COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Boston, MA
June 15-16, 2005
Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 15-16, 2005

1. Opening Remarks of the Chair

   A. Report on the March 2005 Judicial Conference session
   B. Transmission of Supreme Court-approved proposed rules amendments to Congress

2. **ACTION** – Approving Minutes of January 2005 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. **ACTION** – Approving and transmitting to the Judicial Conference proposed uniform rules' amendments authorizing a court to require electronic filing

6. **ACTION** – Approving and transmitting to the Judicial Conference proposed uniform rules' amendments governing privacy and security concerns arising from electronic filing

7. Report of the Appellate Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed Rule 32.1 and amendments to Rule 25(a)(2)
      i. Federal Judicial Center report on citations to unpublished opinions
      ii. Data on unpublished opinions
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rule 25(a)(5)
   C. Minutes and other informational items

8. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 1009, 4002, 5005, 7004
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 3001, 3007, 4001, 6006, and new Rules 6003, 9005.1, and 9037 (amendments to Rules 1014, 3007, and 7007.1 approved earlier for publication)
   C. Minutes and other informational items, including status report on interim rules and forms implementing Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

9. Report of the Civil Rules Committee

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rule 5
   B. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rule 50
   C. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 16, 26, 33, 34, 37, 45, and Form 45
   D. **ACTION** — Approving and transmitting to the Judicial Conference proposed new Supplemental Rule G and conforming amendments to Supplemental Rules A, C, E, and Civil Rules 9, 14, and 26(a)(1)(E)
   E. **ACTION** — Approving publishing for public comment proposed new Rule 5.2
   F. "Clean-text version" of all proposed rules amendments
   G. Minutes and other informational items

10. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 5, 6, 32.1, 40, 41, and 58
   B. **ACTION** – Approving publishing for public comment proposed amendments to Rules 11, 32, 35, 45, and new Rule 49.1
   C. Minutes and other informational items, including preliminary draft of proposed amendments to Rule 29

11. Report of the Evidence Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed amendments to Rules 404, 408, 606, and 609
   B. Minutes and other informational items

12. Report of the Technology Subcommittee (Oral report)

13. Long-Range Planning Report

14. Next Meeting: January

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Dean John C. Jeffries, Jr.
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Class Actions
(Open), Chair
Judge Shira Ann Scheindlin
Robert C. Heim, Esquire

Subcommittee on Rule 15 and Rule 50
(Open), Chair
Judge Shira Ann Scheindlin
Judge C. Christopher Hagy
Frank Cicero, Esquire

Subcommittee on Style
Subcommittee A
Judge Thomas B. Russell, Chair
Judge C. Christopher Hagy
Dean John C. Jeffries, Jr.
Frank Cicero, Esquire
Honorable Peter D. Keisler
Professor Thomas D. Rowe, Jr., Consultant

Subcommittee B
Judge Paul J. Kelly, Jr., Chair
Judge Shira Ann Scheindlin
Justice Nathan L. Hecht
Robert C. Heim, Esquire
Honorable Peter D. Keisler
Professor Richard L. Marcus, Consultant

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Subcommittee on Blakely
Judge Paul L. Friedman, Chair
Judge David G. Trager
Judge Anthony J. Battaglia
Professor Nancy J. King
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on E-Government Act
Judge Harvey Bartle III, Chair
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Rule 41
(Open), Chair
Judge Harvey Bartle III
Professor Nancy J. King
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Grand Jury
(Open), Chair
Judge Paul L. Friedman
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
DOJ representative

Subcommittee on Preliminary Proceedings
Judge Anthony J. Battaglia, Chair
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Rule 16/Brady
Donald J. Goldberg, Chair
Professor Nancy J. King
Robert B. Fiske, Jr., Esquire
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Victims Rights Act
Judge James P. Jones, Chair
Judge Anthony J. Battaglia
Justice Robert H. Edmunds, Jr.
Professor Nancy J. King
DOJ representative

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

May 18, 2005
Projects

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

			Start Date	End Date
David F. Levi Chair	D	California (Eastern)	Member: 2003 Chair: 2003	---- 2006
David J. Beck	ESQ	Texas	2003	2006
David M. Bernick	ESQ	Illinois	1999	2005
James B. Comey, Jr.*	DOJ	Washington, DC	----	Open
Charles J. Cooper	ESQ	Washington, DC	1998	2005
Sidney A. Fitzwater	D	Texas (Northern)	2000	2006
Harris L. Hartz	C	Tenth Circuit	2003	2006
Mary Kay Kane	ACAD	California	2000	2006
John G. Kester	ESQ	Washington, DC	2004	2007
Mark R. Kravitz	D	Connecticut	2001	2007
J. Garvan Murtha	D	Vermont	1999	2005
Thomas W. Thrash, Jr.	D	Georgia (Northern)	2000	2006
Charles Talley Wells	JUST	Florida	2000	2006
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

Secretary: Peter G. McCabe (202) 502-1800
Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

ADVISORY COMMITTEE ON APPELLATE RULES

			Start Date	End Date
Samuel A. Alito, Jr. Chair	C	Third Circuit	Member: 1997 Chair: 2001	---- 2005
Paul D. Clement*	DOJ	Washington, DC	-----	Open
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
W. Thomas McGough, Jr.	ESQ	Pennsylvania	1998	2005
John G. Roberts, Jr.	C	DC Circuit	2000	2006
Carl E. Stewart	C	Fifth Circuit	2001	2007
Sanford Svetcov	ESQ	California	1999	2005
Patrick J. Schiltz Reporter	ACAD	Minnesota	1997	Open

Principal Staff: John K. Rabiej (202-502-1820)

* Ex-officio

ADVISORY COMMITTEE ON BANKRUPTCY RULES

			Start Date	End Date
Thomas S. Zilly Chair	D	Washington (Western)	Member: 2000 Chair: 2004	---- 2007
Howard L. Adelman	ESQ	Illinois	1999	2005
Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2006
Eric L. Frank	ESQ	Pennsylvania	1998	2005
Irene M. Keeley	D	West Virginia (Northern)	2002	2005
Christopher M. Klein	B	California (Eastern)	2000	2006
J. Christopher Kohn*	DOJ	Washington, DC	-----	Open
Mark B. McFeeley	B	New Mexico	2001	2007
Lawrence Ponoroff	ACAD	Louisiana	2004	2007
Alan N. Resnick	ACAD	New York	1999	2005
Richard A. Schell	D	Texas (Eastern)	2003	2006
K. John Shaffer	ESQ	California	2000	2006
Laura Taylor Swain	D	New York (Southern)	2002	2005
Ernest C. Torres	D	Rhode Island	1999	2005
James D. Walker, Jr.	B	Georgia (Middle)	1999	2005
Eugene R. Wedoff	B	Illinois (Northern)	2004	2007
Jeffrey W. Morris Reporter	ACAD	Ohio	1998	Open

Principal Staff: Jim Wannamaker (202) 502-1910

* Ex-officio

ADVISORY COMMITTEE ON CIVIL RULES

			Start Date	End Date
Lee H. Rosenthal Chair	D	Texas (Southern)	Member: 1996 Chair: 2003	---- 2006
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2007
Jose A. Cabranes	C	Second Circuit	2004	2007
Frank Cicero, Jr.	ESQ	Illinois	2003	2006
Daniel C. Girard	ESQ	California	2004	2007
C. Christopher Hagy	M	Georgia (Northern)	2003	2006
Nathan L. Hecht	JUST	Texas	2000	2006
Robert C. Heim	ESQ	Pennsylvania	2002	2005
John C. Jeffries, Jr.	ACAD	Virginia	1999	2005
Peter D. Keisler *	DOJ	Washington, DC	----	Open
Paul J. Kelly, Jr.	C	Tenth Circuit	2002	2007
Thomas B. Russell	D	Kentucky (Western)	2000	2006
Shira Ann Scheindlin	D	New York (Southern)	1998	2005
Chilton Davis Varner	ESQ	Georgia	2004	2007
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

ADVISORY COMMITTEE ON CRIMINAL RULES

			Start Date	End Date
Susan C. Bucklew Chair.	D	Florida (Middle)	Member: 1998 2004	---- 2007
Harvey Bartle III	D	Pennsylvania (Eastern)	2001	2007
Anthony J. Battaglia	M	California (Southern)	2003	2006
Lucien B. Campbell	FPD	Texas (Western)	1999	2005
Robert H. Edmunds, Jr.	JUST	North Carolina	2004	2007
Robert B. Fiske, Jr.	ESQ	New York	2000	2006
Paul L. Friedman	D	District of Columbia	1999	2005
Donald J. Goldberg	ESQ	Pennsylvania	2000	2006
James Parker Jones	D	Virginia (Western)	2003	2006
Nancy J. King	ACAD	Tennessee	2001	2007
Richard C. Tallman	C	Ninth Circuit	2004	2007
David G. Trager	D	New York (Eastern)	2000	2006
Christopher A. Wray*	DOJ	Washington, DC	----	Open
David A. Schlueter Reporter	ACAD	Texas	1988	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

ADVISORY COMMITTEE ON EVIDENCE RULES

			Start Date	End Date
Jerry E. Smith Chair	C	Fifth Circuit	Member: 2002 Chair: 2002	---- 2005
John S. Davis*	DOJ	Washington, DC	2001	Open
Thomas W. Hillier II	FPD	Washington (Western)	2000	2006
Robert L. Hinkle	D	Florida (Northern)	2002	2005
Andrew D. Hurwitz	JUST	Arizona	2004	2007
Patricia Lee Refo	ESQ	Arizona	2000	2006
Thomas B. Russell**	D	Kentucky (Western)	2000	2006
William W. Taylor III	ESQ	Washington, DC	2004	2007
David G. Trager**	D	New York (Eastern)	2000	2006
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio
** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 15, 2005

****

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

****

At its March 15, 2005 session, the Judicial Conference:

Elected to the Board of the Federal Judicial Center, each for a term of four years, Magistrate Judge Karen Klein of the District of North Dakota to succeed Magistrate Judge Robert B. Collings, and Bankruptcy Judge Steve Raslavich of the Eastern District of Pennsylvania to succeed Chief Bankruptcy Judge Robert F. Hershner, Jr.

Executive Committee

Approved a resolution in recognition of the substantial contributions made by Chief Judge John G. Heyburn II, whose term of service as chair of the Committee on the Budget ended in December 2004.

Insofar as the funding of circuit judicial conferences is concerned, agreed to: (a) encourage the circuits to look to alternative funding sources for non-travel-related expenses to the extent advisable and permissible, including non-appropriated funds (such as attorney admission fees if the bar participates in a conference) and (b) authorize use of appropriated funds for non-travel-related expenses only in alternate years. This action does not affect any circuit judicial conference for which binding commitments have already been made.

Approved the following resolution on judicial security:

Committee on Judicial Resources

Authorized the Administrative Office to transmit to Congress a request for an additional nine permanent and three temporary judgeships in the courts of appeals, and in the district courts, an additional 44 permanent and 12 temporary judgeships, conversion to permanent status of three existing temporary judgeships, and the extension of one existing temporary judgeship for an additional five years.

With regard to the hiring of new probation and pretrial services officers, adopted the following resolution:

> Courts in a position to hire new probation and pretrial services officers are strongly encouraged to consider hiring highly qualified and well-trained officers from those federal courts that are forced to make involuntary reductions in staff.

Committee on the Administration of the Magistrate Judges System

Agreed to make technical and clarifying amendments to the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Recall of United States Magistrate Judges (the ad hoc recall regulations) and the Regulations of the Judicial Conference of the United States Governing the Extended Service Recall of Retired United States Magistrate Judges (the extended service recall regulations).

Approved recommendations regarding specific magistrate judge positions.

Committee on Rules of Practice and Procedure

Approved proposed new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 2002, 9001, and 9036 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Committee on Security and Facilities

With regard to controlling rent costs:

a. Extended, for an additional year to March 2006, its one-year moratorium on non-prospectus space requests, except requests for courtrooms, chambers, lease renewals, official parking, and recovery from natural disasters or terrorist attacks; and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

APR 25 2005

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

APR 2 5 2005

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rule 28.1.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

APR 2 5 2005

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 2002, 3004, 3005, 7004, 9001, 9006, and 9036.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2005, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

APR 2 5 2005

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 6, 27, and 45, and to Rules B and C of the Supplemental Rules for Certain Admiralty and Maritime Claims.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

APR 25 2005

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.2, 29, 32.1, 33, 34, 45, and new Rule 59.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

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

TABLE OF CONTENTS

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.

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.

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

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief

WASHINGTON, D.C. 20544

Rules Committee Support Office

May 26, 2005

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: Legislative Report

Eleven bills were introduced in the 109th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Class Action

On February 18, 2005, the President signed the "Class Action Fairness Act of 2005" (Pub. L. No. 109-2). The legislation, which is virtually identical to a compromise class action bill considered in the last Congress, amends 28 U.S.C. § 1332 and gives federal district courts original jurisdiction over class action lawsuits based on minimal diversity of citizenship where the amount in controversy exceeds $5 million. (Jurisdiction, however, does not extend to class actions if: (1) the "primary" defendants are States, state officials, or other government entities; or (2) the number of members in the plaintiff classes is fewer than 100.) Key provisions of the legislation include:

• **Considerations for Declining Federal Jurisdiction.** The new law provides that a federal court may decline to exercise jurisdiction over a class action if more than one-third but fewer than two-thirds of the members of the plaintiff classes in the aggregate and the primary defendants are citizens of the same state in which the action was originally filed. Under the Act, a court may decline to exercise jurisdiction based on six factors, including whether: (1) the claims asserted involve matters of national or interstate interest; (2) the law of the state where the action was filed governs; (3) the class complaint was pleaded in a way to avoid federal jurisdiction; (4) the class action was brought in a forum with sufficient nexus with the plaintiff class members, the alleged harm, or the defendants; and (5) during the three-year period preceding the filing of the class action, one or more class actions asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

• **Additional Grounds When Federal Jurisdiction Cannot be Exercised.** The Act also prescribes additional grounds when a federal court cannot exercise jurisdiction over a

class action, including when: (1) more than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

• **Multi-District Litigation Provisions.** The Act also provides that any "mass action" removed to federal court cannot be transferred to any other court pursuant to 28 U.S.C. § 1407, unless a majority of plaintiffs request the transfer.

• **Removal of Class Actions.** The Act creates a new section 1453 governing removal of class actions. Under the new section, a court of appeals may consider an appeal from a district court's remand order if a party files an application within 7 days of the order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal is filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

• **Reports on Class Action Settlements.** The Act directs the Judicial Conference—with the assistance of the Federal Judicial Center and the Administrative Office—to prepare and transmit to the House and Senate Judiciary Committees reports recommending the best practices that courts can use to ensure: (1) fair settlements; (2) appropriate awards of attorneys' fees; and (3) class members are the primary beneficiaries of settlements.

Bankruptcy

On April 20, 2005, President Bush signed the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Pub. L. No. 109-8). The Act, which is substantially similar to bills introduced in previous Congresses, revises major portions of the Bankruptcy Code, amends directly a number of Bankruptcy Rules, and requires extensive amendments to the Bankruptcy Rules and Official Forms. The Act, with some exceptions, will take effect on October 17, 2005. Because the legislation will become effective before proposed amendments can be adopted under the normal rulemaking process, the Bankruptcy Rules Committee plans to submit to the Standing Committee for approval by the Judicial Conference proposed interim rules and forms, which address matters requiring immediate attention. Interim rules and forms will be transmitted to the courts before October 2005 with a recommendation that they be adopted.

The Bankruptcy Rules Committee also intends to consider permanent amendments to the Bankruptcy Rules and Official Forms. Any proposed amendments will be published for public comment. At the end of the comment period, the Bankruptcy Rules Committee will have had the experience of the courts with the interim rules and forms and public comments to inform its decision-making before it recommends permanent amendments to the Bankruptcy Rules and Official Forms.

The Bankruptcy Rules Business Issues, Consumer Issues, and Forms Subcommittees met in May 2005 and will meet again immediately preceding the Standing Committee meeting next month. The bankruptcy subcommittees have also held numerous telephone conferences. The full advisory committee is scheduled to meet in August and September 2005.

Civil Rule 11

On January 26, 2005, Representative Lamar Smith introduced the "Lawsuit Abuse Reduction Act of 2005" (H.R. 420, 109th Cong., 1st Sess.). The legislation is similar to an earlier bill introduced in the last Congress and passed by the House of Representatives in September 2004 by a vote of 229-174. (H.R. 4571, 108th Cong., 2nd Sess.). H.R. 420 would: (1) reinstate sanction provisions deleted in 1993 from Civil Rule 11; (2) amend Rule 11 to require a court to impose sanctions for every violation of the rule; (3) apply amended Rule 11 to state cases affecting interstate commerce; and (4) alter the venue standards for filing tort actions in state and federal court.

At the request of the Civil Rules Committee, the Federal Judicial Center conducted a survey of 400 district court judges on Civil Rule 11 and H.R. 4571. Seventy percent of the judges surveyed responded. Of the judges who responded, 87 percent preferred the current version of Rule 11, 5 percent preferred the version of the rule in effect between 1983-1993, and 4 percent preferred the rule version as proposed by the legislation. (The survey is available on the Federal Rulemaking web site at <www.uscourts.gov/rules/newrules10.html>.) On May 17, 2005, Director Mecham sent letters, which enclosed the FJC report, to Chairman James Sensenbrenner and Chairman Arlen Specter, urging them to oppose H.R. 420. (See attached.)

In February 2005, Judge Lee Rosenthal met with Senator John Cornyn—a member of the Senate Judiciary Committee—and committee staffers to brief them on the issues and express opposition to H.R. 420. Also in February 2005, the House of Delegates of the American Bar Association adopted a resolution opposing H.R. 4571 or other similar legislation, supporting the current version of Civil Rule 11, and reaffirming its support for the Rules Enabling Act process. (See attached.) On May 25, 2005, the House Judiciary Committee marked up and favorably reported the bill.

Hearsay Exception

On March 14, 2005, Representative Randy Forbes introduced the "Gang Deterrence and Community Protection Act of 2005" (H.R. 1279, 109th Cong., 1st Sess.). Senator Dianne Feinstein introduced similar legislation—*Gang Prevention and Effective Deterrence Act of* 2005—on January 25, 2005 (S. 155, 109th Cong., 1st Sess.). H.R. 1279 expands federal jurisdiction over juvenile cases. It also would amend Evidence Rule 804(b)(6) by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000). In *Cherry*, the court held that statements made by a murdered witness may be admissible against the defendant who caused the unavailability of the witness and any co-defendant under the following circumstances: (1) the co-defendant participated directly in planning or procuring the declarant's unavailability; or (2) the declarant's unavailability was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. The House passed the bill on May 11, 2005, by a vote of 279-144. There has been no further action on the legislation.

Other Developments of Interest

Asbestos. On April 19, 2005, Senator Specter introduced the "Fairness in Asbestos Injury Resolution Act of 2005" (S. 852, 109th Cong., 1st Sess.). The bill—which builds on the legislation introduced in the last Congress—creates a no-fault trust fund that compensates individuals for asbestos-related injuries. The bill also establishes medical criteria, creates procedures for filing claims, provides for the solvency of the trust fund, and establishes the Office of Asbestos Disease Compensation, which will be headed by an administrator responsible for processing claims for compensation and managing the trust fund. The legislation also provides that a claimant may petition for judicial review of the administrator's decision awarding or denying compensation under the Act. (A petition for review must be filed in the circuit court where the claimant resided at the time the final order was issued. The circuit court must review any petition on an expedited basis.)

The legislation raises a number of concerns regarding the amount of the trust fund and the amount each stakeholder would be required to contribute to the fund, eligibility of claims, and steps necessary to keep the trust fund solvent. At the request of Senator Specter, Judge Edward R. Becker held numerous meetings with representatives from Congress, defendant companies, labor organizations, claimants' attorneys, and insurance companies in an attempt to broker a compromise.

In May 2005, the Senate Judiciary Committee favorably reported the bill.

Multi-District Litigation. On March 2, 2005, Representative Sensenbrenner introduced the "Multidistrict Litigation Restoration Act of 2005" (H.R. 1038, 109th Cong., 1st Sess.). The legislation—which is identical to a bill that passed the House of Representatives by a vote of 418-0 but was not acted upon by the Senate before the 108th Congress adjourned—passed the House by voice vote on March 9, 2005. The legislation would amend 28 U.S.C. § 1407 to allow

a judge with a transferred case in a multi-district litigation proceeding to retain it for trial or transfer it to another district in the interests of justice.

The bill is intended to fill a gap in the statute identified by the Supreme Court in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), which held that statutory authority did not exist for a district judge conducting pretrial proceedings to transfer a case to itself for trial.

James N. Ishida

Attachments

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

May 17, 2005

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to provide you with a copy of the Federal Judicial Center's *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure.* The report was prepared at the request of the Judicial Conference's Advisory Committee on Civil Rules to provide information as part of the Advisory Committee's study of proposals introduced in Congress to amend Rule 11. The report makes it clear that the vast majority of federal district judges believe that the proposed changes to Rule 11 will not help deter litigation abuses, but will increase satellite litigation, costs, and delays.

Since 1995, legislation has regularly been introduced that would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The 1993 change followed several years of examination and was made on the Judicial Conference's recommendation, with the Supreme Court's approval, and after Congressional review. The 1983 provision was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address and generated wasteful satellite litigation that had little to do with the merits of a case. On January 26, 2005, Representative Lamar Smith introduced the Lawsuit Abuse Reduction Act of 2005 (H.R. 420). The bill would restore the 1983 version of Rule 11, undoing the amendments to Rule 11 that took effect in December 1993. The enclosed report shows a remarkable consensus among federal district judges supporting existing Rule 11 and opposing its amendment.

In 1983, Rule 11 was amended to require judges to impose sanctions for violations that could include attorneys' fees. The 1983 version of Rule 11 was intended to address certain improper litigation tactics by providing some punishment and deterrence. The effect was almost the opposite. The 1983 rule presented attorneys with financial incentives to file a sanction motion. The rule was abused by resourceful lawyers. A "cottage industry" developed that churned tremendously wasteful satellite sanctions litigation that had everything to do with strategic gamesmanship and little to do with the underlying claims or with the behavior the rule

attempted to regulate. Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion. The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism.

The 1993 amendments to Rule 11 were designed to remedy major problems shown by experience with the 1983 rule, allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions, but still provide a meaningful sanction for frivolous pleadings. The rule establishes a "safe harbor," providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. Rule 11 does not supplant other remedial actions available to sanction an attorney for a frivolous filing, including punishing the attorney for contempt, employing sanctions under 28 U.S.C. § 1927 for "vexatious" multiplication of proceedings, or initiating an independent action for malicious prosecution or abuse of process.

H.R. 420 would amend Rule 11 to restore the 1983 version, by removing a court's discretion to impose sanctions on a frivolous filing and by eliminating the rule's safe-harbor provisions. After the House of Representatives passed the Lawsuit Abuse Reduction Act of 2004 (H.R. 4571 – the predecessor of H.R. 420) on September 14, 2004, I wrote to Chairman Orrin Hatch on September 16, 2004, advising him that the Judicial Conference opposed legislation amending Rule 11. The Judicial Conference based its position on the problems caused by the 1983 version of Rule 11, which H.R. 420 would restore. The Judicial Conference noted that these problems included:

- creating a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty;
- engendering potential conflict of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;
- exacerbating tensions between lawyers; and
- providing little incentive, and perhaps a distinct disincentive, to abandon or withdraw – and thereby admit error on – a pleading or claim after determining that it no longer was supportable in law or fact.

The Advisory Committee on Civil Rules regularly monitors the operation of the Civil Rules, inviting the bench, bar, and public to inform it of any problems. The Committee stands ready to address any deficiency in the rules, including Rule 11. Although the Committee is mindful of Congressional concerns about frivolous filings addressed in pending legislation, the Committee has not received any negative comments or complaints on existing Rule 11 from the bench, bar, or public. To gain a clearer picture of the operation of Rule 11, the Committee asked the Federal Judicial Center to survey the experience of the trial judges who must apply the rules. The survey sought responses from judges with experience under the 1983 version as well as judges serving only after the 1993 version was adopted. The results of the Federal Judicial

Center's survey show that judges strongly believe that Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The survey's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicate that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 or H.R. 420);
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;
- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and
- 72 percent believe that locating sanction provisions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The judges' experiences with the 1993 version of Rule 11 point to a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. H.R. 420 would effectively reinstate the 1983 version of Rule 11 that proved so contentious and wasted so much time and energy of the bar and bench. Rule 11 in its present form has proven effective and should not be revised. The findings of the Federal Judicial Center underscore the federal district judges' united opposition to legislation amending Rule 11. I urge you on behalf of the Judicial Conference to oppose legislation amending Rule 11.

The Judicial Conference appreciates your consideration of its views. If you have any questions, please feel to contact me. I may be reached at (202) 273-3000. If you prefer, you may have your staff contact Karen Kremer, Counsel, Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

Enclosure

cc: Honorable Patrick Leahy, Ranking Democrat
Members of the Committee on the Judiciary of the Senate

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

May 17, 2005

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

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strategic gamesmanship and little to do with the underlying claims or with the behavior the rule attempted to regulate. Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion. The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism.

The 1993 amendments to Rule 11 were designed to remedy major problems shown by experience with the 1983 rule, allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions, but still provide a meaningful sanction for frivolous pleadings. The rule establishes a "safe harbor," providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. Rule 11 does not supplant other remedial actions available to sanction an attorney for a frivolous filing, including punishing the attorney for contempt, employing sanctions under 28 U.S.C. § 1927 for "vexatious" multiplication of proceedings, or initiating an independent action for malicious prosecution or abuse of process.

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- creating a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty;
- engendering potential conflict of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;
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The Advisory Committee on Civil Rules regularly monitors the operation of the Civil Rules, inviting the bench, bar, and public to inform it of any problems. The Committee stands ready to address any deficiency in the rules, including Rule 11. Although the Committee is mindful of Congressional concerns about frivolous filings addressed in pending legislation, the Committee has not received any negative comments or complaints on existing Rule 11 from the bench, bar, or public. To gain a clearer picture of the operation of Rule 11, the Committee asked the Federal Judicial Center to survey the experience of the trial judges who must apply the rules. The survey sought responses from judges with experience under the 1983 version as well as judges serving only after the 1993 version was adopted. The results of the Federal Judicial

Center's survey show that judges strongly believe that Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The survey's findings include the following highlights:

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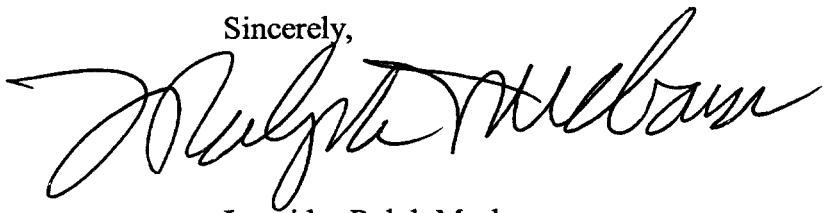
The Judicial Conference appreciates your consideration of its views. If you have any questions, please feel to contact me. I may be reached at (202) 273-3000. If you prefer, you may have your staff contact Karen Kremer, Counsel, Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,



Leonidas Ralph Mecham
Secretary

Enclosure

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the Committee on the Judiciary of the House of Representatives

4/26/05

Defending Liberty
Pursuing Justice

SECRETARY
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AMERICAN BAR ASSOCIATION

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FAX: (312) 988-5153

April 11, 2005

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

RE: Proposed "Lawsuit Abuse Reduction Act"

Dear Mr. McCabe:

At the meeting of the House of Delegates of the American Bar Association held February 14, 2005, the enclosed resolution was adopted upon recommendation of the Tort Trial and Insurance Practice Section, Section of Litigation, Pennsylvania Bar Association, Section of Business Law, Section of Intellectual Property Law, Young Lawyers Division and the Standing Committee on Professional Discipline. Thus, this resolution now states the official policy of the Association.

We are transmitting it for your information and whatever action you think appropriate. Please advise if you need any further information, have any questions or if we can be of any assistance. Such inquiries should be directed to the Chicago office.

Sincerely yours,

Ellen F. Rosenblum

Ellen F. Rosenblum

EFR/nmr
enclosure

cc:

James K. Carroll
Robert D. Liebenberg
Susan Nolte
Dennis J. Drasco
J. Douglas Stewart
Patsy Engelhard
Kenneth Shear
Roseanne T. Lucianek
Robert D. Evans

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 14, 2005

RESOLVED, That the American Bar Association reaffirms its support for the judicial rulemaking process set forth in the Federal Rules Enabling Act and opposes those portions of the proposed "Lawsuit Abuse Reduction Act" of the 108th Congress (H.R. 4571) or other similar legislation that would circumvent that process.

FURTHER RESOLVED, That the American Bar Association opposes enactment of any Congressional legislation that would violate principles of federalism by 1) imposing the provisions of Rule 11 of the Federal Rules of Civil Procedure upon any civil action filed in a state or territorial court; or 2) imposing venue designation rules or provisions upon a personal injury claim filed in a state or territorial court.

FURTHER RESOLVED, That the American Bar Association supports the current version of Rule 11 of the Federal Rules of Civil Procedure, which became effective December 1, 1993, as a proven and effective means of discouraging dilatory motions practice and frivolous claims and defenses.

FURTHER RESOLVED, That the American Bar Association opposes enactment of any Congressional legislation that would: 1) change the current version of Rule 11 for the purpose of imposing mandatory sanctions and removing its current provisions that encourage attorneys to correct, modify or withdraw pleadings or motions; 2) impose any form of mandatory suspension due to prior violations of Rule 11; or 3) extend Rule 11 to problematic discovery motions, requests, responses or non-responses that are subject to Rule 26(g) or Rule 37.

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
109th Congress

SENATE BILLS

- S. 5 - *Class Action Fairness Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Senate Judiciary Committee reported bill favorably without amendment (2/3/05). Passed Senate by vote of 72-26 (2/10/05). Passed House by vote of 279-149 (2/17/05). Signed by President (2/18/05) (Pub. L. No. 109-2).
  - Related Bills: H.R. 516
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), and notification of proposed settlement to appropriate state and federal officials.

    — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state.

    A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the class action was

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

brought in a forum with sufficient nexus with the plaintiff class members, (e) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (f) whether, during the three-year period preceding the filing of the class action, one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

— Section 4 also provides that a district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100. Section 4 adds additional grounds for excluding class actions from federal jurisdiction: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts. Section 5 also provides that the court of appeals may consider an appeal from a district court's remand order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal was filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

— Section 7 states that the amendments to Civil Rule 23, which were approved by the Supreme Court on March 27, 2003, would take effect on the date of enactment or December 1, 2003, whichever occurred first.

- S. 155 - *Gang Prevention and Effective Deterrence Act of 2005*
  - Introduced by: Feinstein
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05).
  - Related Bills: H.R. 1279
  - Key Provisions:

    — Section 206 amends **Evidence Rule 804(b)(6)** to admit a statement offered against a party who conspired in a wrongdoing that resulted in the unavailability of the declarant.

- S. 256 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 2/1/05
  - Status: Referred to the Senate Committee on the Judiciary (2/1/05). Judiciary Committee reported favorably with amendments (2/17/05). Passed Senate by vote of 74-25 (3/10/05). Referred to House Committees on the Judiciary and Financial Services (3/15/05). House Judiciary Committee held mark-up session and ordered bill reported by vote of 22-13 (3/16/05). House Report 109-31 filed (4/8/05). Committee on Financial Services discharged (4/8/05). Passed House by a vote of 302 - 126 (4/14/05). Signed by the President (4/20/05) (Pub. L. No. 109-8).
  - Related Bills: H.R. 685
  - Key Provisions:

    — Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

    — Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

    — Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

    — Section 419 directs the Judicial Conference, after consultation with the Executive Office of the United States Trustee, to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Judicial Conference to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.
— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."
— Section 435 directs the Judicial Conference to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.
— Section 601 amends **chapter 6 of 28 U.S.C.,** directing (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to compile such statistics and make them available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than July 1, 2008.
— Section 604 expresses the sense of Congress that (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.
— Section 716 expresses the sense of Congress that the Judicial Conference should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.
— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."
— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

[SA #26 amends 11 U.S.C. § 107 restricts public access to certain sensitive information of the debtor.]

- S. 737 - *Security and Freedom Enhancement Act of 2005*
  - Introduced by: Craig
  - Date Introduced: 4/6/05
  - Status: Referred to the Senate Committee on the Judiciary (4/6/05).
  - Related Bills: None

- Key Provisions:
  — Section 3 amends **18 U.S.C. § 3103** by requiring that notice be given to the subject of the search warrant within 7 days after execution of the warrant.

- S. 852 - *Fairness in Asbestos Injury Resolution Act of 2005*
  - Introduced by: Specter
  - Date Introduced: 4/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/19/05). Senate Judiciary Committee held mark-up session (4/28/05).
  - Related Bills: H.R. 1957.
  - Key Provisions:
    — Section 302 provides that a claimant may petition for judicial review of the administrator's decision awarding or denying compensation under the Act. Exclusive jurisdiction rests in the circuit court where the claimant resides at the time the final order is issued. The circuit court must review the decision on an expedited basis.
    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also states that, except as provided, the remedies set forth shall be the exclusive remedy for any asbestos claim.

HOUSE BILLS

- H.R. 420 - *Lawsuit Abuse Reduction Act of 2005*
  - Introduced by: Smith
  - Date Introduced: 1/26/05
  - Status: Referred to the House Judiciary Committee (1/26/05). Referred to House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05).
  - Related Bills: None
  - Key Provisions:
  — Section 2 amends **Civil Rule 11** by requiring the court to impose an appropriate sanction upon attorneys, law firms, or parties who violate provisions of the rule.
  — Section 3 would make amend Rule 11 applicable to state cases affecting interstate commerce.
  — Section 4 generally provides that a personal injury claim filed either in state or federal court may be filed only in the state or federal district where (1) the person bringing the claim (a) resides at the time of filing, or (b) resided at the time of the alleged injury; (2) the alleged injury or circumstances giving rise to the personal injury claim occurred; or (3) the defendant's principal place of business is located.

- H.R. 516 - *Class Action Fairness Act of 2005*
  - Introduced by: Goodlatte
  - Date Introduced: 2/2/05

- Status: Referred to the House Committee on the Judiciary (2/2/05).
- Related Bills: S. 5
- Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, and review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location).

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

These provisions do not apply in any civil action where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.

— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.

— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

- H.R. 685 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

- Introduced by: Sensenbrenner
- Date Introduced: 2/9/05
- Status: Referred to the House Committees on the Judiciary and Financial Services (2/9/05).
- Related Bills: S. 256
- See S. 256

- H.R. 1038 - *Multidistrict Litigation Restoration Act of 2005*
  - Introduced by: Sensenbrenner
  - Date Introduced: 3/2/05
  - Status: Referred to the House Committee on the Judiciary (3/2/05). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee held mark-up session and forwarded to full committee (3/3/05). Judiciary Committee held mark-up session and ordered reported by voice vote (3/9/05). H. Rprt. 109-24 filed (3/17/05). Passed by House (4/19/05).
  - Related Bills: None.
  - Key Provisions:
    — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory damages.

- H.R. 1279 - *Gang Deterrence and Community Protection Act of 2005*
  - Introduced by: Forbes
  - Date Introduced: 3/14/05
  - Status: Referred to the House Committee on the Judiciary (3/14/05). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (4/5/05). Subcommittee held mark-up session and forwarded to full committee by vote of 5-3 (4/12/05). Committee held mark-up session and ordered reported by vote of 16-11 (4/20/05). House Report No. 109-74 filed (5/5/05). House passed by vote of 279-144 (5/11/05). Received in Senate and referred to Committee on the Judiciary (5/12/05).
  - Related Bills: S. 155
  - Key Provisions:
    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

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

May 17, 2005

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

Federal Rulemaking Web Site

We have posted on the Judiciary's Federal Rulemaking Internet web site <www.uscourts.gov/rules> all advisory rules committees' reports to the Standing Committee and Standing Committee's reports to the Judicial Conference from 1992/3 to present. Together with rules committees' minutes dating back to 1992, we now have on the web site a core collection of rules records for the past 12 years. The collection allows users to research the "legislative history" of rules amendments considered by the rules committees during the past decade.

This summer, we will begin to convert into electronic form the rules committees' minutes and reports contained on microfiche from 1935-1991 (see below). We plan to add these core records to our document-management system and post them on the web site.

We also posted on the web site this year—for the first time—all comments received on proposed amendments published for comment in August and November 2004, including the proposed electronic discovery rules amendments (see below).

Comments Received on Proposed Amendments

During the last comment period, the office received, acknowledged, forwarded, and followed up on over 300 comments. In light of the substantial public interest in the proposed electronic discovery amendments, we posted all comments on the rules web site. This new procedure was intended to facilitate an interchange of ideas among the bench, bar, and public to highlight and sharpen the key issues arising from the proposed rules amendments. The rules web site recorded a 300% increase in the number of "visits" to the web site during this year's public comment period (December 15, 2004-February 15, 2005) compared to last year.

We will continue to distribute the comments to the committee members electronically using Adobe PDF, with a follow-up mailing of a complete set of all comments received.

Committee and Subcommittee Meetings

For the period from December 16, 2004, through May 17, 2005, the office staffed ten meetings, including one Standing Committee meeting, five advisory rules committee meetings, three subcommittee meetings, and a meeting of the informal working group on mass torts. The office also staffed four public hearings—three Civil Rules hearings and one Appellate Rules hearing. We also arranged and participated in numerous conference calls involving rules subcommittees.

The docket sheets of all suggested amendments for Bankruptcy, Civil, Criminal, and Evidence Rules have been updated to reflect the rules committees' recent respective actions. Every suggested amendment along with its source, status, and disposition is listed. The docket sheets are updated after each committee meeting, and they are posted on the rules web site.

The office staff continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. Pertinent documents were forwarded to the appropriate reporter for consideration.

Automation Projects

In March 2005, we purchased a microfiche scanner that will enable us to convert into electronic form rules committees' microfiche records from 1935-1996. The records will be transferred to our web-based electronic document-management system (Documentum 5) and posted on the Federal Rulemaking web site.

Documentum continues to work very well. We are using Documentum to file, review, and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, expedite intake and processing of e-mails and attachments, and track different versions of documents to ensure the quality and accuracy of work products. We hope to add an enhancement to the system soon that will allow remote access to the database by committee members, reporters, and staff.

Miscellaneous

In February 2005, we posted on the rules web site the *Preliminary Draft of Proposed Style Revision of the Federal Rules Civil Procedure*, seeking public comment on proposed style rules amendments and rule amendments separate from style amendments. At the same time, we sent the rules to the legal publishers. Printing of the pamphlet, which contains the rules

proposals, was delayed by the Government Printing Office for over two months. In accordance with administrative regulations, we are compelled to process our printing projects with GPO. We are working to resolve this issue and prevent such delays in the future. The pamphlet was sent to the court family and other interested parties in early May.

In March 2005, we delivered to the Supreme Court proposed amendments to Bankruptcy Rules 2002, 9001, and 9036 that were approved by the Judicial Conference at its March 2005 session. The proposed amendments—which are being considered on an expedited schedule—facilitate the transmission of notices to a centralized, agreed-upon electronic mailing address, and could save the courts considerable amounts of money in mailing and administrative expenses.

On April 25, 2005, the Supreme Court approved proposed new rules and amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure that were approved by the Judicial Conference at its September 2004 and March 2005 sessions. The new rules and amendments were transmitted to Congress and will become effective on December 1, 2005, unless Congress enacts legislation to reject, modify, or defer the amendments.

James N. Ishida

Attachments

Bankruptcy Rules Tracking Docket (By Rule Number) 5/10/05

Approved Items - No Further Action by Committee Necessary

Suggestion	Track
Rule 1007 Debtor to include matrix name/address persons for schedules D-H	12/1/05
Official Form 6, Schedule G Amend to delete statement re notice	12/1/05
Rule 1011 Technical amendment to conform to Rule 1004	12/1/04
Rule 2002(j) Technical amendment to correct reference to IRS	12/1/04
Rule 3004 Debtor or trustee may not file proof of claim until creditor time expires	12/1/05
Rule 3005 Conform to code	12/1/05
Rule 4008 Reaffirmation agreement to be filed within 30 days of discharge	12/1/05
Rule 7004 Clerk sign, seal summons electronically	12/1/05
Rule 9006(f) Additional time after service by mail	12/1/05
Rule 9014 Opt out of mandatory discovery provisions of Rule 7026 for contested matters	12/1/04
Official Forms 16D and 17 Technical changes	12/1/04

Active Items

Suggestion	Docket No., Source & Date	Status Pending Further Action	Track
Rule 1009 Social security number - amended statement		4/04 - Committee approval 6/04 - Standing Committee affirm 8/04 - Published for public comment 3/05 - Committee approved **PENDING FURTHER ACTION**	12/1/06
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 _____ 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered 9/03 - Committee considered and approved in principle 3/04 - Committee approved for publication 6/04 - Standing committee approved for publication 8/04 - Published for public comment 3/05 - Committee approved 3/05 - Standing Committee approved 3/05 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**	12/1/05
Rule 3002(c)(5) Address calculation of claims filing deadline when notice is served by Bankruptcy Noticing Center	04-BK-E Judge Dana L. Rasure, on behalf of the Bankruptcy Judges Advisory Group to the AO 11/15/04	12/01 - Referred to chair and reporter 3/05 - Committee referred to subcommittee for further study **PENDING FURTHER ACTION**	

Rule 3007 Procedure for objection to claim - no affirmative relief at same time		9/04 - Committee approval to be sent to Standing Committee tentative publish date 05 1/05 - Standing Committee approved for publication **PENDING FURTHER ACTION**	12/1/07
Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approved **PENDING FURTHER ACTION**	12/1/06
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Reviewed by Committee - Tab 11 11/04 - Referred to Consumer Subcommittee for study **PENDING FURTHER ACTION**	
Rule 5005(a)(2) Permit or require electronic filing	04-BK-D Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 11/04 - Publication (3 month period) Fast Track 3/05 - Committee approved **PENDING FURTHER ACTION**	12/1/06

Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel and District Judge to entities already listed	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee considered and approved for publication 1/04 - Standing Committee approved for publication 8/04 - Published for Public Comment 3/05 - Committee approved **PENDING FURTHER ACTION**	12/1/06
Rule 7004(b)(9) and (g) Service summons and complaint on attorney for debtor	Committee proposal will be sent to Standing Committee	8/04 - Published for public comment 3/05 - Committee approved **PENDING FURTHER ACTION**	12/1/06
Rule 7007.1 Corporate ownership statement with initial filing suggestion		9/04 - Committee approval technical amendment no publish 1/05 - Standing Committee approved for publication **PENDING FURTHER ACTION**	12/1/05
Rule 8002(a) Extending the appeal time	Committee proposal	8/04 - Referred to Committee 9/04 - Tab 16 Committee Notebook 10/04 - Referred to Technology Subcommittee for study 3/05 - Referred back to technology Subcommittee for further study **PENDING FURTHER ACTION**	
Rule 9001 Notice provider definition	Committee proposal	3/04 - Committee approval 6/06 - Standing Committee approval 8/04 - Published for public comment 3/05 - Committee approved 3/05 - Standing Committee approved 3/05 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**	12/1/05

Rule 9006 Address calculation of claims filing deadline when notice is served by Bankruptcy Noticing Center	04-BK-E Judge Dana L. Rasure, on behalf of the Bankruptcy Judges Advisory Group to the AO 11/15/04	12/04 - Referred to chair and reporter 3/05 - Referred to subcommittee for study **PENDING FURTHER ACTION**	
Rule 9021 Separate Document Requirement	Letter from Judge David Adams	8/04 - Referred to Committee 9/04 - Committee Review - Tab 12 11/04 - Referred to Privacy, Public Access and Appeals Subcommittee for study 3/05 - Referred back to subcommittee for further study **PENDING FURTHER ACTION**	
Rule 9036 Notice by electronic means is complete upon transmission	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02 2005 or for 2006	2/02 - Referred to reporter, chair and committee 9/03 - Committee considered and approved in principle 1/04 - Standing Committee approved for publication 8/04 - Published for public comment Fast Track 3/05 - Committee approved 3/05 - Standing Committee approved 3/05 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**	12/1/05
New Rule Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed Rule 5.1 4/05 - Civil Rules Committee approved **PENDING FURTHER ACTION**	

Official Form 6, Schedule I Income of non-filing spouse disclosure	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approved **PENDING FURTHER ACTION**	12/1/05
Official Form 10 Amend Proof of Claim form. (May affect Rule 3001)	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair and Subcommittee on Forms 11/04 - Referred to Form Subcommittee 3/05 - Committee approved for publication **PENDING FURTHER ACTION**	

Inactive Items / Historical Information

Suggestion	Docket No., Source & Date	Status
Rule 1019 File superseding claims in cases converted to Chapter 7	Thomas J. Yerbich November 8, 2004	11/04 - Referred to chair and reporter 3/05 - Committee declined to adopt **COMPLETED**
Rule 1019(3) Amend to address claims filed before conversion in chapter 11, 12, and 13 cases	04-BK-G Thomas J. Yerbich, Court Rules Attorney 11/8/04	11/04 - Received by chair 3/05 - Committee declined to adopt. **COMPLETED**
Rule 1019(5)(A) Deal with "nonexistence" of debtor-in-possession	04-BK-C R. Bradford Leggett, Esq. 5/21/04	5/04 - Referred to chair and reporter 9/04 - Tab 13 Discussed by Committee - Committee declined to adopt. **COMPLETED**
Rule 2002(c)(1) Amend regarding sales of property under 11 U.S.C. 363	04-BK-F Judge Vincent P. Zurzolo 9/15/04	9/04 - Received by chair 3/05 - Committee declined to adopt. **COMPLETED**

Rule 2002(p) Add subdivision regarding sales of property under 11 U.S.C. 363	04-BK-F Judge Vincent P. Zurzolo 9/15/04	9/04 - Received by chair 3/05 - Committee declined to adopt. **COMPLETED**
Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 4/04 - Tabled motion carried **COMPLETED**
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **COMPLETED**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **COMPLETED**
Rules 6004(a) Sale of property	9/04 letter from Judge Vincent Zurzolo	10/04 - referred to reporter for review 3/05 - Committee declined to adopt **COMPLETED**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **COMPLETED**
Rule 7001 dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and referred to Attorney Conduct Subcommittee **COMPLETED**
Rule 7023.1 Eliminate rule extension number	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **COMPLETED**

Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01/BK-A Jay L. Welford, Esq. And Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **COMPLETED**
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK-005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee 9/04 - Committee defers action FURTHER ACTION MAY BE APPROPRIATE
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **COMPLETED**
Official Form 1 Amend Exhibit C to the Voluntary Petition	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **COMPLETED**
Official Form 9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **COMPLETED**
Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **COMPLETED**

Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **COMPLETED**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **COMPLETED**

CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CIVIL RULES	
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 5(b)(2)(D) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**
Rule 5(e) Mandatory electronic filing should be encouraged to the fullest extent possible	04-CV-G Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair 11/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and deferred action 1/05 - Standing Committee approved 3/05 - Judicial Conference approved **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 6 Time Issues	03-CV-C Irwin H. Warren, Esquire 6/26/03	6/03 - Referred to reporter and chair 4/04 - Committee considered and approved 6/04 - Standing Committee approved

Suggestion	Docket Number, Source, and Date	Status
		9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 6(e) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7.1(a) Simplify filing by creating a national event in the CM/ECF system for filing of supplemental statement	04-CV-I Lawrence K. Baerman, Clerk 11/29/04	12/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 8(c) In restyling the civil rules: delete "discharge in bankruptcy"; and insert "claim preclusion" and "issue preclusion"	04-CV-E Judge Christopher M. Klein 3/30/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**

Suggestion	Docket Number, Source, and Date	Status
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 23 Revise to protect the status of the small defendant	03-CV-D William S. Karn 7/31/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee=s report 2/04 - Committee presented E-Discovery Conference at Fordham Law School in New York 4/04 - Committee considered and approved subcommittee's recommendation to publish for public comment 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 30(b)/45 Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee 8/03 - Committee published proposed amendments to Civil Rule 45 re notifying witness of the manner of recording the deposition 4/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 30(b)(6) Myriad proposed amendments	04-CV-B New York State Bar Association Commercial and Federal Litigation Section (Gregory K. Arenson, Esq., Chair) 2/24/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K. Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 50(b) Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered 10/03 - Committee considered 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 54(b) Define "interlocutory order"	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered 4/05 - Committee reviewed **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and ' 3 of H.R. 903 02-CV-D Gregory K. Arenson 4/19/02	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. ' 303 would amend the rule 4/97 - Stotler letter to Hatch 5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 68 Permit plaintiffs and defendants to make offers of compromise	04-CV-H Judge Christina A. Snyder 7/23/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 68 Address the practice of "high-low" settlement agreements	04-CV-J Judge Paul D. Borman 12/21/04	12/04 - Received by chair **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 81(c) Removal of an action from state courts C technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
	FORMS	
CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
SUBJECT MATTER		
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved. **PENDING FURTHER ACTION**
New Admiralty Rule G Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees	02-CV-C James A. Andrews	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and

Suggestion	Docket Number, Source, and Date	Status
should not be effective until adoption in the FRCP or Local Rules of Court	4/1/02, 5/13/02	chair **PENDING FURTHER ACTION**
De Bene Esse Depositions Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Discovery Rules Return to them as they were before the 1993 amendments	04-CV-D Judge Wm. R. Wilson, Jr. 2/9/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication. Publication to be deferred. 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 4/04 - Committee approved for publication restyle Civil Rules 38-63 6/04 - Standing Committee approved for publication 1/05 - Standing Committee approved for publication 2/05 - Published for public comment **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Require less than unanimous verdicts	04-CV-F Judge James T. Trimble, Jr. 4/1/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	CRIMINAL RULES	
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Advisory Committee approved **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Advisory Committee approved **PENDING FURTHER ACTION**
New Rule 59 To provide counterpart to Civil Rule 72	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 - Supreme Court approved **PENDING FURTHER ACTION**
SUBJECT MATTER		
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition*. *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)	03-CR-F Steven W. Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET

ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
	EVIDENCE RULES	
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.)		5/94 - Committee decided not to amend (comprehensive review) 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 11/96 - Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 404(a) Prohibit the circumstantial use of character evidence in civil cases		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey 11/03 - Committee considered survey 4/04 - Committee considered survey 4/05 - Committee considered survey **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
Rule 609(a) Clarify types of crimes that qualify for mandatory admission under the rule		4/02 - Committee referred to reporter 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 4/05 - Committee approved **PENDING FURTHER ACTION**
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
SUBJECT MATTER		
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

DATE: May 6, 2005

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 18, 2005, in Washington, D.C. The Committee gave final approval to two amendments, approved another amendment for publication, and removed two items from its study agenda. The Committee also approved a letter to the chief judges and others regarding the proliferation of local rules on briefing, and the Committee took a first look at problems caused by the Justice for All Act of 2004.

