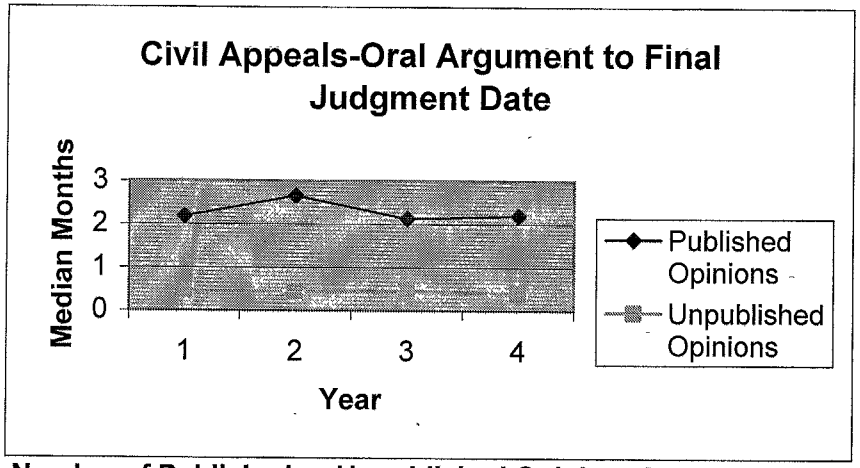
	Year 1	Year 2	Year 3	Year 4	Year 5
P	32	32	25	43	34
U	903	1196	1333	1243	1226



Number of Published or Unpublished Opinions Per Year:

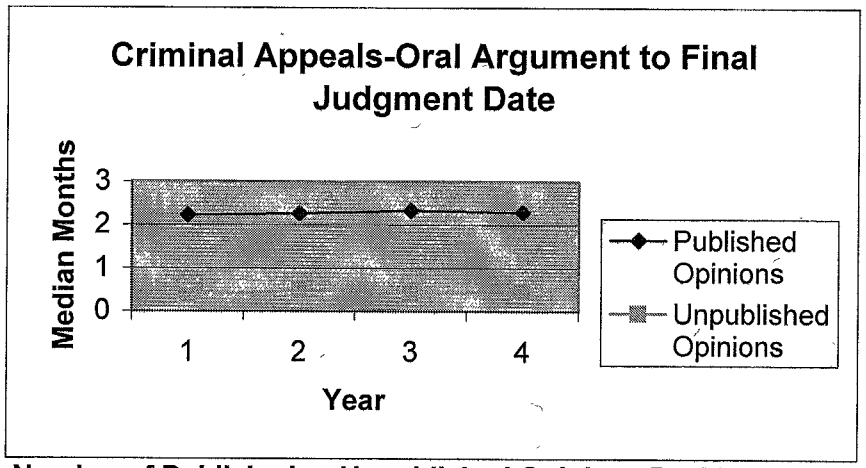
	Year 1	Year 2	Year 3	Year 4	Year 5
P	39	24	30	24	25
U	802	1066	1121	1083	1116

Median Disposition Time for DC Circuit Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions



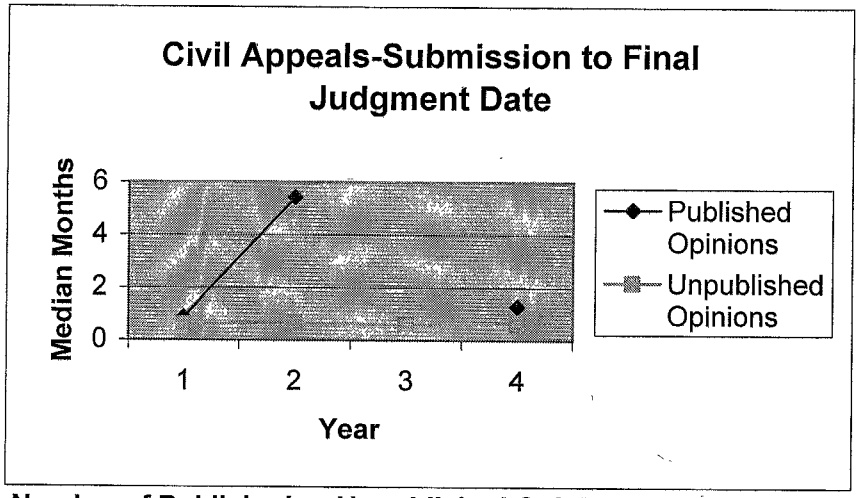
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	100	83	95	101	No data
U	15	15	16	23	No data



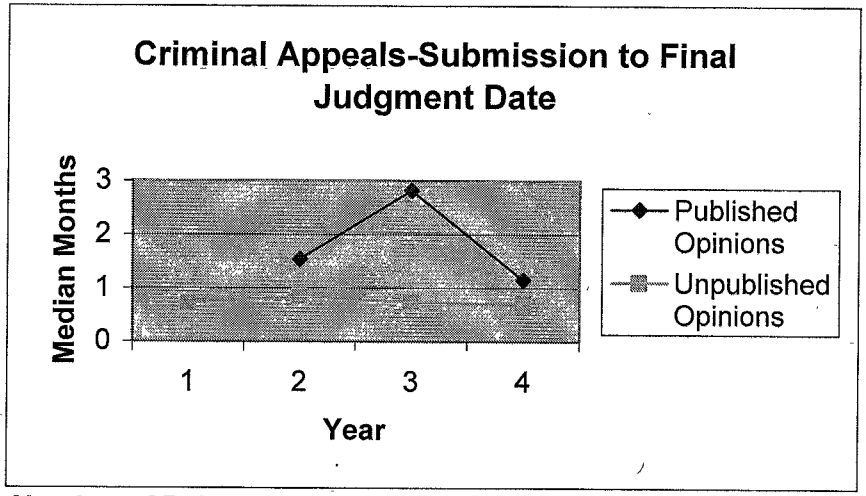
Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	29	26	23	27	No data
U	4	6	5	9	No data



Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P	4	3		2	No data
U	228	222	194	153	No data



Number of Published or Unpublished Opinions Per Year:

	Year 1	Year 2	Year 3	Year 4	Year 5
P		2	1	1	No data
U	25	22	14	15	No data

Median Disposition Time from Oral Argument or Submission to Final Judgment in Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions
(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)
Excludes Asbestos Cases (outliers) in 5th Circuit

		Civil Appeals							
		Oral Argument to final judgment date				Submission to final judgment date			
		Published Opinion		Unpublished Opinion		Published Opinion		Unpublished Opinion	
Circuit	Year	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months
01	1	200	2.6557	19	.9180	16	1.8525	304	1.8361
	2	200	2.8197	23	1.0820	12	1.6557	150	2.7377
	3[a]	202	2.9508	28	1.1803	26	1.5082	93	3.1803
03	1	177	3.3443	178	.4590	22	3.7541	808	1.7705
	2	205	3.7705	214	.5574	27	3.9672	974	1.8689
	3[a]	198	4.0328	192	.4918	42	3.3770	899	1.4754
	4	172	3.2787	208	.5082	23	3.8361	974	1.6393
	5	178	3.8525	197	.5246	17	3.7705	801	2.1639
04	1	203	3.8689	278	2.4098			1189	.9508
	2	183	3.4426	301	2.1311	3	7.5738	1637	.9508
	3[a]	159	4.0656	287	1.8361	3	.0000	1637	.5574
	4	169	2.9180	291	1.7705	4	4.2623	1060	.3934
	5	154	3.1639	263	2.6230			1153	.6557
05	1	358	3.4754	238	.5082	102	1.8197	1625	.7213
	2	396	3.9016	368	.2623	112	1.8361	1596	1.1148
	3[a]	409	3.6721	353	.3934	85	1.7705	1753	.7869
	4	352	3.0820	340	.4754	64	2.3934	1186	.9508
	5	377[b]	3.6393[b]	229	.2951	64	2.6230	1265	1.0164
06	1	221	4.4590	435	1.5738	23	3.8361	665	1.3770
	2	238	3.9672	365	1.3443	14	3.6066	643	1.3443
	3[a]	240	3.5246	469	1.4098	32	3.2787	820	1.3770
	4	244	3.6230	428	1.6557	42	4.4262	896	1.3443
	5	236	3.7377	305	1.8361	27	4.8525	851	1.3770
08	1	468	3.1311	92	1.0000	68	2.1803	618	.2951
	2	448	2.9836	84	.6557	57	1.4754	721	.2623
	3[a]	429	3.2459	79	.4590	52	1.1967	604	.3279
	4	363	2.9836	93	.6230	57	1.4098	592	.2623
	5	423	3.3770	71	.7541	63	1.3443	635	.2623
10	1	160	4.1639	95	2.5246	62	2.4754	667	1.4754
	2	192	3.9344	113	2.7541	59	2.0984	654	1.1803
	3[a]	189	3.9344	95	1.7049	56	2.8525	670	1.3115
	4	210	4.1803	146	2.6230	42	2.4262	573	1.5738
	5	196	5.4426	106	2.5902	57	2.9508	491	1.7705
11	1	243	4.4918	285	.3934	32	2.0328	903	1.4754
	2	258	5.1148	313	.4590	32	1.3934	1196	1.3770
	3[a]	253	3.9344	334	.5246	25	2.1311	1333	1.3443
	4	263	3.8689	346	.9836	43	1.6066	1243	1.2131
	5	231	3.6721	254	.6885	34	1.8197	1226	1.2459

Median Disposition Time from Oral Argument or Submission to Final Judgment in Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions
(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)
Excludes Asbestos Cases (outliers) in 5th Circuit

		Civil Appeals							
		Oral Argument to final judgment date				Submission to final judgment date			
		Published Opinion		Unpublished Opinion		Published Opinion		Unpublished Opinion	
Circuit	Year	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months
DC	1	100	2.1803	15	.4590	4	.8525	228	.5902
	2	83	2.6557	15	.4262	3	5.4098	222	.6557
	3[a]	95	2.1311	16	.4590			194	.5902
	4	101	2.1967	23	.3934	2	1.2787	153	.6230
Total	1	2130	3.4426	1635	1.2459	329	2.2951	7007	1.0820
	2	2203	3.6393	1796	1.0820	319	2.0000	7793	1.1475
	3[a]	2174	3.4754	1853	1.0820	321	2.2623	8003	.9836
	4	1874	3.2459	1875	1.1475	277	2.3607	6677	1.0820
	5	1795	3.7049	1425	1.3770	262	2.7213	6422	1.1148

Median Disposition Time from Oral Argument or Submission to Final Judgment in Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions
(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)
Excludes Asbestos Cases (outliers) in 5th Circuit

		Criminal Appeals							
		Oral Argument to final judgment date				Submission to final judgment date			
		Published Opinion		Unpublished Opinion		Published Opinion		Unpublished Opinion	
Circuit	Year	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months
01	1	80	2.0328	9	1.1148	16	1.2787	131	1.0820
	2	95	2.0328	6	1.2951	20	1.4262	75	1.2787
	3[a]	74	2.4262	13	1.1148	6	1.9344	29	2.2623
03	1	71	2.8852	54	.8033	19	3.8033	293	2.8525
	2	73	3.5082	85	.4590	7	4.0328	355	2.9508
	3[a]	63	3.2131	88	.4590	12	2.9344	331	2.5246
	4	36	3.9344	65	.4262	6	3.2459	321	2.2295
	5	66	4.2459	76	.4918	11	3.7377	334	2.7541
04	1	98	3.0820	168	2.2459	1	.4590	348	.9180
	2	97	3.3770	171	2.0000	2	1.5246	376	.9508
	3[a]	81	2.8525	131	2.2623	5	6.8852	368	.7213
	4	66	2.7377	98	1.8361			460	.6230
	5	51	3.8361	99	2.6557			552	.9508
05	1	168	2.0328	93	.6885	37	1.1475	667	.6557
	2	206	2.2459	162	.6885	39	1.2787	597	.7869
	3[a]	216	2.5738	109	.6885	40	1.0000	697	.7213
	4	227	2.5574	177	.9508	35	.8525	730	.6557
	5	191	2.7213	148	.3607	23	2.6230	655	.6885
06	1	75	4.1311	222	1.0656	17	5.0820	246	1.4098
	2	89	2.6557	215	.8852	10	4.9508	184	1.3770
	3[a]	130	3.6721	253	1.2459	24	5.4098	260	1.5246
	4	108	3.7049	216	1.8689	33	5.2131	236	1.6885
	5	119	2.9836	202	1.5738	19	4.9836	320	1.4098
08	1	197	3.2131	30	.9344	28	1.5902	201	.3279
	2	190	2.6885	28	.7705	39	1.2131	177	.2623
	3[a]	171	2.9180	36	.6885	28	.8689	175	.2623
	4	153	2.5574	40	.2951	32	.8852	226	.2623
	5	170	2.9016	40	.6557	42	1.8361	242	.2623
10	1	83	2.9836	44	1.5902	26	1.0328	125	1.0164
	2	137	2.6885	84	2.6885	23	1.5082	212	1.0164
	3[a]	91	2.7541	101	1.5738	25	1.8361	207	.9836
	4	84	2.6721	98	1.9836	17	1.8361	182	.9836
	5	80	3.6885	69	2.1967	33	1.5738	174	1.0164
11	1	182	4.7213	202	.4262	39	1.7049	802	1.7377
	2	155	5.7049	188	.4590	24	1.7869	1066	1.3770
	3[a]	107	2.7213	103	.6885	30	1.5738	1121	1.2787
	4	116	4.5410	178	1.1475	24	1.7213	1083	1.2131
	5	113	3.8689	158	1.3934	25	1.6393	1116	1.2131

Median Disposition Time from Oral Argument or Submission to Final Judgment in Civil and Criminal Appeals for 2-Years Periods Before and After Courts of Appeals Adopted Policy Permitting Citation of Unpublished Opinions (Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits) Excludes Asbestos Cases (outliers) in 5th Circuit

		Criminal Appeals							
		Oral Argument to final judgment date				Submission to final judgment date			
		Published Opinion		Unpublished Opinion		Published Opinion		Unpublished Opinion	
Circuit	Year	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months	No. of Appeals	Median Months
DC	1	29	2.2295	4	.3607			25	.7213
	2	26	2.2623	6	.4754	2	1.5410	22	.8525
	3[a]	23	2.3279	5	.3934	1	2.8197	14	.7377
	4	27	2.2951	9	.4590	1	1.1475	15	.6885
Total	1	983	2.9836	826	1.3934	183	1.6066	2838	1.1803
	2	1068	2.7705	945	1.1148	166	1.4590	3064	1.2131
	3[a]	956	2.7541	839	1.2459	171	1.8361	3202	1.1475
	4	817	2.9508	881	1.3443	148	1.7377	3253	1.0492
	5	790	3.0164	792	1.3770	153	2.4590	3393	1.1475

a. Year in which the citation policy was adopted.

b. Excludes 322 asbestos appeals with median disposition times of 42.2 months.

Types of Opinions in Appeals Terminated on the Merits

(Two years before and two years after the circuit began allowing citation of unpublished opinions)

		All Published Opinions		All Other Unpublished Opinions		Unpublished Opinions Written, Unsigned, Without Comment		
Circuit	Year	Appeals	Proportion of All Opinions	Appeals	Proportion of All Opinions	Appeals	Proportion of All Opinions	All Opinions
1st	1	312	40.3%	463	59.7%			775
	2	327	56.3%	254	43.7%			581
	3*	308	65.4%	163	34.6%			471
3rd	1	289	17.8%	335	20.7%	998	61.5%	1622
	2	312	16.1%	499	25.7%	1129	58.2%	1940
	3*	315	17.3%	463	25.4%	1047	57.4%	1825
	4	237	13.1%	433	24.0%	1135	62.9%	1805
	5	272	16.2%	528	31.4%	880	52.4%	1680
4th	1	302	13.2%	1983	86.8%			2285
	2	285	10.3%	2485	89.7%			2770
	3*	248	9.3%	2423	90.7%			2671
	4	239	11.1%	1909	88.9%			2148
	5	205	9.0%	2067	91.0%			2272
5th	1	665	20.2%	2551	77.6%	72	2.2%	3288
	2	753	21.7%	2610	75.1%	113	3.3%	3476
	3*	750	20.5%	2842	77.6%	70	1.9%	3662
	4	678	21.8%	2358	75.8%	75	2.4%	3111
	5	977	29.8%	2228	68.1%	69	2.1%	3274
6th	1	336	17.6%	1568	82.4%			1904
	2	351	20.0%	1407	80.0%			1758
	3*	426	19.1%	1802	80.9%			2228
	4	427	19.4%	1776	80.6%			2203
	5	401	19.3%	1678	80.7%			2079
8th	1	761	44.7%	697	41.0%	244	14.3%	1702
	2	734	42.1%	675	38.7%	335	19.2%	1744
	3*	680	43.2%	625	39.7%	269	17.1%	1574
	4	605	38.9%	738	47.4%	213	13.7%	1556
	5	698	41.4%	750	44.5%	238	14.1%	1686
10th	1	331	26.2%	931	73.8%			1262
	2	411	27.9%	1063	72.1%			1474
	3*	361	25.2%	1073	74.8%			1434
	4	353	26.1%	999	73.9%			1352
	5	366	30.3%	840	69.7%			1206
11th	1	496	18.5%	1739	64.7%	453	16.9%	2688
	2	469	14.5%	2307	71.4%	456	14.1%	3232
	3*	415	12.6%	2519	76.2%	372	11.3%	3306
	4	446	13.5%	2523	76.5%	327	9.9%	3296
	5	403	12.8%	2458	77.9%	296	9.4%	3157
DC	1	133	32.8%	272	67.2%			405
	2	114	30.1%	265	69.9%			379
	3*	119	34.2%	229	65.8%			348
	4	131	39.6%	200	60.4%			331

3* The year circuit began allowing citation of unpublished opinions.

