03-AP-393

THE STATE BAR
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— COMMITTEE ON FEDERAL COURTS

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February 13, 2004

Via E-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, N.E.
Washington, DC 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The Advisory Committee on Appellate Rules of the United States Judicial Conference (the "Advisory Committee") has proposed Federal Rule of Appellate Procedure 32.1, requiring circuit courts to permit citation of "unpublished" judicial opinions, orders, judgments and other written dispositions.

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed proposed Federal Rule of Appellate Procedure 32.1, and appreciates the opportunity to submit these comments.[1] The Committee believes the new rule would have adverse effects on access to and administration of justice in the federal courts, and therefore opposes proposed Rule 32.1.[2]

The Committee has considered the Report of the Advisory Committee on Appellate Rules, dated May 22, 2003 ("Advisory Committee Report"), and the arguments in favor of and against the adoption of Rule 32.1. The Committee recognizes that certain considerations might weigh in favor of Rule 32.1. The Advisory Committee states that an estimated 80 percent of opinions issued by the circuit courts during recent years have been designated "unpublished." As a result, the Advisory Committee Note recommends adoption of the new rule for two

[1] The Committee's comments on other proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure are contained in a separate letter.

[2] 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.

essential reasons: (1) to create a uniform standard of citation among the nation's courts,[3] and (2) to eliminate the risk of sanctions for citation of unpublished opinions.[4] Although these goals are well-intentioned, the adoption of Rule 32.1 will likely lead to negative consequences which far outweigh any potential benefits.

The Committee believes that adoption of Rule 32.1 would adversely impact access to justice by certain disadvantaged parties – including non-institutional, *pro se*, and prisoner litigants – while providing an advantage to institutional litigants with significant resources to monitor and analyze the vast number of unpublished decisions – such as the U.S. Department of Justice and institutional litigants. Initial access to unpublished decisions will be dependent upon computers and Internet access. Those parties lacking the necessary resources – or even the access to such resources in the case of prisoners – would be denied access to potentially relevant legal authority. Such limited access would unfairly disadvantage non-institutional, *pro se*, and prisoner litigants.[5]

The Committee also considered whether Rule 32.1 would result in a decrease in judicial efficiency and therefore impair the quality of justice. The Committee believes Rule 32.1 would undermine the courts' effective use of summary dispositions in routine cases. Each court should maintain the discretion to issue unpublished, uncitable opinions, briefly informing the parties of the decisional basis in routine cases. These non-precedential cases, presenting simple issues of well-settled law, are appropriate for unpublished summary disposition, without the discussion, reasoning and analysis necessary for opinions which may later be cited.

The Committee evaluated opposing scenarios that would likely result from the adoption of Rule 32.1. The Committee believes courts may spend significantly greater resources and time preparing unpublished decisions if they were made citable by Rule 32.1. The Committee is concerned that if unpublished decisions could be cited beyond the scope of each particular case,

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[3] Local circuit rules differ in their treatment of the citation of unpublished opinions – some allow it, others do not. According to the Advisory Committee, the "conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit." Advisory Committee Report at 27. The Ninth Circuit Court of Appeals and district courts within the Ninth Circuit prohibit citation of "unpublished" opinions except in very limited circumstances. The Advisory Committee recognized that all circuit courts allow unpublished opinions to be cited in some circumstances, such as to support claims involving issue preclusion, claim preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Advisory Committee Report at 31.

[4] The Advisory Committee states that it "believes that restrictions on the citation of 'unpublished' or 'non-precedential' opinions – the violation of which can lead to sanctions or to formal charges of unethical conduct – are wrong as a policy matter." Advisory Committee Report at 27. According to the Advisory Committee, Rule 32.1 "will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public." Id. at 35.