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

II. Action Items

The Advisory Committee is seeking final approval of two items and approval for publication of one item.

A. Items for Final Approval

1. New Rule 32.1

a. Introduction

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 by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee 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. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts 2004, tbl. S-3 (2004). 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.

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 determination. It says nothing about what effect a court must give to one of its unpublished opinions

or to the unpublished opinions of another court. 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). Rule 32.1 addresses only the *citation* of federal 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 contention of issue preclusion, claim 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 contentions 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 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 such 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. Moreover, 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 Committee 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 addition, every court of appeals is now 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. No. 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 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). An exhaustive study conducted by the Federal Judicial Center ("FJC") at the request of the Advisory Committee found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. *See* FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 15, 70 (2005) [hereinafter FJC REPORT]. Unpublished opinions are often read and cited by both judges and attorneys precisely because they do 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 the unpublished opinions that both are reading.

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 opinions (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. To the contrary, a study of the federal appellate courts conducted by the Administrative Office of the United States Courts at the request of the Advisory Committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005). The FJC, as part of its study, asked the judges of the First and D.C. Circuits — both of which have recently liberalized their citation rules — what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload. All of the judges who responded — save one — reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See* FJC REPORT at 12-13, 67-68. In addition, when the FJC asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional

work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. Id. at 10, 63. It is, of course, true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished opinions causes the harms predicted by defenders of no-citation rules. 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 judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is simply no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that Rule 32.1 would not have an "appreciable impact" on their workloads. Id. at 17, 74. Moreover, the attorneys who expressed positive views about Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits. *See* id. at 17-18, 75.

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 makes 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, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule 32.1(a) abolishes those rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals 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 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).

c. Changes Made After Publication and Comment

The changes made by the Advisory Committee after publication are described in my May 14, 2004 report to the Standing Committee. At its April 2005 meeting, the Advisory Committee directed that two additional changes be made.

First, the Committee decided to add "federal" before "judicial opinions" in subdivision (a) and before "judicial opinion" in subdivision (b) to make clear that Rule 32.1 applies only to the unpublished opinions of federal courts. Conforming changes were made to the Committee Note. These changes address the concern of some state court judges — conveyed by Chief Justice Wells at the June 2004 Standing Committee meeting — that Rule 32.1 might have an impact on state law.

Second, the Committee decided to insert into the Committee Note references to the studies conducted by the Federal Judicial Center ("FJC") and the Administrative Office ("AO"). (The studies are described below.) These references make clear that the arguments of Rule 32.1's opponents were taken seriously and studied carefully, but ultimately rejected because they were unsupported by or, in some instances, actually refuted by the best available empirical evidence.

d. Summary of Public Comments

The 500-plus comments that were submitted regarding Rule 32.1 were summarized in my May 14, 2004 report to the Standing Committee. I will not again describe those comments. Rather, I will describe the empirical work that has been done at the request of the Advisory Committee.

You no doubt recall that, at its June 2004 meeting, the Standing Committee returned Rule 32.1 to the Advisory Committee with the request that the proposed rule be given further study. The Standing Committee was clear that its decision did not signal a lack of support for Rule 32.1. Rather, given the strong opposition to the proposed rule expressed by many commentators, and given that some of the arguments of those commentators could be tested empirically, the Standing Committee wanted to ensure that every reasonable step was taken to gather information before Rule 32.1 was considered for final approval.

Over the past year, Dr. Timothy Reagan and several of his colleagues at the FJC have conducted an exhaustive — and, I am sure, exhausting — study of the citation of unpublished opinions. A copy of the FJC's lengthy report has been distributed under separate cover. Before I summarize that report, I again want to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research.

The FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. I will focus on the results of the two surveys, for those are the components of the research that are most relevant to the question of whether Rule 32.1 should be approved.

The attorneys received identical surveys. The judges did not. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which altogether forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage

citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C. Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. The response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a

"permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule 32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished

opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great

amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft

unpublished opinions and on their overall workload. Again, opponents of Rule 32.1 have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed by the Advisory Committee to explain this anomaly, Dr. Reagan

responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1 point), "a little less burdensome" (2 points), "no appreciable impact" (3 points), "a little bit more burdensome" (4 points), and "substantially more burdensome" (5 points). The average "score" was 3.1. In other words, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have

an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

The AO also did research for us — research for which we are also very grateful. The AO identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). The AO's report is attached. As you will see, the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of summary dispositions. The AO's study thus failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Advisory Committee discussed the FJC and AO studies at great length at our April meeting. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, fail to support the main arguments against Rule 32.1. Some Committee members — including one of the two opponents of Rule 32.1 — went further and contented that the studies in some respects actually refute those arguments. Needless to say, for the seven members of the Advisory Committee who have supported Rule 32.1, the studies confirmed their views. But I should note that, even for the two members of the Advisory Committee who have opposed Rule 32.1, the studies were influential. Both announced that, in light of the studies, they were now prepared to support a national rule on citing unpublished opinions. Those two members still do not support Rule 32.1 — they prefer a discouraging citation rule to a permissive citation rule — but it is worth emphasizing that, in the wake of the FJC and AO studies, not a single member of the Advisory Committee now believes that the no-citation rules of the four restrictive circuits should be left in place.

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

a. Introduction

At the request of the Committee on Court Administration and Case Management ("CACM"), the Appellate Rules Committee has proposed amending Appellate Rule 25(a)(2)(D) to authorize the circuits to use their local rules to mandate that all papers be filed electronically. Virtually identical amendments to Bankruptcy Rule 5005(a)(2) and Civil Rule 5(e) (which is incorporated by reference into the Criminal Rules) — accompanied by virtually identical Committee Notes — were published for comment at the same time as the proposed amendment to Appellate Rule 25(a)(2)(D).

b. Text of Proposed Amendment 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, if reasonable exceptions are allowed, 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 that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under Rule 25(a)(2)(D), a local rule that requires electronic filing must include reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 25(a)(2)(D).

A local rule may require that both electronic and "hard" copies of a paper be filed. Nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise.

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c. Changes Made After Publication and Comment

Rule 25(a)(2)(D) has been changed in one significant respect: It now authorizes the courts of appeals to require electronic filing only "if reasonable exceptions are allowed." The published version of Rule 25(a)(2)(D) did not require "reasonable exceptions." The change was made in response to the argument of many commentators that the national rule should require that the local rules include exceptions for those for whom mandatory electronic filing would pose a hardship.

Although Rule 25(a)(2)(D) requires that hardship exceptions be included in any local rules that mandate electronic filing, it does not attempt to define the scope of those exceptions. Commentators were largely in agreement that the local rules should include hardship exceptions of some type. But commentators did not agree about the perimeters of those exceptions. The Advisory Committee believes that, at this point, it does not have enough experience with mandatory electronic filing to impose specific hardship exceptions on the circuits. Rather, the Advisory Committee believes that the circuits should be free for the time being to experiment with different formulations.

The Committee Note has been changed to reflect the addition of the "reasonable exceptions" clause to the text of the rule. The Committee Note has also been changed to add the final two sentences. Those sentences were added at the request of Judge Sandra L. Lynch, a member of CACM. Judge Lynch believes that there will be few appellate judges who will want to receive only electronic copies of briefs, but there will be many who will want to receive electronic copies in addition to hard copies. Thus, the local rules of most circuits are likely to require a "written" copy or "paper" copy, in addition to an electronic copy. The problem is that 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 this sentence may leave attorneys confused as to whether a local rule requiring a "written" or "paper" copy of a brief requires anything in addition to the electronic copy. The final two sentences of the Committee Note are intended to clarify the matter.

d. Summary of Public Comments

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** (04-AP-005) 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.

Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report

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Federal Judicial Center
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Introduction

The Appellate Rules Advisory Committee has proposed a new Rule 32.1, which would permit attorneys and courts in federal appeals in all circuits to cite unpublished opinions. Currently, by local rules, courts in four circuits (the Second, Seventh, Ninth, and Federal Circuits) forbid citation to their unpublished opinions in unrelated cases; we call these "restrictive" circuits. Courts in six circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits) discourage citation to their unpublished opinions, but permit it when there is no published opinion on point; we call these "discouraging" circuits. Courts in the remaining three circuits (the Third, Fifth, and District of Columbia Circuits) more freely permit citation to unpublished opinions; we call these "permissive" circuits.

At its June 2004 meeting, the Standing Committee on Rules of Practice and Procedure asked the Appellate Rules Advisory Committee to ask the Federal Judicial Center to conduct empirical research that would yield results helpful to the Standing Committee's consideration of the Appellate Rules Advisory Committee's proposed rule.[1] We undertook a research effort with three components: (1) a survey of judges, (2) a survey of attorneys, and (3) a survey of case files.[2]

We surveyed all 257 sitting circuit judges and asked them how citation rules are likely to affect the time it takes to prepare unpublished opinions, the length of unpublished opinions, and the frequency of unpublished opinions. We also asked judges in circuits whose courts permit citation to unpublished opinions in unrelated cases—the discouraging circuits and the permissive circuits—whether these citations require additional work, are helpful, and are inconsistent with published authority. We asked judges in restrictive circuits whether special characteristics of their circuits would create problems if attorneys were permitted to cite unpublished opinions in unrelated cases. The

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1. Below is the text proposed to the Standing Committee in June 2004:

> **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.

2. We are grateful to our colleagues Joe Cecil, Jim Eaglin, Tyeika Hartsfield, Estelita Huidobro, Carolyn Hunter, Dean Miletich, Donna Pitts-Taylor, and Jeannette Summers for their assistance with this research. We are grateful to Geoffrey Erwin, Sylvan Sobel, and Russell Wheeler for their quick review of this report.

courts of appeals in both the First and the District of Columbia Circuits changed their local rules recently to relax their restrictions on citations to unpublished opinions, and we asked judges in those circuits about the effects of the rule changes.

To get a representative sample of appellate attorneys who practice in each circuit, we selected the authors of briefs filed in a random sample of appeals in each circuit where a counseled brief was filed on both sides—cases we call fully briefed appeals. We asked attorneys about their desires to cite unpublished opinions in the cases selected, and we asked them about the probable impact of a rule permitting citation to unpublished opinions.

We examined a random sample of cases filed in each circuit to determine how often attorneys and courts cite unpublished opinions in unrelated cases. We have also collected data on whether the cases are resolved by published or unpublished opinions, or without opinions, and how long the published and unpublished opinions are.

We prepared this preliminary report to present to the Appellate Rules Advisory Committee at its meeting in Washington, D.C., on April 18, 2005. This report includes analyses of all responses in the survey of judges, almost all of the responses in the survey of attorneys, and a majority of cases in the survey of case files (9 out of 13 circuits). We expect to have all data analyzed before the Standing Committee meets June 15–16, 2005.

Chapter One:
Survey of Judges

Judges in circuits that permit citation to unpublished opinions in unrelated cases do not think the number of unpublished opinions that they author, the length of their unpublished opinions, or the time it takes them to draft unpublished opinions would change if the rules on citing unpublished opinions were to change. Judges in circuits that recently relaxed their rules on citation to unpublished opinions reported some increase in such citations, but no impact on their work.

Judges in circuits that permit citation to unpublished opinions in unrelated cases reported that these citations create only a small amount of additional work and are seldom inconsistent with published authority, but they are no more than occasionally helpful.

Judges in circuits that forbid citation to unpublished opinions in unrelated cases, on the other hand, predicted that relaxing the rules on citation to unpublished opinions will result in shorter opinions or opinions that take more time to prepare.

We surveyed all 257 sitting circuit judges, including 165 active judges and 92 senior judges; 222 responded (86%). The response rate for individual circuits ranged from 64% in the District of Columbia Circuit (7 out of 11 judges) to 95% in the Sixth Circuit (21 out of 22 judges). (See Exhibit 1.)

Ten judges (4%) responded to the survey, but did not answer its questions (one judge in a restrictive circuit—a senior judge in the Second Circuit who observed that senior judges in that circuit do not prepare unpublished opinions; five judges in discouraging circuits—three judges in the Fourth Circuit who opined that their local rule works well as it is, one judge in the Eighth Circuit who referred us to the views expressed by Judge Arnold in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), and one judge in the Tenth Circuit; and four judges in permissive circuits—one judge in the Fifth Circuit and three judges in the District of Columbia Circuit who opined that their local rule works well as it is).

Part I. Preparing Unpublished Opinions

Most judges in circuits that permit citation to the court's unpublished opinions said that a change in the rules making such opinions either more or less citable would have no impact on the number of unpublished opinions, the length of unpublished opinions, or the time it takes to draft them. Among judges in the circuits that prohibit citation to their unpublished opinions in unrelated cases, nearly half said that their unpublished opinions would get shorter if they were to become citable, and over half of the judges said that

their unpublished opinions would take more time to write. Most judges in the Second, Ninth, and Federal Circuits said that citations to unpublished opinions would create special problems for their circuits, but most judges in the Seventh Circuit said that such citations would not create special problems.

A. If Citation Were Prohibited (Discouraging and Permissive Circuits)

We asked judges in circuits that permit citation to their unpublished opinions to tell us what would happen if citation to the court's unpublished opinions were prohibited. We posed these questions to the 155 judges in the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits)[3] and the permissive circuits (50 judges in the Third, Fifth, and District of Columbia Circuits).[4]

1. Length of Unpublished Opinions

We asked: If attorneys in your circuit were prohibited from citing your court's unpublished opinions, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions, judges would not expect the length of unpublished opinions to change if they were not citable. We received answers to these questions from 79% of the judges asked. A large majority (101 out of 123, or 82%) said that the length of their unpublished opinions would stay the same if attorneys were prohibited from citing them. (See Exhibit 2.) Among the judges who said that their unpublished opinions would change in length, approximately twice as many said that they would decrease in length as said that they would increase in length (15 or 12% compared with 7 or 6%). Only six judges (5%) said that the change would be more than moderate; four said that there would be a great decrease or a very great decrease and two said that there would be a great increase.

2. Drafting Time

We asked: If attorneys in your circuit were prohibited from citing your court's unpublished opinions, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there

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3. Three judges in the Fourth Circuit and one judge in the Eighth Circuit said that they regard their circuit as a circuit that prohibits citation to unpublished opinions.

4. One judge in the Third Circuit and one judge in the Fifth Circuit said that they regard their circuit as a circuit that prohibits citation to unpublished opinions.

would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions, judges would not expect the time it takes to prepare unpublished opinions to change if the opinions were not citable. We received answers to these questions from 79% of the judges asked. A large majority (103 out of 123, or 84%) said that the amount of time spent preparing unpublished opinions would stay the same if attorneys were prohibited from citing them. (See Exhibit 3.) Among the judges who said that the amount of time preparing unpublished opinions would change, all but one said that the amount of time would decrease. Only three judges (2%) said that the change would be more than moderate; all three said there would be a great decrease or a very great decrease.

B. If Citation Were Allowed Only Sometimes (Permissive Circuits)

We asked judges in circuits that freely permit citation to the court's unpublished opinions to tell us what would happen if citation to the court's unpublished opinions were permitted only when there is no published opinion on point. We posed these questions only to the 50 judges in the permissive circuits (the Third, Fifth, and District of Columbia Circuits).

1. Length of Unpublished Opinions

We asked: If attorneys were allowed to cite an unpublished opinion of your court only when there is no published opinion on point, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that freely permit citation to the court's unpublished opinions, judges would not expect the length of unpublished opinions to change if they could be cited only when there is no published opinion on point. We received answers to these questions from 72% of the judges asked. A large majority (27 out of 36, or 75%) said that the length of the unpublished opinions that they authored would not change if attorneys were permitted to cite them only when there was no published opinion on point. (See Exhibit 4.) Among the judges who said that their unpublished opinions would change in length, all but one said that the length would increase. Only two judges (6%) said that the change would be more than moderate; both said that there would be a great increase or a very great increase.

2. Drafting Time

We asked: If attorneys in your circuit were allowed to cite an unpublished opinion of your court only when there is no published opinion on point,

would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that freely permit citation to the court's unpublished opinions, judges would not expect the time it takes to prepare unpublished opinions to change if the opinions could be cited only when there is no published opinion on point. We received answers to these questions from 74% of the judges asked. A large majority (28 out of 37, or 76%) said that the amount of time spent preparing unpublished opinions would stay the same if attorneys were permitted to cite them only when there is no published opinion on point. (See Exhibit 5.) All of the judges who said that the amount of time preparing unpublished opinions would change said that it would increase (9, or 24%). Only one said that the change would be more than moderate; this judge said that there would be a great increase.

C. If Citation Were Always Allowed

We asked judges in circuits that either do not permit citation to their unpublished opinions or permit citation to their unpublished opinions only when there is no published opinion on point to tell us what would happen if citation to the court's unpublished opinions were freely permitted.

1. Number of Unpublished Opinions (Discouraging Circuits)

We posed these questions to the 105 judges in the discouraging circuits (the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits).

We asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, do you think that the number of unpublished opinions that you author would increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

In circuits that permit citation to the court's unpublished opinions only when there is no published opinion on point, judges would not expect the number of unpublished opinions that they author to change if citation to the opinions were permitted more freely. We received answers to these questions from 79% of the judges asked. A large majority (66 out of 83, or 80%) said that the number of unpublished opinions that they author would stay the same if attorneys could cite the court's unpublished opinions more freely. (See Exhibit 6.) Among the judges who said that the number of unpublished opinions that they author would change, more than three times as many said that the number would decrease as said that the number would increase (13, or 16%, compared with 4, or 5%). Only six judges (7%) said that the change would be more

than moderate; four said that there would be a great decrease or a very great decrease, and two said that there would be a great increase.

2. Length of Unpublished Opinions (Restrictive and Discouraging Circuits)

We posed these questions to the 207 judges in the restrictive circuits (102 judges in the Second, Seventh, Ninth, and Federal Circuits) and the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits). The wording of the questions was slightly different for the two types of circuits.

Restrictive Circuits—Of judges in the restrictive circuits we asked: If attorneys in your circuit were allowed to cite unpublished opinions of your court, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

Discouraging Circuits—Of judges in the discouraging circuits we asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, would the length of the unpublished opinions that you author increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

We received answers to these questions from 83% of the judges asked. A large majority of judges (69 out of 88, or 78%) in the *restrictive circuits* said that the length of the unpublished opinions that they author *would change* if attorneys were permitted to cite them, but a substantial majority of judges (58 out of 84, or 69%) in the *discouraging circuits* said that the length of the unpublished opinions that they author *would not change* if attorneys were permitted to cite them freely. (See Exhibit 7.)

A plurality of judges in restrictive circuits said that the length of their unpublished opinions would decrease if attorneys were permitted to cite them. Among the large majority of judges (41 out of 69, or 59%) in restrictive circuits who said that their unpublished opinions would change in length, most said that the opinions would decrease in length. Most of these judges (33 out of 41, or 80%) said that the decrease would be more than moderate; 16 judges said there would be a very great decrease, and 17 judges said there would be a great decrease. Of the judges who said that their unpublished opinions would increase in length, half said that the increase would be moderate or less, and half said that the increase would be more than moderate. Six judges said that there would be a very great increase in the length of their unpublished opinions, and eight judges said that there would be a great increase in the length of their unpublished opinions.

Very few judges in discouraging circuits said that the length of their unpublished opinions would decrease if attorneys were permitted to cite them

more freely. Among the minority of judges (26 out of 84, or 31%) in discouraging circuits who said that their unpublished opinions would change in length, a large majority (22 out of 26, or 85%) said that the opinions would increase in length. Most of these judges (12 out of 22, or 55%) said that the increase would be moderate or less; two judges said that there would be a very great increase, and eight judges said that there would be a great increase. Only four judges (5%) in discouraging circuits said that the length of their unpublished opinions would decrease if attorneys could cite them more freely; half said that there would be a great decrease and half said that the decrease would be moderate or less.

3. Drafting Time (Restrictive and Discouraging Circuits)

We posed these questions to the 207 judges in the restrictive circuits (102 judges in the Second, Seventh, Ninth, and Federal Circuits) and the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits). The wording of the questions was slightly different for the two types of circuits.

Restrictive Circuits—Of judges in the restrictive circuits we asked: If attorneys in your circuit were allowed to cite unpublished opinions of your court, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

Discouraging Circuits—Of judges in the discouraging circuits we asked: If no restrictions were placed on the ability of an attorney to cite an unpublished opinion of your court for its persuasive value, would the amount of time spent by your chambers in preparing unpublished opinions increase, decrease, or stay the same? If there would be an increase or decrease, which best describes the degree of change? Choices were very great, great, moderate, small, and very small.

We received answers to these questions from 84% of the judges asked. A very large majority of judges (160 out of 173, or 92%) who answered these questions said that the amount of time they spend preparing unpublished opinions would stay the same or increase if attorneys could cite the unpublished opinions more freely. (See Exhibit 8.) A majority of judges (50 out of 89, or 56%) in the *restrictive circuits* said that the time they would take to prepare unpublished opinions would *increase* if attorneys were permitted to cite the opinions, but a majority of judges (47 out of 84, or 56%) in the *discouraging circuits* said they would take the *same* amount of time to prepare unpublished opinions if attorneys were permitted to cite the opinions freely.

Among the majority of judges in restrictive circuits who said that the amount of time they spend preparing unpublished opinions would increase if attorneys could cite them, a substantial majority (33 out of 50, or 66%) said

that the increase would be more than moderate. This includes more than a third of all judges (37%) in restrictive circuits who responded to the questions. Twelve judges said the increase would be very great; 21 judges said the increase would be great. Among the small minority of judges (12 out of 89, or 13%) who said that the amount of time would decrease, four said the increase would be very great, and four said the increase would be great.

Among the minority of judges in discouraging circuits who said that the amount of time they spend preparing unpublished opinions would change if attorneys could cite the opinions freely, all but one said that the amount of time would increase. Eleven judges said that the increase would be more than moderate, four said the increase would be very great, and seven said that the increase would be great. One judge said that there would be a great decrease.

4. Problems (Restrictive Circuits)

We posed these questions to the 102 judges in the restrictive circuits (the Second, Seventh, Ninth, and Federal Circuits).

We asked: Would a rule allowing the citation of unpublished opinions in your circuit cause problems due to any special characteristics of your court or its practices? If your answer is "yes," please describe the relevant characteristics.

We received an answer to the first question from 84% of the judges asked. A substantial majority of the judges (58 out of 86, or 67%) said that a rule permitting citation to the court's unpublished opinions would be especially problematic for their circuit. (See Exhibit 9.) But although a substantial majority of judges (53 out of 74, or 72%) in the Second, Ninth, and Federal Circuits said that there would be special problems, a majority of judges (7 out of 12, or 58%) in the Seventh Circuit said that there would not be special problems.

Fifty-seven judges offered thoughts on the effect of permitting citation to unpublished opinions in their courts. (See Appendix A.) Twenty judges predicted that citations to unpublished opinions would increase judges' workload. Thirteen judges predicted that unpublished opinions would become shorter if they could be cited. Seven judges expressed concern about the quality of the court's unpublished opinions. Six judges observed that citations to unpublished opinions are unlikely to be helpful. Five judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued. Three judges predicted that allowing citation to unpublished opinions could ultimately result in their being precedential. One judge predicted that permitting citations to unpublished opinions would provide the government with an advantage. A few judges offered thoughts on more than one of these topics, and eight judges expressed other thoughts.

Part II. Work of Chambers Reviewing Briefs (Discouraging and Permissive Circuits)

Most judges told us that citations to unpublished opinions create a small or very small amount of additional work for them, are occasionally or seldom helpful, and are seldom inconsistent with published authority.

We posed these questions to the 155 judges in the discouraging circuits (105 judges in the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits) and permissive circuits (50 judges in the Third, Fifth, and District of Columbia Circuits).

1. Work

We asked: When a brief cites an unpublished opinion of your court, how much additional work does this citation create for you and your chambers staff? Choices were a very great amount, a great amount, some, a small amount, and a very small amount.

Citations to unpublished opinions do not appear to create much additional work for the court. We received answers to this question from 75% of the judges asked.[5] Almost all judges (114 out of 116, or 98%) said that an unpublished opinion creates less than a great amount of additional work. (See Exhibit 10.) Approximately half of the judges who responded said that citations to unpublished opinions create a very small amount of additional work (57 out of 116, or 49%; 40 out of 82, or 49%, in discouraging circuits, and 17 out of 34, or 50%, in permissive circuits).

2. Helpfulness

We asked: Which of the following best describes how often the citation of an unpublished opinion of your court has been helpful? Choices were very often, often, occasionally, seldom, and never.

Citations to unpublished opinions do not appear to be helpful very often. We received answers to this question from 79% of the judges asked. A very large majority (116 out of 123, or 94%) said that citations to unpublished opinions have been helpful less than "often." (See Exhibit 11.) A large minority (48 out of 123, or 39%) said that citations to unpublished opinions are occasionally helpful, and another large minority (54 out of 123, or 44%) said that citations to unpublished opinions are seldom helpful. A smaller minority (14 out of 123, or 11%) said that citations to unpublished opinions are never helpful. Six judges (5%) said that citations to unpublished opinions are often helpful, and one judge (1%) said that such citations are very often helpful.

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5. Five judges wrote "none," which was not one of the choices offered.

3. Inconsistency

We asked: Which of the following best describes how often an attorney has cited an unpublished opinion of your court that is inconsistent or difficult to reconcile with a published opinion of your court? Choices were very often, often, occasionally, seldom, and never.

We received answers to this question from 79% of the judges asked. Almost all judges (119 out of 122, or 98%) said that cited unpublished opinions have been inconsistent or difficult to reconcile with published authority less than "often." (See Exhibit 12.) Many judges (33 out of 122, or 27%) said that cited unpublished opinions are occasionally inconsistent, most (67 out of 122, or 55%) said that cited unpublished opinions are seldom inconsistent, and a few (19 out of 122, or 16%) said that cited unpublished opinions are never inconsistent. Only two judges (2%) said that such opinions are often inconsistent, and only one judge (1%) said that such opinions are very often inconsistent. Although the majority response in most circuits was seldom or never, a substantial majority of Sixth Circuit judges (14 out of 20, or 70%) said that cited unpublished opinions are occasionally inconsistent with published authority.

Part III. Effect of New Local Rules (A Discouraging Circuit—the First Circuit—and a Permissive Circuit—the District of Columbia Circuit)

Two circuits have recently changed their local rules on citations to unpublished opinions. The courts of appeals for the First Circuit and the District of Columbia Circuit used to prohibit citations to their unpublished opinions in unrelated cases.

The court of appeals for the First Circuit still discourages such citations but permits them if they have persuasive value and if there is no published opinion on point. The First Circuit used to be a restrictive circuit and is now a discouraging circuit.

The court of appeals for the District of Columbia Circuit now permits citation to unpublished opinions as precedent. The District of Columbia Circuit used to be a restrictive circuit and is now a permissive circuit. Only unpublished opinions issued after the effective date of the rule change, January 1, 2002, maybe be cited in unrelated cases, however.

We asked these questions of the 10 judges in the First Circuit and the 11 judges in the District of Columbia Circuit. These judges told us that attorneys are now citing unpublished opinions more often, but this has not had an impact on their work.

1. Frequency of Citation

We asked: Since this new local rule took effect, have attorneys cited unpublished opinions much more often, somewhat more often, as often as before, somewhat less often, or much less often?

We received answers to this question from 70% of the judges in the First Circuit. Most judges (5 out of 7, or 71%) said that attorneys cite unpublished opinions more often than before; of these judges, one judge said that it happens much more often, and four judges said that it happens somewhat more often. (See Exhibit 13.) Two judges said that it happens as often as before.

We received answers to this question from 36% of the judges in the District of Columbia Circuit. Most judges (3 out of 4, or 75%) said that attorneys cite unpublished opinions somewhat more often than before; one judge said that it happens as often as before. (See Exhibit 13.)

2. Drafting Time

We asked: Since this new local rule took effect, has the amount of time that you have spent drafting unpublished opinions increased, decreased, or remained unchanged? If the amount of time that you have spent drafting unpublished opinions has changed, has the change been very great, great, small, or very small?

We received answers to these questions from 80% of the judges in the First Circuit. Almost all of the judges (7 out of 8, or 88%) said the amount of time they spend drafting unpublished opinions has not changed since they became citable; one judge said that there has been a small increase in time spent drafting unpublished opinions. (See Exhibit 14.)

We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that the amount of time they spend drafting unpublished opinions has not changed since they became citable. (See Exhibit 14.)

3. Work

We asked: Has the new local rule made your work harder or easier? If the new local rule has made your work harder or easier, has the change been very great, great, small, or very small?

We received answers to these questions from 80% of the judges in the First Circuit. Almost all of the judges (7 out of 8, or 88%) said that there has been no appreciable change in the difficulty of their work since their circuit adopted a new rule permitting citation to unpublished opinions; one judge said that the work has become harder, but it has been a very small change. (See Exhibit 15.)

We received answers to these questions from 36% of the judges in the District of Columbia Circuit. All four judges said that there has been no ap-

preciable change in the difficulty of their work since their circuit adopted a new rule permitting citation to unpublished opinions. (See Exhibit 15.)

Chapter Two:
Survey of Attorneys

A random sample of federal appellate attorneys expressed a substantial interest in citing unpublished opinions. Most attorneys said that a rule permitting citation to unpublished opinions would not impose a burden on their work, and most expressed support for such a rule.

To get a representative sample of attorneys practicing in each of the 13 circuits, we surveyed the authors of the briefs filed in the cases selected for the survey of case files—a random sample of cases in each circuit. So that our sample would be balanced between appellant and appellee attorneys, we surveyed authors of briefs in cases that were fully briefed, by which we mean a counseled brief was filed on both sides. We identified 375 attorneys to survey, ranging from 12 in the Fourth Circuit to 41 in the Eighth Circuit. We anticipate a response rate of approximately 82%. We have already received 286 responses (76%).[6] (See Exhibit 16.)

Part I. Citing Unpublished Opinions in Briefs

A substantial number of attorneys told us that they would have been likely to cite an unpublished opinion if their court's rules on such citations had been more lenient.

A. Wanted to Cite an Unpublished Opinion

1. Opinions by this Circuit

We asked: When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of the court of appeals for *this circuit* that you would have liked to cite, but did not because of the court's rules on citations to unpublished opinions?

Just over a third (39%) of the attorneys said "yes."[7] (See Exhibit 17.) More attorneys in restrictive circuits said "yes" (50%, ranging from 33% in the Second Circuit to 70% in the Federal Circuit) than in the discouraging circuits (36%, ranging from 25% in the Eleventh Circuit to 46% in the Eighth Circuit) or the permissive circuits (32%, ranging from 27% in the District of Columbia Circuit to 35% in the Fifth Circuit).

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6. Some attorneys who responded to the survey did not answer every question.

7. For the attorney survey, averages across circuits are computed so that each circuit is weighted equally.

2. Opinions by Other Courts

We asked: When doing your legal research for this appeal, did you encounter one or more *unpublished* opinions, memoranda, or orders of one or more *other courts* that you would have liked to cite, but did not because of the court's rules on citations to unpublished opinions?

A minority of attorneys (29%) said "yes." (See Exhibit 18.) More attorneys in restrictive circuits said "yes" (39%, ranging from 19% in the Second Circuit to 50% in the Ninth and Federal Circuits) than in the discouraging circuits (24%, ranging from 13% in the First and Eleventh Circuits to 50% in the Eighth Circuit) or the permissive circuits (27%, ranging from 12% in the Fifth Circuit to 42% in the Third Circuit).

B. Would Have Cited an Unpublished Opinion

1. Opinions by this Circuit

We asked: Had this circuit's rules on citation to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of the court of appeals for *this circuit* in your brief or briefs in this appeal?

Nearly half of the attorneys (47%) said "yes." (See Exhibit 19.) More attorneys in the restrictive circuits said "yes" (56%, ranging from 43% in the Second Circuit to 70% in the Federal Circuit) than in the discouraging circuits (45%, ranging from 33% in the First Circuit to 58% in the Sixth Circuit) or the permissive circuits (40%, ranging from 31% in the District of Columbia Circuit to 47% in the Third Circuit).

2. Opinions by Other Courts

We asked: Had the circuit's rules on citation to unpublished opinions been *more lenient* than they are, do you think you would have cited one or more unpublished opinions, memoranda, or orders of one or more *other courts* in your brief or briefs in this appeal?

Approximately one third of the attorneys said "yes" (34%). (See Exhibit 20.) More attorneys in the restrictive circuits said "yes" (36%, ranging from 29% in the Second Circuit to 50% in the Ninth Circuit) than in the discouraging circuits (34%, ranging from 13% in the First Circuit to 55% in the Eighth Circuit) or the permissive circuits (30%, ranging from 18% in the Fifth Circuit to 46% in the Third Circuit).

Part II. The Impact of the Proposed Rule

1. Burden

Attorneys reported that a rule permitting citation to unpublished opinions in unrelated cases would have little impact on their workloads.

We asked: What effect on your appellate work would a new rule of appellate procedure freely permitting citations to unpublished opinions in all circuits (but not changing whether such opinions are binding precedent or not) have on your federal appellate work? Choices were substantially more burdensome, a little bit more burdensome, no appreciable impact, a little less burdensome, and substantially less burdensome.

A plurality of attorneys (36%) said that a rule permitting citation to unpublished opinions in unrelated cases would have "no appreciable impact" on their workloads. (See Exhibit 21.) Regarding the choices ranging from substantially less burdensome to substantially more burdensome as a scale from 1 to 5, the average burden rating among the attorneys answering this question was 3.1, which corresponds to very slightly more burdensome. The average change in burden predicted by attorneys was slightly higher in the restrictive and discouraging circuits (3.1) than in the permissive circuits (3.0). The averages for individual circuits ranged from 2.7 in the Federal Circuit (slightly less burdensome) to 3.5 in the Fourth Circuit (slightly more burdensome).

Approximately 10% of the attorneys said that a rule freely permitting citation to unpublished opinions in unrelated cases would make their work substantially *more* burdensome. The rates for this answer by circuit were highest in the Ninth Circuit (29%) and the First Circuit (19%). The rates for all other circuits were 13% or less.

Approximately 8% of the attorneys said that a rule freely permitting citation to unpublished opinions in unrelated cases would make their work substantially *less* burdensome. The rates for individual circuits ranged from 0% in three circuits (the First, Second, and Seventh Circuits) to 18% in the Federal Circuit.

2. Open-Ended Question

We asked: The Appellate Rules Advisory Committee has proposed a new national rule, which would permit citation to the courts of appeals' unpublished opinions; what impact would you expect such a rule to have?

Although attorneys were not asked explicitly whether they would support or oppose the proposed rule, their support or opposition was often apparent from their answers. Of the 258 attorneys who answered this question, most were supportive of the proposed rule (142, or 55%), many opposed the proposed rule (53, or 21%), and many were neutral (63, or 24%). (See Appendix B for a compilation of the responses.)

Many attorneys commented on the implications of having a substantial amount of additional legal authority to cite. Eighty-five attorneys saw this as having access to additional valuable resources, but three attorneys worried about bias in the additional authority. Twenty-eight attorneys observed that a substantial amount of legal authority to cite entails a substantial amount of additional work, but four attorneys said that they already review the unpublished opinions anyway.

Many attorneys commented on how unpublished opinions are used. Three attorneys discussed strategies for using unpublished opinions even when it is not permissible to cite them. Twenty-three attorneys observed that unpublished opinions are not precedents, which implies that they would not be very useful. Another 16 attorneys provided additional comments calling into question the usefulness of unpublished opinions as authorities. Twelve attorneys opined that unpublished opinions tend not to be of as high quality as published opinions in their drafting, but one attorney said that the quality of unpublished opinions is good.

A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many unpublished opinions are available electronically, this reason appears to have less force. Twelve attorneys mentioned how accessible unpublished opinions are now, but 14 attorneys said that unpublished opinions are still often less accessible than published opinions.

Many attorneys commented on what impact on the court and the law the ability to cite unpublished opinions might have. Nineteen attorneys predicted an increase in legal consistency, but three attorneys predicted a decrease in consistency. Sixteen attorneys predicted that unpublished opinions would improve in quality if they could be cited. Three attorneys, on the other hand, predicted that unpublished opinions would just get shorter. Two attorneys predicted that such opinions would get longer. Five attorneys predicted that cases resulting in unpublished opinions would take longer to resolve.

Several attorneys addressed broad policy issues related to whether attorneys can cite unpublished opinions. Six attorneys opined that the ability to cite unpublished opinions would make courts more accountable. Three attorneys observed that the proposed rule would further blur the distinction between published and unpublished opinions. And 11 attorneys suggested that perhaps the distinction should be eliminated.

Fifty-three attorneys provided other comments: 26 were supportive of the proposed rule, 25 were neutral, and two were opposed to it.

Chapter Three: Survey of Case Files

From all of the appeals filed in federal courts of appeals in 2002, we selected at random 50 in each circuit.[8]

We determined whether each of the 650 appeals selected was resolved by a published opinion (86, or 13%) or an unpublished opinion (217, or 33%). Approximately half of the appeals (327) were not resolved by an opinion. We designated these cases as resolved by "docket judgments." The cases have docket entries stating how the cases were resolved (*e.g.*, appeal voluntarily dismissed, certificate of appealability denied) and an order to that effect may be in the case file, but not a document in the form of an opinion. A small number of the cases selected (20, or 3%) have not yet been resolved. (See Exhibit 22 for the individual circuits' data.) Of the opinions issued in these randomly selected cases, 28% were published. (See Exhibit 23 for the individual circuits' data.)

We examined all of the citations in the briefs and opinions filed in the 650 selected cases. We did not examine *pro se* briefs, and we did not examine memoranda supporting or opposing motions. One or more counseled briefs were filed in 40% of the cases. (See Exhibit 24 for the individual circuits' data.)

We used WestCheck and Westlaw to examine every citation to an opinion in every brief and opinion in the selected cases. This report describes all citations to unpublished opinions. The data are described by circuit.

We have finished examining case files for nine circuits. We cannot draw firm conclusions until we have examined all of the data, but the following is what we have observed so far.

There are citations to unrelated unpublished opinions—in a brief or an opinion—in approximately one-third of briefed cases, and this rate is approximately the same for restrictive, discouraging, and permissive circuits. Approximately half of the cases with citations to unpublished opinions have citations only to unpublished opinions of other courts—other courts of appeals, district courts, and state courts. Unpublished opinions of courts in restrictive circuits are cited to those courts less often than unpublished opinions by other courts are cited to the other courts.

We found opinions by courts of appeals in one restrictive circuit (one opinion in the Seventh Circuit),[9] one discouraging circuit (four opinions in the

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8. The number of cases filed in 2002 per circuit ranged from 1,105 for the District of Columbia Circuit to 12,365 for the Ninth Circuit. (See Exhibit 21.)

9. In *United States v. George*, 363 F.3d 666 (7th Cir. 2004), the court cited an opinion by the district court for the Eastern District of Pennsylvania that was initially pub-

Tenth Circuit),[10] and one permissive circuit (two opinions in the Third Circuit)[11] that cite unrelated unpublished opinions. We found three opinions by the court of appeals for the Tenth Circuit that cite its own unpublished opinions.[12] Interestingly, one of these opinions also cites an unpublished opinion by the court of appeals for the Ninth Circuit, a restrictive circuit.[13] We have not finished examining cases in the First, Sixth, District of Columbia, and Federal Circuits.

When unpublished opinions are cited, especially in briefs, they are often included in string citations, and it does not appear to someone not intimately involved in the cases that inclusion or exclusion of these citations would make much of a difference.

This chapter includes data, for the nine circuits that we have completed, on how the selected appeals were resolved, including how often they were resolved by published or unpublished opinions and how often these opinions are short or very short, and including descriptions of all citations to unrelated unpublished opinions in briefs and opinions. Once all the data have been collected and they can be analyzed, much of this material will be moved to an appendix.

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lished, but subsequently withdrawn by the court and replaced by a new published opinion.

10. In *United States v. Cruz-Alcala,* 338 F.3d 1194 (10th Cir. 2003), the court cited one of its own unpublished opinions and an unpublished opinion by the court of appeals for the Ninth Circuit. In *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004), the court cited one of its own unpublished opinions and an unpublished opinion by the court of appeals for the Third Circuit. In *Jackson v. Barnhart*, 60 Fed. Appx. 255, 2003 WL 1473554 (10th Cir. 2003), the court cited one of its own unpublished opinions.

The court published three opinions in *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02–2323, filed 12/03/2002, judgment 11/12/2004). First the court published an opinion by a two-judge panel staying the district court's preliminary injunction pending appeal. *O Centro Espirita Beneficiente Uniao do Vegetal*, 314 F.3d 463 (10th Cir. 2002). This opinion cites an unpublished opinion by the court of appeals for the Eighth Circuit. The appeal was initially decided by a three-judge panel in a published opinion, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003), but reheard *en banc* and decided by published *per curiam* opinion, *O Centro Espirita Beneficiente Uniao do Vegetal*, 389 F.3d 973 (10th Cir. 2004). An opinion concurring with the *en banc* opinion and an opinion concurring in part and dissenting in part also cite the unpublished Eighth Circuit opinion.

11. In *W.V. Realty Inc. v. Northern Insurance Co. of New York*, 334 F.3d 306 (3d Cir. 2003), the court cited three unpublished opinions by the district court for the Eastern District of Pennsylvania. In *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143 (3d Cir. 2005), a concurring judge cited an unpublished opinion by the district court for the Eastern District of Pennsylvania.

12. *See supra* note 10.

13. *Id.*

First Circuit[14]

Until recently, the First Circuit did not permit citation to unpublished opinions in unrelated cases, but now the circuit permits such citation if the opinion is persuasive and there is no published opinion on point.[15]

The publication rate in this sample will be from 16% to 26% once all the cases are resolved. Eight of the appeals were resolved by published opinions, two were resolved by unpublished opinions, 35 were resolved by docket judgments, and five cases have not yet been resolved.

We have not yet finished analyzing all of the cases for this circuit.

Second Circuit[16]

The Second Circuit does not permit citation to its unpublished opinions in unrelated cases.[17]

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14. Docket sheets and opinions are available on PACER. Both published and unpublished opinions are also on Westlaw. Briefs are usually filed electronically, but we have to contact court staff to receive the documents.

15. 1st Cir. L.R. 32.3(a)(2) ("Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.").

The circuit adopted a rule distinguishing published and unpublished opinions April 1, 1970, and adopted a rule proscribing citation to its unpublished opinions January 1, 1973. The circuit amended its rules on December 16, 2002, to allow citation to its unpublished opinions when they are persuasive and there is no published opinion on point.

16. Docket sheets are available on PACER. Most opinions are on the court's website and Westlaw. (Of the 13 cases in this sample resolved by published opinions or unpublished summary orders, all but one of the published opinions and all of the unpublished summary orders are on the court's website, and all of the published opinions and all but one of the unpublished summary orders are on Westlaw.) Briefs are on Westlaw for most cases with opinions on Westlaw. (Of the 12 published opinions and unpublished summary orders in this sample on Westlaw, all briefs are on Westlaw for all but one case resolved by a published opinion.)

17. *See* 2d Cir. L.R. § 0.23 ("Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.").

The court adopted its rule prohibiting citation to its unpublished opinions in unrelated cases November 31, 1973.

Of the 50 cases randomly selected, 37 are appeals from district courts (14 from the Eastern District of New York; 13 from the Southern District of New York; three each from the District of Connecticut, the Northern District of New York, and the Western District of New York; and one from the District of Vermont), one is an appeal from the United States Tax Court, and 12 are appeals from the Board of Immigration Appeals.

The publication rate in this sample will be from 14% to 22% once all the cases are resolved. Seven of the cases were resolved by published opinions (six signed and one *per curiam*), six were resolved by unpublished summary orders (five of which were published in the *Federal Appendix*), 33 were resolved by docket judgments, and four cases have not yet been resolved.

Published opinions averaged 6,733 words in length, ranging from 1,927 to 22,255. Unpublished summary orders averaged 937 words in length, ranging from 390 to 1,728. Four opinions (31%, all unpublished) were under 1,000 words in length, and two (15%) of these were under 500 words in length.

We expect approximately 13 of the appeals to be fully briefed. In 34 of the appeals no counseled brief was filed, and in three of the appeals a counseled brief was filed only for one side.[18]

There are citations to unpublished court opinions in nine of these cases. In one case the citation is only to an opinion in a related case; in eight cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Second Circuit, four are by courts of appeals for other circuits, 12 are by Second Circuit district courts, and four are by district courts in other circuits.

1. An unsuccessful criminal defendant, *see United States v. Fricker* (2d Cir. 02–1038, filed 01/16/2002, judgment 09/06/2002), cited two unpublished opinions by the court of appeals for the Second Circuit in a discussion of whether a convicted defendant merits a two-level upward sentencing adjustment if the defendant testifies at his trial. The brief cites a Supreme Court opinion to support an argument that an upward adjustment was not merited in this case and then cites two unpublished and one published Second Circuit opinions to support a statement that such upward adjustments should be reserved for clear lies.

2. Both the appellant and the appellee cited unpublished opinions in an unsuccessful appeal of the district court's refusal to set aside an arbitration decision concerning the shipping of steel slabs, *Duferco International Steel Trad-*

18. Twelve of the appeals have been fully briefed, and a respondent's brief is due in a thirteenth case. It is not clear whether or not briefs will ultimately be filed in a fourteenth case.

ing v. T. Klaveness Shipping A/S (2d Cir. 02–7238, filed 03/07/2002, judgment 06/24/2003), published opinion at 333 F.3d 383.

The appellee cited an unpublished opinion by the court of appeals for the Second Circuit with two published opinions by the same court to support a statement that the court reviews legal issues *de novo* and findings of fact for clear error in a review of a district court's confirmation of an arbitration award.

The appellee also cited three unpublished opinions by the district court for the Southern District of New York. The brief cites two of these opinions in its discussion of the standard of review of an arbitration award. The brief cites the third unpublished Southern District of New York opinion as part of quoted text from the published district court opinion in this case.

The appellant quoted an unpublished Southern District of New York opinion concerning the relationship between liability for damages and selection of a port.

3. Both the school district and a parent cited unpublished opinions in a successful appeal by the school district of a determination that it failed to provide a disabled student with an adequate individualized education program, *Grim v. Rhinebeck Central School District* (2d Cir. 02–7483, filed 04/30/2002, judgment 10/08/2003), published opinion at 346 F.3d 377.

The school district's appellant brief cites unpublished opinions by the courts of appeals for the Fourth and Tenth Circuits extensively. The brief also includes an unpublished opinion by the district court for the Southern District of New York in a string citation including a Supreme Court opinion and three published opinions by courts of appeals for the Sixth, Eighth, and Tenth Circuits.

The parent's appellee brief cites an unpublished opinion by the district court for the Northern District of Illinois to support a statement recognizing deference to a school district over educational policy.

4. A fire department's reply brief cites two unpublished opinions in the department's successful appeal of a judgment against it concerning efforts to shut down group housing for recovering alcoholics and drug addicts, *Tsombanidis v. City of West Haven* (2d Cir. 02–7470, filed 04/29/2002, judgment 12/15/2003), published opinion at 352 F.3d 565. (The city's consolidated appeal was unsuccessful.) The brief includes 13 opinions in a nine-page string citation to support a statement that mere enforcement of state law is not sufficient to establish liability where incorporation of state law into local regulations might. One of these opinions is an unpublished opinion by the district court for the Northern District of Illinois, and the citation shows that it was affirmed by the court of appeals for the Seventh Circuit. Another of these citations is a published opinion by the district court for the Southern District of Ohio, and the citation shows that it was affirmed in part and vacated in part by an unpublished opinion by the court of appeals for the Sixth Circuit.

5. Both the appellants and the appellees cited unpublished district court opinions in a mostly unsuccessful appeal by non-settling defendants of a partial settlement agreement in a multidistrict investment fraud case, *Ellis v. Daiwa Securities America, Inc.* (2d Cir. 02–7084, filed 01/23/2002, judgment 05/15/2003), published opinion at 329 F.3d 297.

The non-settling defendants and appellants cited unpublished opinions by the district courts for the Southern District of New York and the Northern District of California. Their brief includes the unpublished Southern District of New York opinion with a published Southern District of New York opinion in a *"see also"* string citation following a two-and-a-half page argument that a plaintiff cannot circumvent the Private Securities Litigation Reform Act over settlements by joining actions filed before its effective date. The brief includes the unpublished Northern District of California opinion with two other district court opinions in a string citation supporting a statement concerning which claims the Private Securities Litigation Reform Act controls.

The plaintiffs and appellees cited one unpublished opinion by the district court for the Eastern District of New York and three unpublished opinions by the district court for the Southern District of New York. Their brief includes the unpublished Eastern District of New York opinion in a string citation with five published opinions (one by the court of appeals for the Second Circuit, three by other federal courts of appeals, and one by a Second Circuit district court) to support an argument that the one satisfaction rule applies only where the settlement and judgment represent common damages. The brief cites one unpublished Southern District of New York opinion as an example of a case that deferred judgment reduction until trial, another unpublished Southern District of New York opinion to argue that it was both wrongly decided and distinguishable, and the third unpublished Southern District of New York opinion to rebut the appellants' reliance on it.

The settling defendants and appellees cited two unpublished opinions by the district court for the Southern District of New York and one unpublished opinion each by the district courts for the Eastern District of Pennsylvania and the Northern District of California. Their brief includes an unpublished Southern District of New York opinion with a published opinion by another district court as examples of courts barring non-settling defendants from asserting claims in an attempt to shift their liability to settling defendants. The brief cites the other Southern District of New York opinion only to argue that the appellants' citation to it is inapposite. The brief cites the unpublished opinion by the Eastern District of Pennsylvania with a published opinion by another district court to support a statement that adding plaintiffs after the effective date of the Private Securities Litigation Reform Act does not alter the commencement date of a pending action. And the brief cites the unpublished Northern District of California opinion to rebut the appellants' reliance on it.