OPINIONS IN FEDERAL COURTS OF APPEALS

Year	Total	Written Published	Unpublished Reasoned (Per Curiam)	Unpublished No Reasons (Summary)
2004	27,438	4,782	16, 973	775
2003	27,009	5,037	16,402	932
2002	27,758	4,920	16,917	1,181
2001	28,840	5,058	17,376	1,248
2000	27,516	5,099	16,510	1,104
1999	26,727	5,371	15,528	1,290
1998	24,910	5,770	13,319	1,684
1997	25,840	5,622	13,942	2,308
1996	27,326	6,035	14,409	2,651
1995	27,772	6,118	14,233	2,937
1994	27,219	6,451	13,496	3,073
1993	25,761	6,085	12,625	3,203
1992	23,597	6,330	10,866	2,706
1991	22,707	6,223	10,464	2,323
1990	21,006	5,942	9,507	2,221
1989	19,322	6,091	9,056	2,045

	Total	Reasons	Unsigned Reasons	Without Comment
1988	19,178	7,226	9,414	2,383
1987	18,502	7,439	8,833	2,092
1986	18,199	7,991	7,953	2,146
1985	13,369	7,108	7,431	1,749
1984	14,327	6,477	6,221	1,624

1983	13,217	5,572	5,737	1,908
1982	12,720	5,042	5,886	1,792
1981	12,168	4,793	5,624	1,751
1980	10,607	4,209	4,954	1,444
1979	9,361	3,616	3,725	2,020
1978	8,850	3,495	3,268	2,087
1977	11,400	3,699	3,830	3,871
1976	9,351	3,818	2,784	2,749
1975	9,077	3,592	2,333	3,152
1974	8,451	3,235	3,164	2,052
1973	9,618	3,377	3,886	2,355
1972	8,537	3,468	3,674	1,395
1971	6,139	3,195	2,179	765
1970	5,121	2,904	1,621	596
1969	4,668	2,572	1,502	594
1968	4,468	2,633	1,266	569
1967	4,087	2,414	1,048	575

MEMORANDUM

DATE: March 21, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 03-10

Section 205 of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires every federal court to maintain a website (§ 205(a)) and to make specific information available through that website, including "docket information for each case" (§ 205(a)(4)), "the substance of all written opinions issued by the court" (§ 205(a)(5)), and "documents filed with the courthouse in electronic form" (§ 205(a)(6)). The Act also provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)).

The Act thus establishes broad access to documents that are filed in or converted to electronic form, but the Act recognizes that access cannot be unlimited. The Act provides that documents that "are not otherwise available to the public, such as documents filed under seal, shall not be made available online" (§ 205(c)(2)). Moreover, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically" (§ 205(c)(3)(A)(i)). These privacy rules are to "provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)).

In response to the Act's directive that the Rules Enabling Act process be used to implement privacy rules, Judge David F. Levi, the Chair of the Standing Committee, appointed an E-Government Subcommittee chaired by Judge Sidney A. Fitzwater. The Subcommittee includes liaisons from each of the five advisory committees (Judge John G. Roberts, Jr., represents this Committee), as well as liaisons from other Judicial Conference committees. The reporters to the advisory committees serve as consultants to the Subcommittee. Prof. Daniel Capra, the Reporter to the Evidence Rules Committee, serves as Lead Reporter to the E-Government Subcommittee.

Over the past year, the E-Government Subcommittee has been working to develop a privacy-rule template that all of the advisory committees could then adopt with minor changes. The E-Government Subcommittee met in January 2004 and developed a template that was reviewed by the advisory committees at their spring 2004 meetings. The E-Government Subcommittee met again in June 2004 and developed a revised template, taking into account the input that it received from the advisory committees. The revised template was reviewed by the advisory committees at their fall 2004 meetings. Further revisions have been made to the template based on the comments made at those meetings, but a number of issues still need to be resolved.

Fortunately, this Advisory Committee no longer needs to participate in the debates over the substance of the privacy rules. At its November 2004 meeting, this Committee decided that, rather than try to pattern an Appellate Rule after the ever-evolving template, the Committee should instead amend the Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the substantive decisions can be left to the Committee on Court Administration and Case Management and to the other advisory committees — all of whom have far

more of a stake in the privacy issues than this Committee — and the Appellate Rules will not have to be amended continually to keep up with changes to the other rules of practice and procedure. The Committee instructed me to draft a dynamic-conformity rule for review at the April 2005 meeting.

Drafting such a rule proved more difficult than I anticipated, in part because of complications caused by bankruptcy cases. But with the assistance of the other reporters — particular Prof. Ed Cooper (Civil) and Prof. Jeff Morris (Bankruptcy) — I was able to draft a rule. That draft rule is attached.

I have circulated the draft rule to the other reporters, and all agree that it should work nicely. I also ran the draft rule by Prof. Joseph Kimble of the Style Subcommittee and asked him if there was a shorter or less formal way of referring to the Bankruptcy, Civil, and Criminal Rules (especially in the second sentence of the draft rule). He said "no." He also expressed concern that only the heading of the draft rule indicates that it relates to privacy. He suggested that the first sentence might start with, "A case whose privacy protection was governed by . . . ," and that the second sentence might start with, "In all other proceedings, the privacy protection is governed by . . . ." I do not think the changes are necessary, but the decision, as always, is the Committee's.

I have also attached (1) the latest version of the general template (Prof. Capra warns that this is a "slowly moving target"); (2) the privacy rule approved by the Bankruptcy Rules Committee at its spring 2005 meeting; and (3) the privacy rule drafted by Prof. Cooper for the upcoming meeting of the Civil Rules Committee. You will see that the Bankruptcy Rule differs from the Civil Rule, and that both differ from the general template. These rules are attached only for your information (and perhaps to confirm the wisdom of taking the dynamic-conformity approach).

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. All other proceedings are governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order or the review of a decision of the tax court — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

GENERAL TEMPLATE

Revised Privacy Template

Date: March 16, 2005.

Rule [ ] Privacy Protection For Filings Made with the Court[1]

(a) ~~Limits on Information Disclosed in a Filing~~ Redacted Filings. Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number,[2] ~~a minor's name~~ a name of a person known to be a minor,[3] a person's birth date, [or] a financial account number [or the home address of a person][4] may include only

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[1] The Appellate Rules Committee has tentatively determined that it will seek to draft and approve a "piggy-back" version of the template. The piggy back version will provide that if a filing has been made with the lower court, the rules of the lower court would continue to apply to the filing in a court of appeals. With respect to first-time filings in the court of appeals, the parties will have to comply with the e-privacy rule that would have been applicable had the filing been made in the district court. Accordingly, this template provides the basis for the e-privacy projected e-privacy provision in the Bankruptcy, Civil and Criminal Rules.

[2] The change is made to clarify that corporate tax identification numbers are not subject to the redaction requirement.

[3] This change was suggested by the Committee on Bankruptcy. The Committee noted that there may be situations in which the filing party may not know that a certain person is a minor.

[4] The coverage of home address is for the Criminal Rules Committee only. The other Advisory Committees have decided that it is unnecessary, and perhaps problematic, to delete the full address from court filings. In criminal cases, however, there may be special concerns for protecting victims and witnesses from disclosure of a complete address. The model local rule prepared by CACM imposes a redaction requirement for addresses in criminal cases only.

The Criminal Rules Committee will consider whether the redaction requirement for addresses should be narrowed to cover only the addresses of alleged victims and prospective witnesses. CACM's model rule contains no such narrowing, but it is fair to state that CACM did not consider the possibility of limiting the protection to victims and witnesses.

(1) the last four digits of the social-security number and tax-identification number;

(2) the minor's initials;

(3) the year of birth; [and]

(4) the last four digits of the financial account number. [and]

[(5) the city and state of the home address.][5]

(b) Exemptions from the Redaction Requirement. The redaction requirement of Rule [ ] (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, a financial-account number that identifies the property alleged to be subject to forfeiture;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to (a) when originally filed;

(5) a filing covered by (c) or (d) of this rule; [6][and]

[(6) a filing made in an action brought under 28 U.S.C. section 2254 or 2255; [7]

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[5] The redaction requirement for home addresses is to be included, if at all, only in the Criminal rule.

[6] This addition is intended to clarify that social security cases, immigration cases, and sealed filings are exempt from the redaction requirements.

[7] The Criminal Rules Committee has determined, at least preliminarily, that filings in habeas actions should be exempt from the redaction requirement. Civil Rules may wish to consider whether to include a reference to habeas actions in the text of its rule, or otherwise in the Committee Note. Judge Rosenthal would favor including a reference to habeas actions in the text of the rule, as they account for a significant percentage of civil suits.

(7) a filing made in an action brought under 28 U.S.C. section 2241 that does not relate to the petitioner's immigration rights;[8]]

[**(8)** a filing in any court in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case;

(9) an arrest warrant;

(10) a charging document—including an indictment, information, and criminal complaint—and an affidavit filed in support of any charging document; and

(11) a criminal case cover sheet.][9]

[**(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases.** In an action for benefits under the Social Security Act, and in an action under Title 8, United States Code relating to an order of removal, release from removal, or immigration benefits or detention, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) all other persons may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained under Rule [relevant civil or appellate rule]; and

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[8] It has been noted that some immigration cases are brought under section 2241. The rule as written would therefore provide that an immigration proceeding brought under section 2241 would not be available to non-parties by remote access.

[9] Bracketed subdivisions 8-11 are to be included, if at all, in the Criminal Rule only. DOJ has agreed to provide more information on the character of, and the necessity for exemption of, criminal case cover sheets.

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.][10]

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.[11]

(e) Protective Orders. If necessary to protect ~~against widespread disclosure of~~ private or sensitive information that is not otherwise protected under subdivision (a), a court may by order in a case 1) require redaction of additional information, or 2) limit or prohibit remote access by nonparties to a document filed with the court. [12]

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[10] This subdivision (c) is intended to be included, if at all, in the Civil Rules only. The Criminal Rules Committee has determined that there is no need for such an exception in the Criminal Rules, and there would appear to be no need for the exception in the Bankruptcy Rules.

The special treatment for immigration cases was added to the template at the request of the Justice Department and tentatively approved by the Civil Rules Committee.

[11] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

[12] This subdivision has been revised to specify that a judge can take security interests into account in deciding whether to redact information not covered by the general redaction requirement. The proposed reference to widespread disclosure was deleted by the Bankruptcy Committee on the ground that a court may find it necessary to redact information due to the risk that it could be used by certain individuals, even though the risk of "widespread disclosure" would not exist.

This subdivision runs the risk of conflicting with the burgeoning case law that limits sealing orders. A paragraph has been added to the Committee Note to specify that nothing in this subdivision is intended to affect that case law. Nonetheless, there is a concern that this subdivision could be misused as some kind of general authority for protective orders and sealing orders. The Committee may wish to consider whether to delete this subdivision and rely on other law for protections greater than provided in subdivision (a).

(f) Option for Additional Unredacted Filing Under Seal. A party making a redacted filing under (a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains information redacted under (a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier ~~included~~ in the reference list will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information to the extent that such information is filed not under seal and without redaction ~~by filing that information without redaction~~.[13]

Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent

[13] This change was adopted by the Bankruptcy Committee. The concern expressed was that otherwise a party who filed an unredacted document under seal could be found to have waived the protections of the Rule.

they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e).[14] Moreover, the Rule does not affect the protection available under other rules, such as [Civil Rules 16 and 26(c)], or under other sources of protective authority.[15]

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

[Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.] [16]

Subdivision (e) provides that the court can order in a particular case require more

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[14] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

[15] This sentence was suggested by the Civil Rules Committee, and obviously must be adapted to protective rules that exist in the other rules if this language is to be included in the Note.

[16] This paragraph of the Note is for the Civil Rules only.

extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (g) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule [ ] to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons. [17]

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants;

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[17] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

The privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d). [18]

[18] The underlined material is a new addition to the Committee Note that addresses a CACM commentary concerning certain documents that might be filed but should not be made part of the "criminal case file." The term "criminal case file" is not defined, and it is difficult to mesh with the E-Government Act and the template, both of which presume that if a document is filed with the court it is subject to remote electronic access. The paragraph tries to solve this disconnect by stating that such documents — even though filed and thus subject to remote access — can be sealed by the court.

BANKRUPTCY RULES COMMITTEE

Rule [*9037*] Privacy Protection For Filings Made with the Court

(a) Limits on Information Disclosed in a Filing. Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or tax identification number;[1] a name of a person, *other than the debtor,* known to be *and identified as* a minor; a person's birth date; [or] a financial account number may include only [2]

(1) the last four digits of the social-security number and tax-identification number;

(2) the minor's initials;

(3) the year of birth; and

(4) the last four digits of the financial account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement of ~~Rule []~~ *subdivision* (a) does not apply to the following:

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[1] The Bankruptcy committee may wish to consider whether to cover other private "numbers" such as driver's license, alien registration card, and the like. CACM considered the merits of covering more information (such as driver's licenses) and decided that "the line had to be drawn somewhere". CACM approved a comment to its privacy policy that would warn litigants that information such as driver's license numbers in court filings would be published on the internet, and concerned parties should seek a sealing order. The Committee Note, infra, provides similar comment.

[2] The stylistic revision of the opening clauses of subdivision (a) deletes the use of the term "identifiers" in the text of the rule. Some of those present at the previous Bankruptcy Committee meeting found it confusing to refer to "identifiers" that were not specifically identified in the body of the rule.

(1) the record of an administrative or agency proceeding ***unless filed with a proof of claim***;

(2) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to *subdivision* (a) when originally filed; and

(3) filings covered by *subdivision* (c) of this rule. [3]

(4) filings that are subject to § 110 of the Code.

(c) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.[4]

(d) Protective Orders. ***If necessary to protect private or sensitive information that is not otherwise protected by subdivision (a), a court may by order in a case[5] under the Code***

(1) require redaction of additional information, or

(2) limit or prohibit remote electronic access by a

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[3] This addition is intended to clarify that sealed filings are exempt from the redaction requirements.

[4] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

[5] The "in a case" limitation was suggested by the Criminal Rules Committee.

non-party to a document filed with the court.

(e) Option for Additional Unredacted Filing Under Seal. A party making a redacted filing under *subdivision* (a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) Option for Filing a Reference List. A filing that contains information redacted under *subdivision* (a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.[6]

(g) Waiver of Protection of Identifiers. A party waives the protection of *subdivision* (a) as to the party's own information ***to the extent that such information is filed not under seal and without redaction*** ~~by filing that information without redaction~~.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic

[6] This language tracks the amendment to the E-Government Act that permits the filing of a registry list as an alternative to an unredacted document under seal.

filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (c) or (d).[7] Moreover, the Rule does not affect the protection available under other rules, such as [Civil Rules 16 and 26(c)],

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[7] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

or under other sources of protective authority.[8]

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The inclusion of a debtor's full social security number on the notice of the § 341 meeting of creditors, however, is an example of full information that is made available to creditors. Of course, that information is not filed with the court, see Rule 1007(f) (the debtor "submits" this information), and the notice to creditors that is filed with the court does not include the full social security number. Thus, since the full social security number is not filed with the court, it is not available to a person searching that record. Similarly, while § 342(c) of the Code requires that any notice the debtor may send to a creditor must include the debtor's social security number, the notice that is filed with the court should not include that full number even though the notice sent to the creditor would set forth the debtor's full social security number. See 2003 Committee Note to Official Form 16C.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (d) recognizes the court's inherent authority to issue a protective order to prevent remote access to private or sensitive information and to require redaction of material in addition to that which would be redacted under subdivision (a) of the Rule. These orders may be issued whenever necessary either by the court either on its own, or on motion of a party in interest.