[5] Some members of the Committee believe the potential impact of Rule 32.1 should be evaluated empirically, after full implementation of the E-Government Act of 2002. Under the E-Government Act of 2002, every court of appeals will be required to post all of its decisions – including unpublished decisions – on its website. That might have an impact on access to unpublished opinions, at least for litigants who otherwise have access to computers and the Internet.

authoring judges would likely spend unnecessary time and resources preparing carefully reasoned opinions in routine cases. Under this scenario, the Committee believes that Rule 32.1 is likely to impair the administration of justice by (1) needlessly increasing judicial workloads in the issuance of routine, unpublished case decisions, (2) diverting valuable judicial time and resources from crafting important published decisions affecting the law of a circuit, and (3) lengthening the period of time between the filing of an appeal and its disposition.[6] Alternatively, Rule 32.1 may lead courts to conserve judicial resources by issuing single-word dispositions in routine cases (e.g., "affirmed," "reversed"), rather than devoting time to crafting a carefully-worded opinion that sets forth the grounds or legal bases for disposition. Such an approach would allow courts to avoid drafting the brief statement found in current unpublished decisions, but would deprive litigants of any explanation of the court's decision. Moreover, the absence of even a short, plain explanation may adversely affect further appellate review. Neither scenario noted above would be a desirable result.

For the reasons discussed above, the Committee opposes the adoption of proposed Rule 32.1.

Disclaimer

This position 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.

Very truly yours,

Robert J. Schulze, Chair
State Bar Committee on Federal Courts

cc: Members, State Bar Committee on Federal Courts
Saul Bercovitch, Staff Attorney, State Bar of California

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[6] The Committee understands that, in the Ninth Circuit, unpublished cases outnumber published cases by a factor of more than 5 to 1. Rule 32.1 could therefore have a significant impact on the time and attention devoted to researching and preparing the large body of unpublished decisions, which would likely slow judicial disposition rates significantly. *See Hart v. Messenari*, 266 F.3d 1155, 1178 (9th Cir. 2001) ("[T]he judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision.")

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Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
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 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 APPELLATE PROCEDURE

A. Rule 4

The Committee supports in part an amendment to Rule 4(a)(6) proposed by the Advisory Committee on Appellate Rules, and suggests certain modifications to the proposed amendment.

Under Rule 4(a)(1)(A), an appellant must appeal a judgment or order within 30 days after its entry. Rule 4(a)(6) permits the district court to reopen the time for noticing an appeal on the motion of an appellant who has missed the deadline because he did not receive prompt notice of entry of the judgment or order in question. The proposed amendment to Rule 4(a)(6) would

* The Committee's comments on proposed Federal Rule of Appellate Procedure 32.1 are contained in a separate letter.

substantively alter the Rule by changing (1) the circumstances qualifying as the threshold failure to receive notice, and (2) what triggers the deadline for bringing the motion.

The Committee supports the amendment as it relates to number (1), but proposes a somewhat different approach as to number (2). Generally, the Committee understands that the proposed amendment is intended to add clarity and certainty to the circumstances in which Rule 4(a)(6) comes into play; part (1) appears to achieve this goal, but part (2) does not.

1) Proposed amendment affecting the circumstances qualifying as the threshold failure to receive notice.

The Rule presently allows a motion to reopen the time for noticing an appeal when the appealing party was entitled to but did not timely receive notice, without further defining the term "notice." The amendment would specify that the notice to which the Rule refers is "notice under Federal Rule of Civil Procedure 77(d)." This change would appear to achieve the desired goal of eliminating litigation, confusion, and possible circuit splits on that issue. Therefore, the Committee supports this part of the proposed amendment.

2) Proposed amendment affecting what triggers the deadline for bringing the motion.

The Rule presently sets a time limit for bringing a motion for additional time to file the notice of appeal "within seven days after the moving party receives notice of the entry." The proposed amendment would change this time limit to "within 7 days after the moving party receives *or observes written* notice of the entry *from any source*." (Emphasis added.) The Committee believes this change would increase rather than decrease litigation, and would result in confusion and possible circuit splits regarding proper application of the revised Rule.

The proposed new requirement that the triggering notice be "written" appears to be an improvement over the present version of the Rule. The Rule currently refers to "notice" as triggering the seven-day deadline without stating whether that notice must be in writing. Some circuits have held that the notice must be written (*e.g., Bass v. U.S. Dept. of Agriculture*, 211 F.3d 959, 963 (5th Cir. 2000) (collecting cases)), while others such as the Ninth Circuit have held that oral notice is a sufficient trigger if the "quality of the communication" makes it "the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rentao, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). The amendment cures this conflict – as well as hair-splitting regarding when oral notice is the equivalent of written notice – by starting the clock only upon "written" notice of the judgment or order to be appealed.