6. In a pending asylum appeal, *Ni v. United States Department of Justice* (2d Cir. 02–4764, filed 11/18/2002, judgment pending), the government cited two unpublished opinions—one by the court of appeals for the Ninth Circuit and one by the district court for the Southern District of New York. The Ninth Circuit citation notes that a published Ninth Circuit opinion cited by the petitioner has been superseded by regulations. The brief cites the Southern District of New York opinion as in accord with a federal regulation and a U.S. Supreme Court opinion to support a statement that the court reviews a refusal by the Board of Immigration Appeals to reopen or remand a case for abuse of discretion.

7. In an unsuccessful appeal of a crack cocaine conviction, *United States v. King* (2d Cir. 02–1460, filed 08/05/2002, judgment 09/17/2003), published opinion at 345 F.3d 149, the defendant cited an unpublished opinion by the district court for the Southern District of New York concerning child pornography to support an argument that he did not knowingly possess more than five grams of cocaine unless he knew the amount was more than five grams.

8. In an unsuccessful appeal of a defendant's bankruptcy relief by a successful civil plaintiff, *In re Dairy Mart Convenience Stores, Inc.* (2d Cir. 02–5010, filed 02/01/2002, judgment 11/20/2003), published opinion at 351 F.3d 86, the standard of review section of the defendants' appellee brief includes a short "*see also*" string citation, which is headed by a published opinion by the court of appeals for the Second Circuit, and which then includes an unpublished opinion by the district court for the Southern District of New York, which in turn is cited as citing another published opinion by the court of appeals for the Second Circuit.

Third Circuit[19]

Citations to unpublished opinions are permitted in the Third Circuit, but there is a tradition against such citations in court opinions.[20]

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19. Docket sheets are on PACER. Published opinions and most unpublished opinions (17 out of 19 in this sample) are on the court's website, its intranet site, and Westlaw. Some briefs are on Westlaw. (Of the 25 cases with counseled briefs in this sample, all briefs are on Westlaw for seven cases, and some briefs are on Westlaw for two cases.)

20. *See* 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing.").

The court's internal operating procedure rule discouraging the court's citation to its unpublished opinions was adopted July 1, 1990. The original form did not include the words "by tradition."

Before 1994, the court's internal operating procedures allowed for four different types of opinions: for publication, memorandum, signed not for publication, and *per*

Of the 50 cases randomly selected, 46 are appeals from district courts (18 from the Eastern District of Pennsylvania, 11 from the District of New Jersey, 10 from the Middle District of Pennsylvania, four from the Western District of Pennsylvania, two from the District of Delaware, and one from the District of the Virgin Islands) and four are appeals from the Board of Immigration Appeals.[21]

The publication rate in this sample will be from 10% to 14% once all the cases are resolved. Five of the appeals were resolved by published signed opinions (including one with a concurrence, one with a partial concurrence, and one with a dissent), 19 were resolved by unpublished opinions (13 of which were signed and published in the *Federal Appendix* and six of which were *per curiam* opinions—including one opinion published in the *Federal Appendix* and five opinions tabled in the *Federal Appendix*), 24 were resolved by docket judgments, and two cases have not yet been resolved.

There are citations to unpublished court opinions in 14 of the cases. In four cases the citations are only to opinions in related cases; in 10 cases there are citations to unpublished court opinions in unrelated cases. One published opinion and one published concurrence cite unpublished district court opinions; in the other eight cases the citations to unrelated unpublished opinions are only in the briefs.

The four unrelated unpublished opinions cited by the court of appeals for the Third Circuit in these cases are all opinions by the district court for the Eastern District of Pennsylvania. Five of the unrelated unpublished opinions cited by the parties are by the court of appeals for the Third Circuit, one is by a court of appeals for another circuit, seven are by Third Circuit district courts, one is by a Third Circuit bankruptcy court, four are by district courts in other circuits, one is by a bankruptcy court in another circuit, and one is by Delaware's court of chancery.

1. In a published opinion, *W.V. Realty Inc. v. Northern Insurance Co. of New York,* 334 F.3d 306 (3d Cir. 2003) (overturning a Middle District of Pennsylvania jury award based on a finding of insurance bad faith, because irrelevant and prejudicial evidence concerning discovery misconduct was admitted at trial), resolving *W.V. Realty Inc. v. Northern Insurance Co. of New York* (3d Cir. 02–2910, filed 07/15/2002, judgment 06/27/2003), the court of appeals for the Third Circuit cited three unpublished opinions by the district court for the Eastern District of Pennsylvania to show how trial courts in Pennsylvania have handled discovery misconduct in bad-faith cases.

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curiam. In 1994 the last two categories were merged into one: non-precedential. On February 21, 2002, the court merged the memorandum and non-precedential categories, resulting in the two current categories of opinions: precedential and non-precedential.

21. In 2002, 3,686 cases were filed in the court of appeals for the Third Circuit.

The opinion cites two of these opinions and a published opinion by the district court for the Middle District of Pennsylvania to support the statement that "those cases in which courts have permitted bad faith claims to go forward based on conduct which occurred after the insured filed suit all involved something beyond a discovery violation, suggesting that the conduct was intended to evade the insurer's obligations under the insurance contract."

In two places, the court's opinion also cites an unpublished opinion by the district court for the Eastern District of Pennsylvania that the insurance company cited in its briefs, *Slater v. Liberty Mutual Insurance Co.*, 1999 WL 1789367 (E.D. Pa. 1999). First, the court's opinion cites a published opinion by Pennsylvania's superior court that quotes *Slater*. Second, the court's opinion cites *Slater* and a published opinion by Pennsylvania's court of common pleas following a discussion of a published opinion by Pennsylvania's superior court amplifying the statement that "[i]n those cases in which nothing more than discovery violations were alleged, courts have declined to find bad faith."

The insurance company's appellant brief cites four unpublished opinions by the district court for the Eastern District of Pennsylvania. The brief cites *Slater* and another unpublished opinion by the district court for the Eastern District of Pennsylvania in an argument that discovery misconduct is not relevant to insurance bad faith. The brief cites another two unpublished opinions by the district court for the Eastern District of Pennsylvania and a published opinion by Pennsylvania's superior court to support the statement that the state's bad-faith statute clearly mandates that certain issues be tried without a jury.

To rebut an assertion by the insured that the insurance company's opening brief misstates the holding of a published opinion by Pennsylvania's court of appeals, in its reply brief the insurance company quoted the Pennsylvania opinion extensively, and the quotation includes a citation by the Pennsylvania superior court to *Slater*. The brief also states that a published opinion by the district court for the Middle District of Pennsylvania cites *Slater* with approval.

2. In an unsuccessful appeal of a preliminary allocation of attorney fees in pending multidistrict litigation over fen-phen diet drugs, *Brown v. American Home Products Corp.* (3d Cir. 02–4074, filed 11/07/2002, judgment 03/20/2005), opinion published as *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 401 F.3d 143 (finding the preliminary allocation not yet appealable), a concurring judge cited an unpublished opinion by the district court for the Eastern District of Pennsylvania with seven published district court opinions from various circuits as examples of "decisions in which courts have delegated the task of allocating fees among counsel to lead counsel or have relied on an agreement reached by counsel."

In its appellee brief, the plaintiffs' management committee cited an unpublished opinion by the district court for the Eastern District of Pennsylvania and an unpublished opinion by the bankruptcy court for the District of Colorado. The brief includes the Eastern District of Pennsylvania opinion in a string of citations supporting the statement, "It is by now an unassailable proposition that a federal district court presiding over a mass tort MDL may properly award a fee to the plaintiffs' management structure appointed by it, payable out of the fees derived from the representation of the individual litigants whose cases are subject to coordinated pretrial proceedings in the MDL transferee court." The string includes citations to published opinions by four federal courts of appeals, two district courts within those circuits, and the Federal Judicial Center's *Manual for Complex Litigation, Third.* The brief includes the bankruptcy court opinion in a string of citations to support the statement, "This material [referring to material assembled by the committee for the benefit of other plaintiffs' attorneys] is classic 'attorney work product' entitled to protection against compelled disclosure to any person who does not provide fair compensation for the effort involved in creating it." The other citations in the string are three published opinions by the court of appeals for the Third Circuit.

3. In a case affirming a cocaine conviction on the granting of an *Anders* motion, *United States v. Shaw* (3d Cir. 02–2269, filed 05/09/2002, judgment 05/22/2003), unpublished opinion at 65 Fed. Appx. 851, 2003 WL 21197052, the government's appellee brief includes one published and two unpublished Third Circuit opinions in a footnote string citation supporting a statement that the court has disposed of wholly frivolous appeals by dismissal and by affirmance.

4. Similarly, in a case affirming a conviction for illegally entering the United States after conviction for an aggravated felony on the granting of an *Anders* motion, *United States v. Douglas* (3d Cir. 02–4103, filed 11/07/2002, judgment 06/16/2003), unpublished opinion at 67 Fed. Appx. 733, 2003 WL 21380555, the same government attorneys who appeared in the *Shaw* case included the same Third Circuit opinions—one published and two unpublished—in a footnote string citation supporting a statement that the court has disposed of appeals with *Anders* motions by dismissal and by affirmance.

5. In an unsuccessful appeal of the denial of summary judgment to emergency medical technicians who responded to a 911 call for a man having a seizure and responded to his erratic behavior by calling the police, after which the man died, *Rivas v. City of Passaic* (3d Cir. 02–3875, filed 10/17/2002, judgment 04/26/2004), opinion published at 365 F.3d 181, the briefs cite several unpublished opinions.

The technicians cited an unpublished opinion by the court of appeals for the Third Circuit in their appellant brief to support their argument that "the court below failed to comb the record and Local Rule 56.1 statement."

The plaintiffs cited two unpublished district court opinions. Their appellee brief cites an unpublished opinion by the district court for the Eastern District of Pennsylvania as holding that "it was foreseeable that a 911 call misdirected to a private ambulance company rather than the authorized Fire Department Rescue units appropriately staffed to respond to such emergencies would result in serious harm or death." The brief also cites an unpublished opinion by the district court for the Northern District of Illinois as holding that the "plaintiff had a valid claim against paramedics for failure to intervene to protect decedent's safety when the police placed decedent face down in the street, handcuffed him, choked him and inflicted additional injuries on him."

The technicians' reply brief includes an unpublished opinion by the court of appeals for the Sixth Circuit in a string of two citations intended to show that: "Consistent with the Third Circuit's holding in *Anela* [*v. City of Wildwood*, 790 F. 2d 1063 (3d Cir. 1986)], other courts have granted summary judgment for defendants in § 1983 cases where the plaintiff could not identify the accountable state actors and the circumstantial evidence of said actors' identities was too attenuated." The other opinion cited in the string is a published opinion by the court of appeals for the Tenth Circuit.

6. In an unsuccessful *pro se* appeal of an injunction against a malicious prosecution claim in a securities and bankruptcy action, *Signator Investors v. Olick* (3d Cir. 02–3437, filed 09/06/2002, judgment 11/07/2003), unpublished opinion tabled at *Signator Investors v. Olick*, 85 Fed. Appx. 874, 2003 WL 22881726, an investment company's appellee brief twice cites an unpublished opinion by the court of appeals for the Third Circuit as concluding that "the Supreme Court would not create a distinct cause of action for the spoliation of evidence brought outside an existing personal injury or products liability action."

7. In an unsuccessful ERISA appeal of summary judgment in favor of an employer in an action for severance benefits, *Young v. Pennsylvania Rural Electric Association* (3d Cir. 02–3946, filed 10/25/2002, judgment 11/17/2003), unpublished opinion at 80 Fed. Appx. 785, 2003 WL 22701472, the employer's appellee brief cites one unpublished and two published opinions by the court of appeals for the Third Circuit to support the statement, "'Serious consideration' of changes in plan benefits is sufficient to trigger a fiduciary duty to provide complete and truthful information about such changes in response to an employee's inquiry."

8. In an unsuccessful appeal of a jury verdict in favor of an insurance company in which the claimant claimed damage to his furniture store from a boulder dislodged by hurricane Floyd, *McGinnis v. Ohio Casualty Insurance Co.* (3d Cir. 02–2802, filed 06/28/2002, judgment 05/23/2003), unpublished opinion at 67 Fed. Appx. 127, 2003 WL 21205882, the insurance company cited one unpublished opinion and two published opinions by the district court for the Eastern District of Pennsylvania in its appellee brief to support the statement,

"It is clear that in the Eastern District, the Court is the gatekeeper in bad faith."

9. In an unsuccessful appeal of the denial of a preliminary injunction in a dispute over intellectual property rights in a french fry vending machine, *Silver Leaf, LLC v. Tasty Fries, Inc.* (3d Cir. 02–2767, filed 06/27/2002, judgment 10/30/2002), unpublished opinion at 51 Fed. Appx. 366, 2002 WL 31424691, the distributor's appellant brief cites two unpublished opinions by the district court for the Southern District of New York to support the statement that "bad faith on the part of the party seeking to enforce an exculpatory clause will invalidate such a clause." One of the opinions is included in a string citation with two published opinions by the appellate division of New York's supreme court, and the other is included in a footnote appended to the string citation and headed "*see also*."

10. In a voluntarily dismissed appeal of the district court for the District of Delaware's dismissal of a bankruptcy case, *In re Primestone Investment Partners L.P.* (3d Cir. 02–1409, filed 02/08/2002, judgment 05/28/2002), both the debtor and the creditor cited unpublished opinions in their briefs.

In addition to citing three unpublished orders issued in this case, the debtor's brief cites an unpublished opinion by the district court for the District of South Carolina. The brief includes this unpublished opinion in a string of three opinions that "have recognized that '[p]etitions in bankruptcy arising out of a two-party dispute do not per se constitute a bad-faith filing by the debtors.'" The other two opinions in the string are published opinions by the Ninth Circuit's bankruptcy appellate panel and the Middle District of Florida's bankruptcy court.

The creditor's brief cites two unpublished opinions—one by the bankruptcy court for the Middle District of Pennsylvania and one by a Delaware court of chancery. The brief cites the unpublished bankruptcy court opinion as quoted by a published opinion by the district court for the Eastern District of Pennsylvania listing good-faith factors. The brief cites the chancery court opinion and a law review article to support the theory that businesses on the verge of bankruptcy have an incentive to take large financial risks.

Fourth Circuit[22]

The court of appeals for the Fourth Circuit disfavors citation to its unpublished opinions in unrelated cases, but permits it if an opinion has "precedential value" and there is no published opinion on point.[23]

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22. Docket sheets and opinions are on PACER. Opinions are also on the court's website, its intranet site, and Westlaw. Some briefs are on Westlaw. (Of the 12 cases with counseled briefs in this sample, all briefs are on Westlaw for two cases, and some briefs are on Westlaw for one case.)

Of the 50 cases randomly selected, 48 are appeals from district courts (15 from the Eastern District of Virginia, 12 from the Eastern District of North Carolina, five from the District of South Carolina, four each from the Western District of Virginia and the Northern District of West Virginia, three from the District of Maryland, two each from the Middle District of North Carolina and the Western District of North Carolina, and one from the Southern District of West Virginia), and two are appeals from the Board of Immigration Appeals.[24]

The publication rate in this sample is 2%. One of the appeals was resolved by a published signed opinion, 30 were resolved by unpublished *per curiam* opinions published in the *Federal Appendix* (four of which were printed and the rest of which were typewritten[25]), and 19 were resolved by docket judgments.

The published opinion was 7,716 words in length. Unpublished opinions averaged 273 words in length, ranging from 28 to 2,143. Twenty-eight opinions were under 1,000 words in length (90%, all unpublished), and all of these were under 500 words in length.

Six of the appeals were fully briefed. In 39 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in 20 of these cases. In 17 cases the citations are only to opinions in related cases; in three cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Fourth Circuit and one is by a Fourth Circuit district court.

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23. 4th Cir. L.R. 36(c) ("In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. [¶] If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.").

The court's rule on citation to its unpublished opinions has been in effect essentially as it is since October 8, 1976.

24. The number of cases filed in the court of appeals for the Fourth Circuit in 2002 was 4,698.

25. The court used to "print" substantive unpublished opinions for distribution to a mailing list of interested parties, but as of fiscal year 2005, for budget reasons, the court now formats all unpublished opinions as "typewritten" and distributes them only electronically.

1. In *McWaters v. Rick* (4th Cir. 02–1436, filed 04/25/2002, judgment 12/27/2002), in which the court of appeals decided that a complaint by a former county supervisor against the county should be dismissed, *McWaters v. Cosby*, 54 Fed. Appx. 379, 2002 WL 31875539 (4th Cir. 2002), the supervisor's appellee brief quotes an unpublished Fourth Circuit opinion: "A panel of this Court has said that 'the fundamental tenet of equal protection jurisprudence is not changed by [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)].'"

2. *Bailey v. Kennedy* (4th Cir. 02–1818, filed 07/31/2002, judgment 11/17/2003), in which the court of appeals dismissed the plaintiffs' appeal as improperly interlocutory, was consolidated with the defendants' unsuccessful appeal of the denial of qualified immunity, *see Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003). The defendants' appellant brief in the consolidated case, which is also the defendants' cross-appellee brief in the selected case, includes an unpublished Fourth Circuit opinion in a string citation to support the statement, "In responding to calls involving a possible danger to human life, both the United States Supreme Court and the Fourth Circuit have repeatedly recognized that warrantless entries into homes by law enforcement officers are objectively reasonable." A parenthetical note in the citation suggests that the reason for the citation is to show the court's application of text from a Supreme Court opinion.

3. In an unsuccessful *pro se* employment discrimination appeal from the district court for the Eastern District of North Carolina, *Sharp v. Fishburne* (4th Cir. 02–2016, filed 09/10/2002, judgment 02/14/2003), unpublished opinion at 56 Fed. Appx. 140, 2003 WL 329404, the defendants' informal appellee brief cites an unpublished opinion by the district court for the Western District of North Carolina to support the statement, "One court has held that erroneous advice by a government agency causing plaintiff to delay her filing may toll the 180-day period if 'but for' that poor advice, plaintiff's charge would have been timely filed." The brief also cites an unpublished opinion by the court of appeals for the Fourth Circuit that partially affirmed a published district court opinion in order to complete the citation of the district court opinion.

Fifth Circuit[26]

As of January 1, 1996, unpublished opinions by the court of appeals for the Fifth Circuit are no longer precedent, but they may be cited as persuasive authority.[27]

Of the 50 cases randomly selected, 44 are appeals from district courts (11 from the Southern District of Texas; eight from the Eastern District of Texas; seven from the Western District of Texas; six from the Northern District of Texas; three each from the Eastern District of Louisiana, the Middle District of Louisiana, and the Southern District of Mississippi; and two each from the Western District of Louisiana and the Northern District of Mississippi), one is an appeal from the United States Tax Court, and four are appeals from the Board of Immigration Appeals.[28]

The publication rate in this sample is 6%. Three of the appeals were resolved by published signed opinions, 16 were resolved by unpublished *per curiam* opinions (11 of which are published in the *Federal Appendix*—six in cases on the court's conference calendar and five in cases on the court's summary calendar; and five of which are tabled in the *Federal Appendix*[29]—three in cases on the court's conference calendar and two in cases on the court's summary calendar), and 31 were resolved by docket judgments.

Published opinions averaged 4,805 words in length, ranging from 2,845 to 7,489. Unpublished opinions averaged 390 words in length, ranging from

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26. Docket sheets are on PACER. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished opinions are on the court's website and its intranet site. Most unpublished opinions are also on Westlaw. (Of the 16 cases in this sample resolved by unpublished opinions, the opinions for 11 of the cases are on Westlaw.) Most briefs are on Westlaw. (Of the 16 cases with counseled briefs in this sample, all briefs are on Westlaw for 11 cases, and some briefs are on Westlaw for one case.)

27. 5th Cir. L.R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document.").

The court adopted a rule distinguishing published from unpublished opinions October 15, 1981. Until 1996, the court regarded even unpublished opinions as precedential.

28. In 2002, 8,810 cases were filed in the court of appeals for the Fifth Circuit.

29. The court only sends published opinions to Westlaw. But as of July 2003, the court now posts unpublished opinions on the Internet and Westlaw retrieves them from there. So Westlaw has the text of only some unpublished opinions issued before July 2003, but is expanding its collection over time to include opinions back to 1998.

41 to 1,266. Fourteen opinions were under 1,000 words in length (74%, all unpublished), and 13 of these were under 500 words in length (68%).

Eleven of the appeals were fully briefed. In 33 of the appeals no counseled brief was filed, and in six of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. In one case the citations are only to opinions in related cases; in three cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

None of the unrelated unpublished opinions cited are by the court of appeals for the Fifth Circuit. One of the opinions is by a Fifth Circuit district court, one is by a district court in another circuit, and two are by Texas's courts of appeals.

1. In a partially successful appeal by the plaintiff in an action for automobile accident insurance benefits, *Hamburger v. State Farm Mutual Automobile Insurance Co.* (5th Cir. 02–21126, filed 10/14/2002, judgment 03/02/2004), opinion published at 361 F.3d 875, the appellant cited an unpublished opinion by the district court for the Northern District of Texas in a discussion of the reasonableness of the insurer's conduct in actions for bad faith.

2. In a successful civil appeal by the manufacturer of plumbing products in an action by a distributor for breach of a distribution contract, *Coburn Supply Co. v. Kohler Co.* (5th Cir. 02–41317, filed 09/18/2002, judgment 08/06/2003), published opinion at 342 F.3d 372, the defendant cited a different unpublished opinion in each of its briefs. The defendant's appellant brief devotes 21 lines of text, encompassing two paragraphs, to an unpublished opinion by the district court for the District of Massachusetts concerning reasonable notice in terminating a contract to distribute dental equipment. The reply brief identifies an unpublished opinion by a Texas court of appeals as a "particularly demonstrative example from Texas case law" concerning franchise agreements.

3. In an unsuccessful appeal of summary judgment awarded to a store in an action for false imprisonment of a suspected shoplifter, *Vilandos v. Sam's Club Wal-Mart Stores Inc.* (5th Cir. 02–20762, filed 07/15/2002, judgment 04/03/2003), unpublished opinion at 65 Fed. Appx. 509, 2003 WL 1923003, the shopper's appellant brief devotes 14 lines of text to a discussion of an unpublished opinion by a Texas court of appeals concerning how much time is reasonable to detain a suspected shoplifter.

Sixth Circuit[30]

The Sixth Circuit disfavors citation to an unpublished opinion in an unrelated case, but permits it if the opinion has "precedential value" and there is no published opinion on point.[31]

The publication rate in this sample will be from 12% to 16% once all the cases are resolved. Six of the appeals were resolved by published opinions, 19 were resolved by unpublished opinions, 23 were resolved by docket judgments, and two cases have not yet been resolved.

We have not yet finished analyzing all of the cases for this circuit.

Seventh Circuit[32]

The Seventh Circuit does not permit citation to unpublished opinions in unrelated cases.[33]

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30. Docket sheets are on PACER. Published opinions are on the court's website. Published and unpublished opinions are on the court's intranet site and on Westlaw.

31. 6th Cir. L.R. 28(g) ("Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court.").

The court adopted a rule prohibiting citation to its unpublished opinions April 11, 1973. On February 1, 1982, the rule was relaxed to permit citations to unpublished opinions if they "have precedential value" and there is no published opinion on point.

32. Docket sheets have been available on PACER since January 1, 2005. Before then, they were on the court's website. They are also on the court's intranet site. Published opinions are on the court's website, its intranet site, and Westlaw. Unpublished orders are only on Westlaw. Almost all briefs are on the court's website and its intranet site. (Of the 17 cases with counseled briefs in this sample, all briefs are on the court's website and its intranet site for 16 cases, but only the appellant's brief, not the appellee's brief or the appellant's reply brief, is on the court's website and intranet site for one case.) A few briefs are on Westlaw. (Of the 17 cases with counseled briefs in this sample, briefs are on Westlaw for three cases.)

33. 7th Cir. L.R. 53(b)(2)(iv) ("Unpublished orders: . . . Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (A) in any federal court within the circuit in any written document or in oral argument; or (B) by any such court for any purpose.").

The court adopted a distinction between published and unpublished opinions February 1, 1973, and has proscribed citation to its unpublished opinions in unrelated cases since then.

Of the 50 cases randomly selected, 48 are appeals from district courts (20 from the Northern District of Illinois, ten from the Northern District of Indiana, six from the Southern District of Indiana, four each from the Eastern District of Wisconsin and the Western District of Wisconsin, three from the Central District of Illinois, and one from the Southern District of Illinois) and two are appeals from the Board of Immigration Appeals.[34]

The publication rate in this sample is 16%. Eight of the appeals were resolved by published signed opinions, seven were resolved by unpublished orders published in the *Federal Appendix*, and 35 were resolved by docket judgments.

Published opinions averaged 4,147 words in length, ranging from 1,536 to 8,070. Unpublished opinions averaged 1,451 words in length, ranging from 373 to 3,106. Three opinions were under 1,000 words in length (20%, all unpublished), and one of these was under 500 words in length (7%).

Eleven of the appeals were fully briefed. In 33 of the appeals no counseled brief was filed, and in six of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. In one case the citation is only to an opinion in a related case; in three cases there are citations to unpublished opinions in unrelated cases. One published opinion cites a depublished district court opinion from another circuit; in the other two cases the citations to unrelated unpublished opinions are only in the briefs.

None of the unrelated unpublished opinions cited are by courts of appeals. Three of the unrelated unpublished opinions cited are by the district court for the Northern District of Illinois and one is by the district court for the Eastern District of New York. In addition, one case includes citations to a depublished opinion by the district court for the Eastern District of Pennsylvania.

1. In an unsuccessful appeal of a conviction for a counterfeit check scheme, *United States v. Mustapha* (7th Cir. 02–4000, filed 11/12/2002, judgment 04/14/2004), opinion published as *United States v. George*, 363 F.3d 666, the appellant's brief cites an opinion by the district court for the Eastern District of Pennsylvania that was initially published, but subsequently withdrawn by the court and replaced by a new published opinion. The brief acknowledges the vacation and reconsideration of the depublished opinion, but cites it extensively to support an argument against the reliability of fingerprint identification. The court cited the same depublished opinion in its rejection of the appellant's argument.

2. In an unsuccessful *pro se* appeal seeking *habeas corpus* relief for ineffective assistance of counsel, *United States v. Sims* (7th Cir. 02–2397, filed

34. In 2002, 3,463 cases were filed in the court of appeals for the Seventh Circuit.

05/30/2002, judgment 07/01/2003) (no opinion), the government's brief cites three unpublished district court opinions—two by the district court for the Northern District of Illinois and one by the district court for the Eastern District of New York.

The brief cites one unpublished opinion by the district court for the Northern District of Illinois to support the statement that "a large number of unsuccessful pleadings" filed by the appellant in district court "do not toll the period in which to file a timely Rule 60(b)(6) motion." The brief cites the other unpublished opinion by the district court for the Northern District of Illinois and a published opinion by the Northern District of Indiana to support the statement, "The final order or judgment denying a § 2255 motion becomes effective when docketed."

The brief cites an unpublished opinion by the district court for the Eastern District of New York and a published opinion by the court of appeals for the Second Circuit to support the statement, "What is a 'reasonable time' for purposes of Rule 60(b) is a 'question to be answered in light of all the circumstances.'" The brief also cites this unpublished opinion by the district court for the Eastern District of New York and a published opinion by the court of appeals for Third Circuit to support the statement, "Other courts have held delays of roughly the same time or less to be unreasonable under Rule 60(b)(6) where the errors alleged were or should have been known earlier."

3. In an unsuccessful appeal by an employer of bricklayers of a judgment in favor of the bricklayers' union requiring an audit of the employer's payroll records, *Bricklayers Local 21 of Illinois Apprenticeship and Training Program v. Banner Restorations, Inc.* (7th Cir. 02–3512, filed 09/27/2002, judgment 09/22/2004), published opinion at 385 F.3d 761, both parties cited an unpublished opinion by the district court for the Northern District of Illinois. The employer urged the court of appeals to follow the lead of a district court judge in requiring a signed agreement between an employer and a union for the employer to be bound by a collective bargaining agreement. The union countered that the unpublished opinion is consistent with the district court's judgment in the case appealed.

Eighth Circuit[35]

Unpublished opinions by the court of appeals for the Eighth Circuit are not precedent; citation to them in unrelated cases is disfavored, but permitted if they "have persuasive value" and there is no published opinion on point.[36]

Of the 50 cases randomly selected, 48 are appeals from district courts (11 from the Eastern District of Missouri; eight from the Eastern District of Arkansas; six from the Western District of Missouri; five each from the Southern District of Iowa and the District of Nebraska; four from the Western District of Arkansas; and three each from the Northern District of Iowa, the District of Minnesota, and the District of South Dakota),[37] one is an appeal from the United States Tax Court, and one is an appeal from the National Labor Relations Board.[38]

The publication rate in this sample is 34%. Seventeen of the appeals were resolved by published signed opinions (including one with a concurrence and a dissent), ten were resolved by unpublished *per curiam* opinions published in the *Federal Appendix*, and 23 were resolved by docket judgments.

Published opinions averaged 2,596 words in length, ranging from 1,521 to 6,149. Unpublished opinions averaged 220 words in length, ranging from 62 to 495. Ten opinions were under 1,000 words in length (37%, all unpublished), and all ten of these were under 500 words in length.

Twenty of the appeals were fully briefed. In 23 of the appeals no counseled brief was filed, and in seven of the appeals a counseled brief was filed only for one side.

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35. Docket sheets and opinions are on PACER. Opinions and most briefs are on the court's Web and intranet sites. (Of the 27 cases in this sample with counseled briefs, two briefs—one brief each in two cases—are not on the court's Web and intranet sites.) Opinions and some briefs are on Westlaw. (Of the 27 cases in this sample with counseled briefs, all briefs are on Westlaw for three cases, some briefs are on Westlaw for seven cases, and no briefs are on Westlaw for eight cases.)

36. 8th Cir. L.R. 28A(i) ("Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.").

The court adopted a distinction between published and unpublished opinions January 1, 1973, and originally prohibited citation to its unpublished opinions in unrelated cases. In 1996, the court amended its rules to allow citation to unpublished opinions if they are persuasive and there is no published opinion on point.

37. This sample did not include any appeals from the District of North Dakota.

38. In 2002, 3,189 cases were filed in the court of appeals for the Eighth Circuit.

There are citations to unpublished court opinions in 12 of these cases. In four cases the citations are only to opinions in related cases; in eight cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Four of the unrelated unpublished opinions cited are by the court of appeals for the Eighth Circuit, two are by courts of appeals for other circuits, two are by Eighth Circuit district courts, three are by district courts in other circuits, and five are by the United States Tax Court.

1. The State of Nebraska cited two unpublished opinions by the court of appeals for the Eighth Circuit in its appellee brief in an unsuccessful *pro se* prisoner appeal. *See Brunzo v. Clarke* (8th Cir. 02–2553, filed 06/14/2002, judgment 03/06/2003), unpublished opinion at 56 Fed. Appx. 753, 2003 WL 873986. Both of these opinions were issued on rehearings following vacations of published opinions cited by the *pro se* appellant, but the state cited the opinions for their holdings concerning the constitutionality of disciplinary segregation as well as to show the invalidity of the appellant's authorities.

2. In an unsuccessful appeal that challenged sentencing enhancements based on the victim's vulnerability and the fact that the defendant physically restrained the victim during the offense, *United States v. Brings Plenty* (8th Cir. 02–3971, filed 12/06/2002, judgment 07/08/2003), published opinion at 335 F.3d 732, both parties cited an unpublished opinion by the court of appeals for the Eighth Circuit. The government cited the opinion in its appellee brief to support the statement, "There appears [to be] only one case in this circuit addressing whether physical restraint enhancement applies in an instance in which a perpetrator dragged his victim from room to room in the course of assaulting her. In that case, this Court upheld the imposition of the physical restraint enhancement." The defendant's reply brief devotes more than a page to a discussion of this opinion, factually distinguishing it and also stating "since *Sazue* decided the issue before it without discussion, analysis, or citation to authority concerning the issue before this Court, it provides no persuasive value. Therefore, the government's citation of the case is inconsistent with Eighth Circuit Local Rule 28A(i)."

3. In an unsuccessful criminal sentence appeal, *United States v. Gammons* (8th Cir. 02–1003, filed 01/02/2002, judgment 10/02/2002), unpublished opinion at 47 Fed. Appx. 419, 2002 WL 31175539, the government's appellee brief cites an unpublished opinion of the court of appeals for the Eighth Circuit to support its argument that the defendant's sentence was within the sentencing guidelines range.

4. An employee cited several unpublished opinions in both his appellant brief and his reply brief in his successful appeal of the district court's conclusion that his previous discrimination settlement agreement with his employer barred a challenge to denial of disability retirement benefits. *See Seman v. FMC Corp. Retirement Plan* (8th Cir. 02–1883, filed 04/09/2002, judgment 07/01/2003),

published opinion at 334 F.3d 728. Two of these opinions are by courts of appeals for other circuits, one is by the Eighth Circuit district court from which the case is appealed, and one is by a district court in another circuit.

Both briefs cite an unpublished opinion from the court of appeals for the Tenth Circuit to support the argument that release of an employer from future actions does not necessarily release the employer's benefit plan. The reply brief also notes that a published district court opinion was reversed in part "on other grounds" by an unpublished opinion by the court of appeals for the Sixth Circuit.

The opening brief also quotes an unpublished opinion by the district court for the Eastern District of Louisiana to support the principle that release of an employer only releases the benefit plan if the plan is unfunded so that an action against the plan is really an action against the employer.

The brief cites an unpublished opinion by the district court for the District of Massachusetts and a published opinion by Minnesota's supreme court to support the statement that "a court is to construe a settlement agreement in a manner that reflects the intent of the parties."

5. In an employer's unsuccessful appeal of a remand to state court of a sexual harassment case, *Lindsey v. Dillard's, Inc.* (8th Cir. 02–1455, filed 02/21/2002, judgment 10/07/2002), published opinion at 306 F.3d 596, the employer cited an unpublished opinion by the district court for the Western District of Missouri, in both its appellant brief and its reply brief, to support the relevance of the amount of a settlement demand to the amount in controversy for jurisdictional purposes.

6. In an unsuccessful *pro se* prisoner's *habeas corpus* appeal, *Gibson v. Reese* (8th Cir. 02–3030, filed 08/09/2002, judgment 02/10/2003), unpublished opinion at 55 Fed. Appx. 793, 2003 WL 262491, the government's appellee brief includes in a string citation an unpublished opinion by the district court for the Eastern District of Pennsylvania. The issue concerns applying custody credit for parole revocation to the sentence for the crime that violated the terms of parole.

7. In an unsuccessful *pro se* appeal of the dismissal of an action to enjoin foreclosure on a mortgage, *Young v. United States Department of Housing and Urban Development* (8th Cir. 02–3117, filed 08/23/2002, judgment 10/20/2003), unpublished opinion at 78 Fed. Appx. 553, 2003 WL 22383010, the Department of Housing and Urban Development's appellee brief includes an unpublished opinion by the district court for the Northern District of Texas in a string citation concerning private rights of action against the department under the Fair Housing Act.

8. The Internal Revenue Service cited five unpublished tax court opinions in its appellee brief in an unsuccessful *pro se* appeal of a judgment denying a tax deduction for law school expenses by a legal librarian, *Galligan v. Commissioner of Internal Revenue* (8th Cir. 02–3734, filed 11/17/2002, judgment

04/15/2003), unpublished opinion at 61 Fed. Appx. 314, 2003 WL 1877174. The IRS's brief cites two unpublished tax court opinions to support the statement, "The Tax Court has also denied deductions to taxpayers who would have been economically disadvantaged by a switch to the career for which they were newly qualified." The brief includes the other three in a string citation supporting the statement, "Courts have thus routinely disallowed deductions for the law school expenses of taxpayers in any number of law-related occupations."

Ninth Circuit[39]

The court of appeals for the Ninth Circuit does not permit citation to its unpublished opinions in unrelated cases.[40]

Of the 50 cases randomly selected, 36 are appeals from district courts (ten from the Central District of California; six from the Southern District of California; four from the District of Arizona; three each from the Eastern District of California, the Northern District of California, the District of Nevada, and the Western District of Washington; two from the District of Idaho; and one each from the District of Alaska and the District of Montana)[41] and 14 are appeals from the Board of Immigration Appeals.[42]

The publication rate in this sample will be either 6% or 8% once all of the cases are resolved. Three of the appeals were resolved by published signed opinions, 12 were resolved by unpublished memorandum opinions published in the *Federal Appendix* (including one with a dissent), 34 were resolved by docket judgments, and one case has not yet been resolved.

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39. Docket sheets are on PACER. Published opinions are on the court's website and intranet site, and on Westlaw. Unpublished memorandum dispositions are on Westlaw and some are also on the court's intranet site. (Of the 12 cases in this sample resolved by unpublished memorandum dispositions, the memoranda are on the court's intranet site for four cases.) For cases resolved by published opinions or unpublished memorandum dispositions, most briefs are on Westlaw. (Of the 14 cases in this sample with counseled briefs resolved by opinion or memorandum disposition, all briefs are on Westlaw for 10 cases and some briefs are on Westlaw for two cases.)

40. 9th Cir. L.R. 36–3(b) ("Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit, except in the following circumstances. [Enumerated related–case circumstances follow.]).

The court adopted a distinction between published and unpublished opinions March 1, 1973, and has proscribed citation to its unpublished opinions since then, with the exception of a 30-month experimental period ending December 31, 2002.

41. This sample does not include any appeals from the District of Guam, the District of Hawaii, the District of the Northern Mariana Islands, the District of Oregon, or the Eastern District of Washington.

42. In 2002, 12,365 cases were filed in the court of appeals for the Ninth Circuit.

Published opinions averaged 2,284 words in length, ranging from 1,632 to 3,108. Unpublished opinions averaged 557 words in length, ranging from 123 to 1,495. Ten opinions were under 1,000 words in length (67%, all unpublished), and eight of these were under 500 words in length (53%).

Eleven of the appeals were fully briefed, but the briefs in one of these cases are under seal, apparently because of trade secrets. In 34 of the appeals no counseled brief was filed, and in five of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in four of these cases. All of these are citations to unrelated cases. All of these citations are in briefs, not opinions.

Two of the unrelated unpublished opinions cited are by the court of appeals for the Ninth Circuit, but citation to these opinions may have just been to complete citations to published opinions. The other unrelated unpublished opinions cited are district court opinions, one by a Ninth Circuit district court and three by other district courts.

1. In an unsuccessful appeal of the denial of asylum, *Reyes-Mota v. Ashcroft* (9th Cir. 02–72782, filed 08/29/2002, judgment 09/19/2003), unpublished opinion at 76 Fed. Appx. 159, 2003 WL 22176700, the petitioner cited a depublished opinion by the court of appeals for the Ninth Circuit. The brief notes that the depublished opinion was superseded by a published opinion and it may be that only citation to the superseding opinion was intended.

2. In a pending case concerning federal sentencing guidelines, *United States v. Murillo* (9th Cir. 02–50200, filed 04/24/2002, judgment pending), the government's appellee brief notes that a cited published opinion by the court of appeals for the Ninth Circuit was amended on denial of rehearing by a published opinion concerning the sentence and an unpublished opinion concerning the conviction.

3. In a successful reopening of an immigration case because of ineffective assistance of counsel, *Algarne v. Immigration and Naturalization Service* (9th Cir. 02–72045, filed 07/10/2002, judgment 05/20/2003), unpublished opinion at *Algarne v. Ashcroft,* 65 Fed. Appx. 167, 2003 WL 21186544, the petitioner cited an unpublished order by the district court for the Northern District of California to support the statement that his case was "squarely controlled by" a published opinion by the court of appeals for the Ninth Circuit.

4. The Bureau of Prisons cited three unpublished opinions by district courts in other circuits (one by the district court for the District of Kansas and two by the district court for the District of Minnesota) in an unsuccessful prisoner's appeal, *Bramwell v. United States Bureau of Prisons* (9th Cir. 02–55516, filed 03/27/2002, judgment 10/27/2003), opinion published at 348 F.3d 804. The unpublished opinions are listed in the Bureau's appellee brief in a footnote headed "*accord*" and appended to a string citation of ten published opinions supporting the Bureau's main legal argument.

Tenth Circuit[43]

The Tenth Circuit disfavors citation to unpublished opinions in unrelated cases, but permits it if they are persuasive and there is no published opinion on point.[44]

Of the 50 cases randomly selected, 46 are appeals from district courts (11 from the District of Utah, ten from the District of Colorado, eight from the District of New Mexico, six from the Western District of Oklahoma, five from the District of Kansas, four from the Northern District of Oklahoma, and two from the District of Wyoming),[45] three are appeals from the Board of Immigration Appeals, and one is an appeal from the Office of Workers' Compensation Programs.

The publication rate in this sample will be from 18% to 22% once all the cases are resolved. Nine of the cases were resolved by published opinions (including one with two concurrences; one with a dissent; and a *per curiam en banc* opinion with two opinions concurring in part and dissenting in part, one opinion concurring, and one opinion dissenting); 16 were resolved by unpublished orders published in the *Federal Appendix* (13 with the designation "order and judgment"—one with a dissent—and three with the designation "order"); 23 were resolved by docket judgments; and two cases have not yet been resolved.

Published opinions averaged 9,535 words in length, ranging from 2,981 to 33,814. Unpublished orders averaged 1,428 words in length, ranging from 327 to 6,003. Ten opinions were under 1,000 words in length (40%, all unpublished), and five of these were under 500 words in length (20%).

Seventeen of the appeals were fully briefed. In 30 of the appeals no counseled brief was filed, and in three of the appeals a counseled brief was filed only for one side.

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43. Docket sheets and some opinions are on PACER. (Of the 25 cases in this sample resolved by opinions, the opinions are on PACER for three cases.) Opinions are on the court's intranet site and Westlaw. A few briefs are on Westlaw. (Of the 17 cases in this sample that were resolved by opinions and in which briefs were filed, all briefs are on Westlaw for two cases and some briefs are on Westlaw for two cases.)

44. 10th Cir. L.R. 36.3(B) ("Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.").

Until 1986, the court permitted citations to its unpublished opinions. The court adopted a rule prohibiting citation to its unpublished opinions in unrelated cases November 18, 1986. The court relaxed its rules to permit citation to persuasive unpublished opinions if there is no published opinion on point November 29, 1993.

45. This sample did not include any appeals from the Eastern District of Oklahoma.

There are citations to unpublished court opinions in 12 of the cases. In three cases the citations are only to opinions in related cases; in nine cases there are citations to unpublished opinions in unrelated cases. In four cases the court cited unrelated unpublished opinions; in five other cases only the parties cited unrelated unpublished opinions.

Of the unrelated unpublished opinions cited by the court in these cases, three are by the court of appeals for the Tenth Circuit and three are by courts of appeals for other circuits. Of the unrelated unpublished opinions cited only by the parties in these cases, eight are by the court of appeals for the Tenth Circuit, three are by courts of appeals for other circuits, six are by district courts for Tenth Circuit districts, and 20 are by other district courts.

1. Affirming a drug sentence, *United States v. Cruz-Alcala* (10th Cir. 02–2290, filed 10/22/2002, judgment 08/11/2003), published opinion at 338 F.3d 1194, the court cited one of its own unpublished opinions and an unpublished opinion by the court of appeals for the Ninth Circuit.

In a discussion of whether the defendant waived his right to counsel in prior misdemeanor prosecutions used to enhance his sentence, the opinion states the following: "There is, however, no precedential authority from this court regarding whether an involuntary or unknowing waiver of counsel causes a 'complete denial of counsel.'" The opinion then cites an unpublished Tenth Circuit opinion with the signal *"but cf."*

To support the court's determination of which subsection of the sentencing guidelines controls enhancement for a prior sentence to probation and time served, the opinion cites four opinions by other circuits, including an unpublished opinion by the court of appeals for the Ninth Circuit.

2. In an opinion determining that an immigration judge should have afforded the petitioner's claims of Chinese ethnicity more credibility and evaluated the persecution of ethnic Chinese in Indonesia, *Wiransane v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004), resolving 02–9555 (filed 08/15/2002, judgment 04/27/2004), the court cited unpublished opinions by the courts of appeals for the Tenth and Third Circuits to support a statement than an immigrant's claim for asylum or restriction on removal depends on current conditions: "Subsequent events in Indonesia may well undercut Petitioner's claims."

3. In an opinion reversing the rescission of Social Security disability benefits, *Jackson v. Barnhart*, 60 Fed. Appx. 255, 2003 WL 1473554 (10th Cir. 2003), resolving 02–5065 (filed 05/20/2002, judgment 03/24/2003), the court cited an unpublished Tenth Circuit opinion as an example of its applying a regulation concerning disability coverage for alcoholism even after other related regulations had been amended.

4. In a case affirming *en banc* a preliminary injunction against enforcement of drug laws against religious use of a hallucinogenic tea called *hoasca*, *O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft* (10th Cir. 02–2323, filed

12/03/2002, judgment 11/12/2004), published opinion at 389 F.3d 973, both the court and the parties cited unpublished opinions.

In an opinion by a two-judge panel staying the preliminary injunction pending resolution of the appeal, the court cited an unpublished opinion by the court of appeals for the Eighth Circuit with a published opinion by the district court for the Northern District of Indiana to support a statement that "Even after enactment of [the Religious Freedom Restoration Act], religious exemptions from or defenses to the [Controlled Substances Act] have not fared well." An opinion concurring with the *en banc* opinion and an opinion concurring in part and dissenting in part also cite this unpublished Eighth Circuit opinion. The first of these opinions cites the Eighth Circuit opinion for the same reason that the panel opinion does, and the second of these opinions cites it to distinguish it. The government also cited this unpublished Eighth Circuit opinion in its appellant brief to the three-judge panel that initially heard the appeal.

The plaintiffs cited unpublished opinions in both their brief to the three-judge panel that initially heard the appeal and their brief to the *en banc* court. Their panel brief cites an unpublished Tenth Circuit opinion with a published Sixth Circuit opinion to support the statement, "A party has not carried its burden of proof if it has not persuaded the factfinder." In a discussion of the standard for a preliminary injunction, their *en banc* brief cites a different unpublished Tenth Circuit opinion to support the statement that the court has recently affirmed that the proper standard for determining the *status quo* is "the last uncontested status." In a discussion of the relative weight of preserving the *status quo* and preventing irreparable harm, the brief cites a published Tenth Circuit opinion to support a statement that preservation of the *status quo* eclipses prevention of irreparable harm, and the brief cites an unpublished opinion by the district court for the District of Kansas to support a statement that "Other courts in this circuit have held that the purpose is dual; the prevention of irreparable harm and maintenance of the status quo."

The government's *en banc* reply brief cites the same unpublished Tenth Circuit opinion as cited by the plaintiffs *en banc* to support a statement that "the only possible conclusion is that the injunction here dramatically changes the status quo."

5. In a pending appeal of a dismissal of a Colorado state prisoner's complaint, *Beierle v. Colorado Department of Corrections* (10th Cir. 02–1502, filed 11/13/2002, judgment pending), the prisoner cited four unrelated unpublished opinions—three by the court of appeals for the Tenth Circuit and one by the court of appeals for the Eighth Circuit—to support an argument for the appointment of counsel.

The brief cites two of the Tenth Circuit cases to support a statement that "Although this Court has not addressed in a published opinion the standards applicable to [a request for appointed counsel,] it has indicated in at least two

unpublished decisions that if a district court finds that a plaintiff satisfies this Circuit's standards for appointment of counsel under section 1915(e), the district court must make a 'good faith effort to find an attorney to represent him.'" The brief cites the third unpublished Tenth Circuit opinion in a string of citations in "accord" with the Supreme Court's statement that "[S]ection 1915 'informs lawyers that the court's requests to provide legal assistance are *appropriate* requests, hence not to be ignored or disregarded in the mistaken belief that they are improper,' and 'may meaningfully be read to legitimize a court's request to represent a poor litigant and therefore to confront the lawyer with an important ethical decision.'"

The brief leads a string of citations by other jurisdictions with a citation to the unpublished Eighth Circuit opinion to support the statement, "The majority of courts to have considered the issue ... have concluded that federal courts have the inherent power to appoint counsel for indigent parties in appropriate civil cases." In a footnote, the opinion is cited to show that the court of appeals reached a holding in conflict with a published holding by a district court in the Eighth Circuit adverse to the prisoner's position.

The state cited two of the unpublished Tenth Circuit opinions to rebut them, and the prisoner cited these and the unpublished Eighth Circuit opinion in his reply brief.

6. In an unsuccessful appeal of an unsuccessful claim of age discrimination in employment, *Kaster v. Safeco Insurance Co.* (10th Cir. 02–3386, filed 10/28/2002, judgment 12/03/2003), unpublished opinion at 82 Fed. Appx. 28, 2003 WL 33854633, the employer's brief includes three unpublished opinions in a string citation of eight opinions supporting a statement that the plaintiff "does not attempt to distinguish the numerous ... authorities cited by the district court in its Opinion" to support a conclusion that the plaintiff did not establish a *prima facie* case. One of the unpublished opinions is by the court of appeals for the Tenth Circuit, one is by the court of appeals for the Seventh Circuit, and one is by the district court for the Southern District of Florida. The brief also cites an unpublished opinion by the district court for the District of Kansas to support a statement that "the equitable tolling doctrine has never been applied to provide plaintiff with an additional 180 or 300 day time period to file a charge." The plaintiff's reply brief distinguishes the three unpublished opinions that the employer's brief said he had not distinguished.

7. In a pending appeal concerning the constitutionality of requiring a two-thirds supermajority for Utah voters to enact hunting legislation, *Initiative and Referendum Institute v. Walker* (10th Cir. 02–4123, filed 07/24/2002, judgment pending), the appellees defending constitutionality cited an unpublished Tenth Circuit opinion as upholding Wyoming's supermajority requirement for initiatives against a First Amendment challenge. The plaintiffs' appellant brief distinguishes this opinion and notes in a footnote their previ-

ous objection to the defendants' citation to the unpublished opinion, but acknowledges that the district court relied on it.

An *amicus curiae* brief cites an unpublished opinion by the district court for the Eastern District of Pennsylvania to support the principle that "individuals interested in wildlife issues in general" are not a discrete and insular minority. The opinion is cited as citing published opinions by the courts of appeals for the Third and Ninth Circuits.

8. In an unsuccessful appeal of a criminal sentence for bank fraud on a plea of guilty, *United States v. Gordon* (10th Cir. 02–4171, filed 09/17/2002, judgment 06/18/2003), published opinion at 332 F.3d 1307, the appellant's brief quotes an unpublished opinion by the court of appeals for the Tenth Circuit to support an argument that the sentence should be reduced from 84 months to 70 months to reflect "only the actual checks that were fraudulently made and intended to be cashed," acknowledging that "counsel could not find a Tenth Circuit opinion directly on point."