Subdivision (e) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (f) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v)

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[8] This sentence was suggested by the Civil Rules Committee, and obviously must be adapted to protective rules that exist in the other rules if this language is to be included in the Note.

of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal information by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. *As to financial account numbers, the instructions to Schedules E and F of Official Form 6 note that the debtor may elect to include the complete account number on those schedules rather than limit the number to the final four digits. Including the complete number would operate as a waiver by the debtor under subdivision (g) as to the full information that the debtor set out on those schedules.* ***The waiver operates only to the extent of the information that the party filed without redaction.*** If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule [*9037*] to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons. [9]

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[9] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

CIVIL RULES COMMITTEE

[5.2T7] **Revised Privacy Template**

Date: March 22, 2005.

Rule 5.2. Privacy Protection For Filings Made with the Court[1]

(a) ~~Limits on Information Disclosed in a Filing~~ Redacted Filings. Unless the court orders otherwise, an electronic or paper filing made with the court[2] that includes a social security number or an individual's tax identification number,[3] ~~a minor's name~~ a name of a person known to be a minor,[4] a person's birth date, [or] a financial account number [or the home address of a person][5] may include only

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[1] The Appellate Rules Committee has tentatively determined that it will seek to draft and approve a "piggy-back" version of the template. The piggy back version will provide that if a filing has been made with the lower court, the rules of the lower court would continue to apply to the filing in a court of appeals. With respect to first-time filings in the court of appeals, the parties will have to comply with the e-privacy rule that would have been applicable had the filing been made in the district court. Accordingly, this template provides the basis for the e-privacy projected e-privacy provision in the Bankruptcy, Civil and Criminal Rules.

[2] "[M]ade with the court" remains in the rule to exclude a filing made by the court. The court should not be required to redact its own orders, opinions, or other filings.

[3] The change is made to clarify that corporate tax identification numbers are not subject to the redaction requirement.

[4] This change was suggested by the Committee on Bankruptcy. The Committee noted that there may be situations in which the filing party may not know that a certain person is a minor. Similar situations may arise in civil actions; the change seems suitable for the Civil Rule.

[5] The Criminal Rules Committee will add home addresses to the general redaction requirement. The other Advisory Committees have decided that it is unnecessary, and perhaps problematic, to require that home addresses be subject to a general redaction requirement that applies in all cases. In criminal cases, however, there may be

(1) the last four digits of the social-security number

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special concerns for protecting victims and witnesses from disclosure of a complete address. The model local rule prepared by CACM imposes a redaction requirement for addresses in criminal cases only.

The Criminal Rules Committee will consider whether the redaction requirement for addresses should be narrowed to cover only the addresses of alleged victims and prospective witnesses. CACM's model rule contains no such narrowing, but it is fair to state that CACM did not consider the possibility of limiting the protection to victims and witnesses.

Redaction of home addresses also may be appropriate in some civil actions. A diversity action for injuries inflicted by domestic violence is a persuasive illustration. A driver's license number may be another illustration. This draft responds to such concerns through the provision in subdivision (e) that allows a court to order additional redactions. This provision was added by the Bankruptcy Rules Committee. The protection, however, might fit better in (a) as a new paragraph, making the present provisions paragraph (1) and adding this as paragraph (2):

> (2) The court may order redaction of any other information to protect privacy or security interests.

As compared to the draft in (e), this approach keeps all the redaction provisions together, and limits (e) to a single topic — limits on remote access to the court's electronic records. It also has the advantage of bringing a reference to "security interests" — one of the things the statute says the rule should address — into explicit focus.

Capra makes two arguments against this suggested (a)(2). He believes the rule should not include a general open-ended power to order redactions beyond those directed by subdivision (a). He also believes that if there is to be such power, it fits better in subdivision (e). Capra believes that a supplemental general power makes the rule more complicated, and that it will generate more confusion if it is included in (a) rather than combined with the remote-access provisions in (e). He also fears that the additional authority "could be misused as some kind of general authority for protective orders and sealing orders." See footnote 14 for subdivision (e).

and tax-identification number;

(2) the minor's initials;

(3) the year of birth; [and]

(4) the last four digits of the financial account number.[and]

[(5) the city and state of the home address.]

(b) Exemptions from the Redaction Requirement. The redaction requirement of Rule 5.2(a) does not apply to the following:

(1) in a civil [or criminal][6] forfeiture proceeding, a financial-account number that identifies the property alleged to be subject to forfeiture;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to Rule 5.2(a) when originally filed;

(5) a filing covered by Rule 5.2(c) or (d) ~~of this rule;~~[7][and]

[(6) a filing made in an action brought under 28 U.S.C.

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[6] Need the Civil Rules refer to a criminal forfeiture proceeding? Separately, the Criminal Rules Committee has suggested that because they require redation of home addresses, the exemption should extend to "a financial-account number or real property address that identifies the property alleged to be subject to forfeiture." The address is important to identify the forfeiture property, even if it is identifiable as a person's home address.

[7] This addition is intended to clarify that social security cases, immigration cases, and sealed filings are exempt from the redaction requirements.

section 2254 or 2255;[8] [and]

(7) a filing made in an action brought under 28 U.S.C. section 2241 that does not relate to the petitioner's immigration rights.[9]] [10]

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[8] The Criminal Rules Committee has determined, at least preliminarily, that filings in habeas actions should be exempt from the redaction requirement. They note that many of these actions are filed pro se by petitioners who will not be aware of the redaction requirement. The Civil Rules may wish to consider whether to include a reference to habeas actions in the text of its rule, or otherwise in the Committee Note. The argument in favor of including a reference to habeas actions in the text of the rule is that they account for a significant percentage of civil suits.

[9] It has been noted that some immigration cases are brought under section 2241. The effect of paragraph (7) is to say that a § 2241 proceeding that relates to immigration rights is not exempt from the redaction requirement. But paragraph (5), by exempting from redaction a filing covered by Rule 5.2(c), may exempt such a § 2241 immigration rights proceeding from redaction. Although it is not entirely clear, a § 2241 petition to protect immigration rights may fall within subdivision (c). Subdivision (c) in the current draft bars remote access by nonparties to electronic files "in an action under Title 8 * * * relating to an order of removal, release from removal, or immigration benefits or detention." If (c) protects against nonparty remote access in a § 2241 immigration-rights proceeding, the need for redaction is much diminished, and (b)(5) exempts the proceeding from redaction. All of this creates a drafting dilemma. If we were confident that every § 2241 proceeding relating to immigration rights is covered by (c), we could combine paragraphs (6) and (7): "The redaction requirement of Rule 5.2(a) does not apply to * * * (6) a filing made in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255." A § 2241 proceeding relating to immigration rights would be exempted from redaction under both (5) and (6), but that does not seem to be a problem. It would be protected against remote access by (c).

On the other hand, if we want to require redaction in a § 2241 proceeding that relates to immigration rights, we accomplish that result with the present draft only if Rule 5.2(c) clearly does not apply to such a proceeding. If that interpretation is not clear, we could undertake further work on (b) or (c). Either drafting chore will be awkward. In (c), for example, we could say: "and in an action <u>other than a 28 U.S.C. § 2241 petition</u> under Title 8, United

[**(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases.** In an action for benefits under the Social Security Act, and in an action under Title 8, United States Code relating to an order of removal, release from removal, or immigration benefits or detention, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) all other persons may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

States Code relating to an order * * *." That is not pretty.

[10] Additional exemptions from the redaction requirement are being considered for the Criminal Rules as follows:

> **[(8)** a filing in any court in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case;
>
> **(9)** an arrest warrant;
>
> **(10)** a charging document—including an indictment, information, and criminal complaint—and an affidavit filed in support of any charging document; and
>
> **(11)** a criminal case cover sheet.]

The Department of Justice will supply the Criminal Rules Committee with additional information on the character – and the need for exemption – of criminal case cover sheets. The Committee has not yet determined whether the paragraph (11) exemption is useful. It also is considering deletion from paragraph (10) of "including an indictment, information, and criminal complaint." The language adds nothing, since the identification of charging documents is easy; it also is incomplete

(A) the docket maintained under Rule 79(a)[11]; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.][12]

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.[13]

(e) Protective Orders. If necessary to protect ~~against widespread disclosure of~~ private or sensitive information that is not

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[11] If the Appellate Rule simply incorporates Civil Rule 5.2 for all actions originating in a district court, should Appellate Rule 45(b) be added, either here or in the Appellate Rule that otherwise incorporates Rule 5.2?

[12] This subdivision (c) is intended to be included, if at all, in the Civil Rules only. The Criminal Rules Committee has determined that there is no need for such an exception in the Criminal Rules, and there would appear to be no need for the exception in the Bankruptcy Rules.

The special treatment for immigration cases was added to the template at the request of the Justice Department and tentatively approved by the Civil Rules Committee.

[13] This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

There is an overlap between this subdivision and the concern expressed in footnote 14 that Rule 5.2 should avoid any implicit expansion of current law on sealing orders. This caution is added to the Committee Note; see the text at note 19.

otherwise protected under Rule 5.2(a), a court may by order in a case 1) require redaction of additional information, or 2) limit or prohibit remote access by nonparties to a document filed with the court.[14]

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[14] This subdivision has been revised in two ways at the suggestion of the Bankruptcy Rules Committee. One change would strike out "against widespread disclosure of." This change would allow a court to limit remote access by nonparties without finding a risk of widespread disclosure. A risk of access by even one person might suffice. The Criminal Rules Committee Subcommittee also supports this change. This change also ties to the second change, which adds authority to require redactions not required by subdivision (a).

The authority to order redaction in a specific case of information not covered by the general redaction directions in subdivision (a) is discussed in note 5. The discussion in note 5 raises the question whether it would be better to include this authority as part of subdivision (a). That approach would bring both elements of the redaction protection into one place, and maintain subdivision (e) as a provision that deals only with remote nonparty access. It also would make it easier to face directly the question whether to retain the words that authorize a case-specific limitation on nonparty remote access only to protect against widespread disclosure of private or sensitive information. [Subdivision (e) might profitably be interchanged with subdivision (d), so as to follow the remote access provisions in subdivision (c).] As discussed in note 5, the opposing view is that any case-specific redaction authority may prove confusing, and that if it is to be recognized it is less confusing as part of subdivision (e).

Wherever a case-specific redaction authority is located, if it is included in the rule it might include a reference to protecting "security" interests. The E-Government Act, quoted in the first paragraph of the Note, requires the Supreme Court to prescribe rules "to protect privacy and security concerns * * *."

This subdivision runs the risk of conflicting with the burgeoning case law that limits sealing orders. A paragraph has been added to the Committee Note to specify that nothing in this subdivision is intended to affect that case law. Nonetheless, there is a concern that this subdivision could be misused as some kind of general authority for protective orders and sealing orders. The Committee may wish to consider whether to delete this subdivision and

(f) Option for Additional Unredacted Filing Under Seal. A party making a redacted filing under Rule 5.2(a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains information redacted under Rule 5.2(a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item ~~of redacted information~~ listed. The reference list must be filed under seal and may be amended as of right. Any references in the case to an identifier ~~included~~ in the reference list will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information to the extent that **the party files** such information ~~is filed~~ not under seal and without redaction ~~by filing that information without redaction~~.[15]

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rely on other law for protections greater than those provided in subdivision (a). Civil Rule 26(c) would continue to authorize discovery protective orders. The uncertain authority for pseudonymous pleading that has grown up despite Civil Rule 10 would carry forward. More general sealing authority would persist outside the Civil Rules. As suggested in note 13, a Committee Note comment may suffice to protect against the risk that a rule provision that in any event says nothing about sealing implies a new source of sealing authority.

[15] This change was adopted by the Bankruptcy Committee. The concern expressed was that otherwise a party who filed an unredacted document under seal could be found to have waived the protections of the Rule. The need for this change is unclear. The premise that filing a paper under seal waives the redaction requirement for other papers, filed by any party, is highly questionable. The first question for the Civil Rules Committee is whether to include this variation at all. If we keep this change, it must focus on a filing made by the party; the version first proposed seemed to work a waiver when any party filed unredacted information not under seal: "A party waives the protection of (a) as to the party's own information to the extent that such information is filed not under seal and without redaction." We cannot provide that a party waives when someone else

Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a

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files without redaction. We could add a provision that a party waives when it fails to move within a defined period to redact a filing made by someone else, but that does not seem worth it. (The Committee Note on subdivision (h) correctly states that a party waives by filing.)

particular case. In such cases, the party may seek protection under subdivision (d) or (e).[16] Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.[17]

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.[18]

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may

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[16] This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

[17] This sentence was suggested by the Civil Rules Committee, and obviously must be adapted to protective rules that exist in the other rules if this language is to be included in the Note. If part of (e) is transferred to become a new (a)(2) as suggested in note 5, (a)(2) should be added to this sentence.

[18] This paragraph of the Note is for the Civil Rules only.

provide an alternative to sealing.[19]

Subdivision (e) provides that the court can by order in a particular case require more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.[20]

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) ~~of the rule~~ refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons. [21]

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[19] This new paragraph is intended to pick up and revise the second sentence of the next paragraph, flagged by note 20.

[20] This sentence is needed for (d). See note 19.

[21] This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule,

[22]The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

> The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants;
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)
>
> The privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the

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because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

[22] There is no apparent need to include this in the Civil Rule Committee Note. See note 23.

rule through the sealing provision of subdivision (d). [23]

[23] The underlined material is a new addition to the Committee Note that addresses a CACM commentary concerning certain documents that might be filed but should not be made part of the "criminal case file." The term "criminal case file" is not defined, and it is difficult to mesh with the E-Government Act and the template, both of which presume that if a document is filed with the court it is subject to remote electronic access. The paragraph tries to solve this disconnect by stating that such documents – even though filed and thus subject to remote access – can be sealed by the court.

MEMORANDUM

DATE: March 22, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Proposed Amendment to Federal Rules of Appellate Procedure Published for Comment in November 2004

I. Rule 25(a)(2)(D)

A. Introduction

At its November 2004 meeting, this Advisory Committee approved for publication on an expedited basis an amendment to Appellate Rule 25(a)(2)(D) that would authorize the circuits to use their local rules to mandate that all papers be filed electronically. The Bankruptcy Rules Committee approved for publication an identical amendment to Bankruptcy Rule 5005(a)(2), and the Civil Rules Committee approved for publication an identical amendment to Civil Rule 5(e) (which is incorporated by reference into the Criminal Rules (see Criminal Rule 49(d)). The three proposed amendments were accompanied by virtually identical Committee Notes. These amendments are being considered on an expedited basis at the request of the Committee on Court Administration and Case Management (CACM), which is confident that mandatory electronic filing will result in significant cost savings for the judiciary.

B. Text of Rule and Committee Note

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 25(a)(2)(D).

C. Summary of Public Comments

We received a total of ten comments on the proposed amendment to Rule 25(a)(2)(D). Copies of those comments are attached as "Appendix A."

Leroy White, Esq. (04-AP-001) is concerned that requiring mandatory electronic filing may be "premature." He senses "no enthusiasm" for electronic filing among lawyers and asserts that only one court of appeals (the Eleventh Circuit) requires it. "Congress should take the lead" on this issue.

The **Office of General Counsel of the Department of Defense** (04-AP-002) does not have any suggested changes.

The **American Bar Association** (04-AP-003) is "concerned that the proposed rules may impede full access because they do not require that local rules make some provision for those who might be unable to use an electronic filing system." The ABA believes that the amendments should be revised to require that local rules mandating electronic filing include accommodations for indigent, disabled, and pro se litigants. Specifically, the ABA urges that the amendments incorporate the safeguards of ABA Standard 1.65(c)(ii):

Mandatory Electronic Filing Processes: Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirements, and the court (or its representative) provides training for filers in the use of the process.

Mr. Eliot S. Robinson (04-AP-004) is concerned about the impact of the amendment on pro se litigants. He believes that pro se litigants should be exempt from mandatory electronic filing and that those who want to file electronically should receive assistance, such as training and "remote pro se system access." He also urges that "[o]nly non-proprietary files standards [such as PDF] shall be used."

The **Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board** opposes the amendments. The Committee believes that permitting courts to mandate electronic filing is "premature" and argues that, "if mandatory filing is allowed, then there must be exceptions provided for in accordance with nationally applicable standards that assure equal and full access to the courts." Without such exceptions, the Committee asserts, the amendments "are a recipe for inconsistency, inequality, and inaccessibility." The Committee is particularly concerned about the impact of the amendments on pro se litigants, the disabled, the elderly, the incarcerated, those without access to technology, and those who may have access to technology but do not know how to use it. The Committee is concerned not only with the absence of any hardship exception, but with the lack of "requirements . . . for in forma pauperis sta[tus]."

HALT: An Organization of Americans for Legal Reform (04-AP-006) recommends that the following sentence be added at the end of Rule 25(a)(2)(D): "Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause." HALT asserts that it is not enough to encourage a hardship exception in the Committee Note; rather, such an exception should be required by the rule itself.