However, the requirement that the notice be written does not eliminate all ambiguity or potential for litigation over when the time for bringing a motion under the Rule has begun to run. For example, it is not clear whether an e-mail is a "written" notice. *Cf., Carafano v. Metrosplash.Com. Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("she also received numerous phone calls, voicemail messages, written correspondence, and e-mail from fans through her professional e-mail account").

Another proposed change to the Rule actually introduces new ambiguities. Specifically, under the proposed amendment, the seven-day clock begins running when the moving party "receives *or observes*" notice "*from any source.*" (Emphasis added.) This appears to be an expansion of the circumstances under which the time to bring a motion starts to run. Because the proposed amendment opens the door to more informal methods of receiving notice, it introduces new uncertainties regarding when the time for bringing a motion under the Rule has begun to run.

Factual disputes regarding whether notice has been "observed" are likely to arise when a party opposing a motion under this section tries to show that the moving party had "observed" a notice that he had not "received." If, for example, the moving party's counsel can be shown to have looked at the docket in the court's office, or to have visited a website on which the docket is posted, the court might have to determine whether he or she actually focused on the line item indicating entry of the judgment or order.

It appears, then, that in attempting to bring greater clarity and certainty to the Rule's application, the proposed amendment gives with the right hand but then takes away with the left. The amendment requiring the triggering notice to be "written" should instead be coupled with the requirement that the moving party has actually received a piece of paper containing the notice, rather than merely "observing" the notice in some unspecified manner subject to dispute. Receipt of written notice is objectively determinable and less prone to difficult factual determinations than mere observation, which can be fraught with difficulties of proof.

The Committee believes that a better approach would be to tie the triggering event for filing a motion, like the circumstances qualifying as the threshold failure to receive notice, to the well-defined event of notice under Federal Rule of Civil Procedure 77(d). Specifically, the Rule should be amended to require that the motion be filed within a specified time after notice under Federal Rule of Civil Procedure 77(d) has been given. This change, like the other part of the amendment discussed above, would add clarity and certainty to the Rule, rather than re-injecting the uncertainty that the first part of the amendment was intended to eliminate.

The Committee therefore recommends that the proposed amendment should allow a party to bring a motion to reopen the time to file a notice of appeal only if:

> "the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party is given notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed, whichever is earlier."

B. <u>Rules 26 and 45</u>

The proposed amendments to Rules 26 and 45 redesignate "Presidents Day" as "Washington's Birthday" to conform to 5 U.S.C. § 6103(a), the statute officially establishing the

third Monday in February as "Washington's Birthday." The Committee supports this amendment.

C. Rule 27

The Committee supports the proposed amendment to proposed Rule 27(d)(1)(E), which provides that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of FRAP 32(a)(5) and the typestyle requirements of Rule 32(a)(6). The purpose of the proposed new subdivision (E) is to promote uniformity in federal appellate practice and to prevent abuses that might occur if no restrictions were placed on the size of typeface used in motion papers. This addition represents an attempt to promote fairness so as to better ensure that all parties have the same amount of text available for inclusion in their appellate motion papers.

D. Rule 28

The proposed change to Rule 28 would amend subdivision (c), addressing reply briefs, to delete a sentence that authorized an appellee that had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into Rule 28.1. The proposed amendments would also delete subdivision (h), addressed to briefs in a case involving a cross-appeal. All rules involving such briefing have been consolidated into new Rule 28.1.

The Committee supports the proposed amendments to Rule 28 because it makes more sense to have all of the rules that pertain to cross-appeals consolidated under one rule.

E. Rule 28.1

New Rule 28.1 would provide a comprehensive set of rules governing briefing in cases involving cross-appeals. Some existing rules have been moved into new Rule 28.1 and some new provisions have been added to fill the gap in the existing rules. The new rules reflect the current practice of the large majority of the circuits and have been patterned after the requirements of Federal Rules of Appellate Procedure 28, 31 and 32 on briefs filed in cases that do not involve cross-appeals. Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal:

(1) "appellant's principal brief" must comply with Rule 28(a), must not exceed 30 pages, and it must be served and filed within 40 days after the record is filed;

(2) "appellee's principal and response brief" serves as the principal brief on the cross-appeal, it must also comply with Rule 28(a), must not exceed 35 pages, and must be served and filed within 30 days after the appellant's principal brief is served;

(3) "appellant's response and reply brief" must comply with Rule 28(a)(2) –(9) and (11), must not exceed 30 pages, and must be served and filed within 30 days after the appellee's principal and response brief is served; and

(4) "appellee's reply brief" must comply with Rule 28(c), must not exceed 15 pages, and must be served and filed within 14 days after appellant's response and reply brief is served.