9. In a tobacco company's partially successful appeal of a multi-million dollar judgment in favor of a smoker who lost both legs as a result of smoking-related peripheral vascular disease, *Burton v. R.J. Reynolds Tobacco Co.* (10th Cir. 02–3262, filed 07/23/2002, judgment 02/09/2005), published opinion at 397 F.3d 906, both parties, especially the tobacco company, cited unpublished opinions extensively. The tobacco company cited 18 unpublished opinions—one by the court of appeals for the Sixth Circuit, three by district court for the District of Kansas, and 14 by district courts in other circuits. The plaintiff cited five unpublished opinions—one by the District of Kansas and four by districts in other circuits.

Eleventh Circuit[46]

In the Eleventh Circuit, unpublished opinions are not binding precedent, but they may be cited as persuasive authority.[47]

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46. Docket sheets are on PACER, and they include links to many briefs. (Docket sheets in criminal cases became available electronically December 1, 2004. Of the 23 cases with in this sample with briefs, all briefs are on PACER for 11 cases, some briefs are on PACER for seven cases, and no briefs are on PACER for five cases.) Published opinions are on Westlaw. Unpublished opinions issued before April 16, 2005, are not available electronically. Most briefs are on Westlaw. (Of the 20 cases with counseled briefs resolved by opinion, all briefs are on Westlaw for 16 cases, some briefs are on Westlaw for one case, and no briefs are on Westlaw for three cases.)

47. 11th Cir. L.R. 36–2 ("Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.").

Of the 50 cases randomly selected, 49 are appeals from district courts (11 from the Southern District of Florida, eight each from the Middle District of Florida and the Northern District of Georgia, six from the Middle District of Alabama, five from the Middle District of Georgia, four from the Southern District of Georgia, and two each from the Northern District of Alabama and the Southern District of Alabama) and one is an appeal from the Board of Immigration Appeals.[48]

The publication rate in this sample is 2%. One of the appeals was resolved by a published *per curiam* opinion, 19 were resolved by unpublished *per curiam* opinions tabled in the *Federal Appendix* (one with a partial dissent), and 30 were resolved by docket judgments.

The published opinion was 679 words in length. Unpublished opinions averaged 1,446 words in length, ranging from 93 to 3,871. Ten opinions were under 1,000 words in length (50%, one published and nine unpublished), and eight were under 500 words in length (40%, all unpublished).

Fifteen of the appeals were fully briefed. In 27 of the appeals no counseled brief was filed, and in eight of the appeals a counseled brief was filed only for one side.

There are citations to unpublished court opinions in seven of these cases. In one case the citations are only to opinions in related cases; in six cases there are citations to unpublished opinions in unrelated cases. All of the citations to unrelated unpublished opinions are in briefs, not opinions.

Three of the unrelated unpublished opinions cited are by the court of appeals for the Eleventh Circuit, eight are by courts of appeals for other circuits, one is by a district court in another circuit, and one is by New York's supreme court.

1. Both the government and the defendant cited unpublished appellate opinions in an unsuccessful appeal of a sentencing designation of career offender and an order of restitution, *United States v. Martinez* (11th Cir. 02–14267, filed 08/05/2002, judgment 03/18/2004), unpublished opinion tabled at 99 Fed. Appx. 885, 2004 WL 625765 (published opinion withdrawn on the defendant's successful motion for rehearing).

The government's appellee brief cites an unpublished opinion by the court of appeals for the Eleventh Circuit to support the statement that "as a panel of this Court has observed, an order of 'immediate' restitution may help an inmate earn higher wages while in prison through the Inmate Financial Responsibility Program." The brief also includes an unpublished opinion by the court of appeals for the Sixth Circuit in a string of nine opinions—

At the time the Eleventh Circuit split from the Fifth, unpublished opinions in the Fifth Circuit were precedential. The court adopted a rule designated unpublished opinions non-precedential April 1, 1987.

48. In 2002, 7,367 cases were filed in the court of appeals for the Eleventh Circuit.

including eight published opinions by the courts of appeals for the Eleventh Circuit, the Sixth Circuit, and two other circuits—supporting the statement, "A deferential standard of review for a district court's factual finding regarding prior offenses was followed before *Buford* [*v. United States*, 532 U.S. 59 (2001),] and, of course, after it."

The defendant's reply brief cites four unpublished federal appellate opinions. These include the same unpublished Sixth Circuit opinion in its rebuttal of the government's string citation. The brief also cites an unpublished opinion by the court of appeals for the Fourth Circuit as authority for the standard of review in determining whether the defendant was a career offender. And the brief includes two unpublished opinions—one by the court of appeals for the Second Circuit and one by the court of appeals for the Fourth Circuit—with three published opinions—one by the court of appeals for the Eleventh Circuit and two by courts of appeals for other circuits—to support the statement, "The failure of the district court's restitution order in this case to comply with express statutory requirements amounts to plain error."

2. In an unsuccessful appeal of a conviction for illegal reentry and use of a false passport, *United States v. Urbaez* (11th Cir. 02–11675, filed 03/28/2002, judgment 09/18/2002), unpublished opinion tabled at 49 Fed. Appx. 289, 2002 WL 31174134, the government cited an unpublished opinion by the court of appeals for the Eleventh Circuit and an unpublished opinion by the court of appeals for the First Circuit. The brief cites the unpublished Eleventh Circuit opinion to show that the court has already rejected an argument to overrule a published Eleventh Circuit opinion. The brief cites the unpublished First Circuit opinion in stating that a published Eleventh Circuit opinion adopted its reasoning.

3. In a partially successful securities appeal, *Lockhart Holdings, Inc. v. Doyle Painting Contractors, Inc.* (11th Cir. 02–10295, filed 01/17/2002, judgment 07/03/2002), unpublished opinion tabled at 45 Fed. Appx. 886, 2002 WL 1676368, both parties cited an unpublished opinion by the court of appeals for the Eleventh Circuit and an unpublished opinion by New York's supreme court.

The appellant's brief states that the district court relied on the unpublished Eleventh Circuit opinion, which partially affirmed and partially reversed a published opinion by the district court for the Middle District of Georgia, which the brief also cites. The appellee's brief states that in the unpublished opinion the court affirmed the portion of the lower court's opinion adverse to the appellant's argument.

The appellant's brief states that "the only cases that we have been able to locate on point completely support [the appellant's] position." The two opinions cited are a published New York appellate opinion and an unpublished opinion by New York's trial court. In a footnote, the appellee's brief rebuts the appellant's reliance on the unpublished opinion.

4. The appellant cites an unpublished opinion in each of its briefs in an appeal dismissed by stipulation concerning an award of attorney fees in an employment discrimination action, *Bogle v. McClure* (11th Cir. 02–14980, filed 09/12/2002, judgment 01/05/2004).

The defendants' appellant brief twice cites an unpublished opinion by the court of appeals for the Fourth Circuit. First the brief includes the opinion with two Supreme Court opinions in a string citation following a Supreme Court quotation. In a parenthetical, the unpublished opinion is quoted as stating, "in measuring the degree of a plaintiff's success, 'only those changes in a defendant's conduct which are mandated by a judgment . . . may be considered.'" On the following page, the brief cites the same opinion and parenthetically quotes it as stating "When injunctive relief is sought and denied, 'there is even less occasion to permit a change in conduct to serve as the basis for a fee award under § 1988.'"

The defendant's reply brief invites the reader to compare three opinions justifying reductions in attorney fee awards for unsuccessful claims—a published opinion by the court of appeals for the Seventh Circuit, an unpublished opinion by the district court for the Eastern District of Louisiana, and a published opinion by the district court for the District of Nevada.

5. In an unsuccessful appeal by an employer of an employment discrimination judgment in favor of the plaintiff, and a partially successful cross-appeal by the plaintiff of dismissed claims, *Brewton v. Georgia Department of Public Safety* (11th Cir. 02–14782, filed 09/03/2002, judgment 07/17/2003), unpublished opinion tabled at 77 Fed. Appx. 505, 2003 WL 21804100, the defendant's reply brief devotes a ten-line paragraph to a discussion of an unpublished opinion by the court of appeals for the Ninth Circuit in which the court "reversed an outcome-determinative sanction under Rule 37(c) as abuse of discretion."

6. In an unsuccessful appeal of a drug sentence, *United States v. Tolbert* (11th Cir. 02–11460, filed 04/11/2002, judgment 12/23/2002), unpublished opinion tabled at 55 Fed. Appx. 901, 2002 WL 31932873, the government's appellee brief cites an unpublished opinion by the court of appeals for the Ninth Circuit to support an argument for a three-level enhancement.

District of Columbia Circuit[49]

Citation to unrelated unpublished opinions was proscribed before 2002, but is now permitted.[50] But unpublished district court opinions may not be cited in

49. Docket sheets and disposition orders are on PACER. Published opinions and some unpublished disposition orders are on Westlaw. The court has provided us with documents not available online.

unrelated cases, and unpublished opinions of other courts of appeals may only be cited as permitted in briefs to those courts.[51]

The publication rate in this sample will be from 24% to 30% once all of the cases are resolved. Twelve of the appeals were resolved by published opinions, 20 were resolved by unpublished opinions, 15 were resolved by docket judgments, and three cases have not yet been resolved.

We have not yet finished analyzing all of the cases for this circuit.

Federal Circuit[52]

The Federal Circuit does not permit citation to unpublished opinions in unrelated cases.[53]

The publication rate in this sample will be from 12% to 14% once all of the cases are resolved. Six of the appeals were resolved by published opinions, 41 were resolved by unpublished opinions, two were resolved by docket judgments, and one case has not yet been resolved.

We have not yet finished analyzing all of the cases for this circuit.

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50. D.C. Cir. L.R. 28(c)(1). *See* D.C. Cir. L.R. 28(c)(1)(B) ("All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions) entered on or after January 1, 2002, may be cited as precedent.").

51. D.C. Cir. L.R. 28(c)(2).

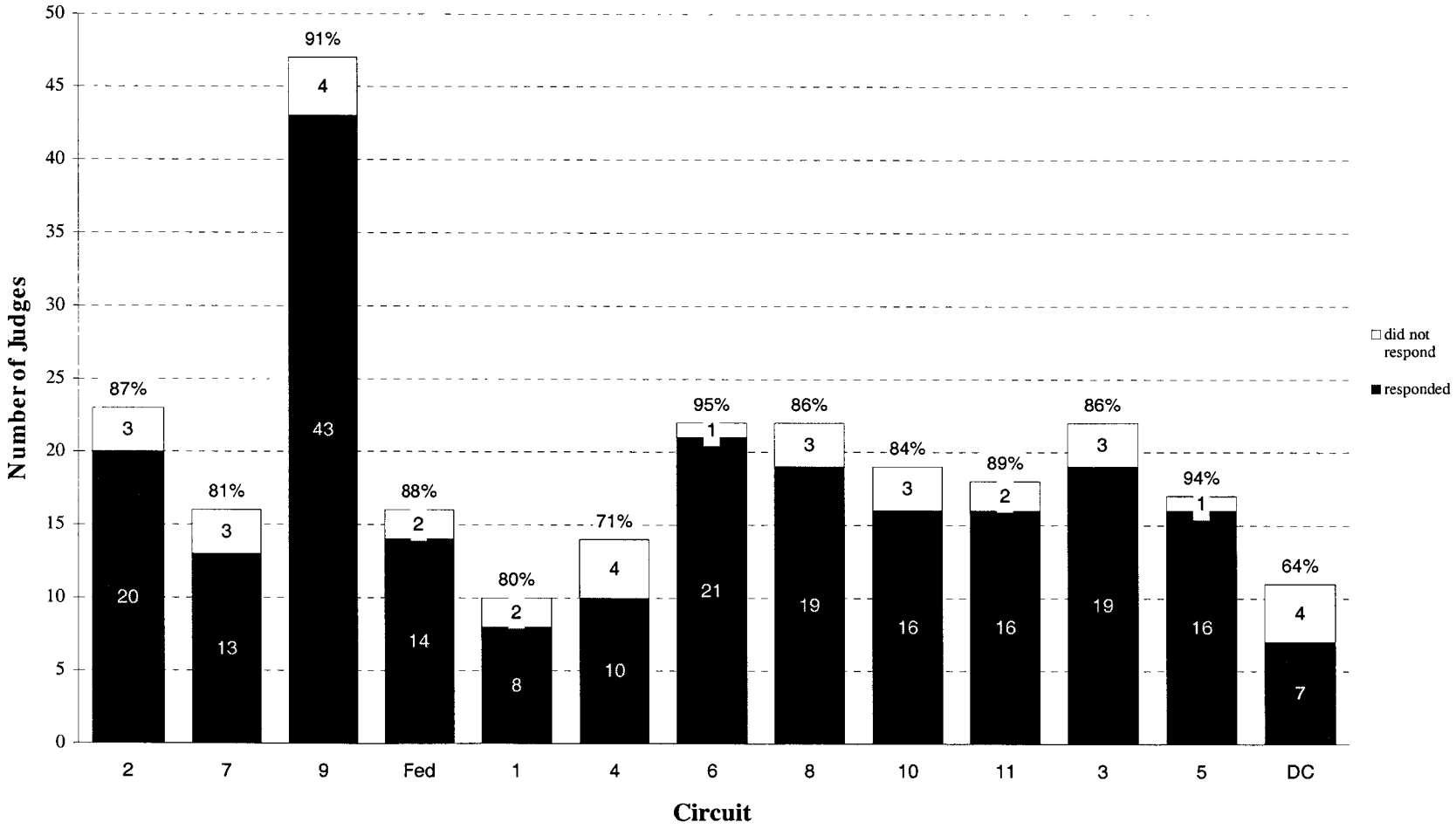
52. Docket information is available through PACER. Opinions and some briefs are on Westlaw. The court has provided us with documents not available online.

53. Fed. Cir. L.R. 47.6(b) ("An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent.").

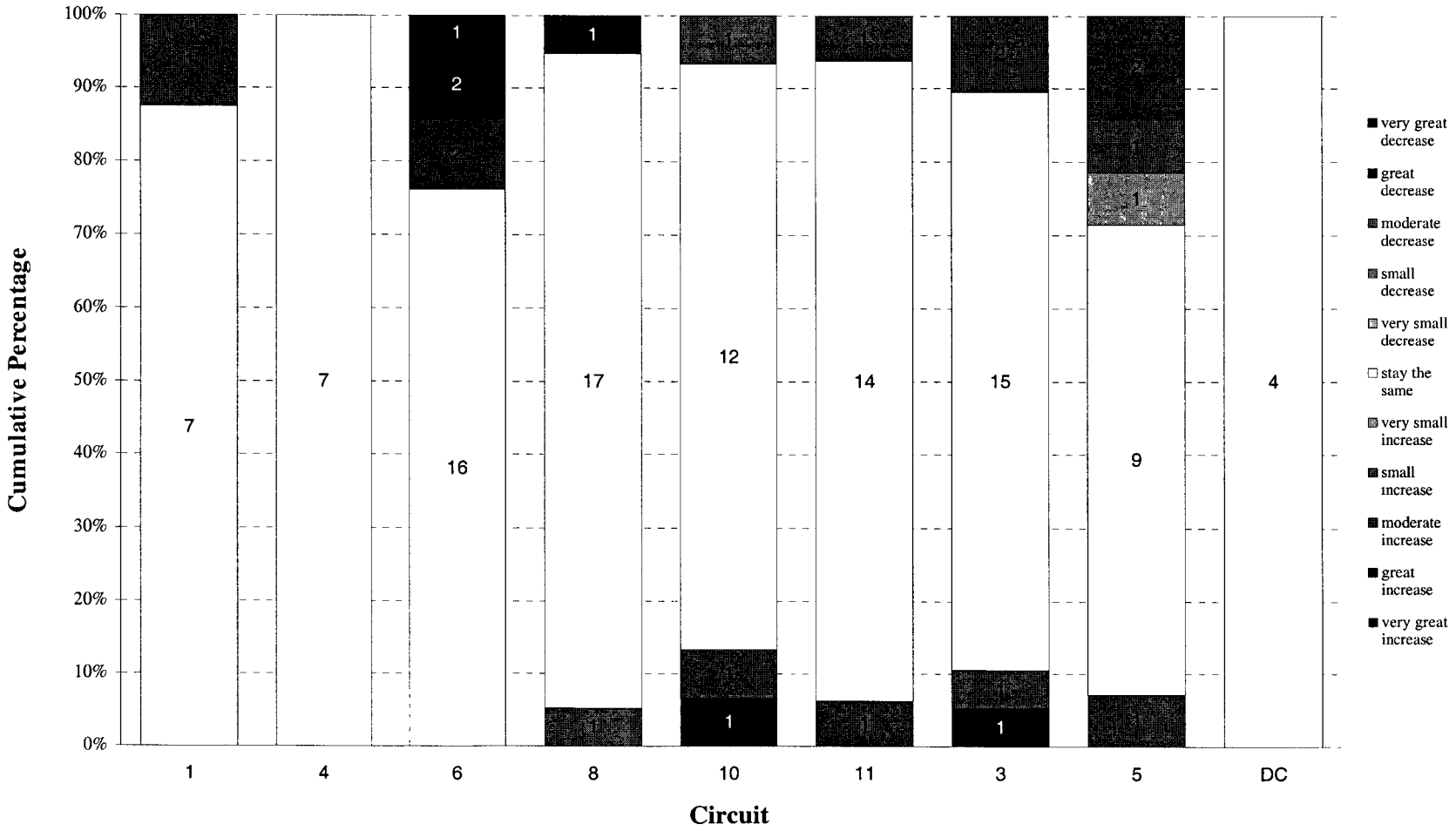
The court's original local rules, adopted October 1, 1982, distinguished published and unpublished opinions and proscribed citation to the latter in unrelated cases.

Exhibits

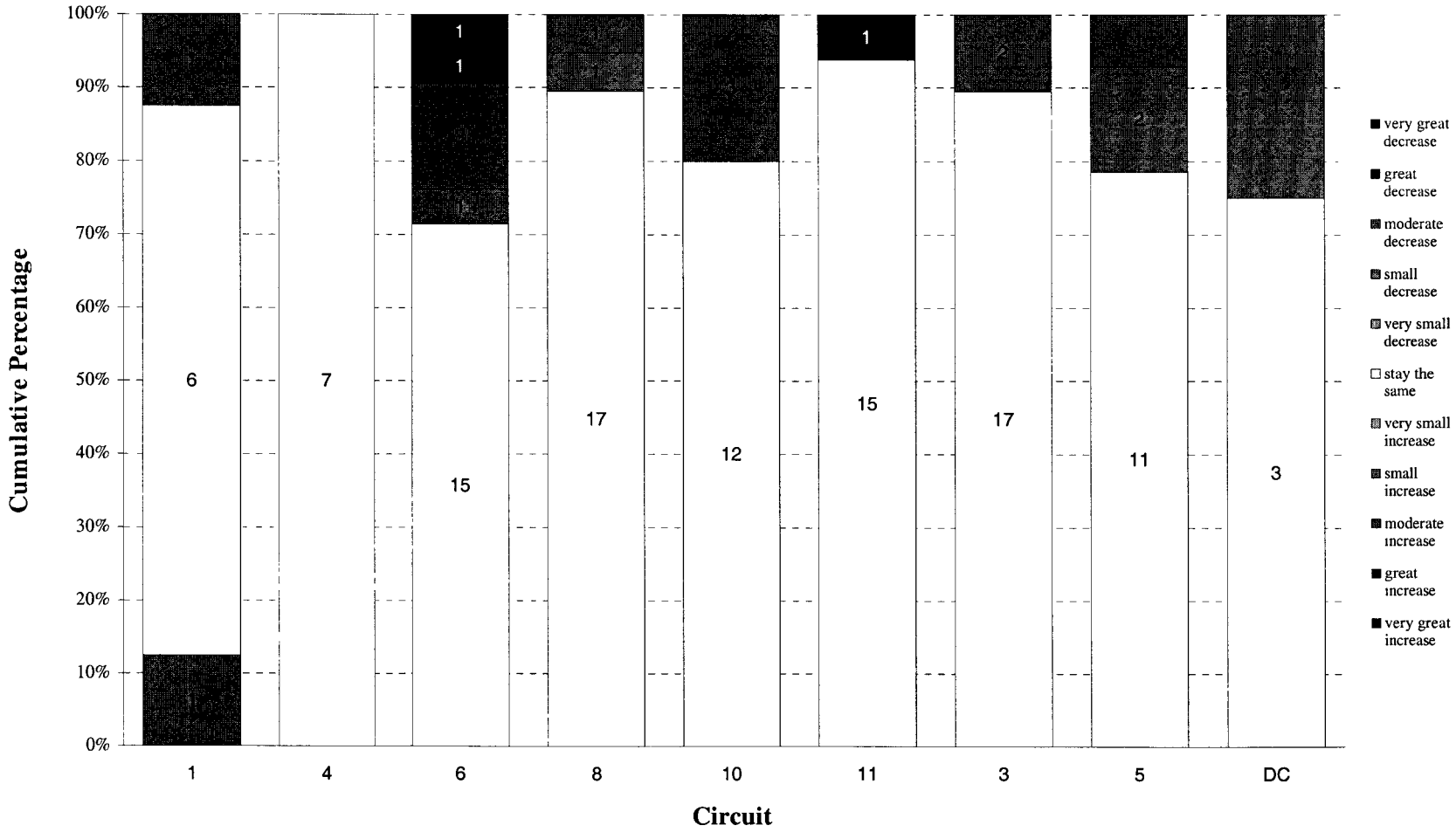
1. Judge Survey Response Rates



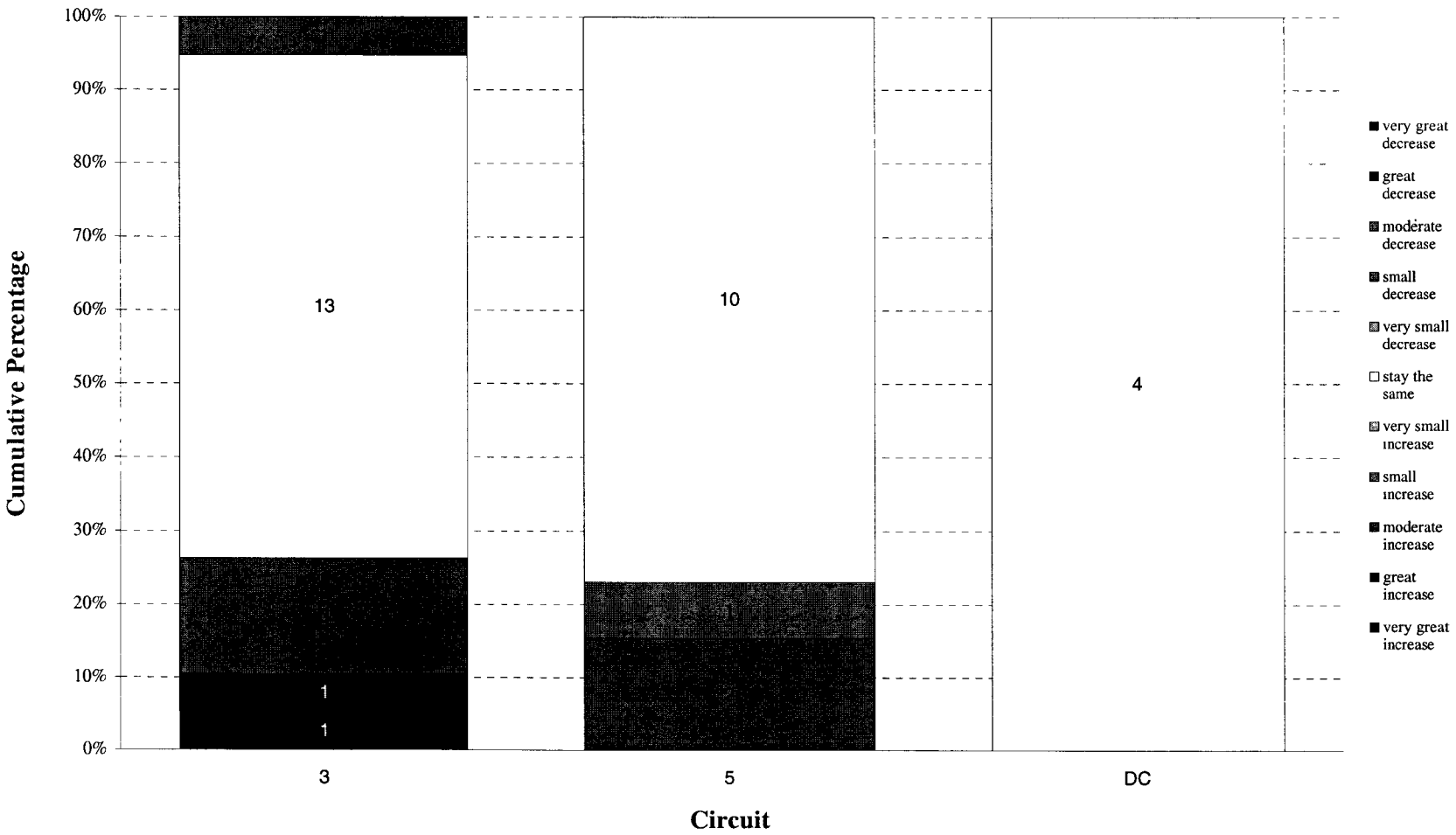
2. Length of Unpublished Opinions If Citation Was Prohibited



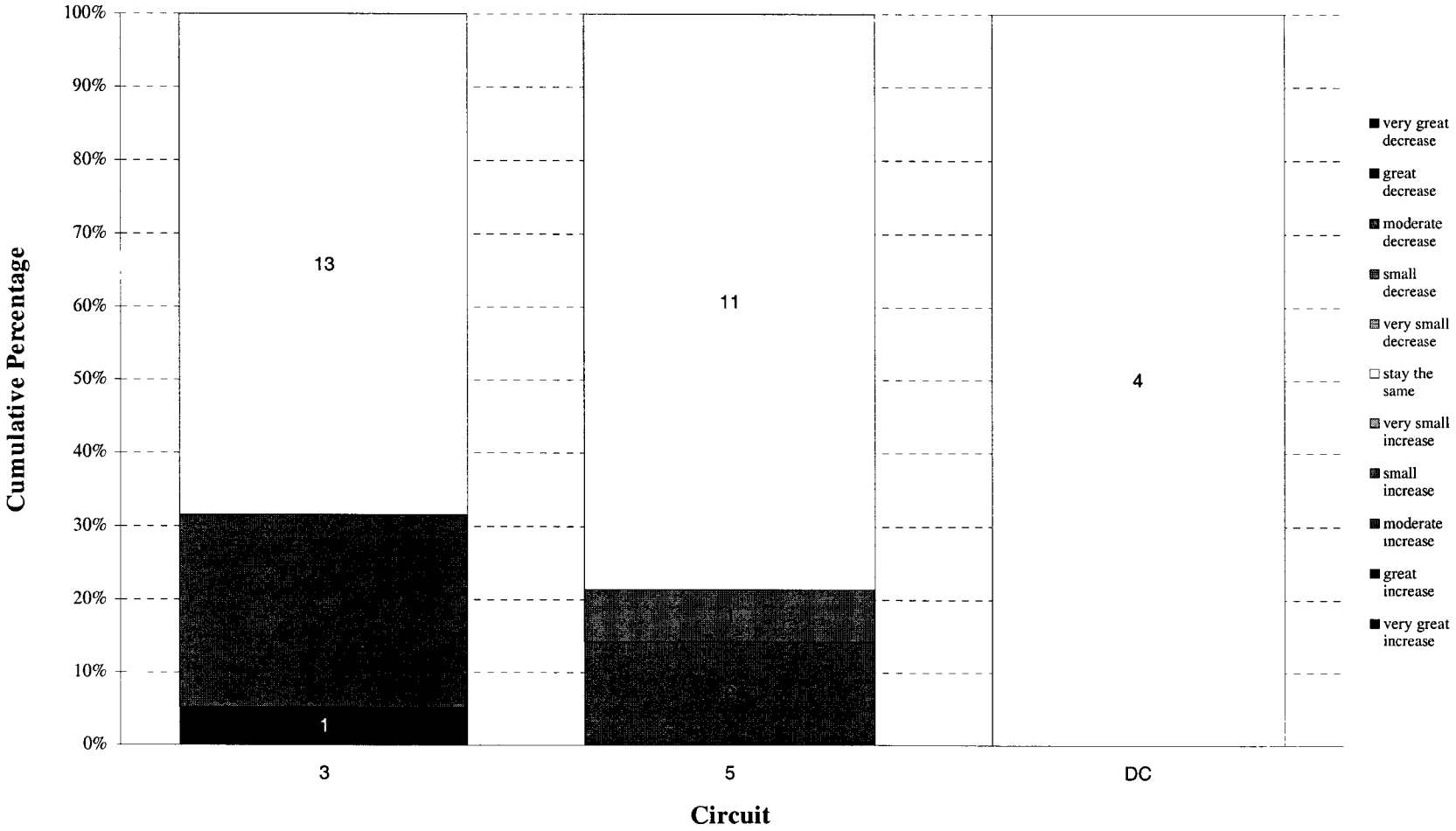
3. Time Preparing Unpublished Opinions If Citation Was Prohibited



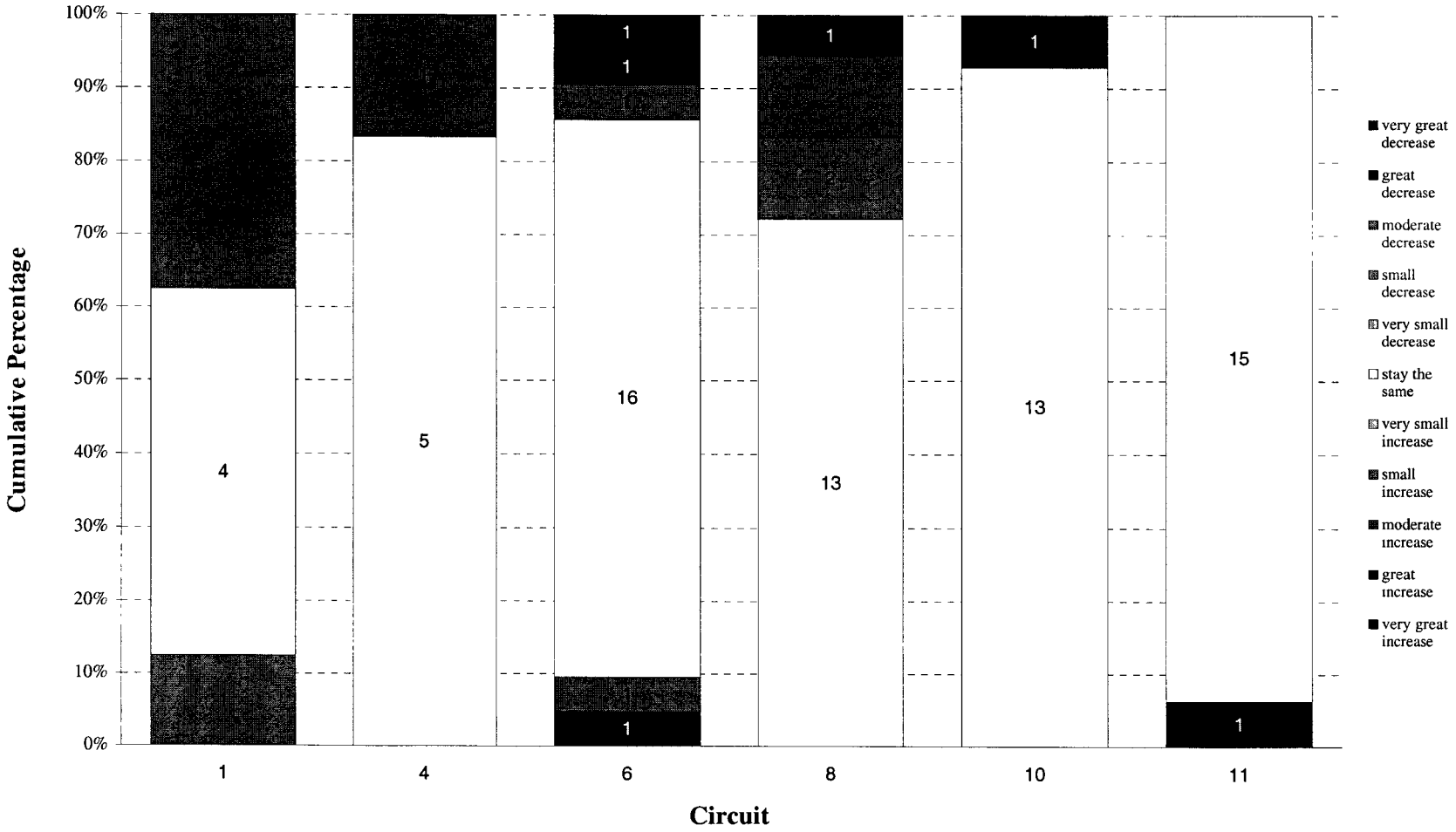
4. Length of Unpublished Opinions If Citation Was Allowed Only Sometimes



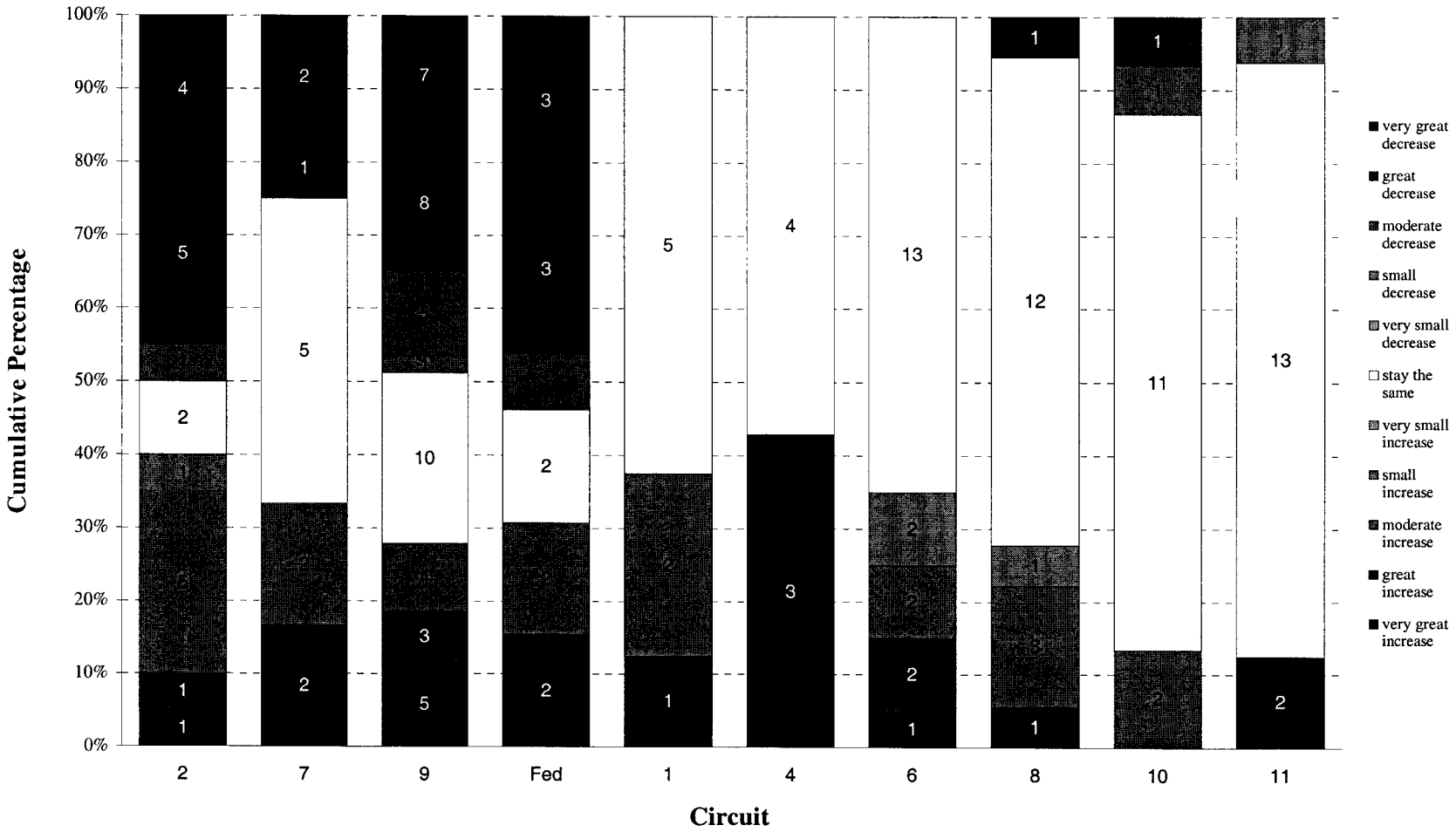
5. Time Preparing Unpublished Opinions If Citation Was Allowed Only Sometimes



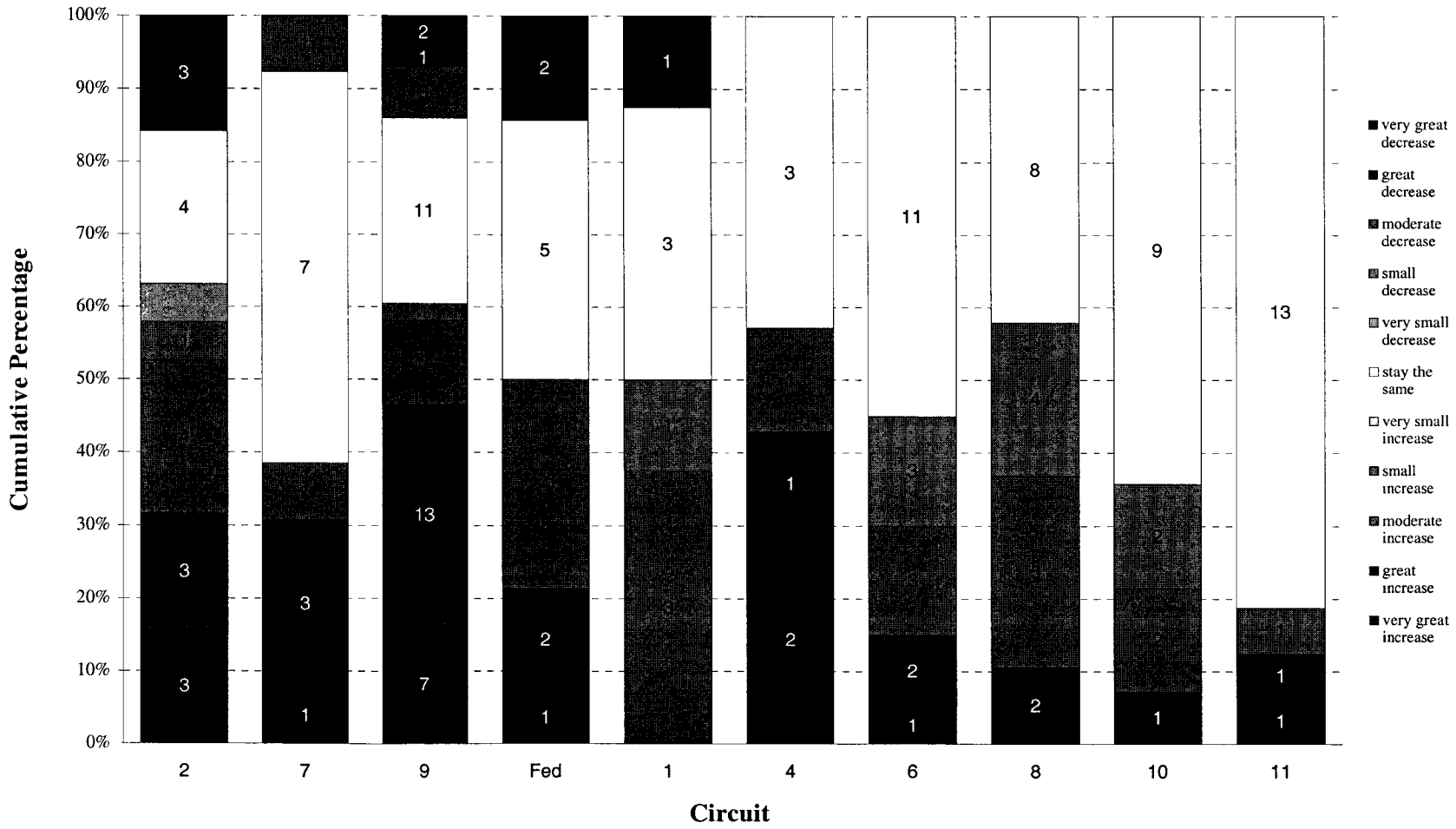
6. Number of Unpublished Opinions If Citation Was Freely Permitted



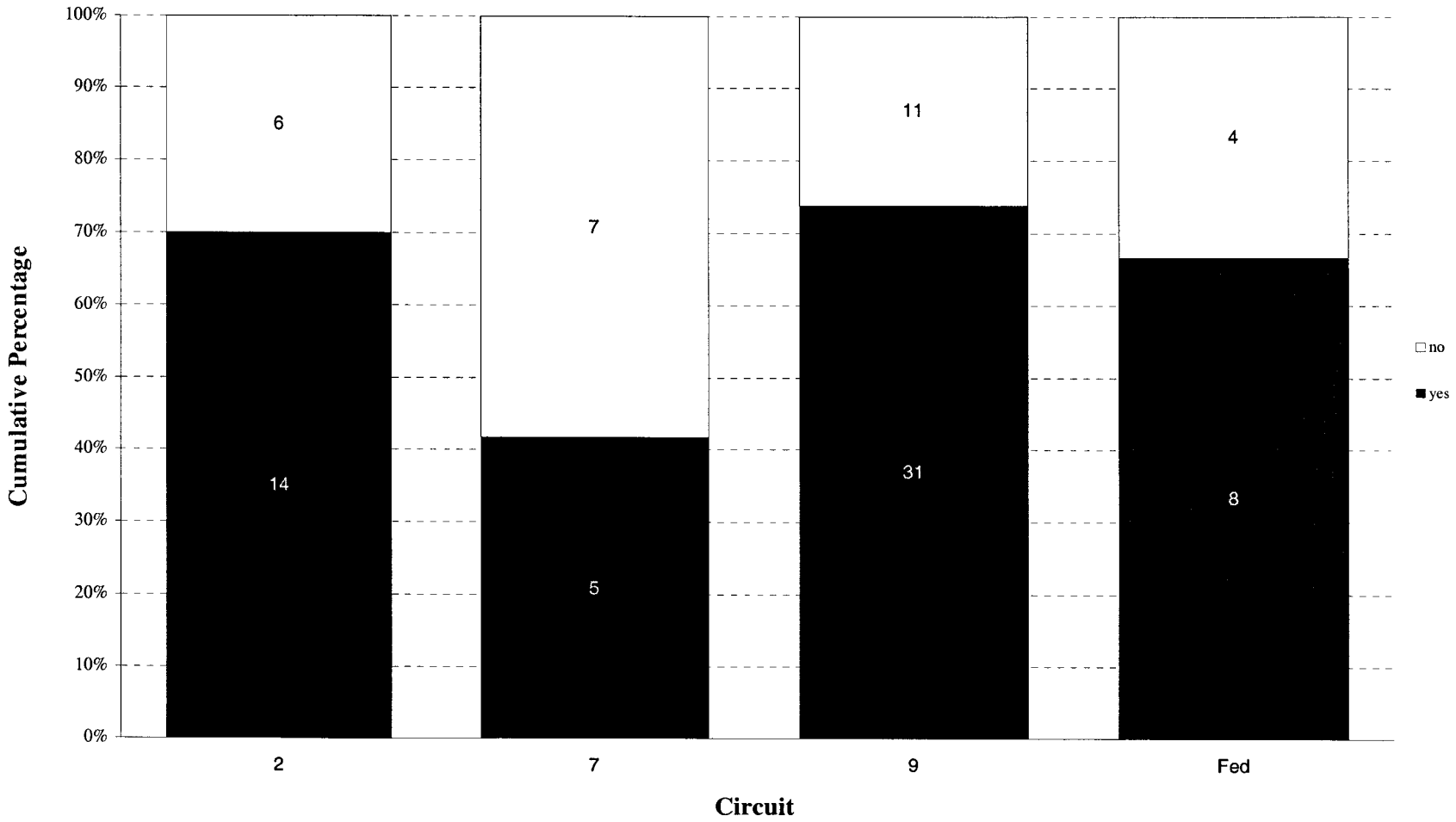
7. Length of Unpublished Opinions If Citation Was Freely Permitted



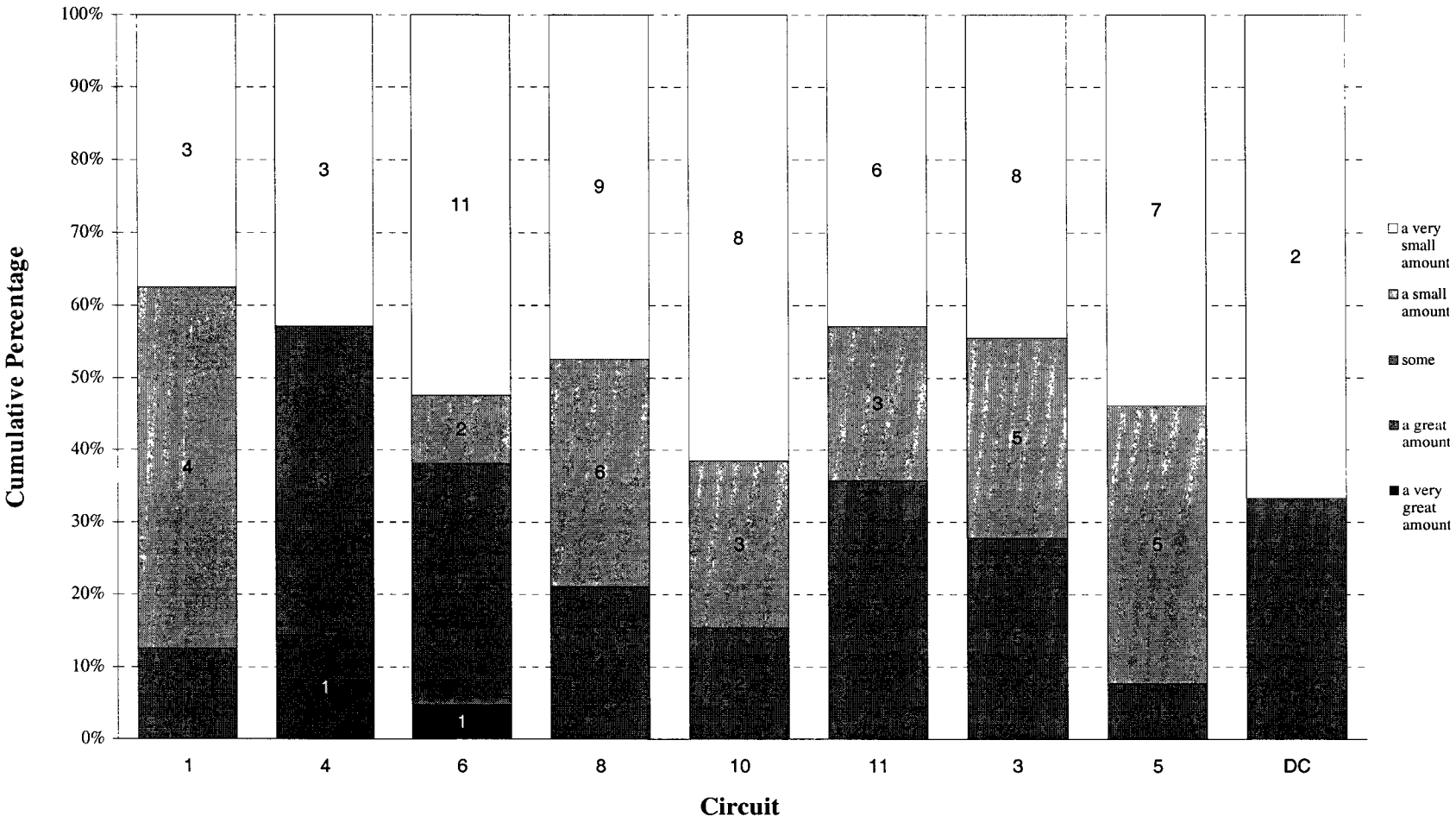
8. Time Preparing Unpublished Opinions If Citation Was Freely Permitted