The **Self Help Committee of the Northwest Women's Law Center** (04-AP-007) reports that a significant percentage of its clientele does not have access to technology and expresses concern that the amendments "do not take into account the probability that mandatory electronic filing will pose yet another hurdle for individuals representing themselves." The Committee urges that the amendments be revised to "include a mandate for all federal courts to ensure access for *pro se* litigants."

The **Committee on Federal Courts of the State Bar of California** (04-AP-008) supports the proposed amendments.

The **Standing Committee on the Delivery of Legal Services of the State Bar of California** (04-AP-009) argues that the amendments should require exceptions for "pro se litigants who lack resources and/or the ability to comply, such as incarcerated individuals" and "attorneys who lack the technological resources to file papers electronically such as some legal aid attorneys and some pro bono attorneys."

Richard Zorza, Esq. (04-AP-010) is concerned that the amendments will "add[] an additional barrier to access to self represented litigants." Local rules may not include hardship exceptions or may include hardship exceptions that are inadequate. He urges that mandatory filing be imposed only on those represented by counsel.

The **Executive Committee of the State Bar of Michigan** did not submit a comment on the proposed amendment to Appellate Rule 25(a)(2)(D), but did comment on the proposed amendment to Civil Rule 5(e). Prof. Ed Cooper, the Reporter to the Civil Rules Committee, summarized the Executive Committee's comment as follows: "'[O]pposes the proposed rule, to the extent that it permits local courts to require e-filing of persons other than attorneys.' The rule would be supported if it applied only to filings by attorneys and assured that local rules must allow an attorney to show good cause for failing to file electronically."

D. Recommendation

I want to draw your attention to three issues:

1. The commentators make a good case that the national rules should require courts who choose to mandate electronic filing to include a hardship exception. We have been told so often about the many courts that have already adopted mandatory electronic filing that it is easy to forget that the substantial majority of courts have not. Over the next few years, dozens of local rules committees will sit down to draft electronic filing rules, and I think there is some benefit to instructing them that they must include a hardship exception. Also, I think there is some benefit to signaling in the national rule that, as we rapidly evolve into an all-electronic judicial system, the rules committees will not forget those who lag behind.

That said, I do not think that, at this time, the national rules should spell out the precise scope of the hardship exception. Rather, I believe that the national rules should merely require that local rules include *a* hardship exception — and then, after a few years' experience, we will be in a position to identify and mandate the "best practices" that have emerged from local experimentation.

The Bankruptcy Rules Committee seems to agree. At its meeting this spring, the Committee was persuaded by the comments summarized above to add the following sentence to Bankruptcy Rule 5005(a)(2): "Courts requiring electronic filing shall reasonably accommodate parties who cannot

feasibly comply with the mandatory electronic filing rule." The drafting of this sentence might be improved. One possibility would be to amend the first sentence to provide:

> A court of appeals may by local rule permit — or if exceptions are allowed for good cause require — papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

A second possibility would be to add either of the following sentences at the end of the subdivision:

> A local rule that requires electronic filing must make an exception for good cause.

> A rule that requires electronic filing must permit paper filing when electronic filing is unreasonably burdensome.

There are undoubtedly other possibilities for implementing the decision of the Bankruptcy Rules Committee, but I think that the underlying decision is sound.

In fairness, I should point out that the vote in the Bankruptcy Rules Committee was 9 to 5. Prof. Jeff Morris, the Committee's Reporter, informs me that a substantial minority of the Committee felt that the language in the Committee Note was sufficient to protect those for whom mandatory electronic filing would pose a hardship. Moreover, Prof. Cooper has pointed out that none of the commentators on any of the proposed amendments has cited a single local rule that does not include an adequate hardship exception, nor has any commentator cited a single example of a mandatory electronic filing rule creating a problem. (Of course, as Prof. Cooper concedes, those most likely to have encountered such a problem are unlikely to submit a comment on a proposed amendment.)

2. Judge Sandra Lynch (1st Cir.), a member of CACM, has expressed concern about a possible ambiguity in Appellate Rule 25(a)(2)(D) — an ambiguity that already exists, but that is likely to become more problematic on account of mandatory electronic filing. Here is Judge Lynch's concern:

Many of the courts of appeals are likely to enact local rules that require or permit parties to file their briefs electronically, but that also require parties to file one or more paper copies of their briefs. Judge Lynch said that, on her circuit, there is no judge who wants to receive *only* an electronic copy of a brief, although there are some who want to receive an electronic copy *in addition to* a paper copy. The First Circuit's local rules are thus likely to require a "written" copy or "paper" copy, in addition to an electronic copy. But the last sentence of Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying

these rules." Judge Lynch's concern is that Rule 25(a)(2)(D) has defined both "written" and "paper" to mean "electronic," leaving the courts of appeals without an adjective to describe "real" paper.[1]

Judge Lynch concedes that a little common sense and a careful reading of Rule 25(a)(2)(D) should avoid this problem, but she is concerned that common sense and careful reading are sometimes lacking among those who appear before a court of appeals. She would like to add a sentence to the Committee Note clarifying that nothing in Rule 25(a)(2)(D) should be read to prohibit a court from requiring a "real" paper copy of a filing — a sentence such as the following: "A local rule may require that both electronic and physical [tangible?] copies of a paper be filed; nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise." Judge Alito would like to accommodate her, if the Committee agrees.

3. Finally, on a related matter: The Administrative Office, in conjunction with a group of appellate clerks and appellate staff attorneys, has drafted a set of suggested local rules governing electronic filing. Those draft rules are attached as "Appendix B." The draft rules will be submitted to CACM for approval at its June meeting, but first the authors would like to receive the input of this Committee.

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[1]Suppose, for example, that a local rule provides, "Every party must file both an electronic and a written paper copy of its brief." An attorney might look at Rule 25(a)(2)(D) — which provides that a brief filed electronically "constitutes a written paper" — and be confused about whether he or she may file only an electronic copy.

APPENDIX A

Public Comments Submitted on Proposed Amendments to Rule 25(a)(2)(D)

pamela christmas
<pdchristmas@yahoo.com>
12/15/2004 11:15 AM

To Peter_McCabe@ao.uscourts.gov
cc
Subject Appellate Rules 25

04-AP-001
Request to Testify
1/25 DC

Dear Mr.McCabe:

I would like to testify at the Appellate Rules Committee hearing on January 25, 2005, in Washington, D.C. I would like to testify on Appellate Rule 25.

Sincerely,
Leroy White
Attorney-at-Law
265 South Englewood Dr
Baton Rouge, La 70810
Telephone 225-766-3142

pdc

Leroy White
Attorney at Law
265 S. Englewood Drive
Baton Rouge, LA 70810
January 3, 2005

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference
Of the United States

Re: Statement on Proposed Amendment
To Appellate Rule 25 (a) (2) D on
Electronic filing of Appeals to United States
Circuit Courts of Appeal

The United States Court of Appeals for the Eleventh Circuit requires Electronic filing of appeals to the Eleventh Circuit Court of Appeals. Current copy of the Local Rule requiring Electronic filing has been received by undersigned from the Office of the Clerk, United States Court of Appeals for the Eleventh Circuit. The remaining United States Courts of Appeals do not require Electronic filing of Appeals to their Circuits Courts of Appeals.

A NOTE entitled Electronic filing and Informational Privacy by Kylakitajima has published in the Hastings Law Quarterly at 27 Hastings Law Quarterly at page 563 (1999-2000).

A very current Article Copyright 2004 Association of Trial Lawyers of America entitled, The State of Electronic filing, by Susan Larson, a member of The South Dakota Bar.

Finally, an Article entitled, A Review of Electronic Court filing in the United States, has been published in the Journal of Appellate Practice and Process Volume 2. Number 2 (Summer 2000).

The big question as I see it, is whether action by the Judicial Conference in the area of Electronic filing is premature at this time. First of all, the general bar has shown no enthusiasm for active participation. The articles cited herein seem to point to wide future participation in all areas including commerce and state and federal courts. Only one United States Court of Appeals has moved from paper filings of Appeals to Electronic filing of Appeals. When I called the Clerks of Court of the circuit Courts the clerks informed me that they were working on Electronic filings. However, there has been no strong movement in that direction.

With so much hardware available to lawyers, the Courts, and the general public, I believe this is a matter where Congress should take the lead. I did not raise the question of costs, but because the people who have made the studies are optimistic and predict that electronic filings are coming, I believe Congress should be active and strongly encourage general participation by Appeals Courts of the United States, that do not require electronic filings of Appeals.

Finally on May 22, 2003 in comments on Rule 32.1 of Appellate Rules of Procedure considering unpublished opinions the committee noted that "unpublished" opinions are already widely available to the public, and soon every Court of Appeals will be required by law to post all of its decisions, including unpublished decisions on its website. See E-Government Act of 2002, Publ. 107-347, Section 205 (a) (5), 116 stat. 2899, 2913. Congress has already taken the first step by enactment of this legislation.

I will be in Washington, D.C. on another important matter on January 24, 2005. During my visit I will seek assistance from the Louisiana Congressman for the Sixth Congressional District of the State of Louisiana. I will share any direction I receive with the committee.

Respectfully Submitted:

Leroy White
Attorney at Law
LA Bar Roll No. 13427

Enclosure:
Document
Received from
United States Court of Appeals,
11th Circuit

The Federal Rules of Appellate Procedure (FRAP), the Eleventh Circuit Rules, and the Internal Operating Procedures (IOPs) are available on the Internet at

www.ca11.uscourts.gov

The court's web site also contains answers to Frequently Asked Questions, and checklists and tables showing FORMAT, COLOR, QUANTITY, TIME, and other requirements for briefs, record excerpts, and other papers.

Please see the **Notice of Privacy Policy** posted on the court's website, on the Briefing and Filing Instructions page.

Amendments to the Eleventh Circuit Rules took effect on April 1, 2003, and on January 1, 2003. The revised rules are available on the Internet at **www.ca11.uscourts.gov**. Among the revised circuit rules are provisions that:

- require that the Certificate of Interested Persons (CIP) in the second and all subsequent briefs filed must include only persons and entities omitted from the CIP contained in the first brief filed (and in any other brief that has been filed). See 11th Cir. R. 26.1-1.
- permit service by electronic means, if the party being served consents in writing. See FRAP 25(c).
- require counsel to provide the court with electronic briefs by uploading the electronic briefs to the court's web site. See 11th Cir. R. 31-5.

ELECTRONIC BRIEF UPLOADING

In addition to providing the required number of paper copies of briefs, all parties (except pro se parties) are required to upload the brief in electronic format to the court's Web site as described in 11th Cir. R. 31-5 and these instructions. The electronic brief must be completely contained in a single Adobe Acrobat® PDF file (see instructions for generating the PDF file below), i.e., the cover page through and including the certificate of service shall be contained in one file. Appendices need not be included in the electronic brief. Hypertext links to cases, statutes and other reference materials available on the Internet are authorized. The certificate of service shall continue to indicate service of the brief in paper format.

To upload your brief:

- Go to this court's Web site at www.ca11.uscourts.gov

(e) Extension of Time Must Be Requested Prior to Due Date. A request for an extension of time to file a brief or record excerpts pursuant to this rule must be made or filed prior to the expiration of the due date for filing the brief or record excerpts. The clerk is without authority to file a party's motion for an extension of time to file a brief or record excerpts received by the clerk after the expiration of the due date for filing the brief or record excerpts. A request for an extension of time to correct a deficiency in a brief or record excerpts pursuant this rule must be made or filed within 14 days of the clerk's notice as provided in 11th Cir. R. 42-3. The clerk is without authority to file a party's motion to correct a deficiency in a brief or record excerpts received by the clerk after the expiration of the 14-day period provided by that rule. [See 11th Cir. R. 42-2 and 42-3 concerning dismissal for failure to prosecute in a civil appeal.]

(f) Motion for Leave to File Out of Time. The clerk is without authority to file a party's motion for leave to file a brief or record excerpts out of time received by the clerk after the expiration of the due date for filing a brief or record excerpts or for correcting a deficiency in a brief or record excerpts. [See 11th Cir. R. 42-2 and 42-3 concerning dismissal for failure to prosecute in a civil appeal.]

11th Cir. R. 31-3 Briefs - Number of Copies. One originally signed brief and six copies (total of seven) shall be filed in all appeals, except that pro se parties proceeding in forma pauperis may file one originally signed brief and three copies (total of four). One copy must be served on counsel for each party separately represented.

11th Cir. R. 31-4 Expedited Briefing in Criminal Appeals. The clerk is authorized to expedite briefing when it appears that an incarcerated defendant's projected release is expected to occur prior to the conclusion of appellate proceedings.

11th Cir. R. 31-5 Electronic Briefs.

In addition to and contemporaneous with the filing of any paper brief, counsel for any party or amicus curiae shall provide the court with the same brief in electronic format. All electronic briefs shall be in Adobe Acrobat® PDF file format. The time for serving and filing a brief is determined by service and filing of the paper brief, which is the official record copy of the brief, and is not affected in any way by providing electronic briefs. If corrections are required to be made to the paper brief, a corrected copy of the electronic brief shall be provided.

An electronic brief shall be uploaded to the court's Web site in accordance with this rule and directions to be provided by the clerk. In the alternative, at the direction of the clerk or with the clerk's permission, an electronic brief may be provided in another format, including (but not limited to) floppy disk or CD-ROM as described in this rule. An electronic brief in its entirety, including all contents required by 11th Cir. R. 28-1, 28-2, or 29-2, must be combined and contained in a single electronic document or file.

(a) Internet Upload. An electronic brief shall be provided by uploading the brief to the court's Web site at www.ca11.uscourts.gov. Prior to uploading the first brief, the uploading party will be provided instructions by the clerk. Appendices may be included in the electronic brief, but are not required to be included. Hypertext links or bookmarks to cases, statutes and other reference materials available on the Internet are authorized. The certificate of service shall indicate the date of service of the brief in paper format.

Leroy White
Attorney at Law
365 Englewood Dr
Baton Rouge, La 70810
225-766-3142

January 19, 2005

Mr. Peter G. McCabe, Secretary
(202)502-1820
Fax (202) 502-1766

Re: Rule 25 (a) (2) (d)
Electronic Filing: Federal Rules
Of Appellate Procedure

A court of appeals may be local rule permit or require paper to be filed, signed, or verified by electronic means.....
Substance of Testimony to be given on January 25, 2005.

I consider the "opt out" provided to be extremely significant. Only one United States Circuit Court of Appeals requires Electronic Filings to that court which is The United States Court of Appeals for the Eleventh Circuit.

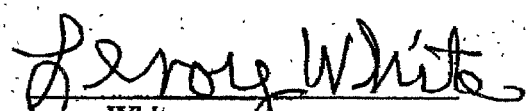
I have a copy of the action taken by the Judicial Conference of the United States in 2001 entitled Report on Privacy and Access Issues in electronic filings. The last action taken was on November 10, 2004.

Mr. John K. Rabiej, Chief, Rules Committee support office gave me an oral statement by telephone, yesterday, January 18, 2005 but I have received no written verification of his statement and I am willing to accept any written statement supporting it.

Because of the "opt out" clause provided the program appears to remain in the experimental stage and unless it is removed by action taken, it will remain in the experimental stage. The legal profession has changed drastically. Lawyers expend large sums advertising and promoting their law practice. Lawyers openly solicit class actions tort actions and medical malpractice clients.

Electronic filing may not be worth much to many lawyers who brag about large sums they recover in the millions of dollars with little work as enducement to potential clients. It is noted that two Law Review Publications were made in 2000 prior to the action of the Judicial Conference of the United States in 2001 and the E-Government Act of 2002. I am enclosing a copy of the law review article published in 2004.

Respectfully:



Leroy White
Attorney at Law
LA BAR ROLL NO. 13427

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

JAN 13 2005

Peter G. McCabe
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
One Columbus Circle, N.E., Suite 4-170
Washington, D.C. 20544

04-CV-111
04-BK-011
04-AP-002

Dear Mr. McCabe:

Thank you for providing us the opportunity to comment on the preliminary draft of proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure. We do not have any suggested changes.

Sincerely,

Daniel J. Dell'Orto
Principal Deputy General Counsel

Robert J. Grey, Jr.
President

AMERICAN BAR ASSOCIATION

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Chicago, Illinois 60610-4714
(312) 988-5109
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E-mail: abapresident@abanet.org

Defending Liberty
Pursuing Justice

04-AP-003

February 8, 2005

04-BK-016

04-CV-168

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to Appellate Rule 25(a), Bankruptcy Rule 5005(a), and Civil Rule 5(e) regarding Mandatory Electronic Filing

Dear Mr. McCabe:

I write to you on behalf of the American Bar Association regarding proposed amendments to the Federal Appellate, Bankruptcy and District Court Rules that would permit local rules to mandate electronic filing. See *Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure - Nov. 2004*

We are grateful for the ongoing efforts of the Administrative Office and the Judicial Conference to improve the administration of justice by adopting new technologies. It is clear that electronic filing and improved data management are important to advance efficient operation of our courts. At the same time, we are sure that the Judicial Conference is mindful of the fundamental principle that our legal system must be effective and available for all members of society, regardless of their economic or social condition. We are concerned that the proposed rules may impede full access because they do not require that local rules make some provision for those who might be unable to use an electronic filing system.