In addition, Rule 28.1 provides for type-volume limitations. The type-volume limitations allow an appellant 14,000 words in its principal brief and 14,000 in its combined response and reply brief, for a total of 28,000 words. The appellee/cross-appellant is allowed 16,500 words for its combined principle brief and response brief and 7,000 for its reply brief for a total of 23,500 words. The Committee agrees that because cross-appeals are often protective in nature and the issues raised are often related to the underlying appeal, the cross-appellant does not necessarily always need as many words/length of brief as the appellant. Moreover, if a particular cross-appellant finds that he or she is in need of additional words/length of brief to argue his or her position, that cross-appellant may then file the appropriate motion with the court.

In summary, the Committee supports proposed Rule 28.1 as drafted.

F. Rule 34

The proposed amendment to Rule 34 is found at subdivision (d), addressing cross-appeals and separate appeals. A cross-reference has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

The Committee supports this amendment.

G. Rule 35

The Committee supports the proposed amendment to Rule 35(a), which addresses when a hearing or rehearing en banc may be ordered by a court of appeals. The new rule would amend Rule 35(a) so that a "majority of the circuit judges who are in regular active service *and who are not disqualified* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." (proposed amendment in italics). Currently, two national standards – 28 U.S.C. § 46(c) and Rule 35(a) – provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these current standards apply to all of the courts of appeals, in practice, the circuits follow three very different approaches when one (or more) active judges are disqualified, as the Advisory Committee has recognized. Under the new rule, all circuits would follow the "case majority" approach, whereby disqualified judges would not be counted in the base in calculating whether a majority of judges have voted to hear a case en banc.

The Committee supports the proposed amendment for the same reasons set forth by the Advisory Committee. First, the Committee believes that it is important for all circuits to follow a consistent approach with respect to when a hearing or rehearing en banc is ordered. There are fundamental fairness concerns when an appellant's opportunity to have a hearing or rehearing en banc is largely dictated by the differing procedural approaches of the various circuits. Therefore, the Committee agrees with the proposed Committee Note that the courts of appeals "should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially, when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches." Second, the "absolute majority" approach[1] has an important drawback because it treats a disqualified judge, as a practical matter, as having voted against hearing a case en banc, even when that is not in fact true. Finally, the Committee agrees that the absolute majority approach is less preferable than the case majority approach, because the former can lead to the unjust result whereby the en banc court is left without authority to overturn a panel decision with which almost all of the circuit's active judges disagree.[2]

II. FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee supports the proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9005. The proposed amendments are designed to make notice provisions within the Rules consistent, and follow local practice.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 5.1

New Rule 5.1 would impose a notice requirement on parties and a certification requirement on courts in cases where a party questions the constitutionality of a federal or state statute but the federal government (in the case of a challenge to a federal statute) or the state government (in the case of a challenge to a state statute) is not a party to the case. The purpose of these notice and certification requirements is to give the federal or state government an opportunity to intervene in the litigation.

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[1] Under this approach, disqualified judges count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc.

[2] For example, in a case in which five of a circuit's twelve active judges are disqualified, the case cannot be heard en banc even if six of the seven non-disqualified judges strongly disagree with the panel opinion, thereby permitting one active judge effectively to control circuit precedent, even over the objection of all of his or her colleagues.

Relocating the existing notice requirement from Rule 24 seems likely to highlight the notice requirement in a way the current rules fail to do. Imposing the notice requirement on the party making the constitutional argument seems logical, not particularly burdensome, and fair in light of the no-forfeiture provision of proposed subdivision (d). Accordingly, the Committee supports the concept underlying the proposed rule.