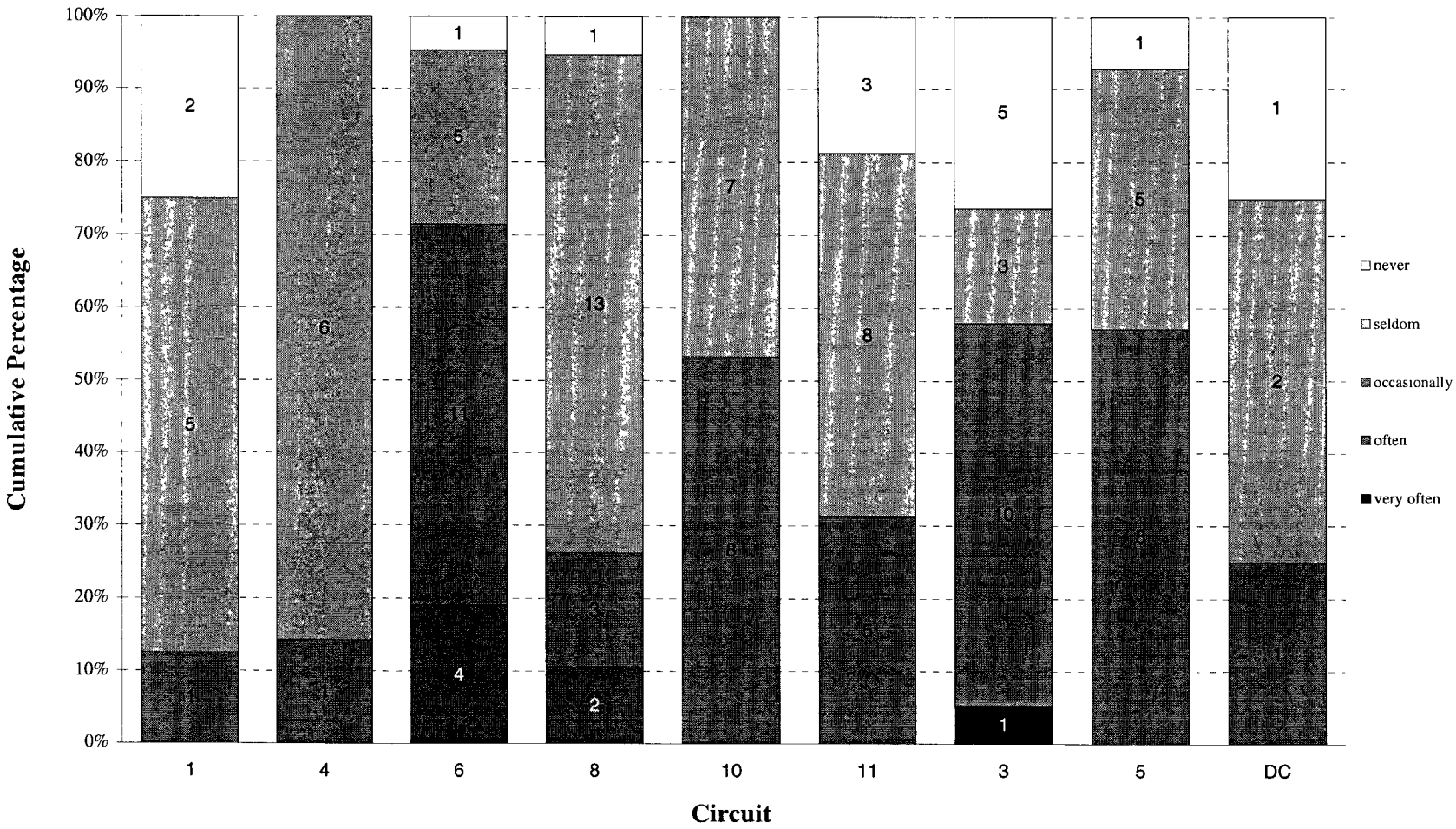
9. Problems With Proposed Rule



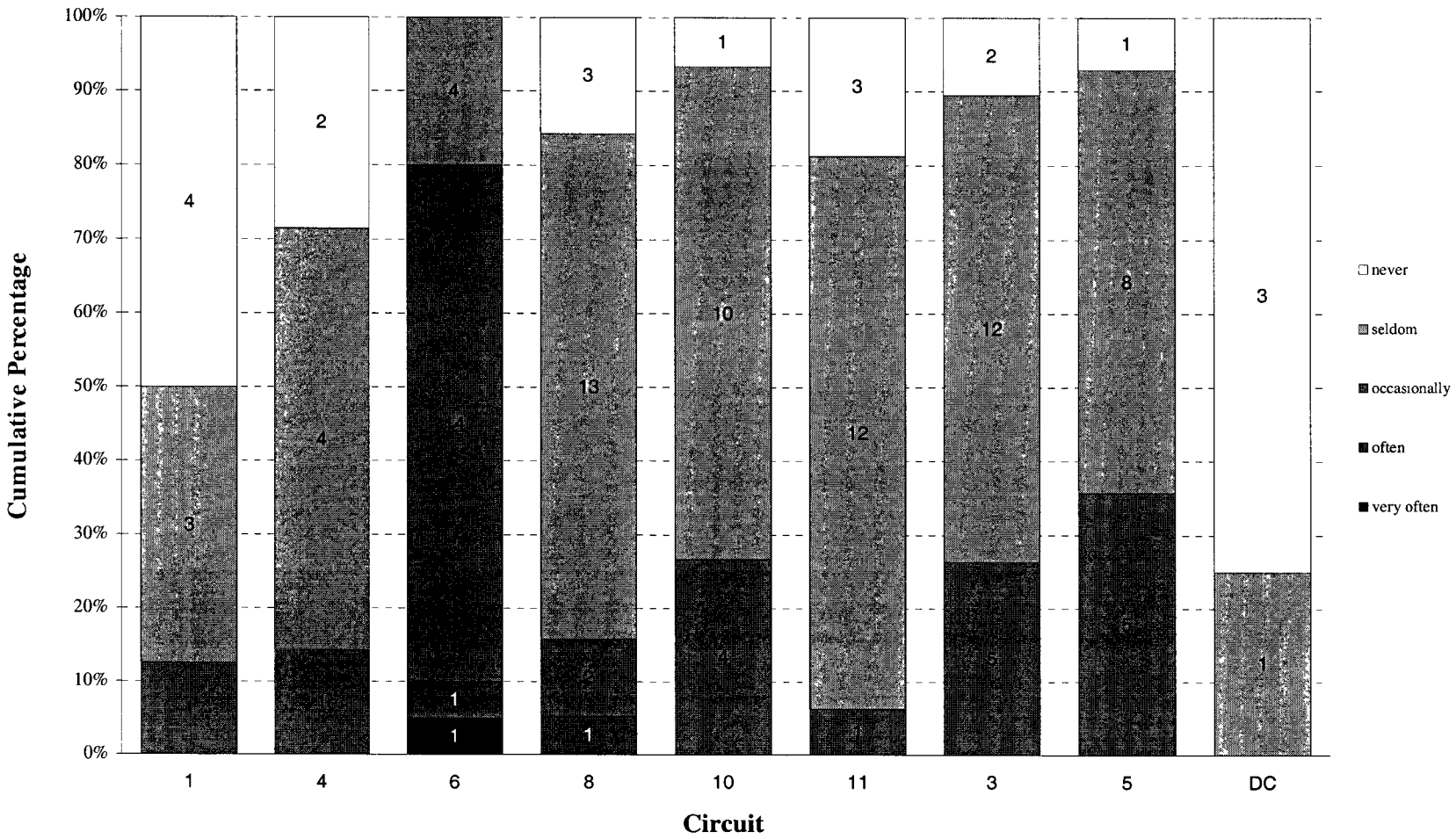
10. Unpublished Citation's Additional Work



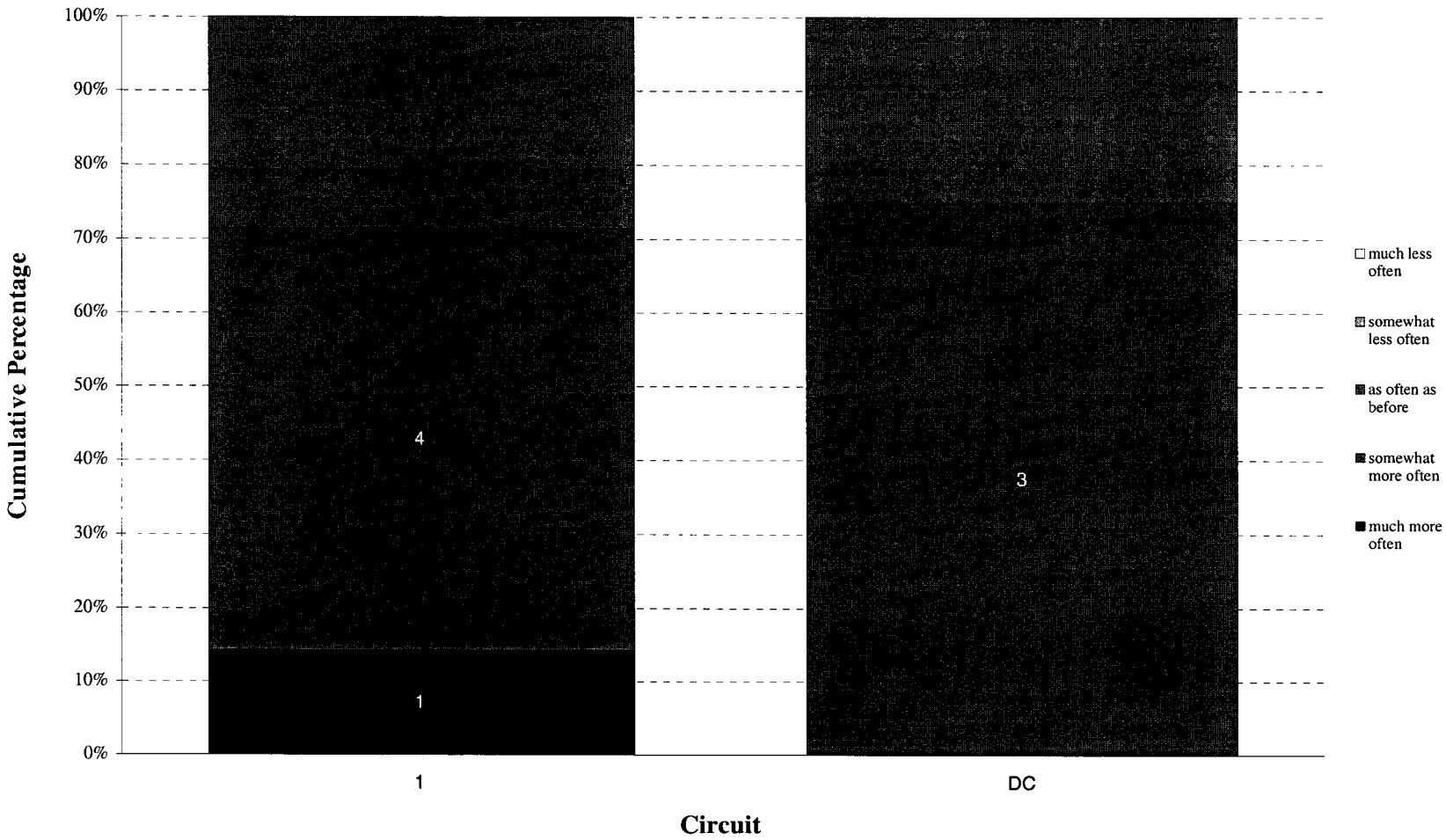
11. Unpublished Citation's Helpfulness



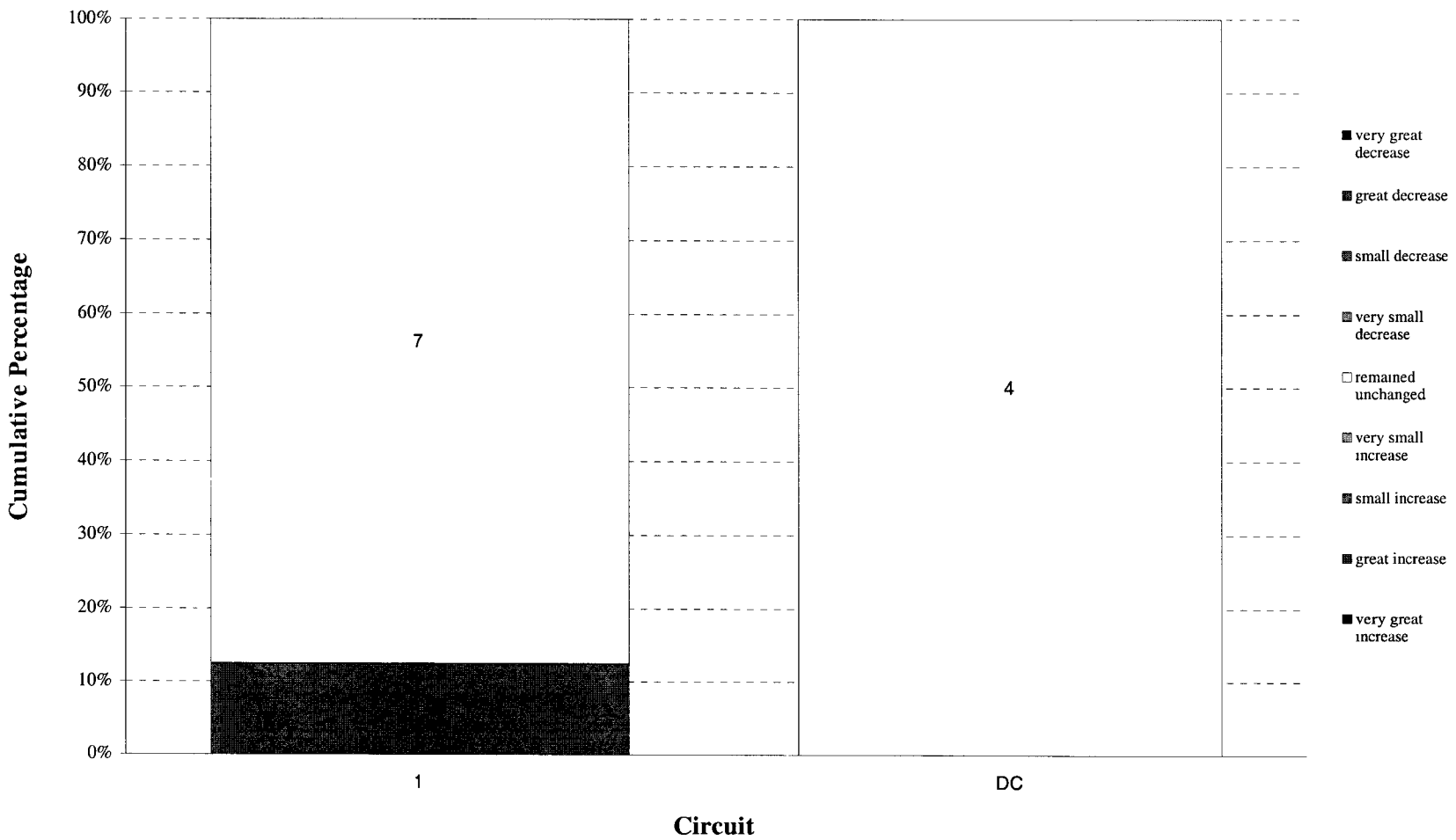
12. Unpublished Citation's Inconsistency



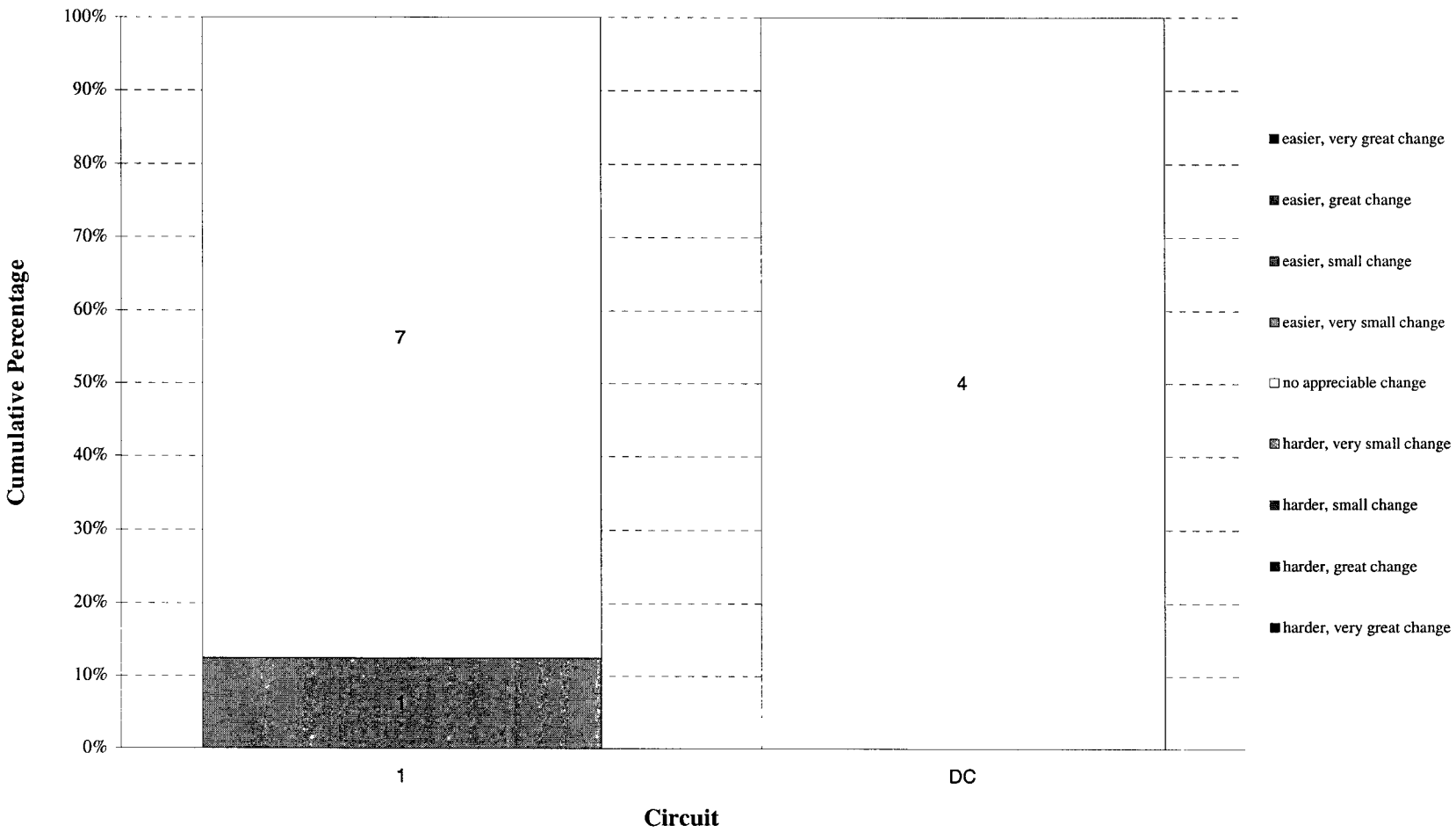
13. Frequency of Citation to Unpublished Opinions After Local Rule Change



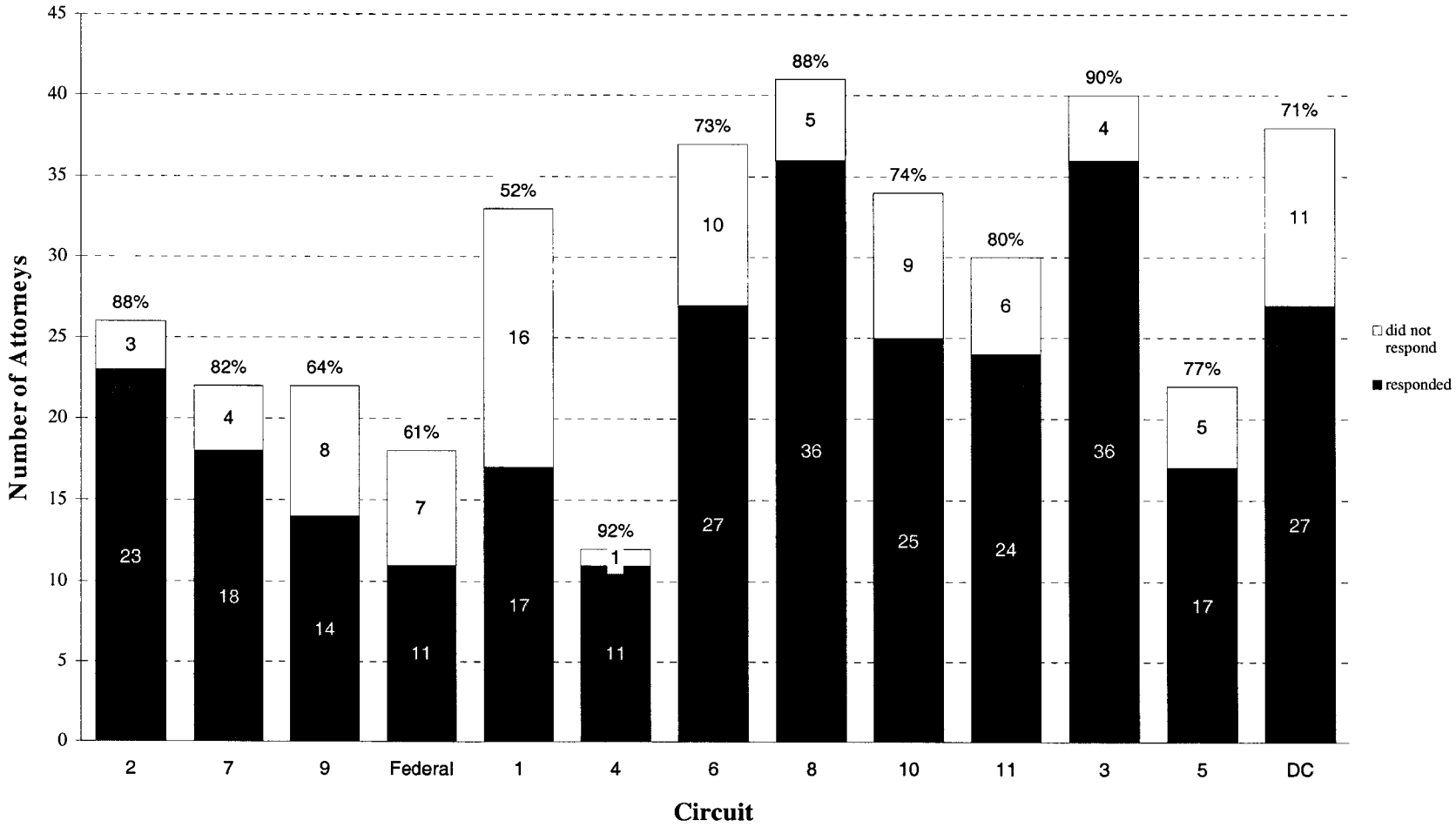
14. Time Preparing Unpublished Opinions After Local Rule Change

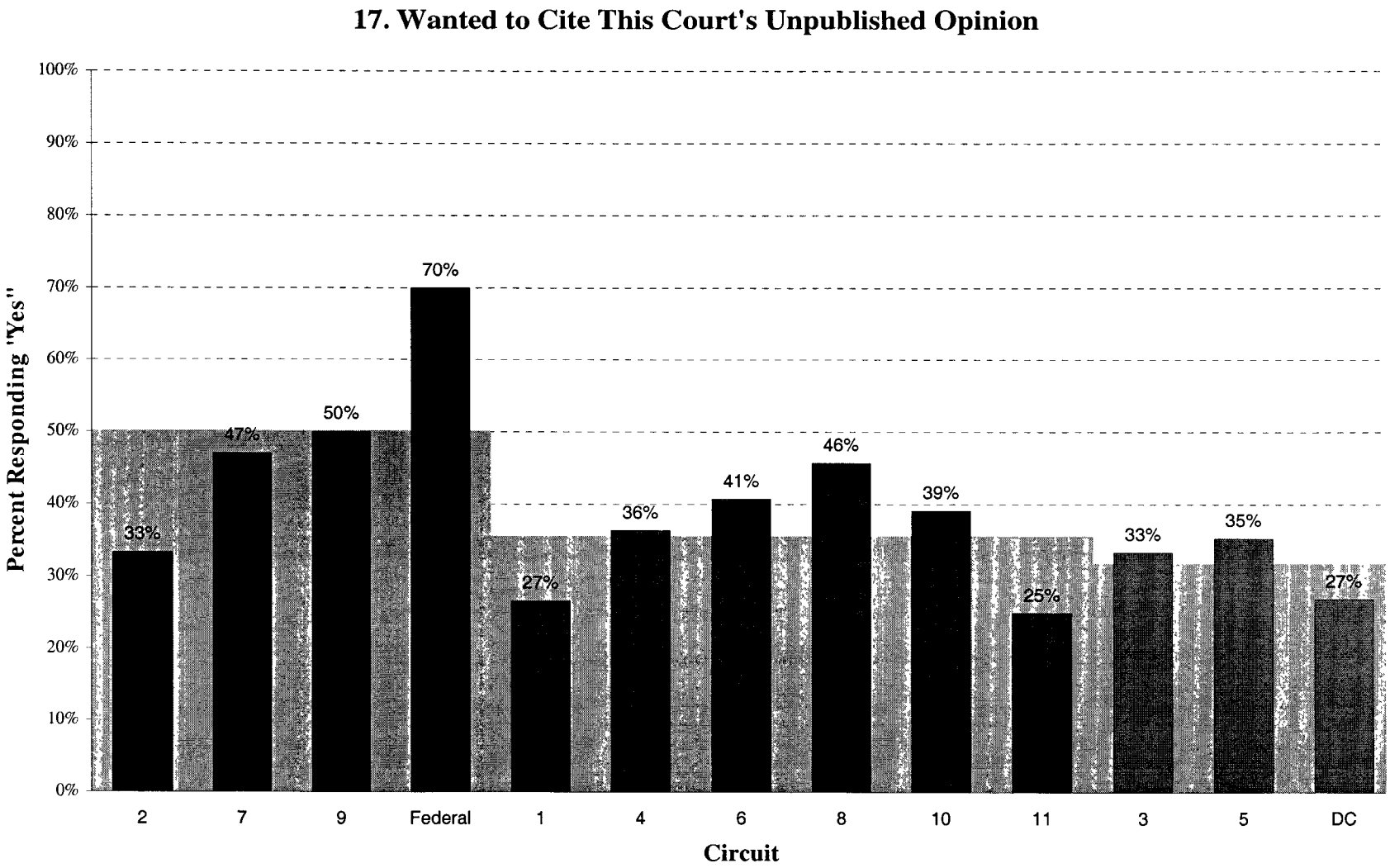


15. Work After Local Rule Change

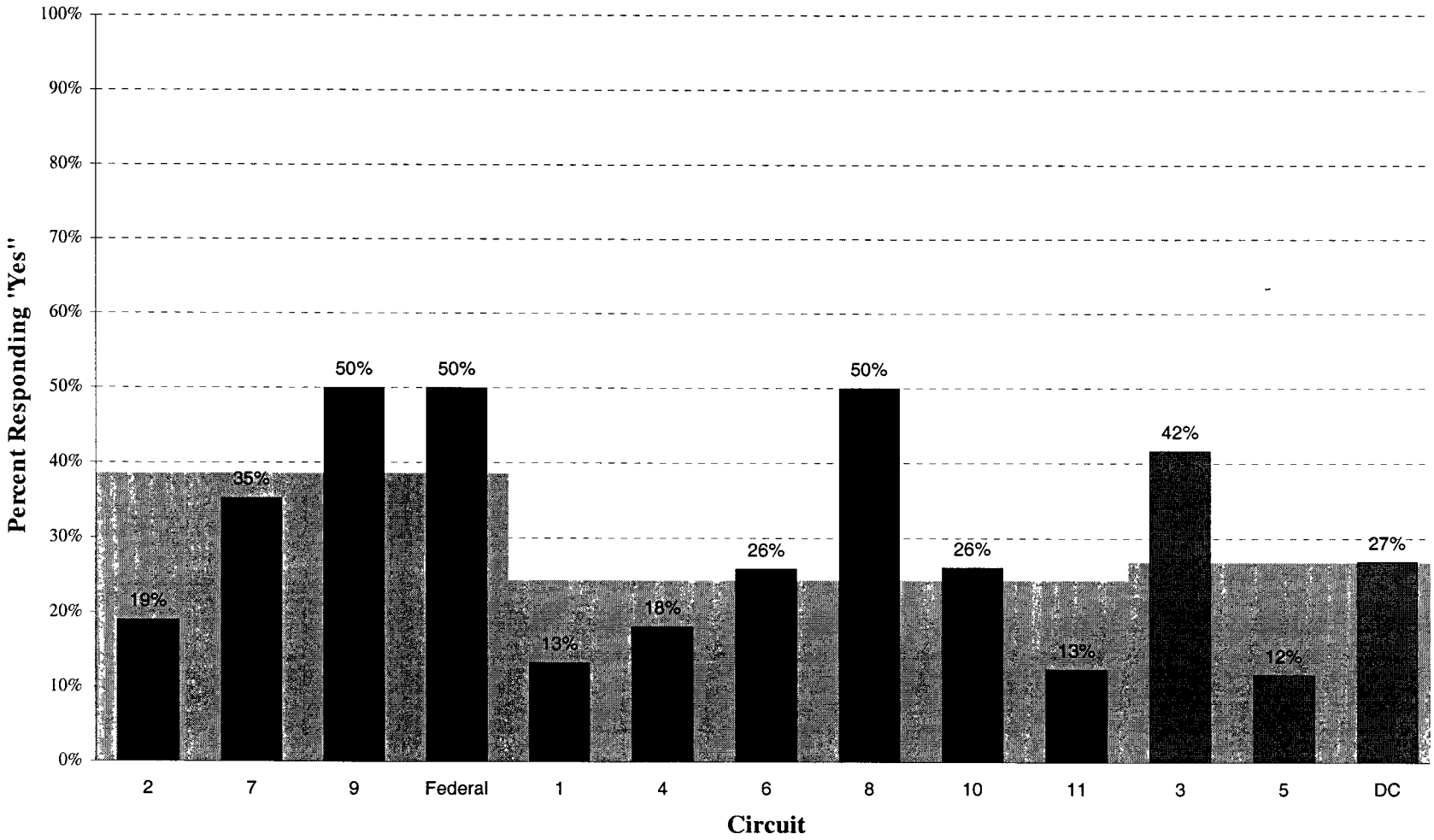


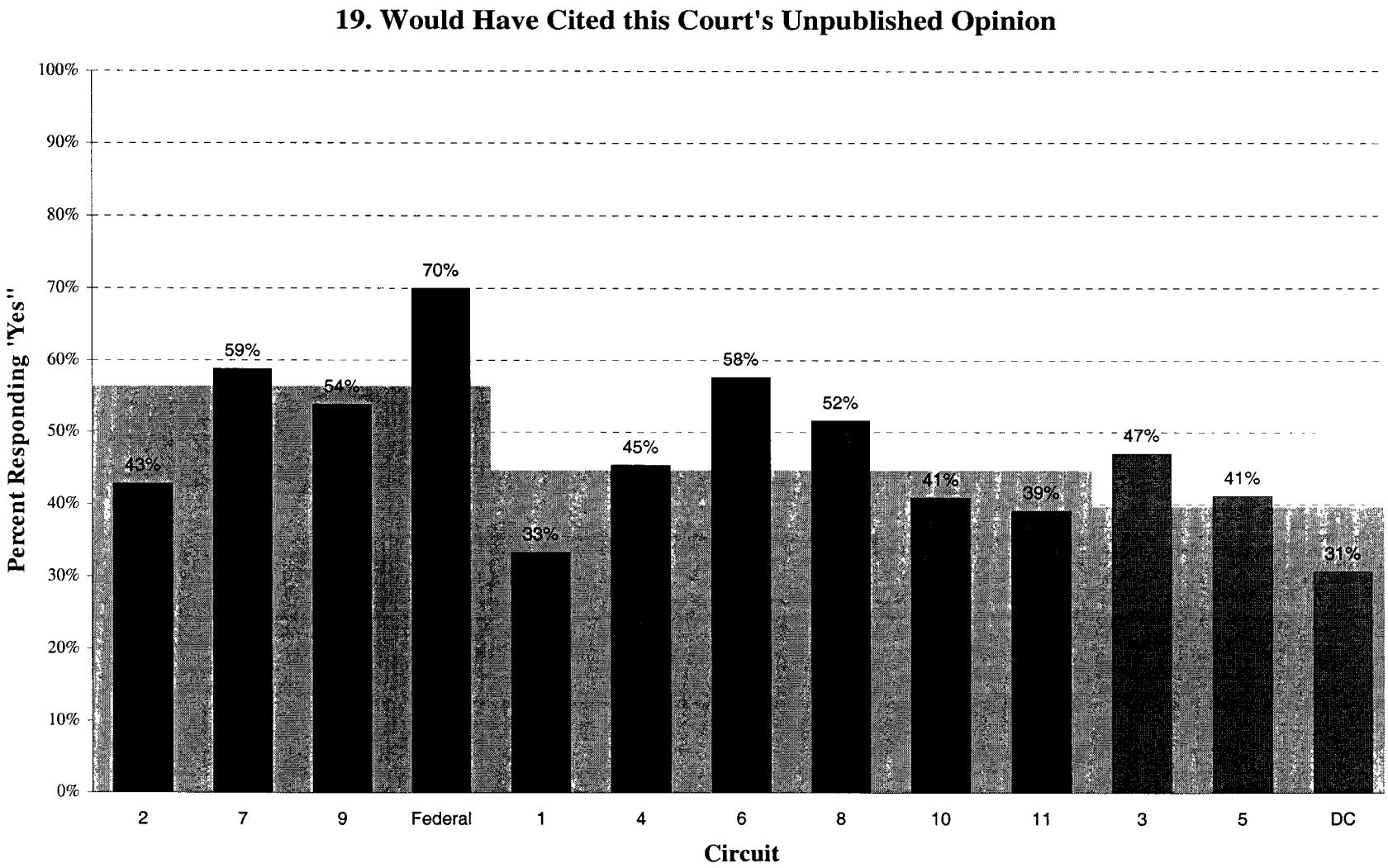
16. Attorney Survey Response Rates



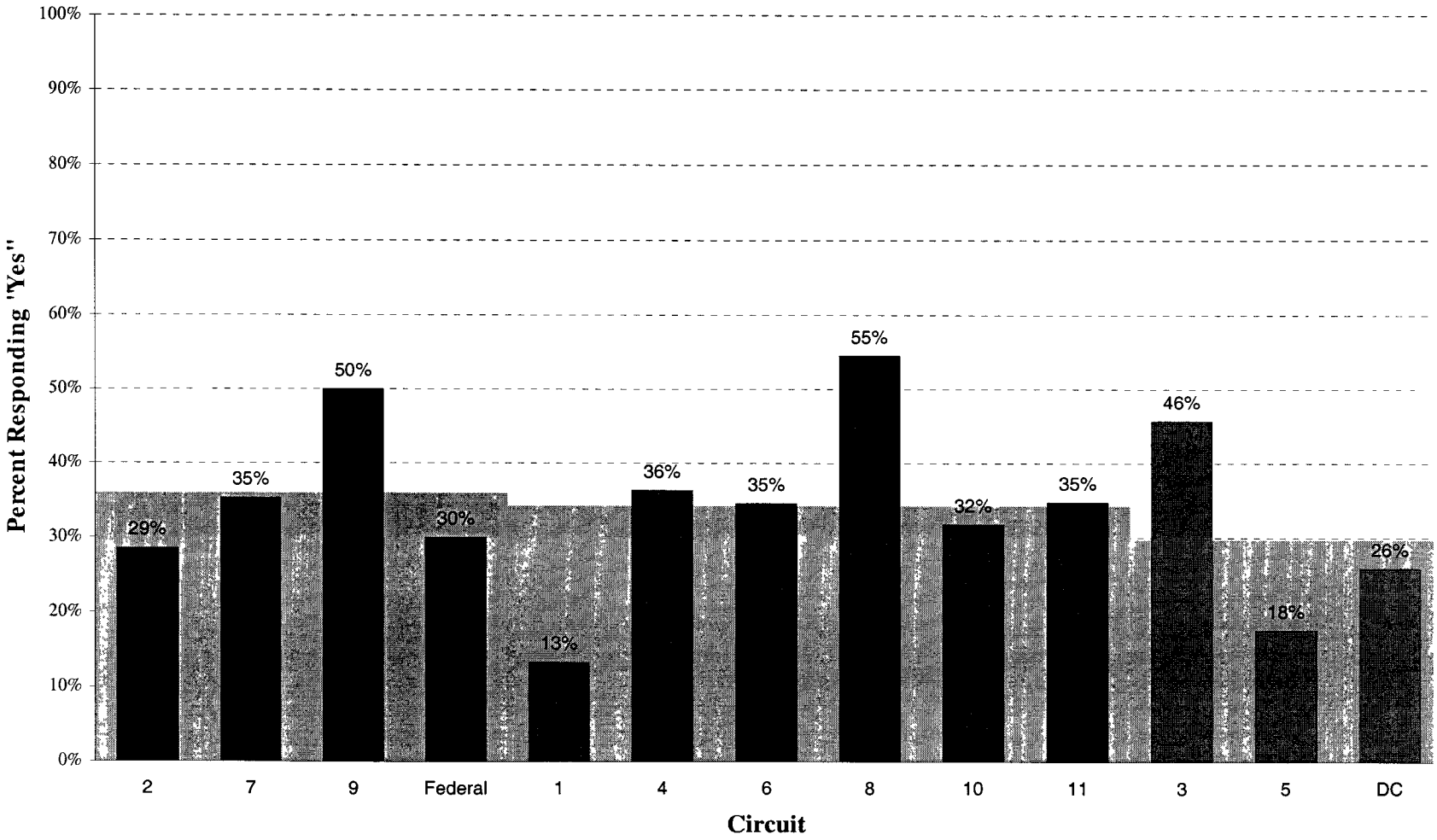

17. Wanted to Cite This Court's Unpublished Opinion
Percent Responding "Yes"
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
33%
47%
50%
70%
27%
36%
41%
46%
39%
25%
33%
35%
27%
2
7
9
Federal
1
4
6
8
10
11
3
5
DC
Circuit

18. Wanted to Cite Another Court's Unpublished Opinion

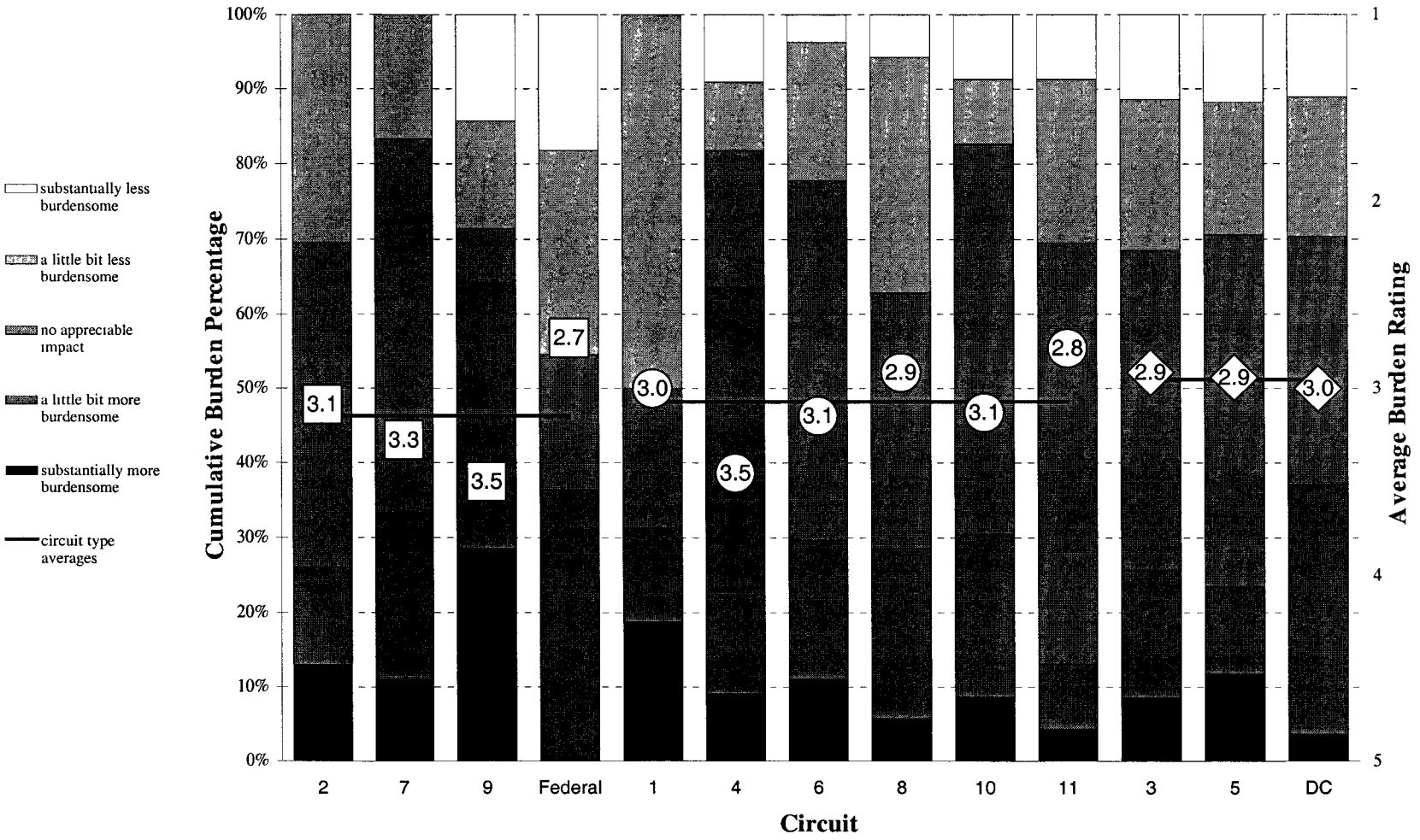



19. Would Have Cited this Court's Unpublished Opinion
Percent Responding "Yes"
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
43%
59%
54%
70%
33%
45%
58%
52%
41%
39%
47%
41%
31%
2
7
9
Federal
1
4
6
8
10
11
3
5
DC
Circuit

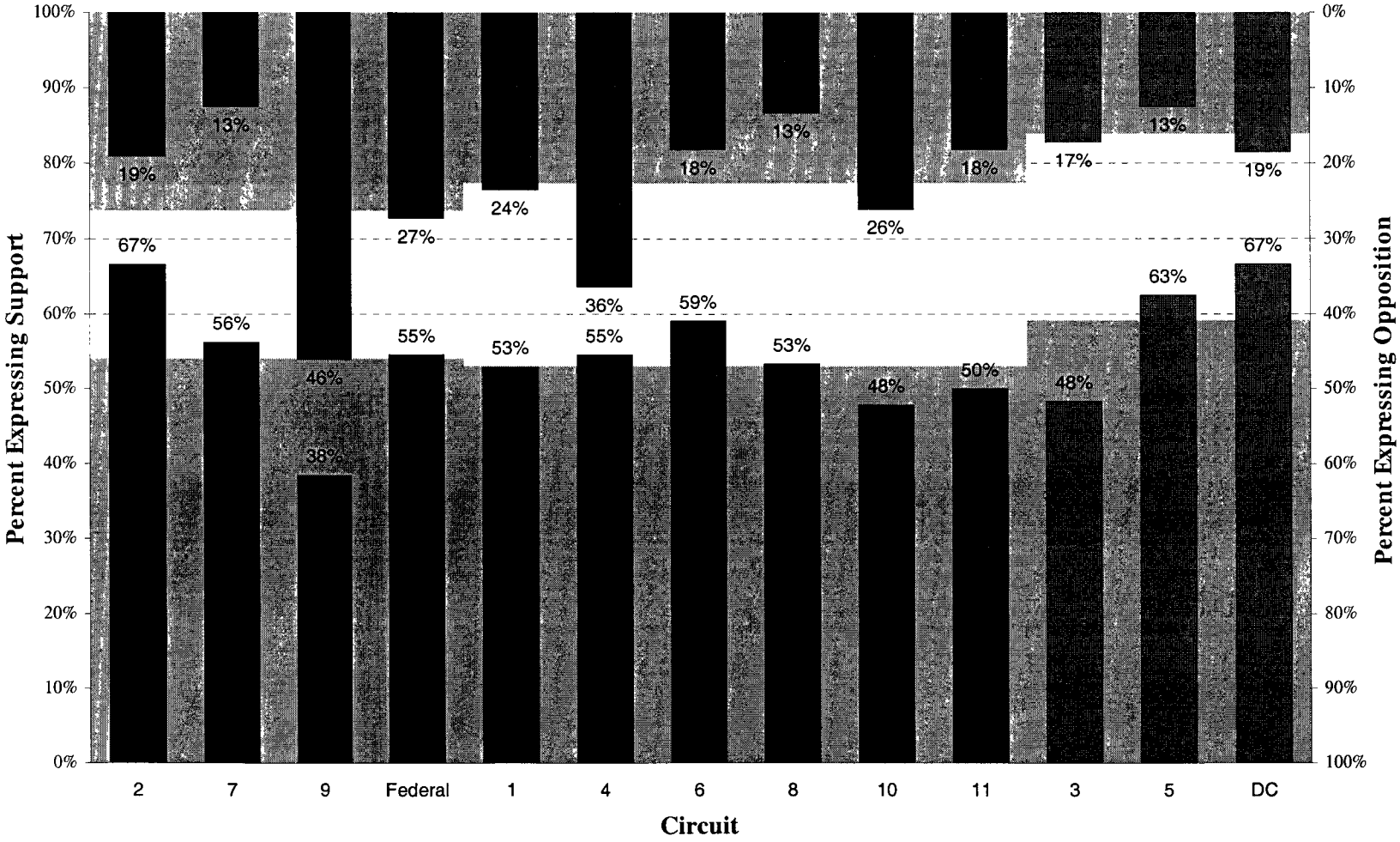
20. Would Have Cited Another Court's Unpublished Opinion