The ABA House of Delegates considered the issue of mandatory electronic filing in February 2004. At that time, the House of Delegates adopted as ABA policy Standard 1.65 of the Standards Relating to Court Organization, which specifically addresses court use of electronic filing processes. Standard 1.65(c)(ii) states:

> Mandatory Electronic Filing Processes: Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirements, and the court (or its representative) provides training for filers in the use of the process.

We face great challenges both at the bar and within society as a whole in our efforts to provide access to the courts for those of limited means. The ABA has a long and proud history of support for the Legal Services Corporation and advocacy for pro bono services by all lawyers. Notwithstanding our efforts, the poor and those of moderate income face many obstacles to the successful use of the courts to resolve their legal problems and assure the application of the rule of law to all in our society. We face the reality that many litigants represent themselves in our courts, most frequently because they cannot afford a lawyer and the resources of free legal services are insufficient to reach them.

I encourage the Judicial Conference to reexamine the proposed changes to its rules that permit courts to adopt local rules requiring electronic filing. We recommend that the Conference give further consideration to the impact of the rules changes on those who are likely to be harmed by such a change. We ask that the Conference incorporate the safeguards of Standard 1.65 into the black letter of amended rules governing mandatory electronic filings; we do not believe that mere inclusion in the rules commentary is sufficient on this important issue.

Thank you for your consideration.

Sincerely,

Robert J. Grey, Jr.
President
American Bar Association

04-AP-004

"Robinson, Eliot S." <Eliot.Robinson@Sterlingbancorp.com>
01/31/2005 08:21 AM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject Comment on Proposed Amendment to FRAP Rule 25. Filing and Service (a) FILING. (2) Filing: Method and Timeliness. (D) Electronic filing.

January 31, 2005
Peter G. McCabe
Secretary, Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Mr. McCabe:

With respect to the subject, I have had experience as a pro se in a civil case and know how hard it is for a pro se party to function effectively in a legal action. I want to make sure that pro se parties are considered in this rule making process.,

To help pro se parties protect their constitutional, Bill of Rights and other legal rights, they must be provided the following:

(A) Full Access. Pro se parties must be provided with full access to any electronic system for the filing of papers with the court. Full access includes without limitation system access at the Pro Se Office, remote pro se system access, training, filing capability, searching capability, reading capability, bi-directional file transfers and printing capability.

(B) Filing Assistance. If the court requires electronic filings and the pro se party elects not to file electronically, district court Pro Se Offices must accept pro se paper filings and convert them to electronic filings.

(C) Non-Proprietary File Standards. Only non-proprietary files standards shall be used. These include without limitation Portable Document Format (PDF), TIFF, ANSI text, OpenOffice, and Rich Text Format (RTF).

Thank you for the opportunity to comment on this proposed rule.

Sincerely,

Eliot S. Robinson
201 East 66th Street, Apartment 8E
New York, NY 10021

Telephone: 212 861 6644 (home)
212 356-6516 (office)

04-CV-171

04-BK-036

"Horowitz Foundation" <djh@horowitzfoundation.org>

02/15/2005 02:16 PM

To Rules_Comments@ao.uscourts.gov

cc mcro1948@whidbey.com

bcc

Subject Comments on Proposed Amendments to Civil Rule 5(e), Bankruptcy Rule 5005(a), and Appellate Rule 25(a) re Mandatory Electronic Filing

04-AP-005

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. Secretary:

As Chair of the Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board I am submitting these comments on certain proposed amendments to federal court rules. These are: Proposed Amendments to Civil Rule 5(e), Bankruptcy Rule 5005(a), and Appellate Rule 25(a) re Mandatory Electronic Filing.

In brief background, the Washington State Access to Justice ("ATJ") Board was established by Order of the Washington State Supreme Court in 1994, and given responsibility to promote, enhance, and assure equal and quality access for low and moderate income persons and others who suffer disparate access barriers to the civil justice system.

Early in 2000, the ATJ Board began serious consideration of the potential consequences and ramifications of the increasing and inevitably greater incorporation and use of the new information and communication technologies (including the internet) in the justice system. After considerable study, the Board concluded that these technologies presented significant positive opportunities, but also carried with them significant problems. They could perpetuate and exacerbate existing barriers and exclusions and indeed create new ones, or they could create new opportunities and pathways to access and use of the justice system in more efficient and effective

ways. The Board determined that a set of fundamental principles to guide the planning, development and use of technology in the justice system was necessary.

As a former Superior Court Judge, with extensive experience in both private and public practice and public service, I was asked to chair this effort.

I am pleased to report that on December 3, 2004, the Washington State Supreme Court signed and entered an Order approving and adopting the Access to Justice Technology Principles. This was the result of over three and a half years of hard work by a large and diverse group of people.

The Preamble of the Access to Justice Technology Principles states: "The use of technologies in the Washington State justice system must protect and advance the fundamental right of equal access to justice. There is a particular need to avoid creating or increasing barriers to access and to reduce or remove existing barriers for those who are, or may be excluded or underserved, including those not represented by counsel."

The actual text of both the Supreme Court Order and the Access to Justice ("ATJ") Technology Principles as adopted can be electronically linked to at our website at: www.atjtechbillofrights.org

Other pertinent information and background can also be found at the above website. Of course, I am also pleased to respond either by direct e-mail or phone to questions or requests for clarification or further context.

It is from this perspective and from my over 40 years of varied experience in the justice system that I offer the following comments, again not only on my behalf but on behalf of this state's Access to Justice Board and, as such, the users and prospective users (both lawyers and non-lawyers) of court systems in this country, in this instance the federal courts.

I have read the proposed rules and the accompanying letters and memoranda. The amendments to the Rules here proposed are all the same, and they are very simple. They add the two words "or require" to an existing rule which to this time allows local courts to adopt local rules that permit electronic filing. With these two words, local courts may go beyond permitting electronic filing; they may require electronic filing. Those two simple words lead to many and complicated problems.

We all agree that our courts should be run as efficiently and as economically as possible. We all agree that the new technologies provide opportunities to help us do a better job of that. However, the essential mission of the courts is not that of a business. The essential mission and task of the courts is to be accessible to all persons who need the courts, and to those people provide a fair opportunity for a just result. Providing access to justice is the fundamental job of the courts, and a fundamental right of all persons in this country. Efficiency and economy cannot compromise that mission and the performance of that job. In order to maximize its goal of maximizing profits and long term success, a business can decide what portion of the population it will target and what portion of the population it will not attend to. Courts cannot do that; courts must be equally available to all. These comments do not reflect new thinking; they reflect the fundamental values and principles on which this country and its system of justice were founded, and which must apply to and guide the use of technology in the courts now and in the future.

The amendments currently proposed, without more, are a recipe for inconsistency, inequality, and inaccessibility. There is no requirement

for any exception to electronic filing in courts that make it mandatory for a vast group of unprepresented people and many attorneys who at this point in time either simply cannot use electronic filing or can use it only after having to overcome barriers or with burdens not required of or experienced by many others. Other persons will be disadvantaged even when using e-filing because of limited time and capacity availability of the necessary technology or persons who can use or assist them in using the technology.

The list is lengthy. The most obvious are pro se litigants. Within that group (and I am sure there are others I have inadvertently failed to list or have not yet discovered) the following face obvious exclusion, barriers, encumbrances, or disadvantages:

1. Those without the technology. Even if they know how to use the technology, public availability of the technology almost invariably carries a fee (and pro ses are often indigent or low or moderate income), and when free as in a library, there are time limitations, both in terms of hours of availability (which often conflict with work hours) and limitations on duration of use because of limited equipment and the demand for use by other members of the public. In certain places, particularly rural areas, availability of the technology is at a considerable distance or one must travel through difficult terrain, requiring time, money, appropriate transport, and occasionally even those are insufficient to enable access.
2. Those living in areas (whether rural or not) without publicly available technology, or, if available, without sufficient capacity (such as broadband) to support the interactivity, handle or support what may be massive amounts of content and material, and other features of the e-filing system in a way that makes its use workable at all or reasonably practical to use. Rural areas are most vulnerable to this, but many inner-city areas are as well.
3. Those who for a great variety of reasons don't know how to use the technology.
3. Persons with disabilities or infirmities who can't use or even get to the technology.
4. Those who, like many of the elderly, are intimidated by the technology.
5. Those who are incarcerated or whose freedom is otherwise restricted.

Whether they are pro se or not, many persons cannot afford additional fees for electronic filing if such are imposed either locally or nationally. There are no requirements in this rule for in forma pauperis standard and procedures as there are for traditional filing fees.

There are persons who have managed to comply with a mandatory requirement to file electronically by using a public facility, but do not have the ability or capacity to receive electronic notices or other transmissions from the court, either at all or in a timely manner.

Finally for this section of the comments, there are not only the pro ses, but the lawyers in rural or other areas that currently do not have sufficient capacity (such as broadband) to support the interactivity, handle or support what may be massive amounts of content and material and other features of the e-filing system in a way that makes its use workable at all or reasonably practical to use.

Positions have been taken in a few of the communications about these proposed amendments that the local courts will take care of such problems. First of all, the rules and the amendments are not clear as to whether, once e-filing has been declared mandatory by a local court, any exceptions are allowable. There is nothing in the rule or the amendments that explicitly provides or recognizes that authority. But assuming that is included, either implicitly or explicitly, there are no standards or any basis set forth on which to base any such action by the local

court. Without standards, there is no rule of law. Judges are adrift, as are litigants. Most often they try to do their best, but sometimes they don't, or they don't succeed. There isn't or may not even be consistency within the local court. If local courts do adopt local rules, where is any guidance for the standards, and why should basic access to justice standards vary? The argument is somtimes made that local systems and conditions vary, and therfore there should be no overarching standards that apply to all courts. This argument is easily met by proper balancing, which is what courts, even in their rule-making capacity, are supposed to be expert at and in fact do all the time. National standards exist in many areas of the law. They cannot and should not be ignored or avoided when they deal with basic requirements such as access to the justice system. The standards can without difficulty be drafted carefully and broadly enough to accommodate local conditions and operational needs while assuring adherence to basic requirements and principles of law. In any event, it is better to guarantee access to the courts more strictly than necessary than not to guarantee it at all. Injustice will not happen in the interim until the correct balance is achieved, as it would if there are no required standards.

Further, the fact that many local courts have to now engaged in good practices without such standards does not solve the problem. What happens when circumstances or conditions change or technology changes? What happens when judges change? Why is there a need for any national rule at all if reliance is simply on local practice? There can be no argument against appropriate standards that are cognizant of the need for sufficient local operational flexibility.

That is what we in the state of Washington tried to do when in 2003 we developed and adopted a statewide court rule pertaining to electronic filing. We hope and believe it is a good rule for now, but we know it's not a perfect rule. We are too early in the evolution of this technology for any rule to be perfect, and as we learn more, we will improve the rule. Washington is a state with a great variety of local conditions, from a large urban center like Seattle to very sparsely populated mountainous regions, to flat prairies to tiny fishing villages and more. In many of these areas connectivity, capacity of access and other technical problems are very different from the areas around Microsoft. We have tried to formulate our standards so that they work for all the people who live in all those areas, and for the courts that serve them, whatever the local conditions. We have tried to accommodate people of different economic status and other differences. We have tried to treat pro se litigants equally. We have provided for local operational flexibility.

While that rule (GR 30) does not currently allow for exclusive mandatory electronic filing, it does make a serious effort to provide consistency and fairness for those, both lawyers and pro ses, where that service is available and is used by one or both parties. Thus, while local courts can determine whether or not they want to charge an additional fee for electronic filing, there is an in forma pauperis provision requiring waiver of such a fee under the same conditions and standards as for waiver of a non-electronic filing fee. (GR 30.6(b)).

Likewise, to treat small law firms or solo practitioners equally with law firms with 16 or 24 hour staffs, GR 30.4(a) provides that a document electronically received outside the Clerk's normal business hours will not be considered filed until the beginning of the next business day.

These are issues that especially require consideration when electronic filing is made mandatory. No doubt there are others.

To conclude, given the significant access to justice and equitable treatment issues, and in the context of the present state of technology availability and capacity, and the computer literacy and capability of the people we must serve, our considered opinion is that providing for mandatory electronic filing at this time is premature. There must be alternative means of filing allowed, and the treatment of all filers of whatever type must be equal. As an alternative, if mandatory filing is allowed, then there must be exceptions provided for in accordance with nationally applicable standards that assure equal and full access to the courts while providing flexibilty for local operational needs.

Electronic filing should not become a barrier to access to the federal courts, or to any court system. I am sure the intention and the substantial effort and resources expended on this effort was to make access easier and less burdensome to all. This requires further careful thought and directly addressing the issues which have been raised.

We stand ready to assist and to provide our full cooperation and resources should you so desire.

Respectfully,

Donald J Horowitz
Former Superior Court Judge
Chair, Access to Justice Technology Bill of Rights Committee
Washington State Access to Justice Board
Donald Horowitz

Phone: (206) 328-2952
Cell Phone: (206) 790-5079
Fax: (206) 328-7566

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

Comments Submitted to the
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Regarding Proposed Changes to:

Rule 5 of the Federal Rules of Civil Procedure,
Rule 25 of the Federal Rules of Appellate Procedure,
Rule 5005 of the Federal Rules of Bankruptcy Procedure.

Submitted by
Thomas M. Gordon, Senior Counsel
February 14, 2005

HALT—*An Organization of Americans for Legal Reform* thanks the Committee on Rules of Practice and Procedure for the opportunity to submit comments regarding proposed changes to Rule 5 of the Federal Rules of Civil Procedure, Rule 25 of the Federal Rules of Appellate Procedure, and Rule 5005 of the Federal Rules of Bankruptcy Procedure. HALT is a national nonprofit organization representing the interests of consumers of legal services by working to make the civil justice system more accessible and accountable to those consumers. As part of this mission, HALT works to reduce and eliminate barriers that might prevent consumers from resolving their legal issues through self-help or at the lowest possible cost.

HALT commends the Committee for its continued efforts to conform the federal procedural rules to the needs of today's legal consumers and practitioners. However, on

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behalf of our 50,000 members nationwide, HALT respectfully suggests slight modifications to the proposed rules to ensure that the new rules adequately reflect the needs of *pro se* litigants. While HALT agrees that there may be many advantages to encouraging or even requiring electronic filing in the vast majority of cases, HALT is concerned that the proposed rules do not require a court to make any exceptions to its electronic filing requirement if the court decides to make electronic filing mandatory. HALT appreciates and agrees wholeheartedly with the language in the comments to each proposed rule in which the Committee notes that "courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general 'good cause' exceptions." These comments are an important addition to any proposal to allow courts to require electronic filing; therefore HALT strongly encourages the committee to include these comments in the rules themselves.

According to the American Bar Association, each year, 38 million low- and moderate-income Americans are shut out of the legal system simply because they cannot afford to hire a lawyer. Part of the solution to this crisis in access lies in expanding the ability of civil litigants to represent themselves in a wider array of legal matters. This is especially true in the context of bankruptcy proceedings, where bankruptcy filers cannot afford adequate legal representation almost by definition. As proposed, the new rules suggest that a bankruptcy court could require everyone—including *pro se* litigants—to file electronically. This would clearly be a great disservice to these litigants, putting them at an even greater disadvantage in handling their legal matters than they're already in

today. The proposed rules would put *pro se* litigants at the same disadvantage in the civil context, and to a lesser extent, in the appellate context, as well. In order to maximize the ability of *pro se* litigants to handle their own legal affairs, HALT urges the Committee to revise its proposed rules as follows:

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) Filing: Method and Timeliness.

* * * * *

(D)Electronic filing. A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause.

Once again, HALT commends the Committee on Rules of Practice and Procedure for its continued efforts to ensure our federal procedural rules meet the needs of today's legal consumers and practitioners. To that end, we urge the Committee to modify the proposed rules slightly in order to address the needs of *pro se* litigants.

NORTHWEST WOMEN'S LAW CENTER
3161 Elliott Ave., Suite 101, Seattle, WA 98121
Administration: 206-682-9552 ♦ Fax: 206-682-9556
Information & Referral: 206-621-7691 ♦ TTY 206-521-4317

February 11, 2005

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to Appellate Rule 25(a), Bankruptcy Rule 5005 (a), and Civil Rule 5(e) regarding Mandatory Electronic Filing

Dear Mr. McCabe:

I am writing to you on behalf of the Self Help Committee of the Northwest Women's Law Center regarding proposed amendments to the Federal Appellate, Bankruptcy, and District Court Rules that would permit local rules to mandate electronic filing.