The Committee does not support, however, two specific provisions of the rule, and recommends that these provisions be changed. First, in subdivision (c) the proposed rule sets a minimum 60-day period for intervention by the federal or state government. The Committee disagrees with this provision, because the Committee believes it could tend to freeze action in a case for that 60-day period, to the potential detriment of a plaintiff seeking timely relief.[3] Rather than setting a blanket 60-day intervention period, the Committee believes the rule should leave the timing-of-intervention issue to the discretion of the courts, since in individual cases it likely will make sense to allow for a shorter or longer intervention period as circumstances vary.

The Committee notes that while current law provides for intervention of right by the federal government or a state government in a case raising a constitutional challenge, there is no minimum time period for intervention specified under current law. 28 U.S.C. § 2403. The Committee is aware of no evidence showing that the lack of a specified minimum period for intervention has caused any prejudice to the ability of the federal and state governments to win admission to cases in order to defend the constitutionality of their laws. The Committee also notes that Federal Rule of Civil Procedure 24 does not set a minimum period for intervention generally and instead provides only that intervention must be "timely," with timeliness determined by the circumstances of the individual case. Fed. R. Civ. P. 24(a), (b). To follow the same timing principle in new Rule 5.1, the Committee urges that subdivision (c) be deleted from the proposed rule.

Finally, the Committee is not persuaded by the justification for the 60-day intervention period advanced in the Committee Note – that this period "mirrors" the 60-day period established by Rule 12(a)(3)(A) for the federal government to file an answer to a complaint. Timing considerations can be different at the beginning of a case than in a case that may have been on file for months or years, as numerous cases subject to the notice requirement of proposed Rule 5.1 will have been. The Committee also notes that certain statutes require the federal government to answer complaints in less than 60 days, so the 60-day period established by Rule12(a)(3)(A) does not apply uniformly in all cases. *See, e.g.,* 5 U.S.C. § 552(a)(4)(C) (requiring federal government to answer Freedom of Information Act complaint within 30 days); 16 U.S.C. § 1855(f)(3)(A) (requiring federal government to answer complaint under Magnuson-Stevens Act within 45 days).

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[3] The Committee recognizes that the Committee Note states that "the court retains authority to grant any appropriate interlocutory relief" during the pendency of the 60-day period. As a practical matter, though, the Committee believes that the specification of a minimum 60-day intervention period could make it less likely that a court will grant relief during this period, as some courts will be inclined to wait 60 days before acting.

As a separate issue, the Committee notes that, read literally, proposed Rule 5.1(a) would seem to require a party to file multiple notices of constitutional questions in a single case, since such a notice seemingly must be filed after each "pleading, written motion, or other paper" that draws the constitutionality of a state or federal statute into question. Such a requirement for multiple notices seems unnecessary to accomplish the purpose of providing notice, and unreasonably burdensome to the party raising the constitutional challenge. The Committee suggests that the proposed rule be redrafted to provide that a party need only file a notice of constitutionality once in any given case.

B. Rule 6(e)

Rule 6(e) sets forth the method for counting the time to respond to a pleading when the pleading is served by mail or one of the other methods set forth in Rule 5. Currently, Rule 6(e) provides that three additional days are to be provided but fails to state whether those days are to be added to the beginning or end of the prescribed period or taken into account by some other means. The proposed amendment clarifies that the additional days added to the response time are to be added after the prescribed period expires. The Committee supports this clarification.

C. Rule 27

The Committee supports the proposed amendments to Rule 27, which correct an outdated reference to Rule 4(d), and make other conforming changes.

D. Rule 45

The Committee supports the proposed amendments to Rule 45, which would be updated to conform to Rule 30, requiring that a notice of deposition set forth the means by which the deposing party intends to record the deposition

IV. FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rule 32

The Committee supports the proposed amendments to Rule 32, which would be modified to provide for allocution for victims of felonies that do not involve either sexual abuse or violence.

B. Rule 32.1

The Committee supports the proposed amendments to Rule 32.1, which would be modified to address allocution rights at revocation and modification hearings.

C. Rule 59

The Committee supports proposed new Rule 59, which sets forth a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges.

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Very truly yours,

Robert J. Schulze, Chair
State Bar Committee on Federal Courts

cc: Members, State Bar Committee on Federal Courts
Saul Bercovitch, Staff Attorney, State Bar of California