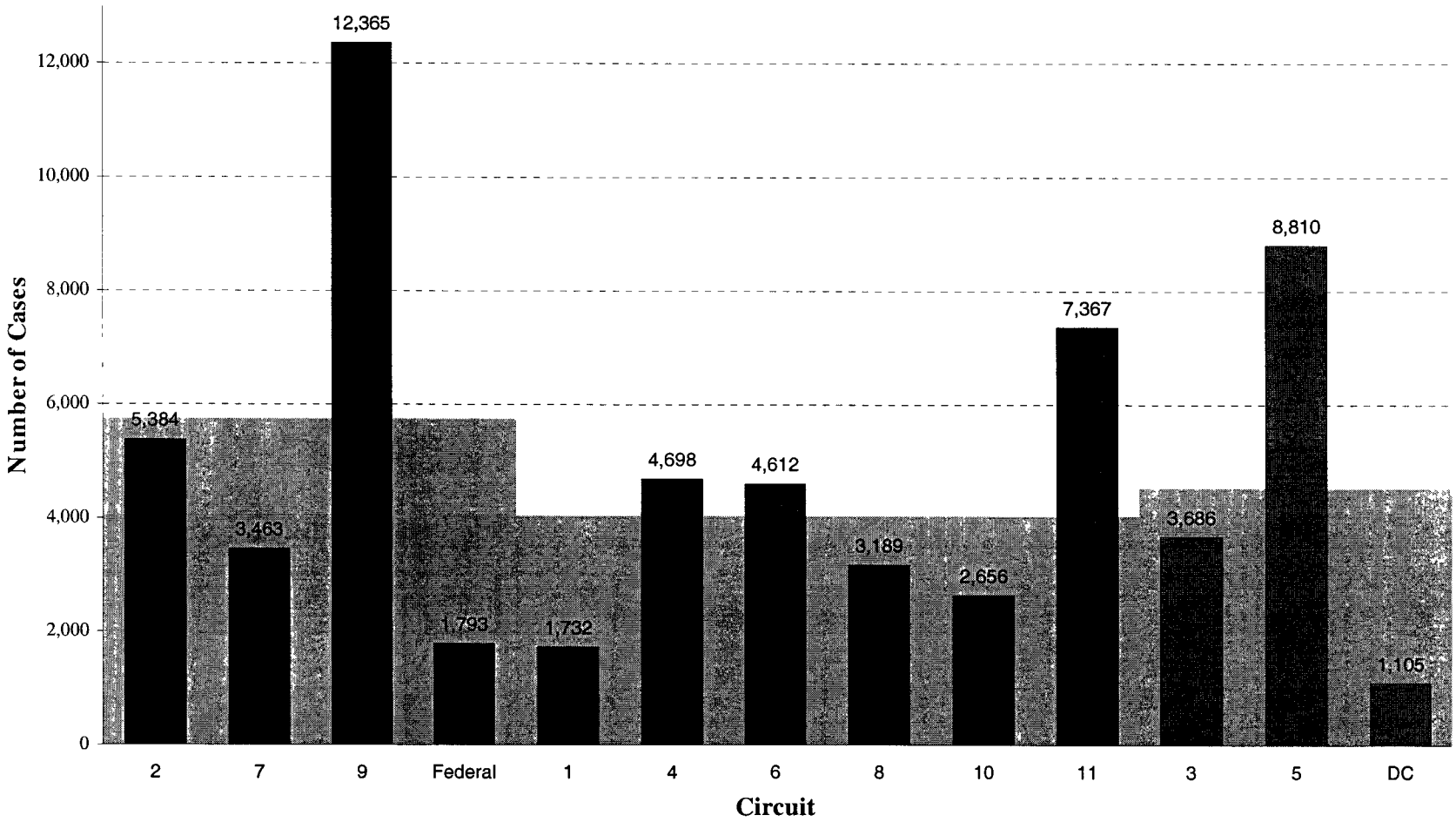
21. Impact on Work of New Rule



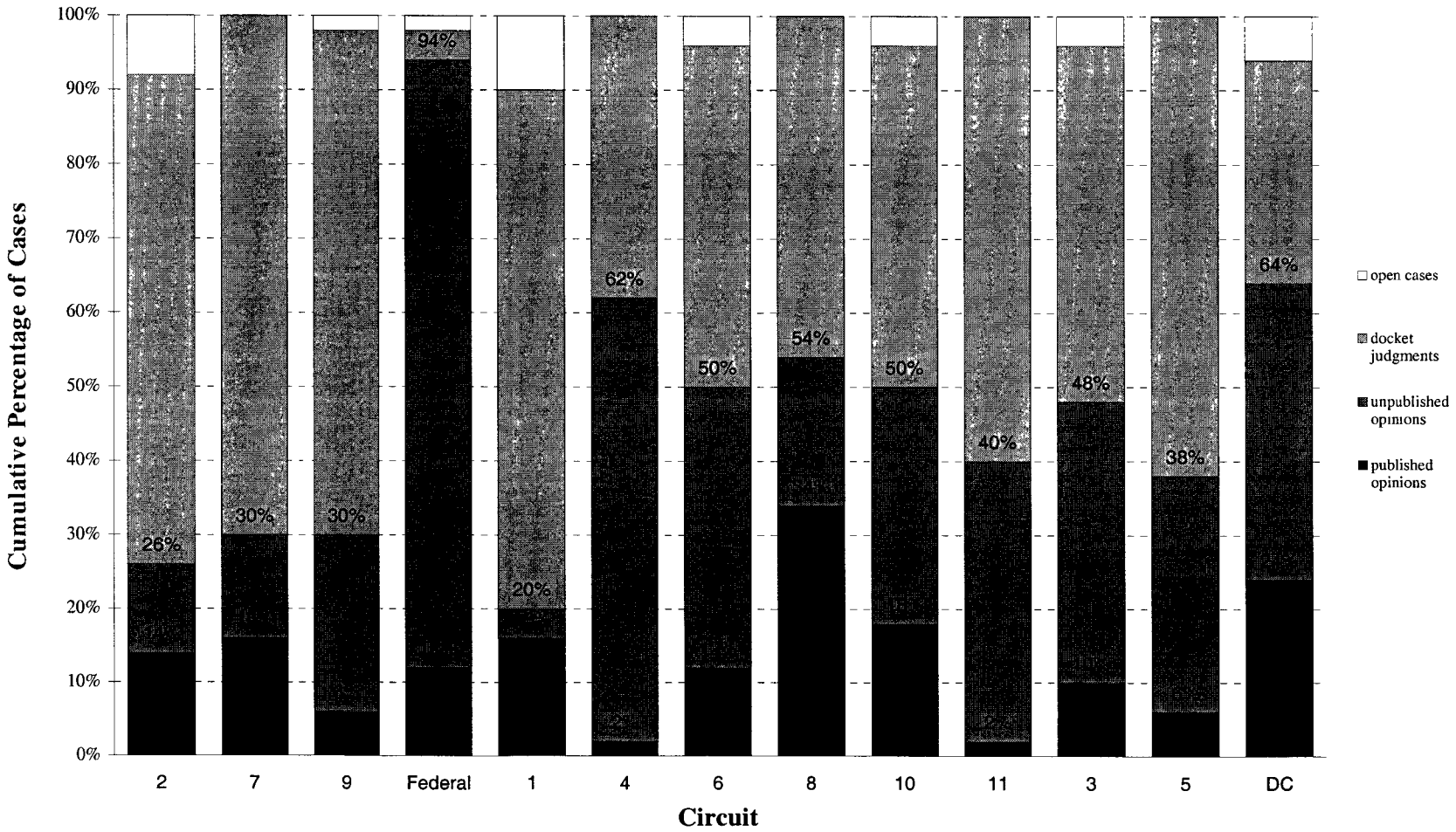
22. Attitude Toward Proposed Rule



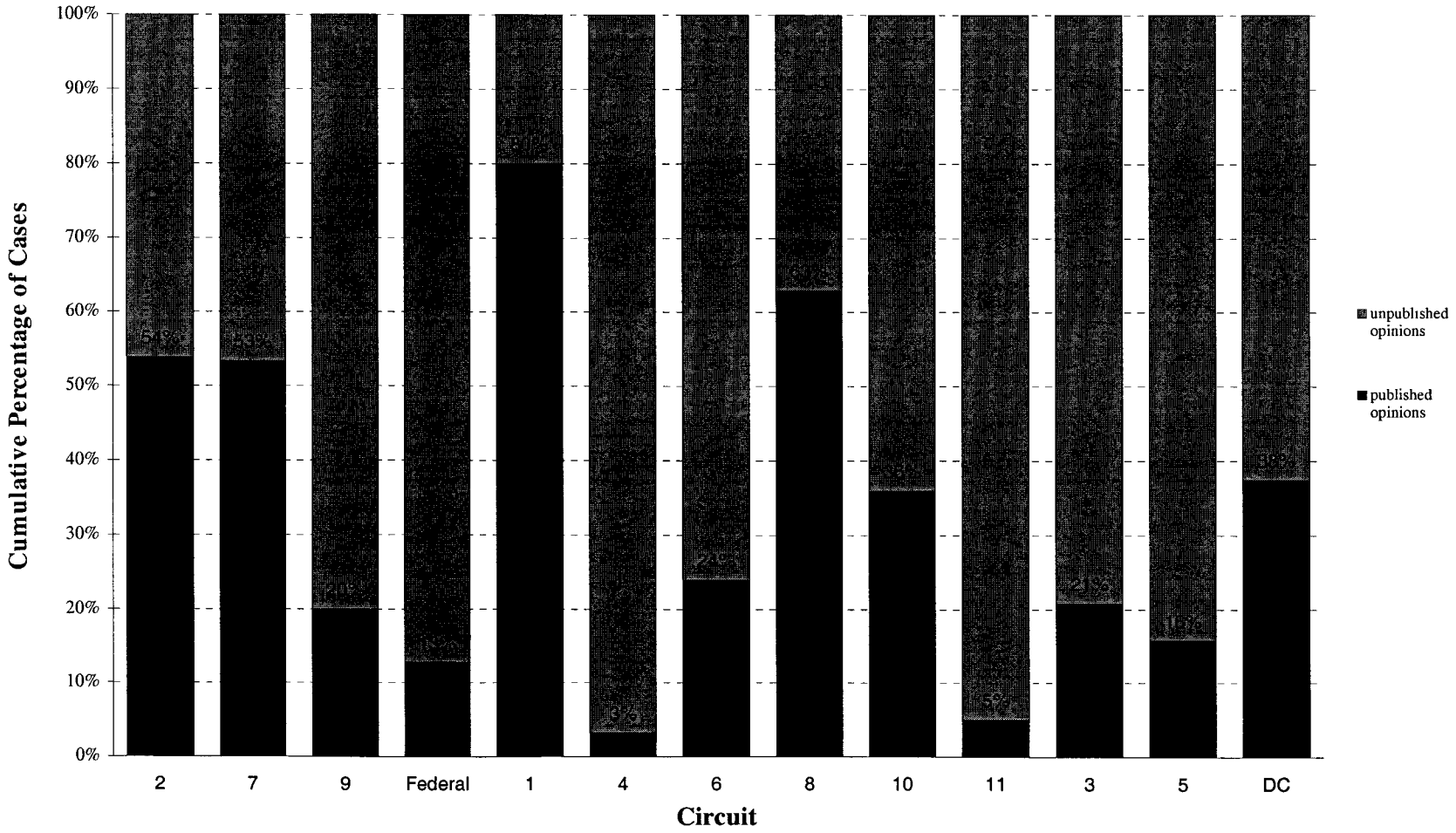
23. Cases Filed in 2002



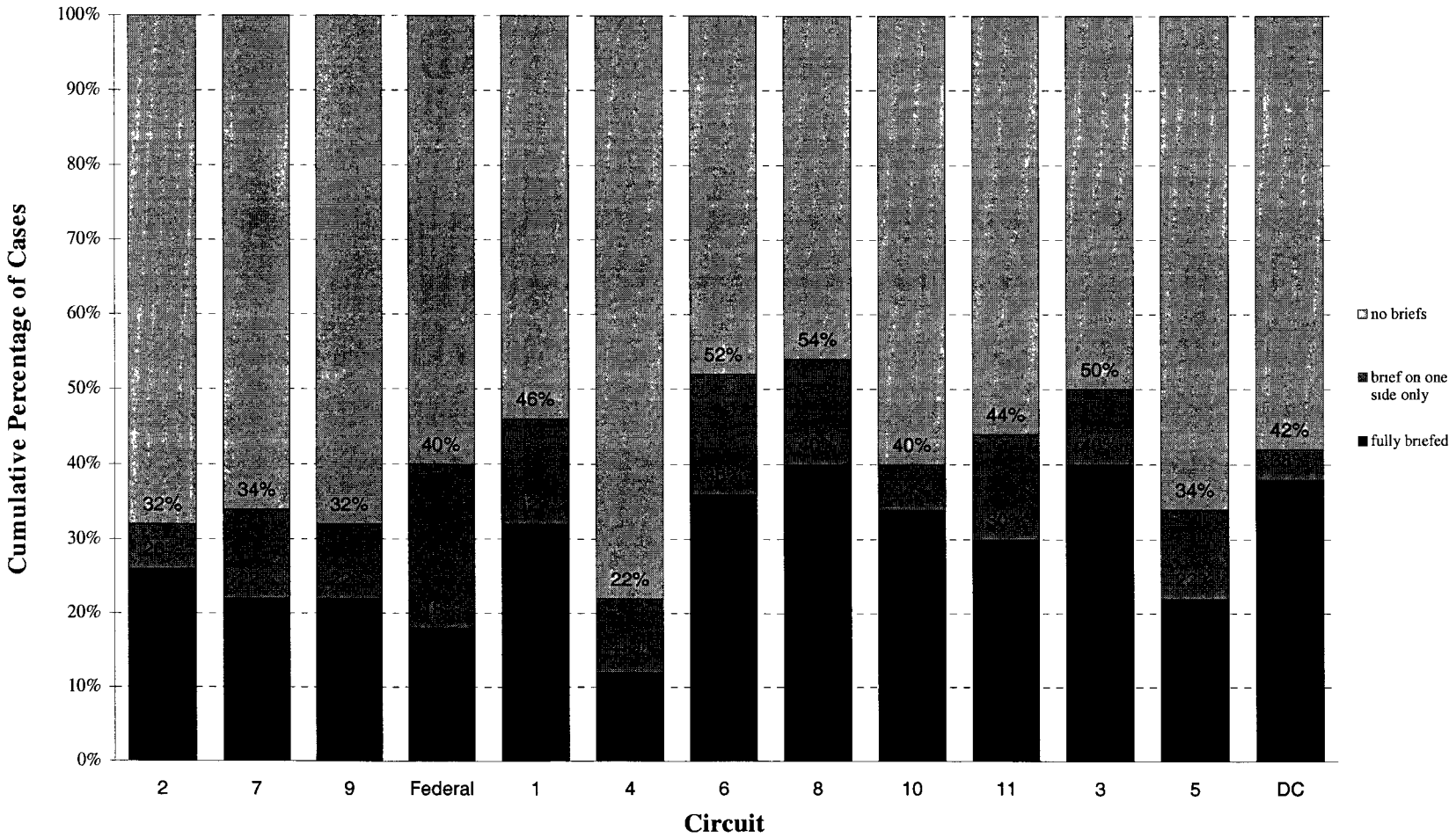
24. Dispositions (With Opinion Rates and Publication Rates)



25. Publication of Opinions in Closed Cases With Opinions



26. Appeals With Counseled Briefs



Appendix A: Judges' Predictions of Problems Posed by Citations to Unpublished Opinions

We asked judges in the restrictive circuits (the Second, Seventh, Ninth, and Federal Circuits) whether a rule allowing the citation of unpublished opinions would cause problems because of any special characteristics of their court or its practices. Those who responded "yes" were invited to describe the relevant characteristics. This appendix compiles their responses.

Responses are organized by major theme: an increase in workload (20 responses), unpublished opinions becoming shorter (13 responses), a concern about the quality of the court's unpublished opinions (seven responses), the small likelihood that citations to unpublished opinions would be helpful (six responses), a concern about increased time to resolve cases (five responses), a concern that unpublished opinions might come to be regarded as precedential (three responses), an observation that the rule change would be advantageous to the government (one response), and other thoughts (eight responses). A few responses covered more than one theme and are cross-referenced accordingly.

We present the judges' responses anonymously and essentially verbatim, with light copyediting. Each response is identified by circuit and ordinal position in this report. So response 7–4 is the fourth response here from a Seventh Circuit judge.

Second Circuit

Fourteen Second Circuit judges said that citations to their court's unpublished opinions would create special problems; six judges said that they would not. Three judges did not return an answer to this question. (One judge who said that citations to unpublished opinions would create problems did not elaborate.)

Unpublished Opinions Would Become Shorter

Three judges predicted that unpublished opinions would become shorter if they could be cited.

2–1. Presently, we prepare unpublished opinions that carefully respond to the issues raised on appeal, but are not as extensive or work-intensive as published opinions. If unpublished opinions are citable, there will likely be two effects. In most cases the unpublished opinions will be reduced to a bare minimum. This will have the effect of depriving litigants of the general reasoning of the dispositive decision and perhaps make it

more difficult for the litigant to seek further review whether by rehearing or by petitioning the Supreme Court. In some cases, the result could be the opposite—a greater expenditure of time and effort than would otherwise be the case to create a more fulsome unpublished opinion that approaches the kind of effort required by a published opinion. If the rule were applied retroactively, there would be an impairment of the circuit's *corpus juris* as unpublished opinions never intended for citation could be included in briefs. The Second Circuit would vastly prefer to decide on its own whether unpublished opinions are citable as opposed to having the issue decided for the court by outsiders.

2–2. If unpublished opinions are citable, two different effects are foreseeable. In most cases, the unpublished opinion will be reduced to a bare minimum. This will deprive litigants of the general reasoning provided in our unpublished opinions up to now, and perhaps make it more difficult for a litigant to seek further review. In other cases, the result may be just the opposite; more care and effort than necessary may be expended in making these opinions more like published opinions, at the expense of scarce judicial time and resources. One should ask: what has been the purpose of unpublished opinions up to now? The purpose, as our circuit has regarded it, is to make clear to litigants and counsel what the basis of the court's decision is, and to show in summary fashion that the panel has considered each and every point argued by each side. Unpublished opinions are appropriate when existing precedent governs the issues raised. If made citable, both virtues of the unpublished opinion—its clarity and its economy—may be undermined.

2–3. The proposed rule would endanger the practice of giving a reasoned decision in *all* cases, because it would lead to useless one-line orders.

Unpublished Opinions Are Not Helpful in Other Cases

Three judges observed that citations to unpublished opinions are unlikely to be helpful.

2–4. Our guideline for the use of unpublished summary orders restricts them to cases adequately covered by pre-existing precedent. Our rule of practice does not permit citation to summary orders as authority for a proposition of law (although they may of course be cited with reference to the disposition of the particular case). We consider this practice highly beneficial to the quality of justice in our circuit for the following reason. Our judges, like others elsewhere, are over-worked and are putting in long hours. Realistically, they cannot really work longer hours; changes would simply affect allocation of judges' time. Under our present practice, we devote little time to the explanations in summary orders because their non-citability limits their potential to cause harm. Consequently, our judges can devote more time to the published opinions, that is to say, to the cases that

play a significant role in shaping and explaining the law. If unpublished orders become citable, we would need to worry lest a carelessly written passage of a summary order cause problems. Our judges would be compelled to take substantial time away from the opinions that are important to the development of the law, devoting that time instead to the cases that have little or nothing to say about the law. Since summary orders are properly used only in cases adequately covered by existing precedent, counsel have little need to cite them. The desire to cite them arises primarily in circumstances where the order—prepared in haste—said something ill advised, which would not have been said had the order been citable. Allowing them to be cited would serve little useful purpose but would cause a wasteful misallocation of judicial time—taking valuable time away from the difficult task of getting it right in the opinions that play a role in shaping and explaining the law.

2–5. (a) Since summary orders are never pre-circulated to the full court and do not appear as slips, judges who were not on the panel have no opportunity ever to know what they say. So I'd be disinclined to give a summary order cite any weight. I worry that litigants will be lulled into relying on material that the judges will not credit or consider. (b) Summary orders do not purport to state all the facts and circumstances that bear upon the result. Ordinarily, they say that "the parties are assumed to be familiar with the facts, procedural history, and the appellate issues presented." (c) Sometimes a summary order is indicated because the briefing is so poor that the salient issues are not raised, the best precedents are omitted, or the issue is scrambled. While I do research, I'm not willing to do the lawyering for any party; so a summary order is often unhelpful even if the issue is ostensibly interesting.

2–6. Because of the volume of cases heard by this court, fact-bound, non-precedential decisions are best handled in summary fashion. Citation of the orders out of their factual context would be misleading.

Increased Workload

Three judges predicted that citations to unpublished opinions would increase judges' workload. (In addition to comments 2–7 and 2–8, see comment 2–4.)

2–7. More work with no benefit to the cause of justice. Anything worth saying to those other than the parties and trial lawyers should end up in a *per curiam* or other published opinion.

2–8. Such a rule would greatly delay the resolutions of cases and add considerably to our workload.

Disposition Time

Three judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued. (In addition to comments 2–9 and 2–10, see comment 2–8.)

2–9. Speedy disposition of cases, a characteristic of this court, would be affected.

2–10. A characteristic of our court is to issue summary orders promptly.

Quality of Unpublished Opinions

One judge expressed concern about the quality of the court's unpublished orders. (See comment 2–4.)

Other Thoughts

Three judges had other thoughts.

2–11. Our summary orders are generally quite detailed. I am sure much of that is because 20% of our cases are *pro se* and we are the only circuit to allow *pro se* litigants to argue.

2–12. It would harm the collegiality of the court, because of strong differences in opinion as to how summary orders should be prepared.

2–13. Our court uses staff decision making far less than other circuits.

Seventh Circuit

Only five Seventh Circuit judges said that citations to their court's unpublished opinions would create special problems; seven judges said that they would not. Four judges did not return an answer to this question. (Comment 7–5 below comes from a judge who said citations to unpublished opinions would not create special problems.)

Unpublished Opinions Would Become Shorter

Three judges predicted that unpublished opinions would become shorter if they could be cited.

7–1. If attorneys were allowed to cite unpublished orders in our circuit, it would immeasurably increase the amount of time spent by judges in reviewing the draft orders of the staff law clerks, who do not usually operate under the direct supervision of a judge. One reason it would take a great deal more time is because each and every case citation would have to be verified more thoroughly than is now done in the Rule 34 cases (cases decided on briefs without oral argument) and short argument cases (ten minutes). These cases are routinely handled and include the proposed

judgment and sentencing recommendation sent to us for review, modification, approval, or declination. Because of the large volume of the same, the publication time of these orders, as well as the time allotted to the orally argued cases, would be impacted and thus interfere with the present caseload flow. If every case, in effect, were to be treated as a polished, thoughtfully considered published opinion, I am confident that this circuit might well have to seriously consider limiting the number of cases heard on oral argument as well as the time allotted for each case. This is because precious time and resources will be taken from an already overburdened caseload and allocated to the Rule 34 and short argument matters. Thus, the court may be forced to adopt the procedure of issuing cursory, one-line orders in many cases as some other circuits have done, rather than our present procedure of issuing well reasoned, cited, and thoughtful extensive and thorough opinions. The result would be detrimental to the court system, judges, litigants and the bar, and I seriously urge that the judicial authorities considering this question give serious consideration before adopting the procedure of allowing the citing of unpublished orders in this circuit.

7–2. I oppose citing unpublished opinions/orders. We have too many published ones as it is. Our orders now are quite detailed. I will do shorter ones—*e.g.*, "the evidence is sufficient," etc.—if they are going to be cited back to us.

7–3. We provide a full statement of reasons in *all* cases—no one word affirmances. We could not continue the practice if all our opinions could be thrown back in our faces.

Unpublished Opinions Are Not Helpful in Other Cases

Two judges observed that citations to unpublished opinions are unlikely to be helpful.

7–4. In general, the "unpublished" dispositions in the Seventh Circuit are detailed, factually intensive treatments of a subject. Generally also, they represent applications of such well established standards as the *McDonnell Douglas* test, substantial evidence review of Social Security or immigration rulings, or *Anders* review of a criminal appeal. Finding the hidden advance in the law will be a search for a needle in a haystack. It is also quite unnecessary, given the percentage of opinions that are published in this circuit, which is in turn a direct consequence of our policy to grant oral argument in all fully counseled cases. Later publication of "unpublished" orders has been an adequate corrective for the occasional slip.

7–5. Citing unpublished opinions (orders) will not facilitate the resolution of cases nor improve the quality or uniformity of circuit law.

Quality of Unpublished Opinions and the Slippery Slope to Precedent

One judge expressed concern about the quality of the court's unpublished orders and predicted that allowing citation to unpublished opinions could ultimately result in their being precedential.

7–6. If we are going to cite "unpublished" opinions, we might as well publish everything. Non-argued cases with little or no merit deserve no more than short orders, and snippets from them should not have precedential value. In our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write. These definitely should not be available for citation.

Increased Workload

One judge predicted that citations to unpublished opinions would increase judges' workload. (See comment 7–1.)

Ninth Circuit

Thirty-one Ninth Circuit judges said that citations to their court's unpublished opinions would create special problems, 11 judges said that they would not, and one judge said that he did not know. Four judges did not return an answer to this question. (One judge who said that citations to unpublished opinions would create problems did not elaborate.)

Increased Workload

Fifteen judges predicted that citations to unpublished opinions would increase judges' workload.

9–1. Our local rule contemplates a memorandum disposition of a paragraph or two—the result and the reason. Changing this practice to a published disposition would put pressure on the court to expand the dispositions into more substantive recitations. Simply because we issue an unpublished disposition does not mean that we don't spend considerable time reviewing the record and reviewing the case. However, many cases do not merit an extensive explanation. Switching to citable dispositions will definitely increase the workload of already very busy judges. Finally, there is no need for citation. We ran an experimental citation approach, and attorneys did not find occasion for citation. Our limited citation rule addresses key issues concerning *res judicata*, circuit splits, etc.

9–2. Because of the great caseload of the Ninth Circuit, the Ninth Circuit would be particularly impacted. Also, because 37.5% of our case volume is immigration cases, "publishable" case memos would have to be more carefully checked against earlier rulings to avoid intra-circuit splits in

what tend to be repetitive situations. I may be repeating what I said earlier, but the more experience I have on this court, the more grateful I am that unpublished dispositions are not citable. Oh, I almost forgot. Often we do not call a case for a vote for a rehearing *en banc* because, although wrongly decided by the panel, it does not involve Rule 35 and Rule 40 issues. And it will only affect the parties. If all memorandum dispositions are to be cited, the number of *en banc* calls will surely rise.

9–3. Currently my court issues very brief unpublished opinions. The parties are aware of the facts. If there is no disagreement among the parties concerning the appropriate standard of review, or the applicable law, we generally omit reference to the citations supporting these principles. If those opinions are now to be published, we will be required to set forth the relevant facts and discuss principles of law that are not in dispute so that counsel will be able to determine whether the unpublished opinion is pertinent or distinguishable.

9–4. We assume unpublished memoranda are addressed only to the parties, who know the history and the facts of the case. We only state what we decide and why. If they were citable, then we would have to assume they are written to the public at large and describe the history and facts, and this would increase dramatically the time involved in preparing them. Also, the issues decided and why might have to be explained in more depth.

9–5. The practice in our court with respect to unpublished opinions is to make them very brief with no recitation of the facts, the standard of review, etc., unless they are directly at issue. We assume that the unpublished opinions are for the parties and that this information need not be part of the disposition. If publication is involved and citation is permitted, we write for the general public, a much more time time-consuming process.

9–6. This is a very large circuit. It should have been divided many years ago. To permit citations to unpublished opinions will increase the burden on the court very significantly. The solution is to create two or more circuits out of the geographic monster of the Ninth. It is a remnant of a sparsely populated west. That west is now heavily populated. *The time for restructuring is now.*

9–7. Right now, neither the lawyers nor the judges need to pay any attention to unpublished dispositions. If they can be cited, that would change. Much time could be required to address unpublished dispositions, all of which time would be wasted, in my opinion. I have yet to see any meaningful explanation of either the necessity or benefit of citing unpublished opinions.

9–8. I am not sure how special this characteristic is in relation to the problem, but here it is: We have a much higher case volume than other cir-

cuits. (Not per judge, but overall.) That will mean a *huge* number of previously uncitable memorandum dispositions will be citable. More work for us, and a *lot* more work for the lawyers.

9–9. We are already laboring under a back-breaking caseload. The immigration caseload continues to expand. Having to spend more time reading and researching cases when the caseload is already extremely heavy would create an additional burden on chambers.

9–10. Some judges and panels may increase the time they put in on unpublished opinions. At present, unpublished opinions get less work by some judges. I think allowing citation of unpublished opinions will dramatically increase the work of the circuit.

9–11. About one-half of our unpublished dispositions are written by central staff attorneys (not elbow clerks). Judges review them minimally, mostly for result. That practice could not be maintained.

9–12. Probably it would cause more burden with our already excessive caseload, because many judges would write longer dispositions.

9–13. The number of unpublished opinions is great, and it would require substantially more time to complete opinions.

9–14. It would probably greatly interfere with our screening program and cripple our productivity.

9–15. Much more attention to the facts of the case would be required to provide a context.

Unpublished Opinions Would Become Shorter

Five judges predicted that unpublished opinions would become shorter if they could be cited.

9–16. In my circuit there is a clear distinction between precedential and non-precedential. We believe it is important to inform the parties the reason for the decision without worrying about some phrase unintentionally being a cloud on the precedent of the circuit. That is why I believe the rule change would result in shorter, less explanatory dispositions. I hope it will not lead to simple judgment orders as in some other circuits.

9–17. Because prior memorandum dispositions were written with the clear understanding that they had no precedential value, changing the rule now means that underlying assumption was wrong. I would have written such dispositions quite differently, and far more tersely, had I known the rule would be undermined by the proposed change now under consideration.

9–18. Given our large volume of cases, the only way to avoid an increased burden of writing "publishable-quality" dispositions will be to revert to extremely summary format; otherwise our "published" opinion backlog will increase. I would therefore opt for very summary dispositions.

9–19. Most of our judges share bench memos, which tend to be fairly long. Often the bench memos are converted into unpublished dispositions without much change. Obviously, they would have to be pared down substantially if they were to become citable.

9–20. I would try to say as little as possible in all unpublished opinions. This would result in a considerable disservice to lawyers and litigants. The volume of our work leaves little alternative, however.

Quality of Unpublished Opinions

Two judges expressed concerns about the quality of the court's memorandum dispositions.

9–21. We have two kinds of unpublished decisions—those issued in calendared cases before regular panels (not all of which are argued), and those issued in "screening" cases, in which drafts are prepared by central staff and approved by three-judge panels after oral presentations and brief reviews of documents. I would be comfortable having the first group cited, as long as they are not precedential, because a substantial amount of chambers work, by both law clerks and judges, go into them. As to the second group—screened cases—the dispositions are exceedingly short, and I have much less confidence in whatever reasoning does appear. Allowing them to be cited would be pointless, as they would (I hope) never be "persuasive" on any issue. Thus, while I hope someday to persuade my court to allow citations to the first kind of disposition, we need to have autonomy to accommodate our own practices.

9–22. Our dispositions that come out of our screening panels in large volume are essentially right as to result, but somewhat short on reasoning.

Disposition Time

Two judges predicted that if unpublished orders could be cited, it could take the court longer to resolve the cases in which they are issued.

9–23. The sheer volume of cases precludes this rule as being a viable solution to whatever perceived problem the rule purportedly addresses. It would also preclude us from handling the hundreds of cases a month through screening sessions. I truly believe that our length of time form filing to disposition would grow exponentially and that we would never catch up.

9–24. Some judges would AWOP (affirm without opinion) more cases. Some would devote hours to fine-tuning, revising, and researching. Delay in filing would ensue.

Unpublished Opinions Are Not Helpful in Other Cases

One judge observed that citations to unpublished opinions are unlikely to be helpful. (See comment 9–1.)

Slippery Slope to Precedent

One judge predicted that allowing citation to unpublished opinions could ultimately result in their being precedential.

9–25. To increase the number of citable decisions, even non-precedential ones, given the number of precedential decisions we have, would exacerbate the problem of size. Neither lawyers nor law clerks can be expected to appreciate the difference between citable-precedential and citable-persuasive, so citable-persuasive dispositions will slither into being precedential. We lack the resources to give 10,000 dispositions the same attention and scrutiny as precedential opinions must have; all that is necessary is for three judges to agree on the disposition, not each word, but if dispositions can be cited for some kind of value that should change. If they don't have any value, what is the point of citing them? Bottom line: it is a back door way to make everything precedential.

Other Thoughts

Five judges had other thoughts.

9–26. Although I personally support allowing the citation of unpublished decisions as persuasive (not binding) authority, the opposition on our court is such that it would cause many judges to alter their writing method.

9–27. We try to tell the parties why we decided what we decided, with a bit of a nod to the record. But truly 99.9% of the unpublished cases do not decide any law *or* provide new factual insights.

9–28. Problems with citations to unpublished opinions in this circuit arise from our volume of cases and our practice of writing detailed unpublished dispositions to inform the parties.

9–29. It would increase the volume of citable cases by a factor of 5 or 6 to 1. We only allow citation of about 18% of all dispositions on the merits.

9–30. Our circuit provides fewer opportunities to compromise and reach consensus. In some cases rifts would be magnified.

Federal Circuit

Eight Federal Circuit judges said that citations to their court's unpublished opinions would create special problems; four judges said that they would

not, and two judges said that they did not know. Two judges did not return an answer to this question.

Quality of Unpublished Opinions

Three judges expressed concerns about the quality of the court's non-precedential (unpublished) opinions.

F–1. We are a national court. Thus, barring unusual intervention by Congress or the Supreme Court, we establish national rules. We therefore would have to be even more careful than we now are with each statement we make in an opinion so that what is cited back to us does not unintentionally preclude the proper resolution of later cases. And, frankly, it is very possible, even likely, that once non-precedential opinions become citable, a move will ensue to make them precedential. Thus, what we originally write with the understanding that it is non-precedential, albeit citable, may become precedent as well.

F–2. Many of our non-precedential opinions are in *pro se* appeals by federal employees from decisions of the Merit Systems Protection Board. Because these cases are often poorly briefed, it is easy to miss potentially important legal issues or to make statements in opinions that, with better briefing, would likely not be made. Allowing citation of these decisions would add to the clutter of briefs and suggest that the court has reached considered decisions on particular issues when in fact that is often not true.

F–3. The majority of our jurisdiction is exclusive. We circulate all published panel opinions to the whole court for comments before they are released and all members of the court carefully review them. Counsel should not be able to cite opinions that have not been through that process.

Unpublished Opinions Would Become Shorter

Two judges predicted that unpublished opinions would become shorter if they could be cited.

F–4. All opinions are "published" in one form or another—what we are talking about is *non-precedential* opinions. If our non-precedential opinions could be cited, then the *pro se* petitioners would get less useful opinions; there would be more summary affirmances; and non-precedential citations would only clutter up the briefs. A terribly short-sighted idea.

F–5. If attorneys could cite our non-precedential opinions, I would push for summary dispositions or have non-precedential opinions say as little as possible.

Slippery Slope to Precedent

Two judges predicted that allowing the citation to unpublished opinions could ultimately result in their being precedential. (In addition to comment F–6, see comment F–1.)

F–6. First, we have many complex patent cases that are best resolved by non-precedential opinion. Second, the law develops more orderly when some cases are not made precedential.

Increased Workload

One judge predicted that citations to unpublished opinions would increase judges' workload.

F–7. Courts that favor the citation of non-precedential opinions employ legions of staff attorneys to process them, while in this court non-precedential opinions are handled in chambers. In light of budgetary constraints, the central staffs of courts can be expected to decline, and the work returned to chambers where it belongs. I would expect this to affect the views of the proponents of a new role.

Government Advantage

One judge predicted that permitting citations to unpublished opinions would provide the government with an advantage.

F–8. The government is a party to most appeals here and can fully read non-precedential opinions. It will have many more opinions to cite in briefs under a revised rule.

Appendix B: Attorneys' Thoughts on the Impact of the Proposed Rule

Attorneys were asked what impact they would expect to result from the proposed lifting of restrictions on citation to unpublished opinions. Although attorneys were not asked explicitly whether they would support or oppose the proposed rule, their support or opposition was often apparent from their answers. Of the 258 attorneys who answered this question, most were supportive of the proposed rule (142, or 55%), many opposed the proposed rule (53, or 21%), and many were neutral (63, or 24%).

We classified the attorneys' responses by theme and sub-theme: the availability of additional authority (more authority, bias, more work, already reviewed), the usefulness of unpublished opinions (strategy, not precedent, not useful, poor quality, good quality), access to unpublished opinions (accessible, less accessible), impact on the court (more consistency, less consistency, higher quality opinions, shorter opinions, longer opinions, delay), broad policy issues (accountability, a blurred distinction between published and unpublished opinions, whether opinions should even be unpublished). Several comments fell into more than one category.

The comments are compiled here. Generally comments falling into more than one category are compiled in the category with the fewest comments. Generally supportive comments are presented before neutral and opposing comments, with longer comments presented first.

We present the attorneys' responses anonymously and essentially verbatim, with light copyediting. Each response is identified with an "A" for attorney and a number for ordinal position in this report. So response A–148 is the 148th response presented here.

The Availability of Additional Authority

Many attorneys commented on the implications of having a substantial amount of additional legal authority to cite. Eighty-five attorneys saw this as having access to additional valuable resources, but three attorneys worried about bias in the additional authority. Twenty-eight attorneys observed that a substantial amount of legal authority to cite entails a substantial amount of additional work, but four attorneys said that they already review the unpublished opinions anyway.

More Authority

Eighty-five attorneys observed that the ability to cite unpublished opinions gives them more options in the way of authority to support their arguments. Most of these attorneys (77) were supportive of the new proposed rule; eight were neutral. In addition to the attorney comments compiled here, 25 other attorneys mentioned more authority: attorneys A–64 (supportive), A–65 (neutral), and A–66 (neutral) (comments compiled under *More Work*); attorneys A–76 (supportive), A–77 (supportive), A–78 (supportive), and A–79 (supportive) (comments compiled under *Already Reviewed*); attorney A–82 (supportive) (comment compiled under *Strategy*); attorneys A–84 (supportive), A–85 (supportive), A–87 (supportive), A–90 (neutral), and A–91 (neutral) (comments compiled under *Not Precedent*); attorney A–103 (supportive) (comment compiled under *Not Useful*); attorney A–131 (supportive) (comment compiled under *Accessible*); attorneys A–148 (supportive), A–151 (supportive), and A–152 (supportive) (comments compiled under *More Consistency*); attorney A–163 (supportive) (comment compiled under *Less Consistency*); attorneys A–167 (supportive), A–168 (supportive), A–169 (supportive), A–172 (supportive) (comments compiled under *Higher Quality Opinions*); attorney A–183 (supportive) (comment compiled under *Delay*); and attorney A–193 (supportive) (comment compiled under *Blurred Distinction*).

A–1 (supportive, Tenth Circuit). I am in favor of a new Federal Rule of Appellate Procedure uniformly allowing citation of unpublished opinions. Such a rule would promote consistency and eliminate the maddening situation where, as a litigant, you have found a case directly on point, but are unable to cite it. Although the Tenth Circuit—where I practice predominantly—has a fairly lenient rule on citation of unpublished opinions, the Ninth Circuit, for example, has a much harsher rule. I have been in the frustrating position in district courts of the Ninth Circuit where I am forbidden from citing an unpublished Ninth Circuit case to the district court—authority which presumably would be quite persuasive, if not dispositive. Although courts and commentators frequently state that unpublished opinions only deal with propositions that can be found in published decisions, I have not found that to be the case. Even when that is true to some extent, fact patterns are always different and sometimes critical. An unpublished decision is self-evidently so; even if not binding, I have never understood the rationale behind not being able to cite it at all.

A–2 (supportive, District of Columbia Circuit). My practice has been almost exclusively in the U.S. Court of Appeals for the D.C. Circuit. I would expect little impact overall, in terms of numbers of cases impacted by the change. However, I would expect the rule to have a beneficial impact with respect to certain cases. I have experienced instances (before the rule in the D.C. Circuit was changed in Jan. 2002 to permit citation to un-

published opinions issued by that Circuit) where the *only* case comparable to the issue I was addressing involved an unpublished opinion, or where an unpublished opinion would have been a useful example of an additional comparable situation, but I could not bring this to the court's attention, because the rule barred citation to unpublished opinions. I believe both my client (the federal government) and the court were ill served by the rule in these instances.

A–3 (supportive, Seventh Circuit). I think it would be very helpful. It is difficult to predict the future, so judges who order an opinion to be unpublished cannot foresee what effect that opinion would have in the future. In other cases, I have found unpublished opinions to be directly on point with my issue, but I could not cite them.

Many years ago, the Illinois Appellate Court would direct that only "abstracts" of opinions be published, which turned out to be the West headnotes. There have been more than a few times when one of these "abstracts" was directly on point with my issue. You get the idea.

In the long run, publishing all opinions is better for the profession, because it provides a better basis to obtain on-point precedent. To save space, perhaps "non-published" opinions should only be available on-line.

A–4 (supportive, Second Circuit). I expect that the impact would be a favorable one from the perspective of an office such as mine (United States Attorney's Office). In many appellate cases, it would be useful to bring other similar cases to the court's attention, even though they are unpublished. This did not apply to the appellate immigration case that is the subject of this survey because there is now a wealth of published immigration case law in this circuit and others. I am not aware of the percentage of lawyers who do not have access to unpublished opinions through Westlaw, Lexis, or another computerized service, although lack of access problems could be addressed to some extent by requiring a party who cites to an unpublished opinion to provide a copy of it.

A–5 (supportive, District of Columbia Circuit). In my experience, I occasionally find an unpublished decision that is the closest precedent for the case on which I am working. The ability to cite the unpublished decision could facilitate our presentation of the argument in such an occasional situation. But many times I find that the unpublished decision is cumulative to many other published decisions on the same or similar point. And the unpublished decision itself may cite and rely on an earlier, published decision that may be cited without limitation. The D.C. Circuit has modified its local rule to permit citation of its unpublished decisions issued after Jan. 1, 2002. In a sense, the proposed national rule would not have much impact on our practice.

A–6 (supportive, Eleventh Circuit). I don't believe such a rule change would have an appreciable impact in the Eleventh Circuit, in which I prac-

tice, since such citations are currently citable—although not binding, of course. In those circuit courts of appeal that currently prohibit citation to unpublished decisions, the proposed rule change would have an impact, I believe. Advocates would be inclined to research and cite such unpublished decisions, where before they did not. I think it would enhance the breadth and quality of briefs, since persuasive well-reasoned unpublished decisions could provide further logical and policy arguments for both counsel and appellate courts to ponder in fashioning arguments and decisions, respectively.

A–7 (supportive, Tenth Circuit). I expect that the proposed rule would have a tremendous impact on the litigants and the courts. In my practice, I often read unpublished cases that support a position favorable to my client. Sometimes an unpublished case is the only available source to support a particular position for my client. In such an instance, a rule permitting citation to courts of appeals' unpublished opinions would provide me with the opportunity to support my client's position with some authority. It would promote a fair outcome of the proceedings because litigants would be permitted to more fully advise the court of similar cases.

A–8 (supportive, Second Circuit). Such a rule would be helpful. There have been instances in which a new governing rule has been established in an unpublished opinion, and instances in which an established precedent has been applied to facts identical to those in a case we have been handling. Indeed, in some instance we have moved to publish because the opinions would apply to many of our cases. The availability of these opinions would assist in assuring a uniform jurisprudence in the circuit and would be useful to litigants to have more persuasive authority to cite.

A–9 (supportive, Second Circuit). Such a rule would be helpful. There have been instances in which a new governing rule has been established in an unpublished opinion, and instances in which an established precedent has been applied to facts identical to those in a case we have been handling. Indeed, in some instances we have moved to publish because the opinions would apply to many of our cases. The availability of these opinions would assist in assuring a uniform jurisprudence in the circuit and would be useful to litigants to have more persuasive authority to cite.

A–10 (supportive, District of Columbia Circuit). My impression is that unpublished cases can be useful and there would be no detrimental effect in citing to them (as long as the unpublished status is noted in the citation). Although I have not studied the issue, I feel like unpublished cases sometimes make explicit generally assumed legal principles that otherwise are not cited or discussed (this especially seems to be the case in unpublished opinions deciding matters brought *pro se*).

A–11 (supportive, First Circuit). I think the rule would have a salutary effect. When an unpublished opinion is squarely on point, particularly one

from the same circuit, it is eminently sensible to permit its citation. More than once I have been precluded from citing and discussing a persuasive and well-reasoned unpublished opinion that is on all fours, or close to it, with the case being briefed. As long as the parties understand the precedential limitations of unpublished opinions, their citation should be permissible.

A–12 (supportive, Eleventh Circuit). I believe the ability to cite unpublished opinions would be helpful. Many times legal analysis by appellate courts on a new issue, or slightly new issue, is useful to the parties and the courts. If parties are permitted to cite law reviews, they should be able to cite unpublished opinions, which are likely more useful. The reason I did not cite or would not have cited unpublished opinions in my case was because the area of law had already been thoroughly vetted.

A–13 (supportive, Tenth Circuit). I think such a national rule permitting citation to unpublished opinions would be especially useful, particularly in some areas of the law where, for whatever reason, published opinions are as a rule exceptionally rare. This is particularly true in the context of habeas appeals under 28 U.S.C. § 2255 with respect to which there is a surprising dearth of "published" authority. I am, in other words, very much in favor of the proposed new rule.

A–14 (supportive, Eighth Circuit). It would be of significant value. Whether the opinion is published or unpublished, it is still the opinion of the appellate court and has some value. I have experienced a number of occasions where I could not locate a published opinion that is as squarely on point on a specific issue as any unpublished opinion. A less restrictive rule on the citation to an unpublished opinion would be of value and is recommended.

A–15 (supportive, District of Columbia Circuit). I believe the proposed rule would improve decision making and briefing. Often unpublished decisions have salient analysis that should be brought to the court's attention. As a practitioner, it is frustrating to find a recent unpublished decision directly on point, and not to be able to cite the decision. As a practical matter, "unpublished" decisions are being published anyway.

A–16 (supportive, Eighth Circuit). I believe the proposed rule would be beneficial to the court in providing the court with all applicable precedent. In a number of cases, language in unpublished opinions addresses an issue more completely than in published opinions. Being able to cite such language, particularly from unpublished cases in our circuit, would enhance the arguments made to the court.

A–17 (supportive, Second Circuit). I believe the impact would be to encourage greater advocacy through citation to cases without precedential impact but with persuasive merit. The rule, however, should require the author of the brief to attach a copy of the unpublished decision and to cite

any electronic source for the same (*e.g.*, Westlaw). I strongly support the proposed new national rule.

A–18 (supportive, District of Columbia Circuit). To the extent that unpublished opinions are non-binding, such a rule would nonetheless permit drawing the court's attention to dispositions of similar cases. This would essentially operate like an "accord" citation. To the extent that unpublished opinions are non-binding, there should be no requirement, only permission, to cite to such opinions.

A–19 (supportive, Seventh Circuit). From my own perspective, being engaged in many habeas corpus cases on appeal, there are some procedural practices that would be reflected in unpublished opinions that would occasionally be helpful to illustrate through judicial opinions. Short of that, I'm not sure I would often take advantage of a more lenient rule to this effect.

A–20 (supportive, Seventh Circuit). Any time you expand the universe of cases on which you can rely, you provide an attorney with more and presumably better reasoning to present. Since I never saw any real legitimate basis for limiting citations to published opinions (sometimes the unpublished cases are better), I would be happy to see this rule change.

A–21 (supportive, First Circuit). I believe a more lenient rule of citation would be beneficial to my appellate practice, and to the circuit court, because often times an unpublished opinion will possess an analogous fact pattern or more clear statement of the law. Even if the opinion is not binding precedent, it can be beneficial to guide the court.

A–22 (supportive, First Circuit). Given the availability of unpublished opinions on services such as Westlaw, it would allow practitioners access to cases which may be more on point factually to their own. The ability to cite these cases should assist in presenting argument in a more cogent and relevant manner.

A–23 (supportive, Ninth Circuit). The impact would be positive since frequently there are numerous unpublished decisions from this circuit and other circuits that are directly on point with the facts of a case. Because the cases are unpublished, the attorney is constrained from using the cases as precedent.

A–24 (supportive, First Circuit). It would make it more likely that I would find cases "on point." My only concern is that the holdings in these opinions are (sometimes) not explained as thoroughly as in published opinions, which could lead to the cases being used improperly (out of context).

A–25 (supportive, Fifth Circuit). Attorneys may then have access to additional cases that are on-point or close to it. Often times I encounter cases that resemble the factual pattern of my case, but I am unable to use the information, because the case is unpublished.

A–26 (supportive, Second Circuit). While I did not come across useful unpublished cases during this appeal, I have done so in other cases. I have never fully understood why such decisions should be off-limits, particularly when they are on-point and well reasoned.

A–27 (supportive, Eighth Circuit). I have, in the last two years, seen approximately three or four unpublished opinions with factual bases directly on point with the facts of my own case. Relaxation of the rule would aid me in responding to readings when such a thing occurs.

A–28 (supportive, Fourth Circuit). To the extent that a court has addressed a particular legal issue, albeit in an unpublished decision, I may be able to address issues raised by the court through my brief or oral argument in a more direct and thorough manner.

A–29 (supportive, First Circuit). Unpublished opinions can facilitate, in many instances, the presentation of an argument. Many times the facts are squarely applicable to the matter under consideration. Often they present authority in a very precise manner.

A–30 (supportive, Third Circuit). This rule would have a positive impact because it might permit additional arguments to be raised to the court's attention. The court could then give the unpublished opinion whatever weight it deems appropriate.

A–31 (supportive, First Circuit). Very little, but only positive in my opinion. It is not unusual for me to want to cite 1–3 such opinions in a brief in the First Circuit, but I do *not* because of the rule strongly discouraging it.

A–32 (supportive, Second Circuit). I think it would be helpful—there are cases that could be cited that I am unable to cite now (although I've learned to ignore unpublished opinions because I cannot use them).

A–33 (supportive, Sixth Circuit). It would allow practitioners to cite to more current authority. (It seems as if the amount of unpublished opinions in the past several years has significantly increased.)

A–34 (supportive, Second Circuit). I would support the new rule. Judges will give the weight that such decisions deserve. I have always found it frustrating to see an opinion but not be able to use it.

A–35 (supportive, Fifth Circuit). I occasionally find unpublished authority from this circuit that would be helpful in supporting arguments to a district court or appellate panel.

A–36 (supportive, Federal Circuit). I am in favor of this rule. Many of the circuit's opinions I deal with are unpublished but are extremely important, because they pronounce new legal principles.

A–37 (supportive, Sixth Circuit). Such a rule would result in utilizing more court of appeals precedent in support or opposition to my legal arguments. I would rarely cite to other circuits.

A–38 (supportive, Eleventh Circuit). It would widen the pool of cases available and would give one greater confidence as to the predictability of the outcome of the court's decision.

A–39 (supportive, Sixth Circuit). I would expect the proposed rule to have a positive impact, allowing the citation to additional material without imposing substantial burdens.

A–40 (supportive, Ninth Circuit). It would allow more comprehensive understanding of trends in the law in the different courts and allow reference to broader legal analysis.

A–41 (supportive, Ninth Circuit). Allow a lot more case law for the court to consider, allowing easier references so the court would see what is happening in other courts.

A–42 (supportive, Third Circuit). It will be of assistance in some cases, because there are many unpublished opinions that contain useful analysis of critical issues.

A–43 (supportive, Eighth Circuit). Extremely helpful. The rule would expand the range of citable precedent and enable the preparation of more thorough briefs.

A–44 (supportive, Third Circuit). The proposed rule would allow appellate advocates to advance persuasive reasoning from unpublished opinions.

A–45 (supportive, Eighth Circuit). I believe that such a rule would allow the court to be better-informed about potentially relevant case law.

A–46 (supportive, Eleventh Circuit). I think this would be a good rule change causing few if any problems, but making research a bit easier.

A–47 (supportive, Second Circuit). There would be more law that could be referenced that might address otherwise unaddressed questions.

A–48 (supportive, District of Columbia Circuit). Slightly more work, but some unpublished opinions would be of significant value in my cases.

A–49 (supportive, Eighth Circuit). It would enable us to cite a broader array of case authority. I think it would be helpful.

A–50 (supportive, Eleventh Circuit). It would improve and make more equitable the access to and use of important decisions.

A–51 (supportive, Fifth Circuit). I think it could facilitate more thorough treatment of some issues before the court.

A–52 (supportive, Fourth Circuit). I think it would be a good rule. Sometimes the cases most on point are unpublished.

A–53 (supportive, Tenth Circuit). It would be helpful because the Tenth Circuit has so many unpublished opinions.

A–54 (supportive, Second Circuit). I would expect such a rule to assist me in the presentation of my arguments.

A–55 (supportive, District of Columbia Circuit). Such a rule would be helpful in addressing novel issues of law.

A–56 (supportive, District of Columbia Circuit). Positive. There is useful precedent in them.

A–57 (neutral, Fifth Circuit). I practice primarily in the Fifth Circuit, which already has a very workable Local Rule 47.5.4 for citing unpublished opinions. In my experience, citing to unpublished cases often allows me to provide the court with a fact pattern similar to the case at bar. In this sense, it makes my work more effective. Citations to unpublished opinions is neither more nor less burdensome then not citing to them.

A–58 (neutral, Tenth Circuit). None for me, but for the practice across the country, it would improve appellate practice because parties can cite to whatever persuasive authority is available. The circuit in which I practice, the Tenth Circuit, allows citation to unpublished cases as long as they are attached to the briefs. That is why the proposed rule would have no effect on my practice.

A–59 (neutral, Third Circuit). Twofold impact. On the one hand, allow me to cite unpublished opinions in support of my client's position, and therefore potentially make my work a little less burdensome in that I have more chances to find support for my client's position. On the other hand, it enables my opposing counsel to do the same thing, thereby making my job harder.

A–60 (neutral, Third Circuit). It would clear up confusion between the circuits' different rules; it will enable citation of persuasive authority; it will, however, also increase misuse of non-precedential authority; it may increase the accuracy of judicial dispositions.

Bias

Three attorneys predicted that the additional authority provided by unpublished opinions would have a disproportionate impact on the government. Two attorneys representing appellants in criminal appeals predicated a disproportionate bias in favor of the government and one attorney representing the government in an immigration appeal predicted a disproportionate impact against the government. All three of these attorneys opposed the proposed rule.

A–61 (opposed, Seventh Circuit). Besides making the work of attorneys litigating in the federal courts of appeals more burdensome, if it is applied retroactively, it will have a disproportionately adverse impact on the government's litigation. This is because one of the factors used to decide whether the government will seek further review of an adverse decision is whether the decision has been published.

A–62 (opposed, Eighth Circuit). A negative impact. It would open the door to citation of older cases not intended to be authority or cited, and it would change the nature of future cases resulting in more delay in issuing otherwise simple decisions. We also believe that most unpublished opinions are weighted heavily toward affirming convictions, which is fundamentally unfair to defense research efforts.

A–63 (opposed, Third Circuit). I do criminal defense work and have never had occasion to cite or rely on an unpublished opinion. In my experience, most unpublished opinions on the criminal side tend to favor the government, so the proposed rule would just add more arrows to its quiver.

More Work

Twenty-eight attorneys observed that the ability to cite unpublished opinions would create more work for them. Most of these attorneys (21) opposed the proposed rule, three attorneys supported it, and four were neutral. The supportive and neutral attorneys also mentioned the additional authority that would be available to them if they could cite unpublished opinions. In addition to the attorney comments compiled here, 16 other attorneys mentioned more work: attorney A–48 (supportive) (comment compiled under *More Authority*); attorney A–61 (opposed) (comment compiled under *Bias*); attorney A–81 (opposed) (comment compiled under *Strategy*); attorneys A–99 (opposed) and A–102 (opposed) (comments compiled under *Not Precedent*); attorney A–114 (opposed) (comment compiled under *Not Useful*); attorneys A–118 (opposed), A–121 (opposed), A–122 (opposed), A–123 (opposed), and A–125 (opposed) (comments compiled under *Poor Quality*); attorney A–140 (opposed) (comment compiled under *Less Accessible*); attorneys A–157 (supportive) and A–162 (neutral) (comments compiled under *More Consistency*); attorney A–176 (neutral) (comment compiled under *Higher Quality Opinions*); and attorney A–180 (opposed) (comment compiled under *Shorter Opinions*).