The Northwest Women's Law Center is a non-profit, public interest law organization that advances legal rights for women through public impact litigation, legislative and administrative advocacy, and the provision of legal information and referral services to women and men who cannot afford attorneys or have nowhere else to turn. The Self Help Program of the Northwest Women's Law Center provides a statewide legal information and referral telephone line and a committee of volunteers who prepare self help materials for the public.

Our legal information and referral line volunteers handle 3000 to 5000 calls a year. Since our goal is to provide each caller with information and resources to help resolve her/his legal issue, we are acutely aware of the resources available – and not available – for a wide range of legal issues in various parts of our region. While we encourage people to hire attorneys when possible, only about 25% are referred to private attorneys for even a brief consultation, due to lack of funds. We encourage *pro se's* to take advantage of technological advances, including the Washington Law Help and local court websites and we increasingly employ technology to improve our own services. However, surveys of our callers over the past few years show that at least 65% still prefer to receive hard copies of legal information and resources by mail rather than by email or from a website. We know that a significant percentage have no choice. We feel strongly that technology should improve and supplement access to the legal system for all, rather than limiting such access.

We are concerned that the proposed court rules allowing local courts to mandate electronic filing do not take into account the probability that mandatory electronic filing will pose yet another hurdle for individuals representing themselves. We urge the Committee to amend the proposed rules to include a mandate for all federal courts to ensure access for *pro se* litigants. We recommend assistance from staff at federal courthouses, including technical assistance using court equipment and conversion of hard copies by court staff. In addition, the rule should include exceptions for those who cannot make use of this type of assistance. We request consideration of the above issues and recommendations at this time. Relying on "gradual convergence on uniform exceptions," as noted in the Committee Note to proposed Civil Rule 5(e), ignores the current reality of individuals struggling to access the courts.

Thank you for the opportunity to comment on these proposed rules.

Sincerely,

June Krumpotick
Program Manager
Self Help Committee

04-AP-008

04-BK-039

04-CV-174

04-EV-012

"Bercovitch, Saul" <Saul.Bercovitch@calbar.ca.gov>
02/15/2005 12:51 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

I have attached comments of the State Bar of California's Committee on Federal Courts on the proposed amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence. Please note that the position expressed in the comments is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Thank you.

Very truly yours,

Saul Bercovitch

Saul Bercovitch
Staff Attorney
The State Bar of California
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Fax: (415) 538-2515
E-mail: saul.bercovitch@calbar.ca.gov

JCUS fed rule amendments 8-04 - CFC.pdf

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON FEDERAL COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

February 15, 2005

Via E-mail and U.S. Mail

Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence. The Committee appreciates the opportunity to submit these comments. By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, immigration, and appellate experience.

I. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 5 – Service and Filing of Pleadings and Other Papers

The Committee supports the proposed amendment to Rule 5(e), which authorizes courts to require by local rule that papers be filed electronically. The Committee believes electronic filing is an efficient and cost-effective method of filing documents. The Committee also believes, however, that accommodations should be made for parties who may have difficulty complying with an electronic filing requirement, including economically disadvantaged and incarcerated parties. The proposed Committee Note recognizes this potential problem and comes close to mandating that courts make appropriate exceptions to electronic filing requirements, by stating: "Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general 'good cause' exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 5(e)." The

Committee believes this statement should remain in the Committee Note to acknowledge this issue explicitly.

The transmittal memorandum that accompanies the proposed amendment regarding electronic filing also notes that concern has been expressed about whether required electronic filing would be construed as consent to electronic service under Rule 5(b)(2)(D), but concludes this is not a problem in practice because all courts that have required electronic filing to date have provided an "opt out" for those not wishing electronic service. The Committee agrees with this conclusion, and believes those "opt out" options should remain.

B. Rule 16 – Pretrial Conferences; Scheduling; Management

The Committee supports the proposed amendments to Rule 16. The Committee views the proposed amendments as non-controversial, as they simply insert language concerning two provisions that might be included in a scheduling order: a) provisions for disclosure or discovery of electronically stored information, and b) the parties' agreement for protection against waiving privilege during discovery.

C. Rule 26- General Provisions Governing Discovery; Duty of Disclosure

1. Rule 26(b)(2)

The Committee is split on the proposed amendment to Rule 26(b)(2), with the majority in favor and the minority opposed.

The proposed amendment sets up a procedure to address electronic discovery. The amendment is designed to address the unique features of electronically stored information, such as its volume, the variety of locations where it might be found, and the difficulty of locating, retrieving and producing electronically stored information. Under the proposed amendment a party need not produce electronically stored information that the party identifies as not "reasonably accessible." On motion by the requesting party, the responding party must demonstrate that the information is not reasonably accessible. If that showing is made, the court may still order the party to provide the information if the requesting party demonstrates good cause, and the court may specify the terms and conditions for such discovery.

The majority of the Committee believes the proposed amendment is an appropriate way to deal with the distinctive features of electronically stored information. The majority also believes the proposed Committee Note gives sufficient definition to the term "reasonably accessible," that the term will vary, depending on the circumstances of a particular case, and that case law may better define the standard that would ultimately be established. The majority of the Committee believes the proposed Committee Note provides sufficient guidance to litigants, lawyers and judges in determining whether good cause exists to order the discovery of electronic information that is not reasonably accessible, and adequately addresses terms and conditions that a court might impose in ordering electronic discovery.

IV. FEDERAL RULES OF APPELLATE PROCEDURE

A. Rule 25 – Filing and Service

The Committee supports the proposed amendment to Rule 25, and incorporates by reference its comments on the proposed amendment to Rule 5 of the Federal Rules of Civil Procedure, above.

Disclaimer

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Very truly yours,

A. Marisa Chun, Chair
State Bar of California
Committee on Federal Courts

04-AP-009 RECEIVED 2/15/05 04-BK-040 04-CV-175

"Ngim, Sharon" <Sharon.Ngim@calbar.ca.gov>

02/15/2005 12:39 AM

To <Rules_Comments@ao.uscourts.gov>

cc "Bercovitch, Saul" <Saul.Bercovitch@calbar.ca.gov>, "Doyle, Larry" <Larry.Doyle@calbar.ca.gov>, <bonnie.hough@jud.ca.gov>, <tina.rasnow@mail.co.ventura.ca.us>

bcc

Subject Comments on Federal Rules

Please find attached comments from the State Bar of California's Standing Committee on the Delivery of Legal Services on proposed amendments to Federal Rules regarding electronic filing.

Sharon Ngim
Program Developer and Staff Liaison to the
Standing Committee on the Delivery of Legal Services and the
Indigent Defense Guidelines Working Group
The State Bar of California
Office of Legal Services, Access & Fairness Programs
180 Howard Street
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415/538-2267
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sharon.ngim@calbar.ca.gov
www.calbar.ca.gov

Proposed Amendments to Federal Rules on e Filing 2005[1].doc

THE STATE BAR OF CALIFORNIA

OFFICE OF LEGAL SERVICES, ACCESS & FAIRNESS PROGRAMS

Standing Committee on the Delivery of Legal Services
Chair, Bonnie Hough, San Francisco

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

Tel: 415/538-2267 Fax: 415/538-2552

February 15, 2005

Via E-mail to Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

The State Bar of California's Standing Committee on the Delivery of Legal Services (SCDLS) reviewed the proposed amendments to the Federal Rules, namely Appellate Rule 25(a), Bankruptcy Rule 50005(a) and Civil Rule 5(e), at its video conference meeting on February 5, 2005. We appreciate the opportunity and are pleased to offer our comments below. By way of background, SCDLS is 20 member committee comprised of California attorneys who are actively involved in the delivery of legal services to low-income, moderate-income and self-represented litigants in primarily civil areas including bankruptcy, family, immigration, housing, public benefits and consumer.

Appellate Rule 25(a), Bankruptcy Rule 5005(a) and Civil Rule 5(e)

SCDLS supports the proposed amendments to these three rules which authorize courts to require by local rule that papers be filed electronically, provided that exceptions are made for file by traditional means for: 1) pro se litigants who lack resources and/or the ability to comply, such as incarcerated individuals, and 2) attorneys who lack the technological resources to file papers electronically such as some legal aid attorneys and some pro bono attorneys. In addition, any electronic filing program implemented by the courts should offer sufficient technical support with a designated number for people to call to speak with knowledgeable and helpful staff to walk the pro se litigant or attorney through the e-filing process.

Should you have any questions, please do not hesitate to contact me at 415-538-2267 or sharon.ngim@calbar.ca.gov, or Tina Rasnow, Vice Chair and Legislation Subcommittee Chair for SCDLS at 805-654-3879 or tina.rasnow@mail.co.ventura.ca.us.

Thank you again for this opportunity to comment.

Disclaimer

This position is only that of the State Bar of California's Standing Committee on the Delivery of Legal Services. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Sincerely,

Sharon Ngim

Sharon Ngim
Staff Liaison to the Standing Committee on the
Delivery of Legal Services

04-AP-010

04-BK-041

04-CV-251

Richard Zorza, Esq.
3097 Ordway St., NW
Washington DC 20008
202-549-1128
richard@zorza.net

February 12, 2005

Peter G McGabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the US Courts
One Columbus Circle, NE
Washington DC 20544

Re: Proposed Rules Changes Authorizing Mandating of Electronic Filing

Dear Mr. McGabe:

This letter is submitted in response to the proposal of the Rules Committee of the Federal Judicial Conference which proposes amendments to the Federal Appellate, Bankruptcy and District Court Rules, that would permit the mandating of electronic filing. While I am at attorney who works extensively with many groups dealing with issues facing the self represented, the comment is submitted on my own behalf alone.

I would like to draw the attention of the Committee to the risks this proposal has for access to the court systems for those without lawyers. The core risk, which I believe is not fully addressed by the Committee note, is that particular rules adopted under this provision would have the impact of adding an additional barrier to access to self represented litigants. This could occur either because a particular court adopted a mandate of electronic filing without exceptions, even for the self represented, or if it adopted exceptions not sufficient to protect fully the right to access to justice. Of course most if not all federal courts have so far taken a practical approach to electronic filing, and while it should be hoped that this commonsense attitude will prevail in all cases, it would seem inadvisable as a general matter in any regulatory drafting process to rely on good faith, knowledge, and understanding alone.

It is encouraging that the Committee Note to Rule 5 (e), for example, appears to place value upon the fact that "[c]ourts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means[.]" However the absence of mandate in this language, and the absence of any reference to any right of access, means that a court that choose to adopt a mandate of electronic filing would not

be in violation of the rule, and those excluded from filing as a result of the mandate, would apparently have no remedy under the rule. [1]

Perhaps the greater risk is that the lack of guidance in the proposed rule will result in individual courts mandating electronic filing, and including exception language, but that the language of exception will be inadequate to protect the rights of those who have difficulty using electronic filing. Among these potential risks for self represented litigants might be that:

- The provision will list certain exceptions, but that those exceptions will be too limited.
- The provision will be vague, and in any event act as a discouragement to those who do not have capacity to file electronically.
- The provision will attempt to provide alternative paths to filing, but that those paths will be impracticable, expensive, or otherwise unavailable.
- The provision will not deal with the cost problems for the indigent or low income in dealing with a fee based system.
- The provision will not deal with the particular problems of those with physical or other disabilities.
- The provision will not deal with those who have a religious objection to the use of certain technologies.
- The provision will not address those who are "technologically challenged"
- The provision will not deal with the special situation of the incarcerated, many of whom are under regimes that prevent them from having online access.
- The provision will contain, as suggested in the Committee Note, a "more general 'good cause' exception," but that those affected will not be reassured, and will therefore be deterred from even attempting to file.

Of course, few if any of these risks would occur if it were made clear that the authorization of mandate only applied to those with counsel.

Given these risks and complexities, I would urge that Federal courts should not be authorized to mandate electronic filing for the self represented at this stage in the

---

[1] Rule 5(e), for example, of the Civil Rules, currently states that "the clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." It is not clear if use of paper rather than electronic submission would be considered as not the "proper form," or whether that language refers to lesser transgressions.

development of the technology, either with or without exceptions. This doubt does not extend to represented parties

In my judgment, it would be ideal would be language making clear that electronic filing should be available, but not be mandated, for those without lawyers.

In any event, courts should be encouraged to combine the use of electronic filing with self-represented-friendly services, such as assistance with service, free access to electronic files, and document assembly programs. (This letter does not address in detail whether it is appropriate to bar the self-represented from electronic filing. In the long term this might, unless adequate safeguards were in place, effectively penalize the self represented in that their submissions might be handled differently, and their cases therefore prejudiced.

I hope that you will therefore clarify in the Rule or, if sufficient to have the force of law, make explicit in the note, that the mandate of electronic filing must be limited to those with counsel at the time of the filing of the document. This solution would be simple and easy to apply.

Thank you for your consideration of this comment.

Sincerely,

Richard Zorza, Esq.

APPENDIX B

Draft Model Local Appellate Rules for Electronic Filing And Professor Daniel Capra's Comments on the Draft

"Daniel Capra"
<dcapra@law.fordham.edu>

03/24/2005 08:54 AM

To <John_Rabiej@ao.uscourts.gov>

cc

bcc

Subject Re: Fw: Appellate Model Local Rules

1. Before I get too far into the details of the rules, I can see an immediate question about the relationship between these local rules and the proposed rule on mandatory electronic filing. Nothing in the rules or comments that I can see refers to that pending change. If the national rule change contains Judge Alito's proviso, then note 1 in the Model local rule should make reference to that. If the national change does not contain that proviso, then the question is whether the local rule should be amended in the text to provide that paper copies of briefs must be submitted in addition to mandatory electronic filing. I don't think a local rule requiring paper filing of briefs in addition to mandatory electronic filing would be inconsistent with the mandatory e-filing rule. It simply adds an additional requirement---that is not a conflict under the operating principles of the Squires-less local rules project.

The basic point is that the model needs to be changed slightly to adapt to whatever is being done with the national rule. If the national rule includes mandatory paper filing in addition to mandatory electronic filing of briefs, then note 1 should either be deleted or amended to simply inform the reader of what the national rule says. If the national rule does not include mandatory paper filing of briefs, then the note should be amended to describe what the national rule says; the text of Rule 1 should be amended to require specifically that paper filings must be made in addition to electronic filing; and the note should probably also state that the model local rule is not in conflict with the national rule change.

2. Note 5 to Rule 1 should be amended to refer more directly to the national e-government rules that are being approved by the Advisory Committees for release for public comment. The Note makes it sound like nothing is really happening on this subject. As we all know, something really really important is happening. Change is imminent, at least within the context of the rulemaking process.

3. Note 3 to Rule 8 should be revised in the line where it says that some courts have required retention to the end of the case with time for appeal. These are appellate local rules, so that reference seems out of place.

4. Rule 12 is problematic on a number of grounds, though I know it says it is only intended to be transitional. The most fundamental problem is that it does not specifically require redaction. It simply says that only part of the personal identifier "should be used." First, should is not mandatory. Second, it doesn't say that pre-existing information must be redacted, rather it implies that when you are writing something for the court, you should try not to use in the first instance the entire personal identifier. Yet the end of the rule refers to redaction. So it is confusing. Second, there are no exemptions for preexisting information. Third, there is no provision for limitation on remote access in cases such as social security cases. Fourth, and absolutely the most important, is that Appellate Rules will have a piggy back rule, and that is sure to conflict with the model local rule, which purports to set initial (not piggyback) requirements. I know this is

only supposed to be transitional, but experience with local rules indicates that once it gets adopted, it sometimes does not get changed or deleted to accommodate a national change in the rules.

My bottom line on Rule 12 is that it should either be deleted in its entirety (requiring also a change to some of the notes in the previous rules that refer to it) or it should be amended to track the national appellate rule ---either by use of identical text or by a simple reference to national rule number. I guess the contrary argument is that some privacy protection should be in place until the national rule gets implemented. But I don't think that argument is persuasive. For one, this model local rule is not going to be implemented immediately. It first must be approved by the Judicial Conference in the fall, then it gets distributed, then it takes time to be enacted as a real local rule. By the time all that happens, the national rule is likely to be in place anyway, and if that is so there will then be a conflict with the model, or at least there will be confusion in the districts as to what to do with the model rule. Moreover, unless I am mistaken, none of this is an emergency, as the appellate courts are not on ecf as yet.

Sorry this took so long. Hope it was helpful.

Daniel Capra
Reed Professor of Law
Fordham Law School
>>> <John_Rabiej@ao.uscourts.gov> 03/14/05 2:29 PM >>>
Professor Capra:

For your review and consideration, I have attached revised model local rules governing electronic filing of papers in appellate courts (see attachment at bottom of this message). Please note that a new introduction has been added and most importantly a new "note 1" was added to the commentary to Rule 1, which explicitly states that the model local rule is not inconsistent with Fed. App. R. 31(b). That rule authorizes a court to require counsel to provide 25 paper copies of briefs. The revision was made to address Judge Alito's concern that courts would not welcome a model local rule that eliminated the need for counsel to provide paper copies of briefs.