A–64 (supportive, Seventh Circuit). While it would add to research time, it would open up available arguments, especially for unsettled or changing areas of law, such as immigration. I would welcome the change.

A–65 (neutral, Tenth Circuit). The new rule would make my appellate work both more burdensome and less burdensome. Legal research would be more burdensome as I would feel compelled to search for relevant unpublished cases rather than limiting my research to published opinions. However, when dealing with novel legal issues or fact patterns it would be helpful to be able to freely cite to unpublished decisions, especially those from other circuits.

A–66 (neutral, Sixth Circuit). It would be helpful when such an unpublished opinion was favorable but generally put a heavier burden on a

practitioner when he did research to locate and distinguish all such decisions.

A–67 (opposed, Fourth Circuit). It would probably result in more frivolous motions and arguments. If we can freely cite unpublished opinions of all circuits many will make motions and objections that they would otherwise not have made. Many attorneys, especially those who practice criminal law, will feel they are duty bound to press matters only supported in unpublished opinions. Not to do so will leave them open to a section 2255 attack. The fact that the unpublished opinions are still not binding will not change this. The rule change sends a mixed message: the case is *not binding*, but you can cite it. But why cite if it's not binding? How will courts interpret this? I vote, no change.

A–68 (opposed, Sixth Circuit). In a very few cases with truly "novel" issues, it may well be helpful in directing the reviewing court to relevant legal reasoning applied in prior cases as to that unique question. However, the rule will have the unfortunate effect of opening the floodgates to a myriad of arguments (based on dicta, in many instances) premised on unpublished opinions relative to questions and issues not novel or unique that have been well settled in prior published opinions, thereby increasing the burden of drafting appellate briefs, particularly responsive briefs.

A–69 (opposed, First Circuit). Such a change would dramatically increase the time it takes to prepare a brief. I am an immigration attorney and, as the courts know, there are thousands of such cases pending at any given time, and thousands of unpublished immigration cases. Increasing my reason to include all of these cases—which would be the prudent course to take if both sides may cite them—would be unduly burdensome.

A–70 (opposed, Fourth Circuit). I would expect such a rule would result in attorneys citing unpublished opinions in an effort to change precedent. Thus, I would anticipate each brief would contain a section that would argue for a change in precedent, citing unpublished opinions for the reason for the change.

A–71 (opposed, Ninth Circuit). It would require much more time to write each brief—given the sheer numbers of unpublished decisions—to ensure that you were not in conflict or overlooking something.

A–72 (opposed, Seventh Circuit). Would require additional research into hundreds more unpublished opinions. Would likely increase the time necessary to complete any given appeal.

A–73 (opposed, Federal Circuit). More time expended in briefing responses to citations to unpublished opinions by opposing counsel. No appreciable impact upon outcome of appeals.

A–74 (opposed, First Circuit). Would increase the universe of cases to find and read, create more work, and take longer to write and file briefs.

A–75 (opposed, First Circuit). It would make research take longer.

Already Reviewed

Four attorneys said that they already review unpublished opinions, so the opportunity to cite them would not entail additional work. All four of these attorneys supported the proposed rule.

A–76 (supportive, Second Circuit). In considering my response to the survey, it is important to note that in my brief to the U.S. Court of Appeals for the Second Circuit, I cited one unpublished opinion of the Second Circuit using the Westlaw citation, and a second opinion of the Second Circuit that is reported in the Federal Appendix (Fed. Appx.).

Because of the wide reliance on electronic libraries, "unpublished" opinions are equally as accessible as published opinions. Although unpublished opinion are not considered binding precedent, attorneys generally believe that they are nonetheless important as they provide a basis for at least a subtle argument for consistency by the court. Moreover, if the unpublished opinion is premised upon facts and circumstances very close to those presented by the attorney's case, then the citation to the unpublished opinion is viewed as particularly appropriate. For an attorney preparing a submission, the use of unpublished opinions does not involve any additional work or research, as unpublished opinions necessarily come to the attorney's attention during a Westlaw or Lexis computer inquiry.

From the practitioner's standpoint, unpublished opinions provide an additional source of reference material. The writer hopes that the use of unpublished opinions will not be perceived by the judiciary as increasing its workload by necessitating an increase of effort and care in drafting unpublished opinions.

A–77 (supportive, Fifth Circuit). In theory, opinions are to be unpublished only when the result is in all respects clearly dictated by existing precedent. In practice, however, judges may have a tendency to use the unpublished opinion as a mechanism for results-oriented adjudications of a particular case, comfortable that the analysis in the opinion will not negatively impact the court's jurisprudence more generally as it applies to other cases. If the national rule renders all opinions, published and unpublished, binding precedent, it should curb the tendency for such misuse of unpublished opinions. I would personally favor such a rule.

If the rule merely authorizes citation to unpublished opinions but leaves in place local rules regarding whether such opinions have precedential value, then in my estimation, the rule will have little impact, beyond obviously expanding the universe of cases that may be cited in briefs. Practitioners who research electronically (this is the exclusive method for all attorneys in my firm) are required to cull through unpublished opinions anyway, as they are included in the federal court of appeals databases of

the major online research companies. So there should be no appreciable impact on research time. The rule would simply expand the range of cases that may actually be cited in briefs.

A–78 (supportive, Second Circuit). It would not make the work any more or less burdensome because most research is done electronically—pulling up both published and unpublished cases. It would, however, be beneficial to both the parties as well as the courts (I believe), because it would provide more reasoned decisions from which to draw from especially in areas where there are few cases on point. While of course not precedential, additional reasoning is always helpful.

A–79 (supportive, Tenth Circuit). I believe it would allow for better reasoned arguments and greater intellectual honesty. Unpublished opinions are readily available on Westlaw and Lexis/Nexis, and I read them, even though I cannot cite to them. The work level for me is therefore the same, but it may be a disservice to my client and the court not to be able to point out to the court that a comparable fact pattern had a certain outcome.

The Usefulness of Unpublished Opinions

Many attorneys commented on how unpublished opinions are used. Three attorneys discussed strategies for using unpublished opinions even when it is not permissible to cite them. Twenty-three attorneys observed that unpublished opinions are not precedents, which implies that they would not be very useful. Another 15 attorneys provided additional comments calling into question the usefulness of unpublished opinions as authorities. Twelve attorneys opined that they tend not to be of as high quality as published opinions in their drafting, but one attorney said that their quality is good.

Strategy

Three attorneys mentioned strategies for bringing unpublished opinions to the attention of the court when they are not permitted to cite them directly. Attorney A–80 said that an attorney can cite a decision that the unpublished opinion reviewed so that the citation to the unpublished opinion appears as part of the subsequent history of the cited decision. Attorney A–81 suggests that attorneys can simply incorporate the argument of unpublished opinions without citing them. Attorney A–82 wonders if this would be plagiarism.

Two of these attorneys supported the proposed rule, and one opposed it.

A–80 (supportive, District of Columbia Circuit). It will have a positive impact, insofar as it will allow litigants to point to the actual case that contains the language on which they want to rely. As it stands now, we cite to

the lower court or agency decision and add the "enforced" citation (unpublished) in hopes that the court or clerks will read the unpublished appellate citation. This is a ridiculous way to get these citations to the court's attention, especially when the lower court or agency decision, which was published, does not really contain language directly on point, but the unpublished appellate decision does. Appellate courts respect other appellate courts, even if the precedent is not binding, but without the ability to cite directly to an unpublished appellate decision, we are left with having to cite to a district court or agency opinion which, even if published, is not as persuasive as a decision by an appellate panel. (I have not addressed unpublished district court decisions because they just do not come up much in my practice (labor), because district courts do not deal with labor issues, and because these questions seem geared to unpublished appellate decisions.) Also, speaking from my clerking experience at the district court level, there were many cases in my circuit in which the appellate court had essentially announced or decided a new rule, but had not published it, for some unknown reason. Given that there is no requirement that courts explain why they do not publish a decision, and given that there's no standard for what to publish or not, the rule against citing to unpublished decisions seems unfairly arbitrary.

A–81 (opposed, District of Columbia Circuit). I believe that the proposed rules would make the preparation of appellate briefs somewhat more burdensome. It would also impose an ethical duty on counsel to check unpublished opinions, for which counsel would have to absorb the additional time or costs if not passed on directly to the client. This invites citation to any unpublished opinion, whether specifically provided for by rule or not. In my opinion, counsel should simply incorporate the argument of such unpublished authority. If the logic is persuasive, it matters little whether it originated with another court or the parties' lawyers. The burden of the proposed rule outweighs the benefits.

A–82 (supportive, Eleventh Circuit). The proposed rule change seems directed to circuits that publish their unpublished decisions on Westlaw and Lexis but then do not allow the cases to be cited. My circuit, the Eleventh Circuit, does not make its unpublished decisions available on Westlaw or Lexis, but allows attorneys in the circuit to cite unpublished decisions. So, in some circuits, you can read the cases but not cite them. Here, you can cite them but not read them.

[Footnote added by attorney:] It is worthwhile to note the unfairness of this. Attorneys who practice in Atlanta, who can pick up hard copies of unpublished cases in the clerk's office, and government attorneys, who are always counsel of record in federal criminal cases and get copies of every unpublished criminal case, have access to and can cite unpublished circuit cases the rest of us do not know exist.

So the proposed rule change would have little impact in the Eleventh Circuit until the Eleventh Circuit makes its unpublished decisions readily available online. In general, the proposed rule may increase citation of unpublished decisions, but not significantly. The block-lettered warning that appears atop unpublished cases on Lexis and Westlaw has a chilling effect that may wane if the rules limiting citation of those cases are eliminated, but attorneys will still prefer to cite cases with precedential value. I can cite unpublished cases from other circuits freely now, but I do it only one or two appeals each year.

That being said, I feel strongly that when I find good arguments that may help my clients I should make them, regardless of whether I find the arguments in published or unpublished cases. Rules that prohibit citation to unpublished cases must create a bit of an ethical dilemma for attorneys in circuits that have them. When those attorneys find good arguments in unpublished cases, I wonder: do they (1) ignore them, (2) make the arguments without acknowledging their sources (and thereby commit plagiarism), or (3) cite the cases in violation of the circuit rules?

Not Precedent

Twenty-three attorneys observed that it is well understood that unpublished opinions are not binding precedents in the way that published opinions are. Five of these attorneys were supportive of the proposed rule, nine were neutral, and eight were opposed to it. In addition to the attorney comments compiled here, three other attorneys reminded us that unpublished opinions are not precedent: attorney A–135 (neutral) (comment compiled under *Accessible*); attorney A–180 (opposed) (comment compiled under *Shorter Opinions*); and attorney A–185 (opposed) (comment compiled under *Delay*).

A–83 (supportive, Third Circuit). I would appreciate a rule permitting such citation as long as it was clear that those cases could not be offered for any precedential value. Often unpublished cases lack strong analysis (or any analysis) of a given issue. As a result, they are not "worth" much. Every once in a while, however, they provide helpful analysis which could help judges form their opinions. Such a rule would not necessarily create more work for me, but I could see judges having to work harder if they feel compelled to actually read unpublished cases cited in the parties' briefs.

A–84 (supportive, Tenth Circuit). If the rule does not change the fact that unpublished decisions are not binding precedent, I think the new rule would have no impact. I prepare a lot of appeals, and unpublished decisions can be very useful if they are very close to the facts of your case or the number of similar unpublished decisions is significant for some reason. I regularly cite to them, and their use does not affect my work, because all my research now is done electronically.

A–85 (supportive, Ninth Circuit). I believe that this would make the writing of briefs easier. I am not sure that the rule would have a great impact on the decisions of the courts, as they would not view unpublished decisions as precedent. On the other hand, to the extent that judges are able to get more information, including a clearer picture of what has happened at the administrative level, reference to unpublished decisions could make a difference.

A–86 (supportive, Third Circuit). I personally favor the proposed rule, but do not believe it would have a great impact. A good lawyer cites precedential opinions where possible. If there is no published authority on a particularly obscure point, however, why should the parties and the court not have the benefit of looking at how a different court or panel approached the issue, even if it is not precedential?

A–87 (supportive, Tenth Circuit). As long as these opinions continue to lack value as precedent, I do not think such a rule would be unduly burdensome. It is helpful to practitioners to cite unpublished opinions for persuasive authority, and I would think it would be helpful to members of the court to know the results reached by their colleagues.

A–88 (neutral, Eleventh Circuit). I think it might be useful to cite to the facts of unpublished opinions and how the court issuing the unpublished opinions applied the existing case law to the facts of the particular case. This would be for illustration purposes only. I can't really envision the citation to unpublished opinions being of much help in light of their nonbinding nature. Other than to illustrate how an appellate court analyzed a case, I see little use. However, I do not have a significant appellate practice at the present time and do not have a great deal of appellate experience compared to many practitioners.

A–89 (neutral, Eleventh Circuit). I don't believe it would have much of an effect on my work, nor on my colleagues', since we are currently permitted to cite unpublished decisions. The hesitancy in citing such decisions stems from their lack of binding effect, a circumstance that will not be affected by the proposed rule change.

A–90 (neutral, Seventh Circuit). If such an opinion were favorable it might be useful by analogy. But if not binding as precedent, the fact that unpublished opinions could go either way would make the process very burdensome, especially if they are not Shepardized.

A–91 (neutral, Ninth Circuit). Allowing citation to all opinions would make formulating arguments easier in many cases, but would not necessarily make the arguments any more persuasive if unpublished opinions remain without binding precedent authority.

A–92 (neutral, Fifth Circuit). I would resort to unpublished opinions only in the event of a total lack of supporting precedent in published opinions and then only to provide the court guidance in the instant case.

A–93 (neutral, Seventh Circuit). The courts will take notice of such unpublished opinions, but if such opinions are not binding precedent, there will not be much influence on legal opinions and courts' decisions.

A–94 (neutral, Federal Circuit). Not a significant impact because I believe that the federal appellate courts will continue to follow the *stare decisis* with respect to published decisions only.

A–95 (neutral, Eleventh Circuit). Unless the unpublished opinions have some precedential value the rule change would probably have minimal impact.

A–96 (opposed, Fifth Circuit). As a civil and criminal appellate attorney with experience in both the private and government sectors, I can honestly say there is already enough abuse with citation of cases. The use of unpublished cases would make this situation worse. The Fifth Circuit's rules already allow for the citation of unpublished opinions in certain appropriately limited circumstances. As a former intermediate appellate staff attorney, I also believe that courts should have the right to shield certain decisions from use as precedent. It is part and parcel of the percolation effect for legal issues and the occasional need for decisions based solely on the facts of a particular case. In short, allowing citation to all opinions would have a negative impact on the appellate process and would lead to further abuses on briefing. I oppose such a rule.

A–97 (opposed, First Circuit). The decision of a court to publish or not publish a particular adjudication of an issue or a case is usually tied to their intent of it having prospective generalized application. For one reason or another, a judge may dispose of an issue or a case in a manner that promotes judicial management, but without pretension to precedent; and that distinction is usually reflected in the decision to publish or not. If an unpublished opinion has no precedential value, it should not be relied upon by a party; if it does, it should be published. I do not fathom the logic of the recommendation.

A–98 (opposed, District of Columbia Circuit). Citing to unpublished opinions which have no precedential value would seem to complicate the task of the brief writer. Why cite opinions which have no binding effect? The *American Wrecking* case, for which I was attorney of record, was an OSHA case. The OSHRC has promulgated rules providing that ALJ decisions can be cited but have no precedential value. As a result, I devote substantial time agonizing over whether or not to cite to such decisions, which can be disregarded by the OSHRC. To me, the real issue here is the policy reasons underlying unpublished opinions.

A–99 (opposed, Sixth Circuit). The diligent practitioner would feel a need to consider the universe of unpublished opinions, increasing the time spent on an appeal. Even with the assistance of computers, that time could prove considerable in some cases at least. Yet the unpublished opinions

would have no binding effect (as question 5 above indicates). Therefore, the practitioner would wonder about the utility of the additional work while also feeling obligated to engage in the work. Thus the impact could prove more negative than positive and a source of frustration.

A–100 (opposed, Tenth Circuit). There is a reason unpublished opinions are not cited in the official reporters. It seems that allowing attorneys to cite to unpublished opinions would simply inject more uncertainty into the already uncertain business of interpreting case law. Moreover, practically speaking, judges will probably accord less deference to unpublished opinions, thereby making their use of little real value.

A–101 (opposed, Fifth Circuit). Such references would unnecessarily clutter the appellate briefs and divert the parties' attention from the published opinions that control the issue under review.

A–102 (opposed, Third Circuit). It would be much more burdensome to have to respond to and distinguish cases of no precedential value.

Not Useful

Sixteen attorneys observed that unpublished opinions generally are not useful. Most of these attorneys (nine) were neutral concerning the proposed rule, six opposed it, and one attorney supported it. In addition to the attorney comments compiled here, two other attorneys mentioned that unpublished opinions are seldom useful: attorney A–232 (opposed) (comment compiled under *Poor Quality*); and attorney A–182 (opposed) (comment compiled under *Longer Opinions*).

A–103 (supportive, First Circuit). I think the impact would be modest. The case law in my practice area (energy law) is fairly well established, and there are very few instances in which I would find unpublished case law to be applicable. That said, the proposed rule would be helpful in those rare instances in which I could cite to an unpublished opinion.

A–104 (neutral, Eighth Circuit). The impact would be to essentially replicate briefing methods currently utilized in the local district court, where unpublished opinions appear to be routinely cited regardless of the court issuing the opinion. Any additional burden would fall most heavily on the judges and law clerks of the court of appeals who would be required to review the significantly greater number of cases made available for citations. Given the rather perfunctory legal analysis of most unpublished opinions, many of which are cited only because the opposing party is also utilizing unpublished opinions, it seems doubtful that much of significant value would be added to appellate briefing by a new rule on this issue.

A–105 (neutral, Third Circuit). None. I have rarely found unpublished court of appeals cases helpful. My experience is that unpublished opinions are unpublished for a reason; *i.e.*, either there is nothing remarkable about the case or the opinion is not worthy as precedent. Allowing citation of un-

published cases of lower courts, however, could be helpful. In many states, court of chancery opinions are generally unpublished, but often times are the only opinions available discussing corporate law.

A–106 (neutral, First Circuit). It strikes me as silly that unpublished opinions are readily available on Westlaw but cannot be cited. Nevertheless, only very seldom is an unpublished opinion critical. In most instances the published opinion is more fully explained than an unpublished one and thus more helpful.

A–107 (neutral, Seventh Circuit). I do not believe that permitting the citation of unpublished opinions would have an appreciable impact, because the occasions where I have wanted to cite such a decision have been so few.

A–108 (neutral, Fourth Circuit). No significant impact. There are enough published cases already. Cases are unpublished for a reason, and I expect few unpublished cases will find their way into appellate briefs.

A–109 (neutral, First Circuit). None. Usually the unpublished opinions are cases where the facts or factual scenario have been already resolved under controlling and binding published opinions.

A–110 (neutral, Eleventh Circuit). Very little. In my circuit, I attempt to cite the binding precedent on each issue, and I can't ever remember this being an unpublished opinion.

A–111 (neutral, Second Circuit). The impact would be very minimal as unpublished opinions deal with basic hornbook issues.

A–112 (neutral, Eighth Circuit). None. There are plenty of published cases on which to rely.

A–113 (opposed, Federal Circuit). A few appellate lawyers will advance extremely broad interpretations of the law, based upon unpublished decisions. These arguments will be tedious to rebut. The problem lies in the circuits' rationale for unpublished decisions: that they do not break new legal ground. It is but a short step from that premise to the argument that unpublished decisions are next-best-to-precedential, because, by definition, they (merely) reflect a panel's reading of existing law. This would inevitably encourage lawyers to make use of the ambiguity and place great emphasis upon unpublished decisions that are helpful to the clients, while acknowledging in lip service that the unpublished decisions themselves do not control.

A–114 (opposed, Second Circuit). I would spend additional and significant time searching through unpublished decisions. I guess they would remain as terse as they are now. Thus, it would be difficult to discern whether the cases are factually similar, as many unpublished decisions are fairly light on the facts. The judges might spend more time on the unpublished decisions (*i.e.*, give more information and explanations). I take it on

faith that the unpublished decisions do not add anything new to the law. However, I have seen a few that really were significant and deserved greater exposition.

A–115 (opposed, Tenth Circuit). Except in rare instances, the need for citation to unpublished opinions is non-existent. The Commissioner of Social Security, however, uses them frequently. The Tenth Circuit, disturbingly, has begun citing as authority the unpublished opinions of other circuits. There is usually a reason that opinions are not published. Permitting citation to unpublished opinions from other circuits would be a mistake.

A–116 (opposed, Tenth Circuit). In the Tenth Circuit and in the field of immigration law there appear to be few unpublished cases that do anything but reiterate published decisions. I don't feel that it would make much difference to my practice.

Poor Quality

Twelve attorneys observed that unpublished opinions are not drafted with the same degree of care used in drafting published opinions. Most of these attorneys (10) opposed the proposed rule; two were neutral. In addition to the attorney comments compiled here, two other attorneys expressed concern about the quality of unpublished opinions: attorney A–177 (neutral) (comment compiled under *Higher Quality Opinions*), and attorney A–203 (neutral) (comment compiled under *Should Be Precedent*).

A–117 (opposed, Eleventh Circuit). In my opinion, having a federal rule allowing the citation of unpublished opinions would have a negative impact on appellate practice. My basic understanding is that if an appellate decision establishes a new rule of law or applies an established rule in a different way or to significantly different facts, the court will, and must, publish the opinion. Unpublished opinions are thus only issued when prior precedent applies directly to the issues raised. They give the parties a reason for the ruling, but do not establish new precedent. It is reasonable to conclude that courts will generally play closer attention to the language and reasoning of published decisions because they establish precedent.

My fear is that having a federal rule allowing the citation of unpublished opinions will improperly give greater weight to unpublished decisions that may not have gone through the rigors imposed on precedent-producing decisions. It is ironic that I was selected for this survey based on my filing a brief in *United States v. Urbaez*. That case directly illustrates the dangers of reliance on unpublished decisions. The appeal raised the issue of whether attempted illegal reentry was a specific intent offense. The Eleventh Circuit had ruled in a published opinion that it was not. But that decision did not offer any legal reasoning and merely adopted the reasoning of an unpublished decision from another circuit. However, a close look at that unpublished decision suggests that the other circuit was dealing

with a case of illegal reentry and not attempted illegal reentry. The problem was that the unpublished decision was not clear. In fact, the other circuit later issued a published opinion contrary to that of the Eleventh Circuit. Thus, reliance on an unpublished decision resulted, in my opinion, in bad precedent that has yet to be corrected. If anything, I would hope that reliance on unpublished opinions would be lessened and not encouraged.

A–118 (opposed, District of Columbia Circuit). I think it will require counsel to invest unnecessary effort in reviewing, digesting, and distinguishing earlier decisions that were the result of poor advocacy.

In my view, there are two legitimate reasons for making a ruling (and its reasons) non-precedential: First, that the case calls for the application of well-settled rule to facts that are either peculiar (in this category should fall many sufficiency-of-evidence issues), have already arisen in a published case, or are simply too clear to cause any reasonable dispute. Second, that the case has been so poorly litigated that the court cannot be sure that the resulting decision will be of any value to anyone other than the parties.

Citations to each class of unpublished decision give rise to a different kind of burden. Fact-bound cases make for either difficult or merely duplicative reading. In the former case, opposing counsel must engage in the tedious task of distinguishing the facts; in the latter case, of organizing the various repeated factual patterns into categories, and then distinguishing them as a group.

On the other hand, cases that are poorly litigated often lead to troublesome decisions, for the simple reason that the court is not well advised as to all the possible arguments. The court's resolution was no doubt correct as to those parties because the arguments not made are necessarily waived; the court cannot decide what was not presented to it. However, the decision on the facts presented (excluding the defaults of advocacy) may not be correct as a general legal proposition. If such decisions may be cited—even for merely persuasive value—opposing counsel will be required to show why the decision is not persuasive; that is, that one or more crucial arguments were omitted to be made in the earlier case. Assuming the prior unpublished decision is not unduly lengthy or complicated, the burden would not be tremendous, however, because those arguments would have to be made in the case at hand in any event.

A–119 (opposed, Eleventh Circuit). I disfavor allowing the citation of unpublished decisions. Generally, unpublished decisions are short memorandum-type opinions with hardly any factual discussion or legal analysis. Therefore, citing to these cases should contribute little, if anything, in the adjudication of a notice of appeal. To the contrary, it might make writing a brief more burdensome for appellees. Appellants with questionable claims could be encouraged to rely excessively on seemingly similar unpublished decisions in support of their arguments. If this rule is approved, it should

at least be limited to those cases where there is no precedential case law on the matter before the court, and where no other circuit court has published an opinion addressing the issue.

A–120 (opposed, Sixth Circuit). I personally like to think that the circuit courts put more thought into their published opinions than their unpublished opinions. As such, I think citations to unpublished opinions may contribute to bad precedent—as circuit courts might be reluctant to overrule cited unpublished opinions, which though bad are on point. I would hate for the U.S. Attorney's Office to be able to cite the opinion in my case. I believe it was thoughtless and rushed and overly deferential to the district court judge who, I believe that both parties would concede, was not even on point.

A–121 (opposed, District of Columbia Circuit). There is already ample published authority. The new rule would result in having to distinguish or otherwise argue against all kinds of unpublished orders, opinions, etc., which would be more burdensome on attorneys and the courts. It might hurt the quality of the briefing and writing. Judges, clerks, and attorneys may get distracted by opinions and orders that were never intended for publication or citation, and that could only harm the entire process.

A–122 (opposed, Second Circuit). I believe such a rule would be ill-advised, because of the number and nature of unpublished opinions available online. Research would take considerably longer and raise client costs, without producing a superior product. Many unpublished opinions are not very well written, which could lead to mischief—namely, someone citing them in an effort to distort the law. I oppose the new rules.

A–123 (opposed, Tenth Circuit). I believe that often unpublished opinions are not as carefully crafted or thought out as published opinions, so the use of unpublished opinions should be limited. Further, the sheer number of opinions issued by the courts of appeals every year would make my work more burdensome if the rules were made more lenient.

A–124 (opposed, Eleventh Circuit). I believe the net effect of such a new rule will be negative. Published opinions are more carefully written than unpublished. Some of us who regularly do appellate work find a cacophony of voices in the law now. Unpublished opinions will only add to the discordant effect.

A–125 (opposed, Fourth Circuit). Increase citations in briefs and require responses to unpublished opinions cited in opposition's brief. Main concern is that unpublished opinions are often unpublished due to a quirk in the record not apparent in the opinion and could result in dubious precedent.

A–126 (opposed, Ninth Circuit). I would expect some courts to make unpublished opinions less available to the public. Responding to argu-

ments based on unpublished opinions will be difficult because it is often difficult to discern the factual basis for an unpublished decision.

Good Quality

One attorney remarked that unpublished opinions are actually of good quality. This attorney supported the proposed rule.

A–127 (supportive, Sixth Circuit). Since these cases are now readily available to practitioners in this age of computer research, I think it is reasonable to allow their citation. The court has to apply the same careful legal reasoning in reaching its decision, whether published or unpublished, so I see no reason not to allow citation of unpublished as well as published decisions.

Access to Unpublished Opinions

A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many of them are available electronically from attorneys' desktops, this reason appears to have less force. Twelve attorneys mentioned how accessible unpublished opinions are now, but 14 attorneys said that they are still often less accessible than published opinions.

Accessible

Twelve attorneys observed that in this electronic age, unpublished opinions are now quite accessible, much more accessible than they were when proscriptions on citing unpublished opinions were put in place. Most attorneys (nine) were supportive of the proposed rule; three were neutral. In addition to the attorney comments compiled here, three other attorneys mentioned that unpublished opinions are now very accessible: attorney A–127 (supportive) (comment compiled under *Good Quality*); and attorneys A–76 (supportive) and A–79 (supportive) (comments compiled under *Already Reviewed*).

A–128 (supportive, Third Circuit). Given the advancements in electronic case research and the wide availability of many unpublished dispositions on government and commercial electronic case research services, I believe that relaxation of the current rules on the citation of unpublished opinions would, in general, prove beneficial. In addition, I believe that promulgating a uniform rule concerning the use of unpublished opinions in the federal courts of appeals would have a positive spillover effect on lower courts. I, from time to time, have encountered disparate views even among judges within the same court concerning the utility of unpublished opinions. Presumably, a uniform rule in the federal court of appeals would encourage lower courts to follow suit

A–129 (supportive, First Circuit). Since these decisions are readily available, although technically "unpublished," they should be available for citation without changing their status as precedent. In practice, I have found that these cases are often cited notwithstanding the current rule, especially in areas where there is little other case law. A change in the rule would obviate the need to argue both that the citation to the case was improper, and then address the case on its merits. In fact, that occurred in the subject appeal when opposing counsel cited an unpublished California case in violation of California court rules. It does not make sense to pretend these cases don't exist, when they are readily accessible.

A–130 (supportive, Sixth Circuit). I fully support the more liberal approach to citing unpublished opinions. With computer-assisted research, there is no appreciable difference in research time. Including unpublished opinions with briefs might be a little more burdensome.

A–131 (supportive, Tenth Circuit). We would have more guidance on issues that have often only been fully addressed in unpublished opinions. With computerized research, it would be easy for the practitioner to locate the same.

A–132 (supportive, Sixth Circuit). A positive impact. No reason any more to limit citation to only published opinions. "Unpublished" opinions are available in computer research libraries.

A–133 (supportive, Third Circuit). It would be beneficial and is long overdue. Today, most lawyers are aware of the unpublished decisions and it makes sense to allow their use.

A–134 (neutral, Sixth Circuit). I think the impact would be minimal. Given the availability of unpublished opinions on electronic databases, most researchers, including the court personnel, know of the holdings in unpublished opinions, so the reasoning and ultimate decisions in unpublished cases are often reflected in final decisions of courts. Citation to unpublished opinions simply would reflect the reality of today's research capabilities. Preference should still be for published opinions if available.

A–135 (neutral, District of Columbia Circuit). I expect that the impact would be minor: (1) unpublished opinions are available on Westlaw, so accessibility of unpublished opinions should not be a significant problem; and (2) an appellate court would probably continue to give more weight to a published opinion, even if the rules permitted citation to unpublished opinions (although an appellate court might give significant weight to an unpublished opinion if it involved one of the very litigants then before the court).

A–136 (neutral, Eighth Circuit). More extensive research required equals minimal impact, given computer research methods.

An informal survey of six other attorneys in our office revealed about an even split on the desirability of having unpublished opinions to be citable or precedent.

Less Accessible

Fourteen attorneys said that unpublished opinions are not always as accessible as published opinions, at least not to everyone. Most of these attorneys (11) opposed the proposed rule; two were supportive; one was neutral. In addition to the attorney comments compiled here, three other attorneys remarked that unpublished opinions are less accessible than published opinions: attorney A–82 (supportive) (comment compiled under *Strategy*); attorney A–179 (opposed) (comment compiled under *Shorter Opinions*); and attorney A–188 (supportive) (comment compiled under *Accountability*).

A–137 (neutral, Third Circuit). Realistically, I don't know that it would have much of an impact; however, I believe such a rule may have the opposite effect to the one presumably intended. I presume the intended effect would be to open the court's consideration to those diverse opinions it would, under the present status of procedure, otherwise dismiss. While this intent is laudable, I believe it ignores the problem of open access to opinions. Not to attorneys, mind you, as they have resources available for ready access to unpublished opinions. Rather, the non-attorney, to whom these courts are open and for whom these courts truly operate, would be prejudiced as he or she does not have (or may not have) such resources available. Now, a non-attorney may visit his or her local courthouse and retrieve all published opinions. Would he or she be able to retrieve all unpublished opinions there as well? If not, is that person truly better off being able to cite cases he or she cannot find?

A–138 (opposed, Eleventh Circuit). I think that such a rule would have minimal impact on my practice, but might not be a good idea generally. In my circuit, unpublished opinions are not available on Westlaw and not published for a reason. Although they can be useful in limited situations, in busy circuits such as ours, unpublished opinions dilute the body of law as a whole and should not be more widely used. I am not sure of the practices in other circuits but do know that many circuits do not publish much and therefore unpublished opinions are cited more. A more permissive rule might disincentive publication.

A–139 (opposed, Tenth Circuit). I have not seen this proposed rule. Nevertheless, unless the unpublished opinions of every circuit are readily available and easily accessible for all lawyers via available legal research methods, it may make it difficult for some attorneys to compete. If the rule still requires that copies of unpublished opinions must be attached to the

briefs, it will make the briefs and appendix more lengthy, requiring more paper, copying time, and scanning time for electronic filing.

A–140 (opposed, Fourth Circuit). One practical problem I foresee is that the major providers—Lexis and Westlaw—do not always have the same catalogue of unpublished decisions. That has come up in trial court briefing—research cited on Westlaw by the other party was not retrievable on Lexis. That is what I see as the main pitfall of such a rule. A second problem is just that extra time needed to research other circuit's unpublished decisions. That is not hugely burdensome, but would be an effect.

A–141 (opposed, Sixth Circuit). It would reward practitioners with access to unpublished materials and penalize those without.

It is fundamentally unfair for one side to have access to law that the other side does not have.

This attempt to "liberalize" rules is really just a way to undermine the rule of precedent.

It smacks of the unprincipled disregard for law that permeates the Bush administration!

No! No! A thousand times no! And I mean it!

A–142 (opposed, District of Columbia Circuit). In my field—Freedom of Information Act litigation—and with the limited resources of an attorney who does not have access to Westlaw or Nexis, I would expect this to benefit the government, which has the capacity to comb all courts for unpublished decisions favorable to it, something I cannot do.

A–143 (opposed, Eighth Circuit). It would make brief writing and legal research more difficult for sole practitioners and lawyers from another circuit appearing in those circuits, like me. I appeared in the Eighth Circuit, but my "home" circuit is the Eleventh Circuit. Having to locate unpublished opinions would be difficult.

A–144 (opposed, Second Circuit). Am simply concerned about access to those unpublished decisions that are (1) not my own and (2) not available through the various reporting services we have access to (limited funds for access to comprehensive reporters).

A–145 (opposed, Third Circuit). It would be unfair to litigants whose attorneys do not have the resources to discover unpublished opinions. It unbalances what I believe is a level playing field.

A–146 (opposed, Eighth Circuit). Without having Westlaw or Lexis, I might be at a disadvantage, because I might miss a case that my opponent has access to.

A–147 (opposed, Tenth Circuit). It would make it more difficult for those who have no electronic research subscription.

Impact on the Court

Many attorneys commented on what impact on the court and the law the ability to cite unpublished opinions might have. Nineteen attorneys predicted an increase in legal consistency, but three attorneys predicted a decrease in consistency. Sixteen attorneys predicted that unpublished opinions would improve in quality if they could be cited. Three attorneys, on the other hand, predicted that they would just get shorter. Two attorneys predicted that they would get longer. Five attorneys predicted that cases resulting in unpublished opinions would take longer to resolve.

More Consistency

Nineteen attorneys predicted that their ability to cite unpublished opinions would result in more legal consistency. Most of these attorneys (17) supported the proposed rule; two were neutral. In addition to the attorney comments compiled here, four other attorneys mentioned that the ability to cite unpublished opinions could result in more legal consistency: attorneys A–167 (supportive), A–171 (supportive), and A–174 (supportive) (comments compiled under *Higher Quality Opinions*); and attorney A–184 (neutral) (comment compiled under *Delay*).

A–148 (supportive, Fourth Circuit). It would enable federal appellate attorneys to offer courts more support and authority for the positions they take. It would foster greater consistency of decisions in each circuit. It would enable each circuit to see what issues may warrant more published decisions if the parties routinely are forced to cite only to unpublished decisions because of a dearth of published decisions. It would enable attorneys to demonstrate that the positions they take are based on the court's own rulings and not simply fashioned out of whole cloth.

A–149 (supportive, Federal Circuit). In my experience, I have had to relitigate issues previously decided in unpublished opinions. Permitting citation to such opinions might reduce the need to relitigate issues by discouraging the filing of appeals or by enabling settlements. Otherwise, I don't see a rule that simply allows citation of unpublished, non-precedential opinions having much impact, aside from saving me the trouble of figuring out what rule applies in the circuit, *i.e.*, the general benefit of uniformity for these of us who practice in all 13 circuits.

A–150 (supportive, Eleventh Circuit). The rule change would be desirable inasmuch as abundant non-precedential material is presently cited without restriction. If the new rule allows citation by reference to a national electronic database such as Lexis or Westlaw (without attaching a copy), it will make practice easier. Attorneys should be free to argue to a court what it or other courts have done in other cases. Otherwise courts are able to conceal and disregard questionable and inconsistent dispositions.

A–151 (supportive, Third Circuit). I expect a rule permitting citation to the courts of appeals' unpublished opinions would be beneficial to the parties and the court insofar as such a rule would provide for the broadest consideration of issues relevant to any given appeal and also would help ensure consistency and fairness, two central goals of any system of justice.

A–152 (supportive, District of Columbia Circuit). It would assist counsel in the rare case in which the only cases on point (or nearly the only cases on point) are not published. It also would result in a fairer judicial process that—by eliminating the second class status of unpublished decisions—would likely yield more consistent judicial decision-making.

A–153 (supportive, District of Columbia Circuit). It would enable attorneys, in some cases, to learn about, and to cite, cases, making the court's precedents more consistent and coherent, and might focus the court's use of precedent in a constructive way. I do not see a downside.

A–154 (supportive, Fifth Circuit). It would allow for quicker review as law is being developed and interpreted. It might prevent multiple reargument of issues that have been considered and make it somewhat easier and quicker to explain arguments

A–155 (supportive, Eleventh Circuit). I screen out cases that are unpublished that might be useful before looking at them. Citations to unpublished opinions would lead to greater uniformity within the circuit panels.

A–156 (supportive, Third Circuit). The proposed rule would promote consistency within the circuit and especially within the trial courts (district courts) within the circuit.

A–157 (supportive, Eighth Circuit). It would make brief preparation moderately more expensive, but would promote consistency and better development of the law.

A–158 (supportive, Fifth Circuit). It would permit citations to opinions that may result in consistent rulings on particular issues throughout all circuits.

A–159 (supportive, Eighth Circuit). It would allow the court to consider all previous decisions and thereby render a more informed opinion.

A–160 (supportive, Sixth Circuit). I think it would be good for jurisprudence because it would encourage uniformity in the law.

A–161 (supportive, Eighth Circuit). More uniform rulings and less diversity among circuits.

A–162 (neutral, District of Columbia Circuit). (1) It could reveal the existence of unpublished opinions by different panels within the same circuit that were inconsistent. That would be a good thing. (2) It would raise a concern that a lawyer might be deemed to have committed malpractice if he/she did not discover and cite an unpublished opinion on point and favorable to his or her position. This would not be a great concern if unpub-

lished opinions were always available through Lexis and Westlaw searches.

Less Consistency

On the other hand, three attorneys predicted that the ability to cite unpublished opinions would result in less consistency in the law. Two of these attorneys opposed the proposed rule, and one supported it.

A–163 (supportive, Ninth Circuit). I think more conflicts would appear among "citable" opinions, but that a fuller presentation of relevant authority would be allowed. I am for it.

A–164 (opposed, Ninth Circuit). I would think that it would lower the quality and the certainty of the decisional law in the most important appellate courts, the federal courts of appeal. Since these courts make most of the decisional law on a day-to-day basis.

A–165 (opposed, Eighth Circuit). It would lead to a less coherent body of case law. The court selects for publication its opinions that it wishes to have precedential effect. There should be a mechanism that allows the courts to decide cases without making law.

Higher Quality Opinions

Sixteen attorneys predicted that their ability to cite unpublished opinions could result in unpublished opinions becoming higher in quality. Most of those attorneys (13) supported the proposed rule; three were neutral. In addition to the attorney comments compiled here, four other attorneys mentioned that the ability to cite unpublished opinions might result in better unpublished opinions: attorney A–77 (supportive) (comment compiled under *Already Reviewed*); and attorneys A–196 (supportive), A–199 (supportive), and A–200 (supportive) (comments compiled under *Should Be Precedent*).

A–166 (supportive, Fourth Circuit). The immediate effect is likely to be an incremental increase in decisions cited in appellate briefs and slightly more burdensome research and brief preparation. The long-term impact could be heightened discipline by the judges who have relied too heavily on unpublished opinions as a way of disposing of cases. Most appellate lawyers with whom I have discussed this issue hold the view that a rule allowing citation of unpublished opinions will indirectly but surely improve the quality of those opinions and reduce the uncertainty and confusion that the present practice has generated. Allowing citation to unpublished opinions may lead to increased scrutiny of these opinions by the judges themselves, which may result in a slightly increased burden on them and their law clerks.

A–167 (supportive, Seventh Circuit). In a nutshell, it would be a vast improvement. (1) It will promote uniformity within circuits. (2) It will improve the quality of unpublished decisions. (3) It will help to reduce the perception (especially by the parties, as opposed to their attorneys) that their cases weren't considered as important as others, because their decision was not published, while others were. (4) It will help define the law in fact-specific areas (*e.g.*, my case in *Savage*, which dealt with several frequently recurring issues regarding informants and search warrants) by increasing the database, making it more likely that the parties can find a (citable) decision with similar facts.

A–168 (supportive, Federal Circuit). It would be beneficial, for at least two reasons. First, it would discipline courts with respect to their unpublished opinions, by subjecting them to greater sunshine. Second, it would permit courts and counsel greater resort to prior judicial analysis, if not for their controlling weight, at least for their persuasiveness.

A–169 (supportive, Seventh Circuit). It would not make the work more or less burdensome but it would: (1) improve the quality of advocates' briefs by increasing the quantity of precedential resources, and (2) improve the quality of the unpublished opinions.

A–170 (supportive, Federal Circuit). It would make judges more conscientious in writing what they now render "unpublished." All written opinions should be prepared with the expectation that others will rely on them, and such others should be permitted to do so.

A–171 (supportive, Seventh Circuit). I would hope that decisions would be more consistent and carefully written if unpublished opinions could be cited. This rule may also lead to fewer unpublished opinions. I think this would be a positive development.

A–172 (supportive, Tenth Circuit). Would help lawyers who would like to cite analogous cases but are now prohibited from doing so. Would make circuit courts more careful in drafting unpublished decisions.

A–173 (supportive, Eleventh Circuit). It would force appellate courts to craft their unpublished opinions more carefully.

A–174 (supportive, Fourth Circuit). Improve consistency of holdings and quality of opinions.

A–175 (neutral, Eleventh Circuit). As far as citing cases, not a lot of impact. Where I think it would impact in the Eleventh Circuit is this: Because the court's unpublished opinions are not available to the public, even on PACER, the judges tend to be a little less careful with precedent than they would be if we could see what they are doing in every case. I believe that the reason they do this is that they think there is just not enough time to make every case come out consistently with precedent. I realize the judges are overworked, but attempting to address that problem by not making all the court's opinions available is not a very good answer.

For my money, a rule that requires the court to make all opinions available to publishers and PACER subscribers would solve the problem. The restrictions on citation of the courts that do make the opinions available are reasonable and understandable. They generally do not prevent the citation of an unpublished opinion as persuasive authority.

A–176 (neutral, District of Columbia Circuit). I believe that there would be two significant impacts. First, the courts of appeals will reduce the number of unpublished opinions as they give greater care to all opinions given their possible citation in future cases. Second, appellate counsel will bear an increased obligation in at least some cases to research unpublished opinion to find cases that may be helpful to their position or that opposing counsel may cite in opposition. This will add to the burdens on appellate counsel.

A–177 (neutral, Third Circuit). My impression is that unpublished opinions are less scholarly and undergo less scrutiny internally by the court than opinions that are going to be published. If unpublished opinions can be cited, hopefully the quality of those opinions will improve, which would increase the workload on the courts.

Shorter Opinions

Three attorneys predicted that if unpublished opinions could be cited, courts would issue unpublished opinions with less content. Two of these attorneys opposed the proposed rule; one was neutral.

A–178 (neutral, Eighth Circuit). I expect judges will say less in unpublished opinions so as to reduce the opportunity to elicit a rationale for the decision.

A–179 (opposed, Second Circuit). I expect that adoption of a new national rule permitting the citation of unpublished opinions would have a negative impact on the administration of justice in the Second Circuit. If the proposed rule is adopted and unpublished opinions can be cited as authority, the court would have two choices. The Court could write the equivalent of a published opinion in every case, or it could revert to its prior practice of deciding cases either without opinion or in a few sentences. Writing full opinions in every case would, I suspect, prove to be impossible, as Judges Kozinski and Reinhardt confirmed in their excellent article on this topic in the *California Lawyer*. This means that a return to the practice of deciding cases without opinion would be the likely outcome. In my experience the change to summary orders has been beneficial to the public perception of the courts, since litigants receive a reasoned explanation of the decision, not just an impenetrable order. It would certainly be an unintended consequence of the proposed rule to deprive litigants of the reasons for the decision in their case just because lawyers want more verbiage to cite in future cases.

The proposed rule would also have an adverse effect on the ability of many lawyers to properly represent their clients. Unlike other forms of persuasive authority, such as law review articles, every unpublished opinion on the subject will have to be accounted for in the brief. Since these opinions contain only an abbreviated statement of the facts, lawyers who wish to distinguish the cases will have to obtain the briefs. This clearly favors institutional and wealthy litigants who can spend the time and money necessary to retrieve briefs. The unconscious favoritism of large litigants over single practitioners is also apparent in the advisory committee's decision not to require that copies of unpublished decisions be served with the brief. It is easy to forget that not all lawyers have broadband Internet access or access to expensive databases such as Westlaw or Lexis. Poor clients and lawyers in small practices will be placed at a further disadvantage if this rule is adopted. This is even more true for *pro se* litigants and prisoners.

A–180 (opposed, Ninth Circuit). I believe that the proposed rule will lead the circuits to render summary dispositions under Rule 36(a)(2) in cases where they would otherwise perhaps write an unpublished opinion. I practice primarily before the Federal Circuit and my experience has been that the court already summarily affirms or dismisses under Rule 36(a)(2) in many cases where at least a non-precedential opinion should have been written. Assuming that the court would afford greater attention to the content of its unpublished opinions knowing that other courts of appeals may be seeing them under the proposed rule, I believe it would utilize Rule 36(a)(2) in certain cases in lieu of spending the additional time and resources necessary to "fine tune" an unpublished opinion for possible scrutiny by other circuit judges. Given that the Federal Circuit's caseload is a fraction of that of the regional circuits, I believe it is reasonable to assume that the regional circuits would similarly increase their use of summary dispositions.

The proposed rule's effect on appellate practitioners would vary based on each circuit's local rules. In circuits that would not assign precedential weight to its own unpublished opinions, there would be little reason to expend a great deal of time and resources seeking on-point unpublished opinions from any circuit. The potential persuasive benefits of such opinions would likely be outweighed by the added burden, which would ultimately be shifted to the client.

In circuits treating such opinions as precedential, practitioners' burden would be directly proportional to the number of unpublished opinions the circuits would issue under the proposed rule. Practitioners would be ethically obligated to research unpublished opinions to the same degree as published opinions. Failure to locate a favorable, directly on-point unpublished opinion could create malpractice liability as well. If, however, the circuits substituted summary dispositions under Rule 36(a)(2) for unpub-

lished opinions to a great extent, there would not really be that much additional authority to research.

Longer Opinions

Two attorneys predicted that if they could cite unpublished opinions, perhaps such opinions would become longer and richer in content. One of these attorneys opposed the proposed rule, and one was neutral.

A–181 (neutral, Third Circuit). For me, the rule would have very little impact because I cite unpublished opinions freely now. I suspect, however, that such a rule might adversely affect the productivity of the courts. Knowing that cases can and will be cited, circuit judges might be reluctant to produce 2- or 3-page NPOs. Instead, they might feel the need to write and explain more, increasing the length of NPOs and adding to the significant workload that judges already have.

A–182 (opposed, Third Circuit). It has been my experience that, at least with respect to the Third Circuit's non-precedential opinions. The opinions have little value beyond the particular facts of that given case. Generally, the opinions cite other published (and precedential) opinions; as a result, attorneys can cite to the other, published opinions when drafting briefs and presenting their arguments to the court. In addition, non-published opinions often do not provide the facts in sufficient detail to fully understand the case; the court generally only gives a background of the case, with the understanding that the parties are well familiar with the case. The lack of a complete factual background makes it difficult to cite a non-published opinion in support of your argument, or to distinguish it when cited by an adversary. If the rules are amended to allow citations to unpublished opinions, the court of appeals may find itself in the position of drafting and "publishing" more detailed and comprehensive non-published opinions—*i.e.*, opinions akin to the court's published opinions. If not, I anticipate that the appellate work will become a little bit more burdensome because practitioners will cite non-published opinions that appear to be directly applicable but which may lack a sufficiently detailed factual picture to allow for a meaningful distinction to be drawn. Ultimately, the result may be the ability to cite to non-published opinions that appear to contradict published opinions.

Delay

Five attorneys predicted that the ability to cite unpublished opinions could result in a delay in resolving cases in which they are issued. Three of these attorneys opposed the proposed rule, one attorney supported it, and one attorney was neutral. In addition to the attorney comments compiled here, one other attorney mentioned delay: attorney A–62 (opposed) (comment compiled under *Bias*).

A–183 (supportive, Federal Circuit). Courts may be less inclined to issue certain opinions in writing or, alternatively, may take more time to issue opinions. But this proposed rule will be beneficial to practitioners looking for precedent on narrow issues.

A–184 (neutral, Federal Circuit). I would expect it to result in some slowing in the process of getting opinions finalized. I would also expect it to provide some marginal improvement in the overall consistency of appellate decisions, since the courts should be somewhat better informed about how other appellate courts have dealt with similar situations.

A–185 (opposed, Ninth Circuit). I don't see the purpose of such a rule if unpublished decisions are not binding. I would think this would hinder judges from making certain necessary compromises to reach an equitable decision, knowing that the decision may be cited to and be used in other cases.

A–186 (opposed, Federal Circuit). It would increase the workload of the judges, who will take more time to issue "unpublished decisions." This effect will delay cases which merit "published" decisions.