The revised model local rules will be presented to the Appellate Rules committee, which meets on April 18. I will transmit any comments by you to the committee. Thanks.

John

---- Forwarded by John Rabiej/DCA/AO/USCOURTS on 03/14/2005 09:04 AM -----

DRAFT MODEL LOCAL APPELLATE RULES
FOR
ELECTRONIC FILING

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules was developed for federal appellate courts implementing the electronic filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and can be adapted by courts that offer some other method of electronic filing of court documents.

Through extensive consultation with appellate court clerks and staff attorneys, as well as subject matter experts on the national implementation of electronic filing in the federal district courts, these model rules were adapted from the existing model local rules originally compiled for use in the district and bankruptcy courts. The original model rules were compiled by a subcommittee of the Court Administration and Case Management Committee that also included as members representatives from the Committee on Automation and Technology (now the Committee on Information Technology) and the Committee on Rules of Practice and Procedure. The rules were based, to a significant extent, on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. They were approved by the Judicial Conference in September 2001, and slightly modified in March 2002 and September 2004.

The Federal Rules of Appellate Procedure (Fed. R. App. P. 25(a)) provide that a court "may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." The Federal Rules also authorize each appellate court to make and amend rules governing its practice (Fed. R. App. P. 47(a)). Thus, each court that intends to allow electronic filing should include in its local rules a general authorizing provision. [Footnote: An example of a local rule authorizing electronic filing is as follows: "The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court."]

These Model Local Appellate Rules for Electronic Filing are intended to assist the appellate courts in developing appropriate local rules and procedures relating to the filing and service of documents by electronic means. They are not intended to supplant existing national or local rules of appellate procedure. Rather, they are intended to provide an example of the issues that should be addressed in implementing CM/ECF. Courts are free to accept all, some, or none of these proposed rules.

These model rules may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides public notice of applicable procedures, and allows for input from the bar. On

the other hand, use of general orders gives courts more flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, rule numbering should conform to the numbering system of the Federal Rules.

Rule 1- Scope of Electronic Filing

Except as otherwise prescribed by local rule or order, all cases will be assigned to the court's electronic filing system. Case-initiating documents in original proceedings in the court of appeals must be filed in paper format. All briefs, motions, petitions for rehearing, and other documents subsequently filed in any case with the court by a Filing User registered as set forth under Rule 2 must be filed electronically using the electronic filing system.

Upon the court's request, a Filing User must promptly provide the clerk, in a format designated by the court, an identical electronic version of any paper document previously filed in the same case by that Filing User.

Upon motion and a showing of good cause, the court may exempt a Filing User from the provisions of this Rule and authorize filing by means other than use of the electronic filing system.

Commentary

1. This Model Local Appellate Rule is not intended to supplant the requirements of Fed. R. App. P. 31(b) or any local rule or procedure requiring counsel to provide additional paper copies of filings to the court.

2. Most federal district and bankruptcy courts have adopted the nationally supported Case Management and Electronic Case Files ("CM/ECF") system. The benefits of this system include enhanced public access to court documents, and increased efficiency and reduced costs for litigants and the judiciary, which would have equal applicability to the courts of appeals. Most federal court filings are now created using computer word processing programs, and most filers have electronic mail and Internet access. The Model Rule acknowledges this practice and makes electronic filing the norm to the fullest extent allowed under the Federal Rules of Appellate Procedure. Fed. R. App. P. 25(a)(2)(D) states that "a court of appeals may by local rule permit" papers to be filed electronically. The Model Rule comports with the language of Fed. R. App. P. 25 by limiting the requirement to file electronically to prospective filers who have voluntarily registered as "Filing Users" of the court's electronic filing system under Model Local Rule 2, and by providing a means by which the courts may exempt Filing Users and others from the requirement to file documents electronically for particular documents or particular cases upon showings of good cause. Determination of good cause is left to the discretion of the court, which may weigh all factors it deems relevant, including the potential impact on the filer, other parties, the court, and the public interest, and any other exceptional circumstances. Possible examples of good cause might include: circumstances in which it is not reasonably feasible to convert a document into an electronic format and any other exceptional circumstances (other than "technical failures" addressed in Model Local Rule 11 *infra*) that would prevent, or have prevented, the prospective filer from using the electronic filing system.

3. The phrase "except as otherwise prescribed by local rule or order" encompasses any special provisions (i.e., exclusions or alternative filing procedures) that the court adopts for certain cases, filers, documents, or other circumstances. Such provisions might, for example, relate to certain case types (e.g., social security appeals) in which litigants are not yet prepared to file documents in electronic form or other policy considerations apply. These provisions also might relate to the type of filer, such as pro se litigants, who may be excluded from electronic filing unless permitted by the court to become Filing Users. See Model Local Rule 2. Other common provisions include special requirements for types of documents (e.g., voluminous documents, documents protected by confidentiality orders, state records, transcripts, in camera documents, and ex parte communications). The court has the discretion to determine exclusions or special provisions under these Rules; the court will determine whether such provisions apply to all cases, to specific categories of cases, or to specific cases.

4. The Model Rule authorizes courts to require Filing Users to provide electronic versions of all documents previously filed in paper format, including case-initiating documents and documents filed in cases started before this rule took effect.

5. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. See Model Rule 12. The E-Government Act of 2002 directs the judiciary to establish rules protecting privacy, particularly relating to the content of court filings. This matter is being addressed, in the first instance, by the Judicial Conference's rules committees.

Rule 2 – Eligibility, Registration, Passwords

Attorneys who intend to practice in this court, including those regularly admitted or admitted pro hac vice to the bar of the court and attorneys authorized to represent the United States without being admitted to the bar of this court, should register as Filing Users of the court's electronic filing system. Registration requirements will be defined by the court.

If the court permits, a party to a pending civil case who is not represented by an attorney may register as a Filing User in the electronic filing system solely for purposes of that case. Filing User status will be terminated upon termination of the case. If a pro se party retains an attorney, the attorney must advise the clerk.

Registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules and with the Federal Rules of Appellate Procedure.

Filing Users agree to protect the security of their passwords and immediately notify the PACER Service Center and the clerk if they learn that their password has been compromised. Filing Users may be

sanctioned for failure to comply with this provision.

A Filing User may withdraw from participation in the electronic filing system by providing the clerk with written notice of the withdrawal.

Commentary

1. The Model Rule states an expectation that attorneys who practice in a particular court will register as Filing Users of the court's electronic filing system, and it specifically authorizes attorneys admitted pro hac vice (if the court so permits) and attorneys permitted to represent the United States without joining the court's bar to register as Filing Users. The Model Rule also recognizes that a court, in its discretion, might wish under certain circumstances to permit pro se filers to take part in electronic filing. The Model Rule also states the clerk is to be kept advised if an attorney enters the case so that the formerly pro se party's filing status may be terminated, if appropriate.

2. The Model Rule provides that a person who registers with the system (a Filing User) thereby consents to electronic service of documents subject to the electronic filing system. Amendments to the Federal Rules of Appellate Procedure (Fed. R. App. P. 25(c)(1)(D)) permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use registration for electronic filing as a means to have parties consent to receive service electronically. Courts should establish procedures whereby an attorney can petition the court for relief from this provision.

Rule 3-Consequences of Electronic Filing

Electronic transmission of a document to the electronic filing system consistent with these rules, together with the transmission of a Notice of Docket Activity from the court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed. R. App. P. 36 and 45(b).

Before filing a document with the court, a Filing User must verify its legibility and completeness. When a document has been filed electronically, the official record is the electronic document stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Docket Activity from the court.

Unless otherwise directed by the court, filing must be completed before midnight local time where the Clerk's office is located in order to be considered timely filed that day.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made, subject to compliance with federal and local filing requirements, when it is acknowledged by the Notice of Docket Activity automatically generated by the court's electronic filing system. This provision has no bearing on a court's authority to issue notices of noncompliance or to strike material filed in error or not in conformity with federal or local rules.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

3. The filer should verify the legibility and completeness of the document before completing an electronic filing. This verification should include a check that all necessary parts of the document are included in the single PDF attachment, that all pagination is in order and complete and if there is scanned material, that the pages are aligned appropriately and are legible.

4. In order to preserve searchability, documents filed electronically should be in PDF text format, that is, converted directly from a word processing format into PDF. Since PDF image files created by scanning documents are not electronically searchable, they should be used only if a PDF text file is unavailable.

Rule 4 - Service of Documents by Electronic Means

The Notice of Docket Activity that is generated by the court's electronic filing system constitutes service of the filed document on all Filing Users. Parties who are not Filing Users must be served with a copy of any document filed electronically in accordance with the Federal Rules of Appellate Procedure and the local rules.

If the document is not available electronically, the filer must use an alternative method of service.

The Notice of Docket Activity generated by the court's electronic filing system does not replace the certificate of service required by Fed. R. App. P. 25.

Commentary

1. The electronic filing system generates a Notice of Docket Activity at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, if one was attached to the filing, allowing anyone receiving the notice

by e-mail to retrieve the document automatically. The system sends this Notice to all case participants registered as Filing Users of the electronic filing system. Under the amendments to Fed. R. App. P. 25, a court may, by local rule, provide that the court's automatically generated Notice of Docket Activity constitutes service of the document on all Filing Users in the case.

2. Under the Model Rules, parties who are not Filing Users have not consented to electronic service via the Notice of Docket Activity. They must be served in some other way authorized by Fed. R. App. P. 25.

3. If an electronically filed document is not available to any party for whom service is required, the Filing User must accomplish that service by traditional means. An example of this second category of documents might be sealed documents, depending upon how the court installs and implements the electronic filing system.

4. An amendment to Fed. R. App. P. 26 provides that the three additional days to respond to service by mail will apply to electronic service as well. This provision is intended to account for technical problems that can arise during electronic service and to encourage parties to consent to electronic service.

Rule 5 – Entry of Court-Issued Documents

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules which will constitute entry on the docket kept by the clerk under Fed. R. App. P. 36 and 45(b). Any order or other court-issued document filed electronically without the original signature of a judge or authorized court personnel has the same force and effect as if the judge or clerk had signed a paper copy of the order.

Orders may also be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

Commentary

1. Under the Model Rule, an electronically filed court order has the same force and effect as a traditionally filed paper order, although it lacks an original "inked" signature of the issuing judge or clerk. This rule is drafted broadly to accommodate the various electronic signature options available to the courts, including representation of the name with an s/ and typed name, an inserted signature graphic, or a scanned image. The log-in and password of the filer are the means of verifying the validity of the signature represented in the electronic document.

2. In certain instances, courts may use "text-only" orders – docket entries stating the text of the order

without attaching a separate document. These are generally used to dispose of routine motions or issue other orders that do not require lengthy text.

Rule 6 – Attachments and Exhibits to Motions and Original Proceedings

Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits traditional paper filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. The court may require parties to file additional excerpts or the complete document.

Commentary

1. In many instances, only a small portion of a much larger document might be relevant to a matter before the court, therefore only an excerpt of the larger, original document should be submitted. The court retains the authority to require the filer to provide additional portions or the complete document, and other parties may supplement the filed excerpts or provide the entire document in support of their responsive pleadings.

2. This Model Rule is intended to address only those pleadings which might include attachments or exhibits, such as motions, original proceedings or petitions for permission to appeal. Issues relating to the Record on Appeal and the Appendix might be addressed by Model Local Appellate Rules in the future.

Rule 7–Sealed Documents

A motion to file documents under seal may be filed electronically unless prohibited by law or local rule. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk.

Commentary

1. The Model Rule recognizes that other laws might affect whether a document can or should be electronically filed. Electronic notice of the filing of a sealed document might raise the same privacy concerns that gave rise to the need to file a document under seal in the first place. The court's

electronic filing system is capable of accepting sealed documents electronically from filing users, either directly into a sealed case in which the attorney is a participant or as a sealed filing in an otherwise unsealed case.

2. See Model Rule 4, which addresses service of sealed documents filed electronically.

3. See Model Rule 12 for other provisions addressing privacy concerns arising from electronic filing.

Rule 8– Retention Requirements

Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after the date of the electronic filing. On request of the court, the Filing User must provide original documents for review.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule addresses the retention requirement for "verified documents" (in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury) bearing original signatures of persons other than the person who files the document electronically.

2. The Model Rule places the retention requirement on the person who files the document. Alternatively, a court may, by local rule, place retention responsibility on the firm or entity representing the party on whose behalf the document was filed. (Thus, if counsel changes, the documents would be transferred along with the rest of the case file.) Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. This Model Rule is not intended to address the separate issue of a court's document retention responsibilities under the Federal Records Act and the record disposition schedules approved by the National Archives and Records Administration.

Rule 9– Signatures

The user log-in and password required to submit documents to the electronic filing system serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of the Federal Rules of Appellate Procedure, the local rules of court, and any other purpose for which a signature is required in connection with proceedings before the court.

The name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's log-in and password to be used by anyone other than an authorized agent of the Filing User.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and submitting a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court. Electronically represented signatures of all parties and Filing Users as described above are presumed to be valid signatures. If any party, counsel of record, or Filing User objects to the representation of his or her signature on an electronic document as described above, he or she must, within 10 calendar days, file a notice setting forth the basis of the objection.

Commentary

1. The electronic filing system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Appellate Procedure, including Fed. R. App. P. 38, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. Over time, and with further technological development, a system of digital signatures might replace the current password system.

3. The "s/" preceding a typed name indicates that the electronically filed document was endorsed by that party or Filing User.

4. The third paragraph of the Model Rule does not require a Filing User to personally file his or her own documents. The task of electronic filing may be delegated to an authorized agent, who may use the log-in and password to make the filing. Use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. For documents signed by individuals without log-ins and passwords (non-Filing Users), the Model Rule provides that the signature must appear as "s/" or as a scanned image. Under Model Rule 8 above, the Filing User must retain a paper copy with the original signature of any such document filed by the Filing User. The Model Rule provides considerable flexibility in the filing of documents signed by more than one party, e.g., stipulations. Courts might wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome. The Model Rule presumes that electronically represented signatures of Filing Users are valid and authentic. However, the Model Rule provides a limited opportunity for any party, counsel of record, or Filing User whose signature is electronically represented on a filed document to challenge this presumption. These options are consistent with the signature practices of the district courts utilizing electronic filing and with those portions of the electronic record which required electronic signatures in the district courts.

Rule 10 – Notice of Court Orders and Judgments

Immediately upon the entry of an order or judgment in a case assigned to the electronic filing system, the clerk will electronically transmit a Notice of Docket Activity to Filing Users in the case. Electronic transmission of the Notice of Docket Activity constitutes the notice and service of the opinion required by Fed. R. App. P. 36(b) and 45 (c). The clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the Federal Rules of Appellate Procedure.

Commentary

1. Recent amendments to the Federal Rules of Appellate Procedure authorize electronic notice of court orders where the parties consent. Upon entry of an order or judgment, the electronic filing system automatically generates and sends a Notice of Docket Activity containing a hyperlink to the document. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice has the same force and effect as traditional notice and service and satisfies the court's obligation to provide notice and service of court generated documents.

Rule 11 – Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Commentary

1. The electronic filing system is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party cannot meet a filing deadline because the court's website is not accessible for some reason, or because of the filer's own unanticipated technical failure.

2. The Model Rule does not require the court to excuse the filing deadline allegedly missed due to a technical failure. The court has discretion to grant or deny relief in light of the circumstances.

Rule 12 – Public Access

1. Parties must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court:

(A) **Social Security numbers.** If an individual's Social Security number must be included, only the last four digits of that number should be used.

(B) **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

(C) **Dates of birth.** If an individual's date of birth must be included, only the year should be used.

(D) **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

(E) **Home addresses.** In criminal cases, if a home address must be included, only the city and state should be listed.

2. In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may:

(A) File an un-redacted version of the document under seal, or

(B) File a reference list under seal. The reference list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.

The un-redacted version of the document or the reference list must be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule.

Commentary

1. The Model Local Rule implements the privacy policies adopted by the Judicial Conference and the requirements of the E-Government Act of 2002, as amended. It is intended to promote electronic access to documents in case files while also protecting personal privacy and other legitimate interests.

2. It is each filer's responsibility to redact information from documents submitted by the filer. Documents containing prohibited personal identifiers must be redacted by the parties (or by the court for court-filed documents) so as not to include un-redacted Social Security numbers, financial account numbers, names of minor children, or dates of birth. In criminal cases, home addresses also must be redacted. Information should be provided in shortened form, rather than completely omitted, with Social Security numbers represented as XXX-XX-1234, financial account numbers reduced to the last four digits, names of minor children represented as initials, dates of birth represented by year, and home addresses listed only by city and state.

3. Parties should consult the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." This Guidance explains the policy permitting remote public access to electronic criminal case file documents and sets forth redaction and sealing requirements for documents that are filed. The Guidance also lists documents for which public access should not be provided. A copy of the Guidance is available at the court's website. For further information on privacy issues, see the Judicial Conference policies on privacy and public access to documents filed in civil, criminal, and bankruptcy cases (available on J-Net), as well as section 205(c) of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2914, as amended by Pub.

L. No. 108-281, 118 Stat. 889 (2004).

4. These provisions are interim in nature, as a national rule addressing privacy issues is under consideration by the Rules Committee of the Judicial Conference of the United States.

Rule 13– Hyperlinks

Electronically filed documents may contain the following types of hyperlinks:

(A) Hyperlinks to other portions of the same document; and

(B) Hyperlinks to a location on the Internet that contains a source document for a citation.

Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the filed document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material cited in a filed document. The court accepts no responsibility for, and does not endorse, any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked. The court accepts no responsibility for the availability or functionality of any hyperlink.

Commentary

1. Hyperlinks are a connection from one point of electronic data to another. The federal judiciary's guidelines for electronic case filing have been modified to permit hyperlinks in documents filed in court electronic filing systems.

2. Because documents in the electronic filing system do not have fixed URL addresses, the system currently precludes hyperlinking between documents within the system. Thus, hyperlinks are only permitted within a single document or to sites outside the electronic filing system. Over time, and with further technological development, hyperlinking between electronic documents within the court's electronic filing system, or to the record stored on the electronic file server of a district court, bankruptcy court, or agency, might be possible.

3. Hyperlinks are a convenient means of accessing material cited in electronic documents. Any electronically filed document that contains a hyperlink must also contain the standard citation to the same material. This requirement ensures that anyone working with a printed version of the document

has the necessary citation, and that subsequent failure of a hyperlink will not preclude finding the cited material.

4. Just as the complete text of a document cited in a brief or other filing in support of a legal proposition, unless specifically quoted, is not considered part of the brief, the hyperlink and the site to which it refers are not considered part of the brief. Thus, they will not be considered part of the court's record.

5. Because hyperlinks might be to sites outside the control of the court, the court cannot take responsibility for the viability of those links, nor does it take responsibility for the content of any linked site. Because hyperlinks are not considered part of the record, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the content of the filed document.

MEMORANDUM

DATE: March 22, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item Nos. 02-16 and 02-17

The Advisory Committee has given a great deal of attention to complaints by practitioners about the requirements imposed on briefing by the local rules, internal operating procedures, standing orders, practitioner guides, and briefing checklists of individual circuits. At its last meeting, the Committee decided that this problem should be addressed, at least initially, by sending Marie Leary's report to the circuits, along with a cover letter from Judge Alito (or his successor) asking circuits to review their local rules and make those local rules easier to locate. I was instructed to draft such a letter for the Committee to review at its April 2005 meeting. Mark Levy and Doug Letter kindly agreed to help me in that effort.

Attached is a draft letter from Judge Alito to the chief judges. Although I was unable to get the letter to Mr. Levy before he left for several days out of the office, I did receive helpful input from Mr. Letter, as well as Judge Alito and John Rabiej. Please remember that, as the Advisory Committee agreed at its last meeting, this letter will not be mailed until the debate over proposed Rule 32.1 on unpublished opinions is resolved.

SAMPLE

October 1, 2005

The Honorable Michael Boudin
United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
One Courthouse Way
Boston, MA 02210

Dear Chief Judge Boudin:

I write in my capacity as Chair of the Advisory Committee on the Federal Rules of Appellate Procedure ("FRAP").

Over the past few years, the Advisory Committee has received numerous complaints from appellate practitioners and bar organizations — including the Department of Justice and the Council of Appellate Lawyers and the Appellate Judges Conference of the American Bar Association — about the proliferation of local rules. These complaints have focused on local rules regarding the content of briefs. Practitioners complain that these local rules are numerous, vague, and confusing; that these local rules are often in tension, if not in outright conflict, with FRAP; and that it is difficult for practitioners to find, much less to follow, all local rules on briefing. Practitioners argue that local rules create a particular hardship for attorneys who practice in more than one circuit and are inconsistent with what is supposed to be a unitary federal system. Practitioners have urged the Advisory Committee to take action to reduce or eliminate local rules on briefing.

In order to assist its deliberations, the Advisory Committee asked the Federal Judicial Center ("FJC") to assess the scope of this problem. Enclosed is the exhaustive report prepared by the FJC, entitled "Analysis of Briefing Requirements in the United States Courts of Appeals." The FJC reported that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in FRAP. According to the FJC, over half of the courts of appeals impose seven or more such requirements, and some impose as many as ten. The FJC confirms that many of these local rules are inconsistent with FRAP.

The FJC has also described for us the difficulty it encountered in trying to identify all local requirements regarding briefing. Depending on the circuit, those requirements may be found in local rules, internal operating procedures, standing orders, practitioner guides, or briefing checklists. In some cases, it was impossible for the researchers employed by the FJC to be confident that they had located all local directives regarding briefing without calling the clerk's office.

The Advisory Committee has discussed the FJC's findings at great length. The Advisory Committee has determined that the best way to address the local-rules problem is to seek the assistance of the circuits. The Advisory Committee has two requests:

First, the Advisory Committee urges every circuit to collect all requirements regarding briefing in one clearly identified place on its website. The E-Government Act of 2002 requires courts to post all local rules, standing orders, general orders, and judges' individual rules on the court's website by April 16, 2005. Placing all briefing requirements, including those found in the court's internal operating procedures, in a one centralized location — or even including a prominent notice that identifies and links to all briefing requirements — would be consistent with the Act's purpose. It would also help the bar, improve the administration of justice, and likely reduce the number of complaints about local rules.

Second, the Advisory Committee requests that you review the enclosed report and consider whether the additional requirements on briefing imposed by your circuit might be reduced or eliminated. The Advisory Committee understands that the circuits differ and thus some local variation might be appropriate. The Advisory Committee also understands that, especially in this era of rapidly changing technology, allowing circuits to experiment in their local rules can be beneficial to all. At the same time, the purpose of some of the local variations is not clear, and, as I noted, some local variations may be inconsistent with FRAP.

Thank you for your attention to these requests.

Sincerely,

Samuel A. Alito
Chair, Advisory Committee on Appellate Rules

cc: First Circuit Clerk
First Circuit Executive
First Circuit Advisory Committee

MEMORANDUM

DATE: March 22, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-01

The "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. A copy of § 102 of the Act is attached.

Section 102 creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that is of particular concern to this Advisory Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least three things about this are troubling:

First, § 3771(d)(3) provides that a single judge may issue the writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue the writ "pursuant to circuit rule or the [Appellate Rules]."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. Thus, a court is, within 72 hours, supposed to (1) docket a mandamus petition; (2) distribute the petition to a panel of judges; (3) give the panel time to read the petition; (4) order the respondent to file an answer; (5) serve that order on the respondent; (6) give the respondent time to draft and file an answer; (7) docket that answer; (8) distribute that answer to the panel; (9) give the panel time to read the answer, deliberate, and make a decision; and (if the decision is to deny relief) (10) draft "a written opinion." The 72-hour deadline is virtually impossible to meet under the current rules.

Finally, the fact that the deadline is stated in hours rather than days raises interesting time-computation issues. For example, if the victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? It is not clear how the time-computation rules of Rule 26(a) will apply.

All of these problems were brought to the attention of Congressional staff by the Administrative Office, but to no avail. The question now is whether any of these problems should be addressed by amending the Appellate Rules.

One option for the Advisory Committee is to propose "systematic" changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus, or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting a response, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the Advisory Committee is to add a new subdivision (e) to Rule 21 — a subdivision that would specifically address mandamus petitions filed under § 3771(d)(3). That subsection would supersede the other rules and set up a "fast-track" system that would apply just to § 3771(d)(3) petitions.

A third option for the Advisory Committee is to do nothing for the time being. This would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be only a handful every year) and to get a better understanding of the problems the courts of appeals encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

UNITED STATES PUBLIC LAWS
108th Congress - Second Session
Convening January 7, 2004

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 108-405 (HR 5107)
October 30, 2004
JUSTICE FOR ALL ACT OF 2004

An Act To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 42 USCA § 13701 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Justice for All Act of 2004".

(b) TABLE OF CONTENTS.--The table of contents for this Act is as follows:

involving the crime or of any release or escape of the accused.

"(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

"(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

"(5) The reasonable right to confer with the attorney for the Government in the case.

"(6) The right to full and timely restitution as provided in law.

"(7) The right to proceedings free from unreasonable delay.

"(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

***2262** "(b) RIGHTS AFFORDED.--In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

"(c) BEST EFFORTS TO ACCORD RIGHTS.--

"(1) GOVERNMENT.--Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

"(2) ADVICE OF ATTORNEY.--The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

"(3) NOTICE.--Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

"(d) ENFORCEMENT AND LIMITATIONS.--

"(1) RIGHTS.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

"(2) MULTIPLE CRIME VICTIMS.--In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

"(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take

up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

"(4) ERROR.--In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

"(5) LIMITATION ON RELIEF.--In no case shall a failure to afford a right under this chapter provide grounds for a ***2263** new trial. A victim may make a motion to re-open a plea or sentence only if--

"(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

"(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

"(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.".

"(6) NO CAUSE OF ACTION.--Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

"(e) DEFINITIONS.--For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

"(f) PROCEDURES TO PROMOTE COMPLIANCE.--

"(1) REGULATIONS.--Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

"(2) CONTENTS.--The regulations promulgated under paragraph (1) shall--

"(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

"(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

"(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

"(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.".

***2264**
(b) TABLE OF CHAPTERS.--The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

<< 18 USCA prec. § 3001 >>

"237. Crime victims' rights.....3771".

<< 42 USCA § 10606 >>

(c) REPEAL.--Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

MEMORANDUM

DATE: March 22, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-02

Attached is a letter from attorney Roy H. Wepner proposing that the page limitations of Appellate Rules 35(b)(2) (petitions for hearing or rehearing en banc) and 40(b) (petitions for panel rehearing) be replaced with word limitations.

An identical proposal was discussed at length by the Advisory Committee at its last meeting and rejected by vote of 2 to 5. That discussion is summarized at pages 15 to 17 of the minutes of the November 2004 meeting.

I recommend that Item No. 05-02 be removed from the Committee's study agenda.

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Patents, Trademarks, Copyrights & Unfair Competition

05-AP-A

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RECEIVED 1/26/05

January 17, 2005

Joseph H. Spaniol Jr., Esq., Secretary
Standing Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Amendments To Rules 35 and 40 of the Federal Rules of Appellate Procedure

Dear Mr. Spaniol:

For several years now, appellate practitioners have been able to adjust to the "type-volume" limitations for principal briefs and reply briefs as set forth in Fed. R. App. P. 32(a)(7). To a large degree, this has freed appellate practitioners from concerns about number of pages and the like, knowing that the word processor can instantaneously provide a word count and allow the practitioner to know whether he or she is in compliance with the type-volume limitation.

However, and unfortunately, there presently are no comparable provisions in Rules 35 and 40 dealing with petitions for rehearing and petitions for rehearing *en banc*. When an appeal progresses to that stage, it is necessary for the practitioner to revert to the older rules and to be concerned with margins, typefaces and the like.

Accordingly, I respectfully recommend that provisions be added to Rules 35 and 40 providing appropriate type-volume limitations for petitions for rehearing and petitions for rehearing *en banc*.

I appreciate your consideration of this proposal.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK, LLP

ROY H. WEPNER

RHW/dg

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MEMORANDUM

DATE: March 21, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-03

As of this writing, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has been approved by the Senate and is pending in the House. The House is expected to approve the legislation soon, and President Bush is expected to sign it into law.

As far as I can determine, only one section of the Act has a direct impact on the Federal Rules of Appellate Procedure. Under current law — found in 28 U.S.C. § 158 — an appeal cannot be taken directly from a bankruptcy court to a court of appeals. Instead, the appeal must first be decided by a district court or bankruptcy appellate panel ("BAP"). Section 1233 of the Bankruptcy Act would change that. It would amend § 158 to permit appeals *by permission* — both of final orders and of interlocutory orders — directly from a bankruptcy court to a court of appeals. Such appeals would be permitted only under certain circumstances (e.g., when an order of a bankruptcy court "involves a matter of public importance") and only pursuant to certain procedures (e.g., the circumstances — such as "public importance" — would have to be certified either by order of a lower court or by agreement of the parties). Most importantly, in all cases, a direct appeal would have to be authorized by the court of appeals.

When Appellate Rule 5 was restyled in 1998, the Advisory Committee intentionally wrote the rule broadly so that it could accommodate new permissive appeals authorized by Congress or the Rules

Enabling Act process. In this instance, that strategy appears to have worked, as Rule 5 seems broad enough to handle the new permissive appeals authorized by § 1233. Indeed, § 1233 specifically provides that "an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28 . . . shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure." Section 1233 clarifies that references in Rule 5 to "district court" should be deemed to include a bankruptcy court or BAP and that references to "district clerk" should be deemed to include a clerk of a bankruptcy court or BAP.

There is more to § 1233, but I have described its most important provisions. (A copy of § 1233 is attached, along with a copy of 28 U.S.C. § 158.) The question is whether anything in § 1233 requires this Advisory Committee to propose amending Rule 5. Neither Prof. Jeffrey Morris (the Reporter to the Bankruptcy Rules Committee) nor I believe so. With the clarifications made by § 1233 itself, Rule 5 should suffice to handle the new permissive appeals. It may be wise to amend Rule 5 someday to include explicit reference to the bankruptcy courts and BAPs, but there is no urgency. It seems advisable to wait a few years to see if any unforseen difficulties emerge. If they do, Rule 5 can be amended to address them, and the clarifications can be made at that time.

I recommend that Item No. 05-03 be removed from the study agenda, unless § 1233 is amended in some material respect prior to final passage.

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals [1]

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1–year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3–year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsection (b), each appeal under subsection (a) shall be heard by a 3–judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

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S.256

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Engrossed as Agreed to or Passed by Senate)

SEC. 1233. DIRECT APPEALS OF BANKRUPTCY MATTERS TO COURTS OF APPEALS.

(a) APPEALS- Section 158 of title 28, United States Code, is amended--

(1) in subsection (c)(1), by striking `Subject to subsection (b),' and inserting `Subject to subsections (b) and (d)(2),'; and

(2) in subsection (d)--

(A) by inserting `(1)' after `(d)'; and

(B) by adding at the end the following:

`(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

`(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

`(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

`(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

`(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel--

`(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

`(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

`(C) The parties may supplement the certification with a short statement of the basis for the certification.

`(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal in pending, issues a stay of such proceeding pending the appeal.

`(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.'.

(b) PROCEDURAL RULES-

(1) TEMPORARY APPLICATION- A provision of this subsection shall apply to appeals under section 158(d)(2) of title 28, United States Code, until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended under chapter 131 of such title.

(2) CERTIFICATION- A district court, a bankruptcy court, or a bankruptcy appellate panel may make a certification under section 158(d)(2) of title 28, United States Code, only with respect to matters pending in the respective bankruptcy court, district court, or bankruptcy appellate panel.

(3) PROCEDURE- Subject to any other provision of this subsection, an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28, United States Code, shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure. For purposes of subdivision (a)(1) of rule 5--

(A) a reference in such subdivision to a district court shall be deemed to include a reference to a bankruptcy court and a bankruptcy appellate panel, as appropriate; and

(B) a reference in such subdivision to the parties requesting permission to appeal to be served with the petition shall be deemed to include a reference to the parties to the judgment, order, or decree from which the appeal is taken.

(4) FILING OF PETITION WITH ATTACHMENT- A petition requesting permission to appeal, that is based on a certification made under subparagraph (A) or (B) of section 158 (d)(2) shall--

(A) be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy

appellate panel from which the appeal is taken; and

(B) have attached a copy of such certification.

(5) REFERENCES IN RULE 5- For purposes of rule 5 of the Federal Rules of Appellate Procedure--

(A) a reference in such rule to a district court shall be deemed to include a reference to a bankruptcy court and to a bankruptcy appellate panel; and

(B) a reference in such rule to a district clerk shall be deemed to include a reference to a clerk of a bankruptcy court and to a clerk of a bankruptcy appellate panel.

(6) APPLICATION OF RULES- The Federal Rules of Appellate Procedure shall apply in the courts of appeals with respect to appeals authorized under section 158(d)(2)(A), to the extent relevant and as if such appeals were taken from final judgments, orders, or decrees of the district courts or bankruptcy appellate panels exercising appellate jurisdiction under subsection (a) or (b) of section 158 of title 28, United States Code.