Broad Policy Issues

Several attorneys addressed broad policy issues related to whether attorneys can cite unpublished opinions. Six attorneys opined that the ability to cite unpublished opinions would make courts more accountable. Three attorneys observed that the proposed rule would further blur the distinction between published and unpublished opinions. And 11 attorneys suggested that perhaps the distinction should be eliminated.

Accountability

Six attorneys said that allowing citation to unpublished opinions would make the courts more accountable for their decisions. All of these attorneys supported the proposed rule. In addition to the attorney comments compiled here, one other attorney mentioned accountability: attorney A–192 (supportive) (comment compiled under *Blurred Distinction*).

A–187 (supportive, Sixth Circuit). I think it would be a significant improvement. Not only would it free litigants to cite well-reasoned unpublished opinions, but it would remind the courts that they need to take all appeals seriously even if the case does not appear to merit a published opinion, because they would know that all opinions would be a part of the body of law that contributed to decisions of all cases and the development of the law.

A–188 (supportive, Eleventh Circuit). Positive: The Eleventh Circuit often issues unpublished opinions in cases that we (the U.S. Attorney's Of-

fice) consider important—they tend to "bury" a holding that is important to us. It is possible that such a rule would force the court to look more closely at which opinions they published. Negative: If Westlaw does not publish unpublished cases, how would we access them?

A–189 (supportive, Third Circuit). I am positive that the rule will be beneficial. I am positive that it is counterproductive and contrary to the rules of logic to have decisions that may not be cited, as if absolving the courts of any responsibility for the decisions they make and allowing them to avoid consequences of dealing with citations to those decisions.

A–190 (supportive, Seventh Circuit). Positive. Unpublished opinions allow appellate courts to hide tough decisions that many times assist criminal defendants. Unfortunately, the precedential value is then lost.

A–191 (supportive, District of Columbia Circuit). Public scrutiny of federal officials, whether in the judicial, legislative, or executive branches, always leads to more democracy.

Blurred Distinction

Three attorneys observed that permission to cite unpublished opinions could result in a blurred distinction between published and unpublished opinions. Two of these attorneys supported the proposed rule, and one attorney was neutral.

A–192 (supportive, Eighth Circuit). To the extent that my responses to the rest of the survey are inconsistent with what is contained herein, this statement supersedes statements made in the informal survey form. As noted in the survey, I have done enough briefing since the appeal was argued to have difficulty remembering too much about my choice of cases.

In my circuit, the local rule allows but discourages the citation of unpublished opinions. Accordingly, a rule change permitting the citation to unpublished opinions will not change how I do an appeal. In my circuit such a rule change may cause my circuit to delete the phrase discouraging the citation to unpublished cases from that rule. Accordingly, the rule change to the Federal Rules of Appellate Procedure may encourage greater citation to unpublished cases in my circuit (or may not).

In addition to responding to the survey itself, I would respectfully submit the following observations for your consideration.

(1) The fact that some "unpublished" cases are presently being published by West, and the fact that some circuits permit the citation to unpublished opinions *may* mean that the distinction between published and unpublished cases is becoming less of a distinction. Hopefully, the survey responses will help you meaningfully determine whether local circuit rules permitting the citation of unpublished opinions in fact actually result in

attorneys taking advantage of such a rule and citing to unpublished opinions.

(2) If such a rule change were to result in more attorneys citing to unpublished opinions, the rule change would serve the public objective of encouraging greater scrutiny of unpublished opinions by other jurists and the public. It may further the objective of holding judges and their clerks accountable to the public and to our system of justice to the extent that the highlighting of bad unpublished opinions makes other jurists aware of jurisprudential error. The other judges might be able to fix the problem unless the unpublished cases are reheard en banc or unless the issue arises again in another case. However, highlighting problems in the unpublished jurisprudence may mean that judges become aware of issues that have been incorrectly resolved in unpublished opinions but for which there has not yet been a published opinion issued. Once they become aware of bad decisions, concerned judges in the circuit in which this decision was issued may then choose to hear another case en banc regarding the issue which the unpublished opinion improperly decides so that the published precedent takes the right approach to a particular problem. Potentially, depending on the timing of the hearing of this other case, this issue could result in the correction of the unpublished opinion in a hearing en banc or even in the context of a section 2255 motion (in the rare case in which the issue were important enough).

On the other hand, problems in published jurisprudence, it could be argued, are highlighted by the losing party. If a petition for rehearing en banc were filed by the alleged victim of allegedly bad jurisprudence, then the judges would arguably have the same opportunity to review and scrutinize the unpublished opinion as they would if the unpublished opinion were brought to their attention by citation to this authority in briefs in other cases. However, this argument fails, because the aggrieved party in a civil case (other than one in which counsel is appointed) may not have the money to continue to pursue the appeal after the unpublished opinion is issued. Thus, under the current system, in circuits where the citation to unpublished opinions is prohibited, the degree of scrutiny by other judges of fellow jurists' unpublished opinions may depend at least to some extent on the financial situation of the parties involved in the litigation, even if the mistake is egregious and may be repeated in future cases by the same panel of judges.

Accordingly, I feel a set of appellate rules which does not promote or permit the citation of unpublished opinions (assuming that more unpublished opinions would be cited under such a system) provides for less judicial (and possibly public) scrutiny of unpublished opinions than a system which does permit the citation of unpublished opinions.

(3) Louisiana lawyers working on cases involving state law cite in their briefs to cases from their higher courts. However, because in matters of state law Louisiana lawyers work under the French civil law system, such higher court cases are not binding on Louisiana lower courts. Accordingly, citing to any Louisiana court case in a Louisiana matter probably has the same effect as citing to unpublished case law in federal court. Because of this parallel, it *may* be possible to predict some of the effects of this proposed rule change by studying the dynamics of the effect of citing nonbinding case law in Louisiana courts and how Louisiana's view of its own case law impacts how attorneys handle appeals involving solely questions of state law.

A–193 (supportive, Seventh Circuit). I imagine that it would help practitioners because it can be frustrating to find an unpublished case that is very on point and not be able to cite it, even just as persuasive authority. But I think the effect on the courts themselves would not be entirely positive. Would such a rule eliminate the practical difference between published and unpublished opinions? Sometimes judges do not dissent in a particular instance because they know the decision will be unpublished. If a judge in that instance knew the opinion could be cited, he or she might decide to dissent after all.

A–194 (neutral, Third Circuit). Unpublished opinions would look more like published opinions. In immigration matters, unpublished decisions tend to be denials of the alien's claims. Publishing more denials would help serve as a useful guide to practitioners to identify those claims not worth pursing administratively or before the courts.

Should Be Precedent

Eleven attorneys suggested that maybe the courts' opinions should always be published or always be precedential. Most of these attorneys (eight) supported the proposed rule; three were neutral.

A–195 (supportive, Eighth Circuit). It's difficult to say what impact such a rule would have because, in most cases, you are able to find a published decision that states the same point for which you might want to cite an unpublished opinion. However, when you *need* to cite an unpublished opinion because there is no other authority on point, there should be no obstacle to doing so. Such a rule likely will not lead to wholesale citation to unpublished opinions, but might make considerable difference in some cases. I also support such a rule for the reasons stated in Judge Richard Arnold's withdrawn opinion on unpublished opinion in the Eighth Circuit.

A–196 (supportive, Eighth Circuit). It might give appellate courts more pause when issuing short opinions limited to the particular facts of a case. I think permitting citation to unpublished opinions is a good idea, mainly for the reasons set forth in Judge Richard Arnold's opinion on the

matter, which was later withdrawn. From the advocate's standpoint, I think it will be helpful.

A–197 (supportive, Fifth Circuit). I do not know what impact this rule change will have. I do, however, support the rule change and believe all opinions should be published. In my practice of over 25 years, I have had opinions both favorable and unfavorable to my clients be designated as "unpublished" and have never understood the logic underlying the rule.

A–198 (supportive, District of Columbia Circuit). In my opinion, the core question is what impact would permitting citation to unpublished opinions have on courts of appeals, not appellate practitioners. Permitting citation to unpublished opinions could well have the beneficial effect of encouraging courts of appeals to discontinue their use.

A–199 (supportive, Second Circuit). I would expect the rule to make courts of appeals somewhat more careful about what they say in "unpublished" opinions. I believe the orderly developmental and uniform application of the law would be enhanced by a rule prohibiting the designation of opinions as "unpublished" or "non-binding."

A–200 (supportive, Federal Circuit). I believe it would be beneficial and improve the quality of legal opinions of the courts. I further believe that there should be no "unpublished" opinions.

A–201 (supportive, District of Columbia Circuit). I believe that the new proposed rule is a good idea. A better idea though would be to not have unpublished decisions except in the most routine cases.

A–202 (supportive, Eighth Circuit). I am hugely in favor of this rule. I do not think unpublished opinions should be less valuable than published opinions. A decision is a decision.

A–203 (neutral, Tenth Circuit). I would have some concern that such a rule, if enacted abruptly, would permit citation to opinions that are sometimes not well-thought-out. I believe a better rule would be to allow citation to opinions that are written after the date the rule becomes effective. At bottom, I believe there should be *no* unpublished opinions. Things should be left the way they are for previous unpublished opinions and, in future, there should be none allowed.

A–204 (neutral, Second Circuit). There would be no point to citing the unpublished opinions if they are not binding precedent. I would prefer that the opinions be considered to have the same precedential value as any other appellate decision. This would be of great help to my appellate practice.

A–205 (neutral, Tenth Circuit). The impact would depend on how the court was to consider the precedential value of the unpublished opinion. If such opinions have some value, then it makes no sense to allow the courts of appeals to issue unpublished opinions.

Other Comments

Fifty-three attorneys provided other comments: 26 were supportive of the proposed rule, 25 were neutral, and two were opposed to it.

Other Supportive Comments

Twenty-six attorneys provided other supportive comments.

A–206 (supportive, Fifth Circuit). I would hope that all written decisions, whether published or not, could be cited in any appeal brief. The reasoning of the written decision and how a particular panel addressed an issue should always be available to other panels deciding the same issue.

Besides, it makes no sense to have a "class" of decisions that cannot be relied on in any manner.

A–207 (supportive, District of Columbia Circuit). I believe that the proposed rule is a good one, and one that will have a very minimal impact on the workload of the attorneys preparing appellate briefs. I have never understood the reasoning behind the rule forbidding the citation of an unpublished decision.

A–208 (supportive, Sixth Circuit). I think it would improve federal court practice, and I doubt that it would make federal practice any more burdensome. Attorneys might spend a bit more time researching, but could probably reduce time spent writing memoranda.

A–209 (supportive, Third Circuit). I think the rule permitting citation to the courts of appeals' unpublished opinions should be enacted. Courts should determine whether all cases are applicable, not just those deemed to be worthy of publication.

A–210 (supportive, Sixth Circuit). It would help assure awareness of counsel and court personnel of case law development. Assistance in tracking trends would be of such benefit so as to outweigh any detriment in research time and cost.

A–211 (supportive, District of Columbia Circuit). Allowing these opinions to carry persuasive weight affords a reasonable compromise between the Ninth Circuit's concerns regarding judicial economy and the Eighth Circuit's constitutional concerns.

A–212 (supportive, Eighth Circuit). I believe that permitting citations to unpublished opinions would be helpful to the appellate court when the opinions are relevant to the case.

A–213 (supportive, Sixth Circuit). It would make the appellate attorney's work somewhat easier when there is a desire to cite unreported cases with similar issues.

A–214 (supportive, Fifth Circuit). Other than my answer to question 5 above (much less burdensome), I don't have an expectation.

A–215 (supportive, Fifth Circuit). It would make a positive impact. I support allowing attorneys to cite to an unpublished opinion.

A–216 (supportive, Sixth Circuit). Such a rule would certainly benefit the participants as well as the courts.

A–217 (supportive, Tenth Circuit). Little or no impact. Unpublished opinions are often more helpful than not.

A–218 (supportive, Third Circuit). I think it's a good idea but it probably won't make that much difference.

A–219 (supportive, Tenth Circuit). The new rule would actually aid in the presentation of cases.

A–220 (supportive, Sixth Circuit). It would be an improvement over the status quo.

A–221 (supportive, First Circuit). It would be helpful to counsel and the courts.

A–222 (supportive, Eleventh Circuit). I believe that would be a good rule to adopt.

A–223 (supportive, District of Columbia Circuit). Same. I would welcome this rule change.

A–224 (supportive, Eighth Circuit). It would assist appellate research.

A–225 (supportive, Second Circuit). I would fully support the change.

A–226 (supportive, Third Circuit). I think it would be useful.

A–227 (supportive, Second Circuit). This would be a good idea.

A–228 (supportive, Third Circuit). It would promote justice.

A–229 (supportive, District of Columbia Circuit). Beneficial impact.

A–230 (supportive, Fourth Circuit). Extremely helpful.

A–231 (supportive, Eighth Circuit). Positive.

Other Neutral Comments

Twenty-five attorneys provided miscellaneous neutral comments.

A–232 (neutral, Second Circuit). The primary impact would be that I would rely more upon computer searches of Lexis and Westlaw than I currently do. Now I find the digests of unreported cases in statutory and other compilations provide a thorough review of the law on a particular topic. If unpublished decisions may be cited, I would supplement my current digest and computer research with greater computer research.

A–233 (neutral, Eleventh Circuit). Unpublished opinions may be cited as persuasive authority in the Eleventh Circuit. *United States v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000) (citing 11th Cir. R. 36–2); *United States v. Rodriquez-Lopez*, 365 F.3d 1134, 1138 n.4 (11th Cir. 2004); *United States v. Liss*, 265 F.3d 1220, 1228 n.2 (11th Cir. 2001).

A–234 (neutral, First Circuit). It would depend on the nature of the case and level of departure of the unpublished opinion or order from case law precedent. We must never underestimate, however, the persuasive nature of an unpublished opinion, as long as it is in the pursuance of justice.

A–235 (neutral, Third Circuit). I don't see such a rule as having a "sea change" impact on appellate practice. Rather, it would be a common sense way of putting on the table issues that are under discussion already.

A–236 (neutral, Seventh Circuit). It would make citations to unpublished opinions on points that should be made by courts in published opinions.

A–237 (neutral, Eighth Circuit). No impact on the parties. It would probably impact the court more.

A–238 (neutral, Sixth Circuit). Very little impact.

A–239 (neutral, District of Columbia Circuit). I would not expect it to have any significant impact.

A–240 (neutral, Seventh Circuit). It would have no appreciable impact on the work.

A–241 (neutral, Tenth Circuit). More people would cite them.

A–242 (neutral, Eighth Circuit). No appreciable impact.

A–243 (neutral, Eighth Circuit). Not much impact.

A–244 (neutral, Third Circuit). Little or none.

A–245 (neutral, Ninth Circuit). Little impact.

A–246 (neutral, Third Circuit). Very little.

A–247 (neutral, Sixth Circuit). Very little.

A–248 (neutral, First Circuit). Very little.

A–249 (neutral, Fifth Circuit). Don't know.

A–250 (neutral, Sixth Circuit). Uncertain.

A–251 (neutral, Eighth Circuit). Not much.

A–252 (neutral, Eleventh Circuit). Minimal.

A–253 (neutral, Fifth Circuit). Minimal.

A–254 (neutral, Eighth Circuit). Unknown.

A–255 (neutral, Tenth Circuit). None.

A–256 (neutral, Eighth Circuit). None.

Other Comments in Opposition

Two attorneys provided miscellaneous comments in opposition to the proposed rule.

A–257 (opposed, Third Circuit). I presume that the courts act with care in designating opinions as precedential or not and issue the preceden-

tial opinions as guides. I would expect the proposed rule to have the effect of complicating and diluting these guiding principles.

A–258 (opposed, Ninth Circuit). A bad impact.

About the Federal Judicial Center

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By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

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.

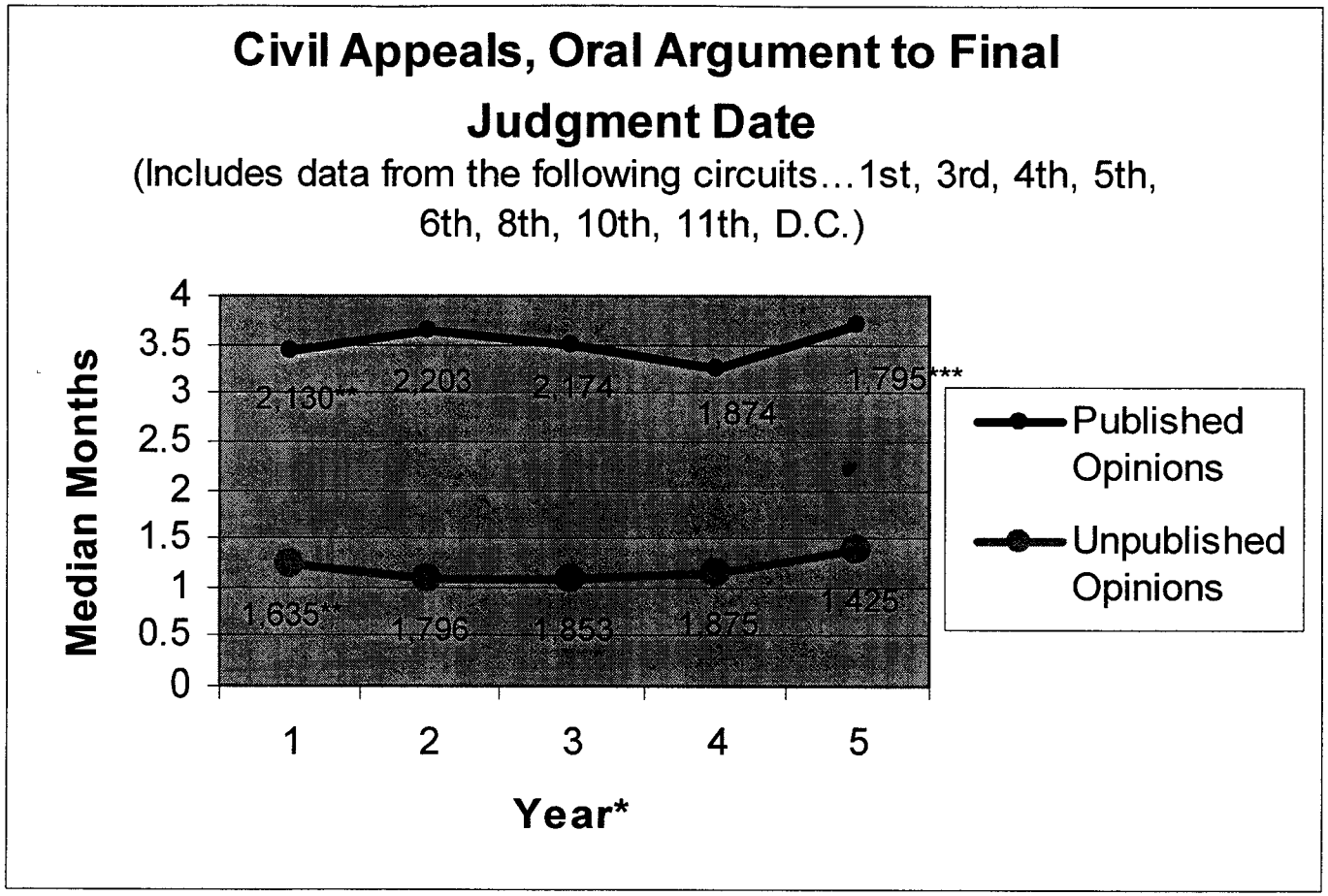
John K. Rabiej

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:

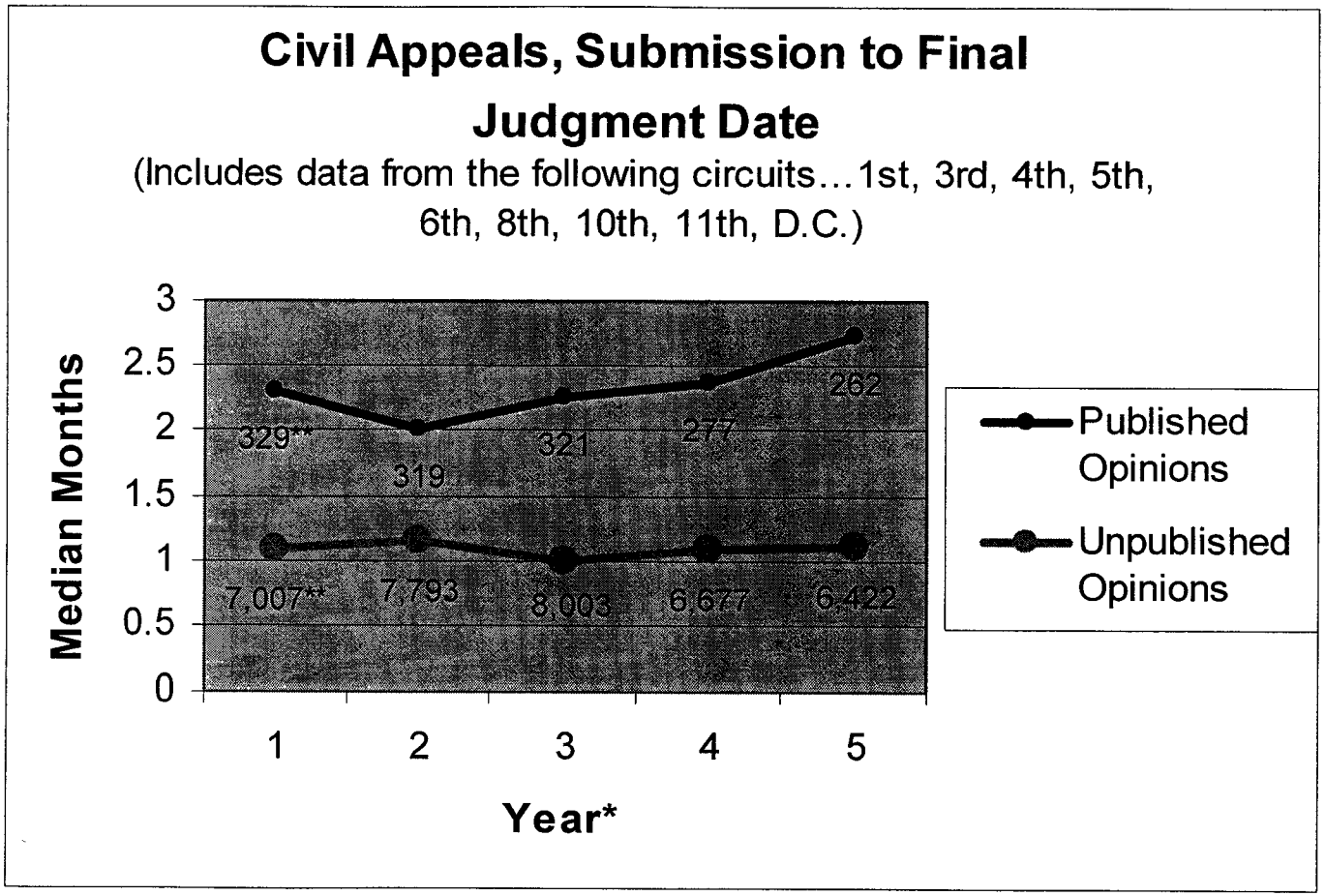
* Data abstracted and aggregated from statistics on the two years preceding and two years following the adoption of a policy permitting citation of unpublished opinions by the courts of appeals. Year 3 denotes idealized year in which the citation policy was adopted.

** 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)



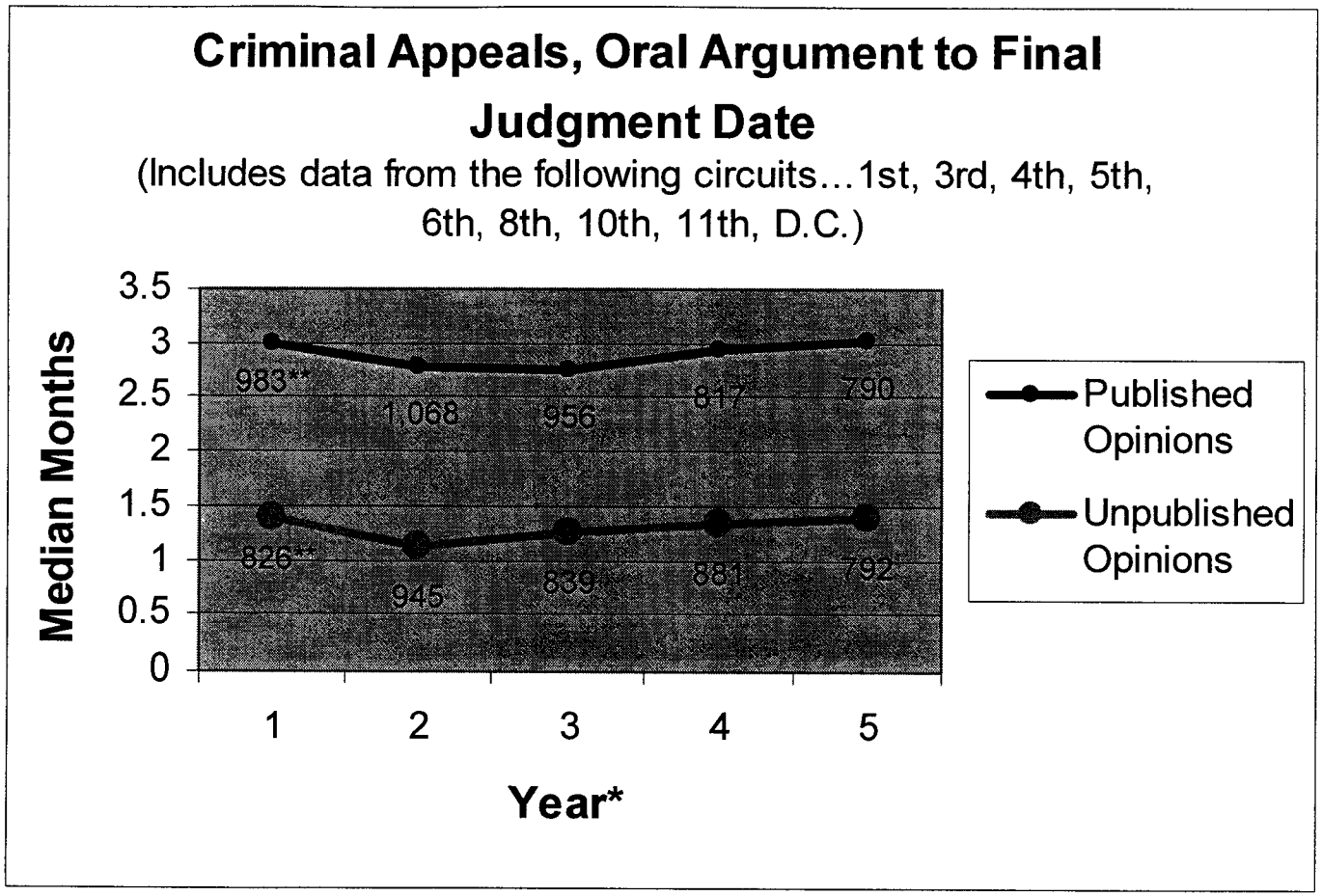
Notes:

* 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)



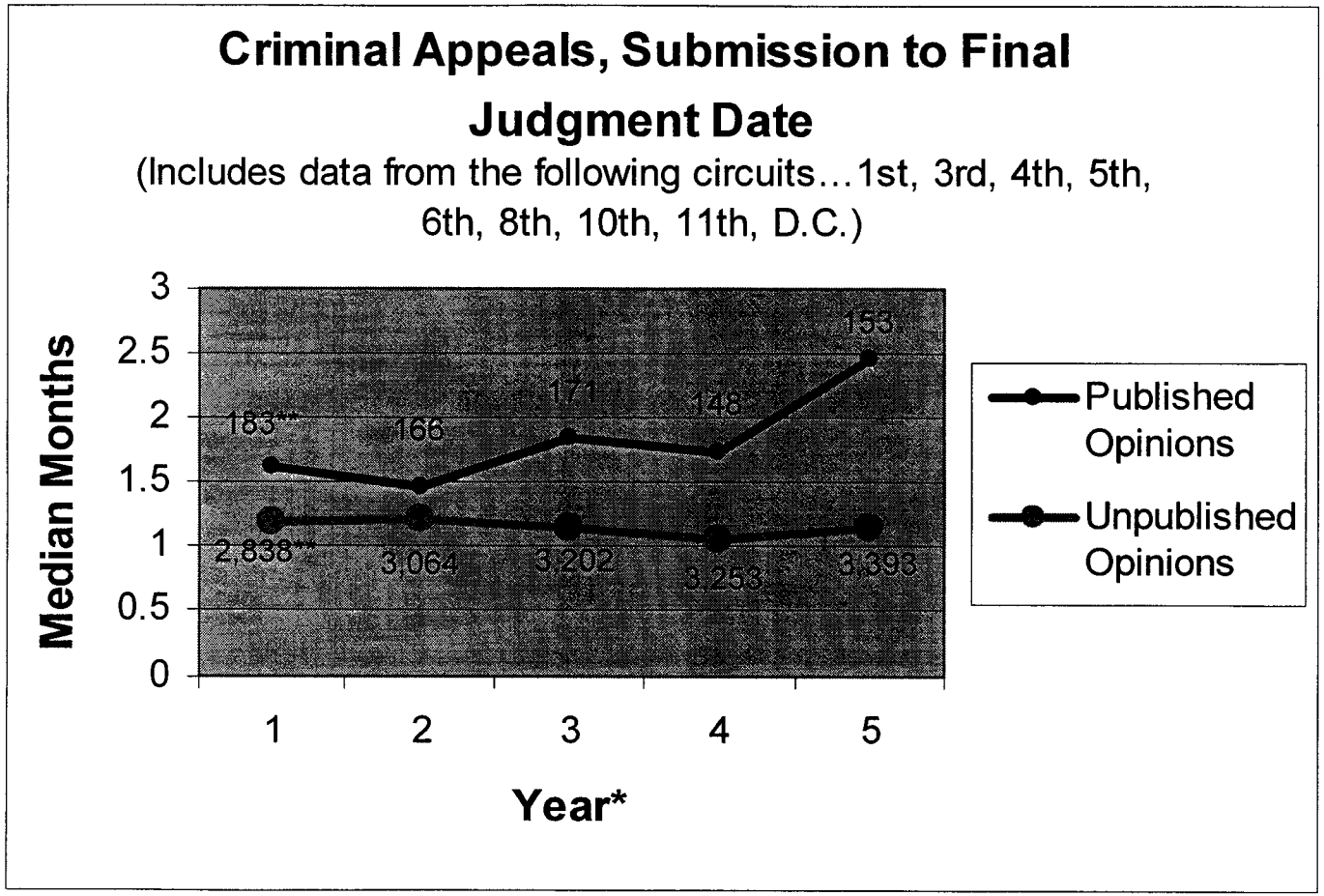
Notes:

* 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)



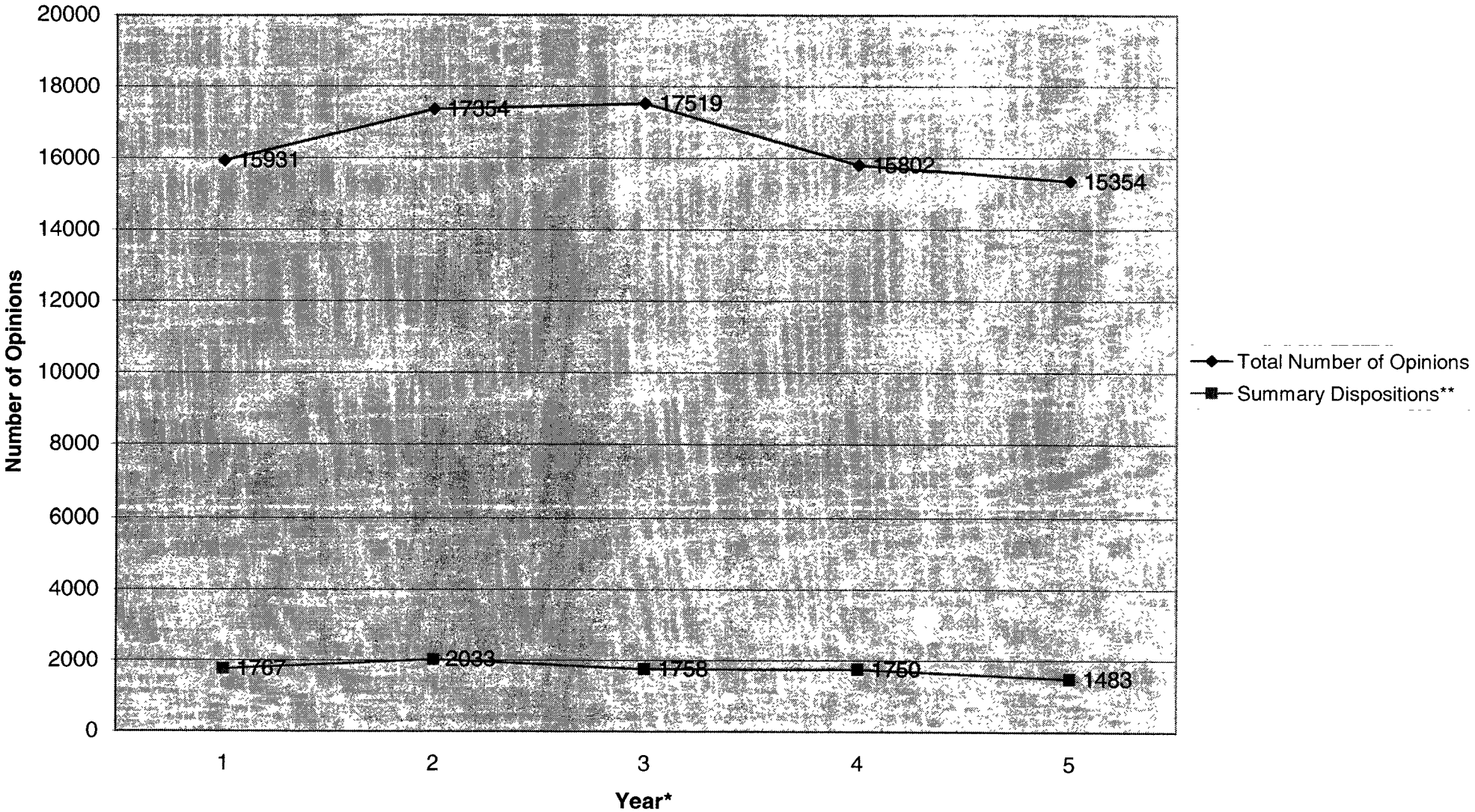
Notes:

* 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

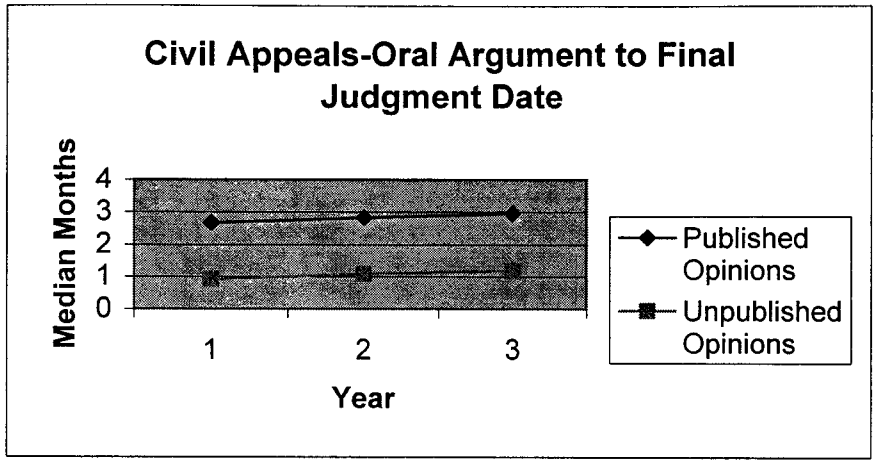
(Data from 1st, 3rd, 4th, 5th, 6th, 8th, 10th, 11th, and D.C. Circuits)



* 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.

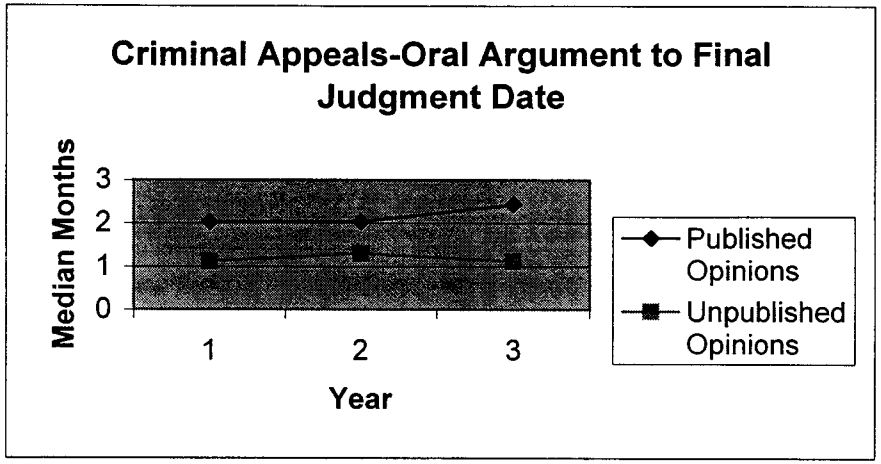
**Issued without signature and comment that do not expound on the law as applied to the facts of each case and do not detail the judicial reasons upon which the judgment is based

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



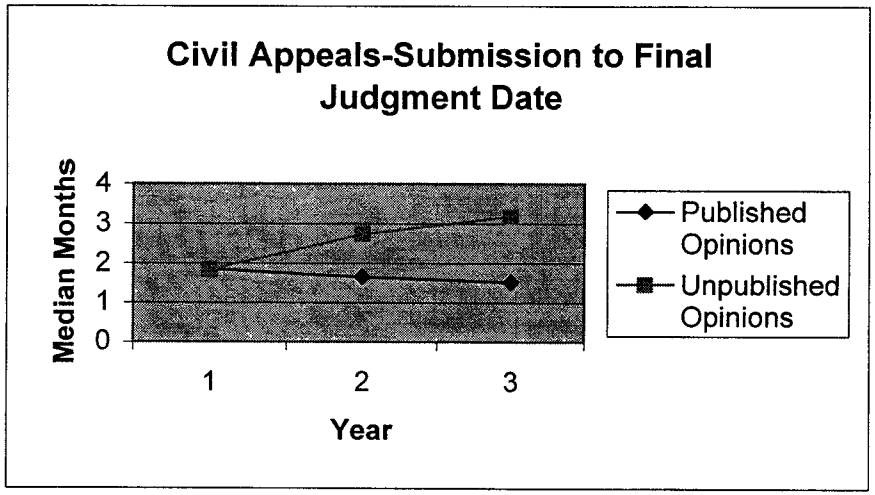
Number of Published or Unpublished Opinions Per Year:

	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



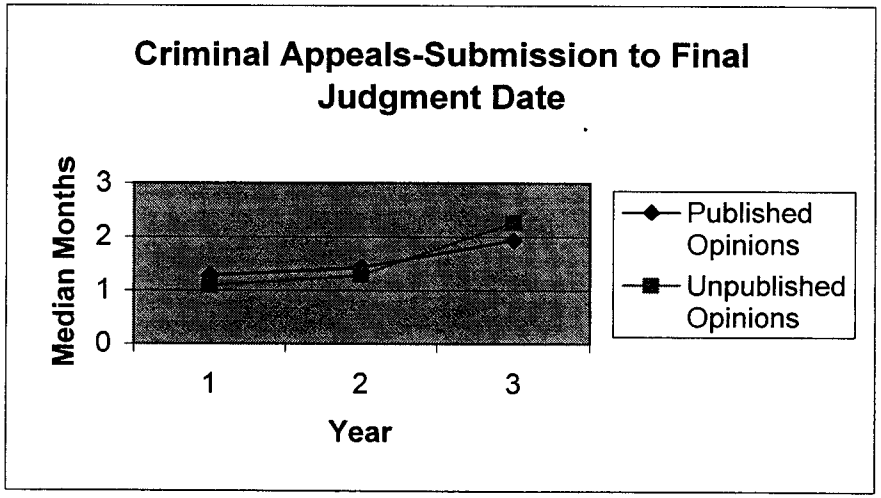
Number of Published or Unpublished Opinions Per Year:

	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:

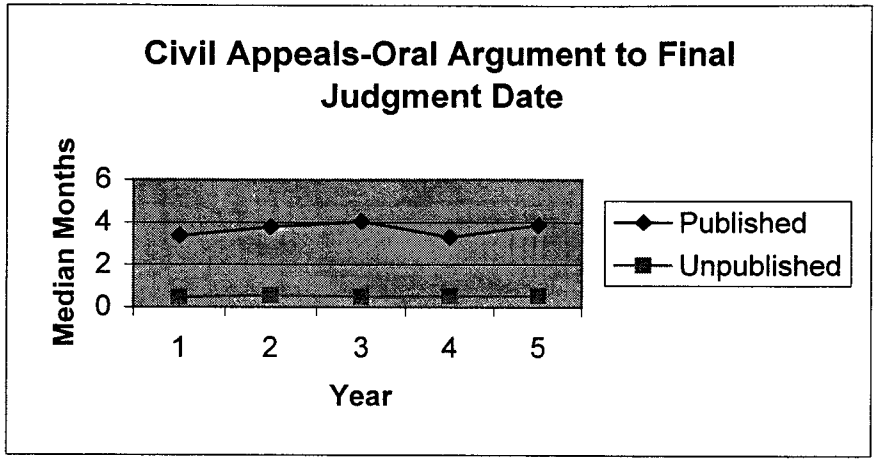
	Year 1	Year 2	Year 3	Year 4	Year 5
P	16	12	26	No data	No data
U	304	150	93	No data	No data



Number of Published or Unpublished Opinions Per Year:

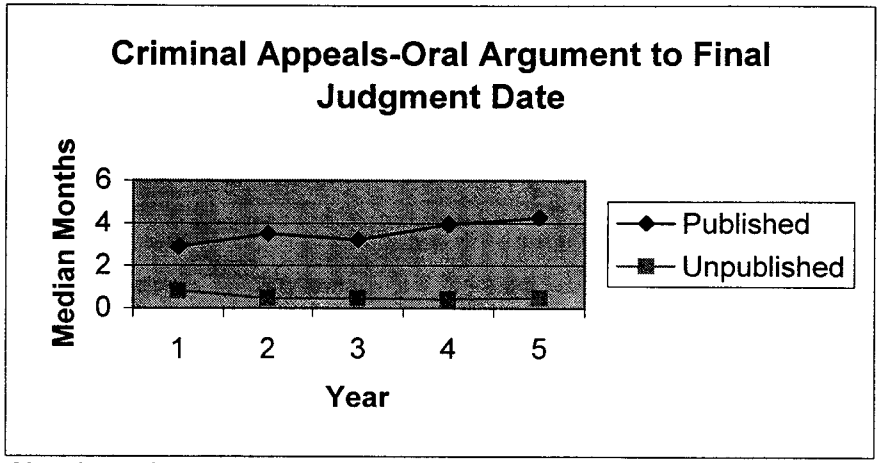
	Year 1	Year 2	Year 3	Year 4	Year 5
P	16	20	6	No data	No data
U	131	75	29	No data	No data

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



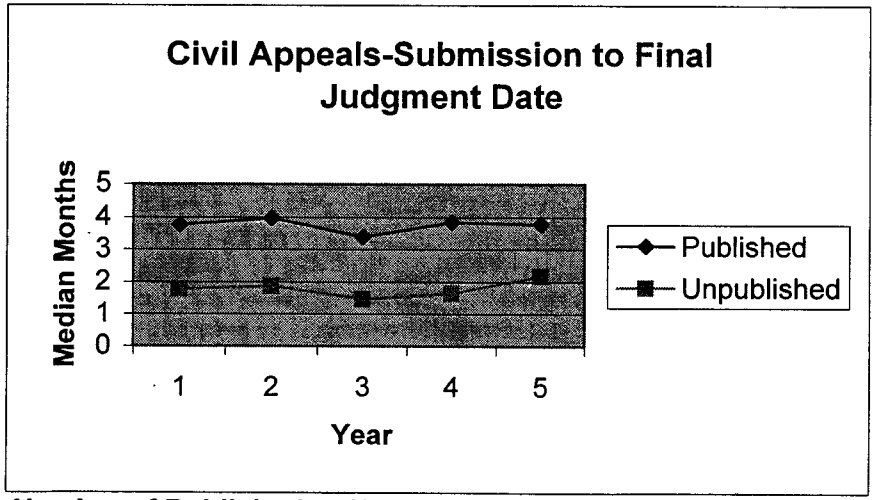
Number of Published or Unpublished Opinions Per Year:

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



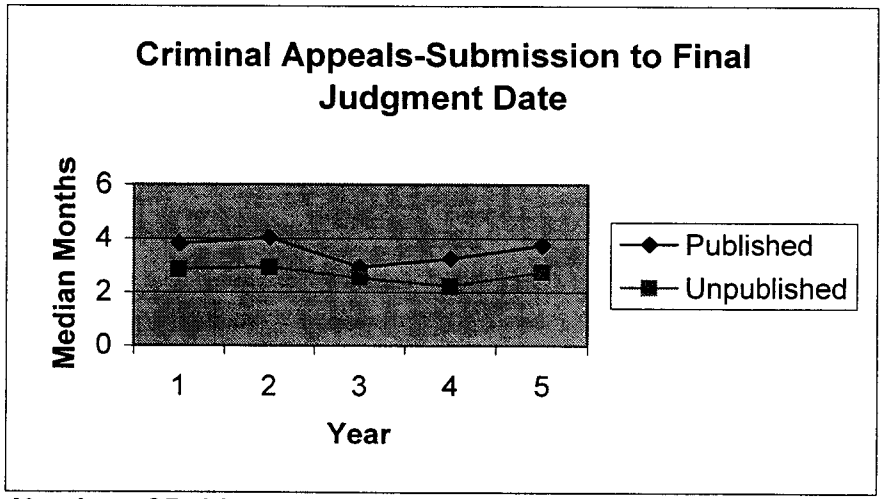
Number of Published or Unpublished Opinions Per Year:

	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:

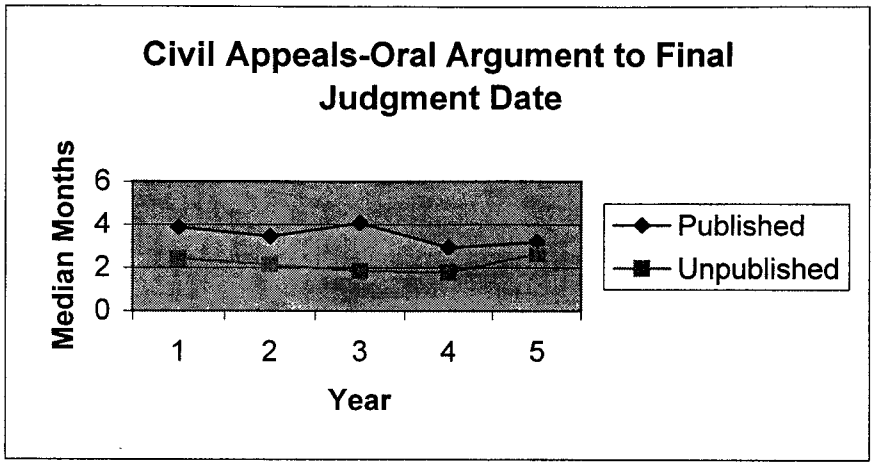
	Year 1	Year 2	Year 3	Year 4	Year 5
P	22	27	42	23	17
U	808	974	899	974	801



Number of Published or Unpublished Opinions Per Year:

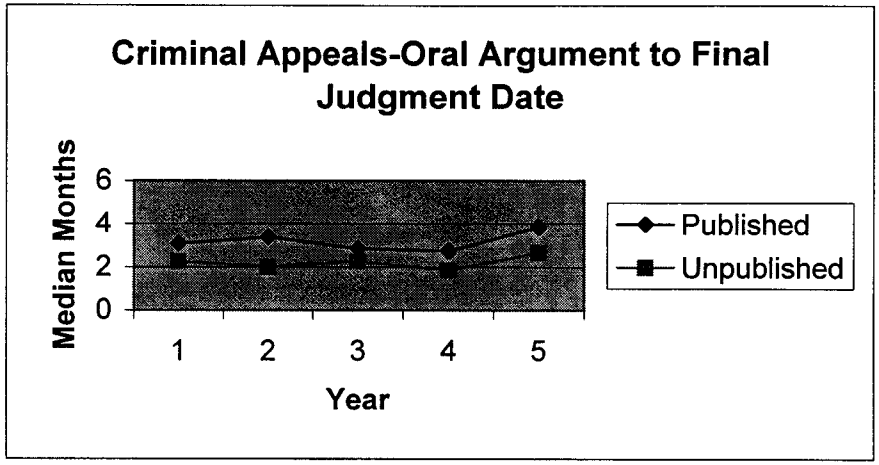
	Year 1	Year 2	Year 3	Year 4	Year 5
P	19	7	12	6	11
U	293	355	331	321	334

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



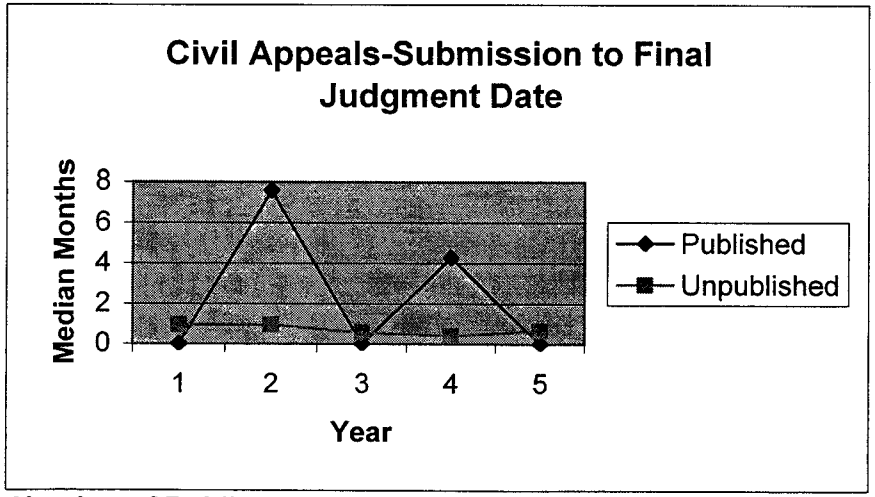
Number of Published or Unpublished Opinions Per Year:

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



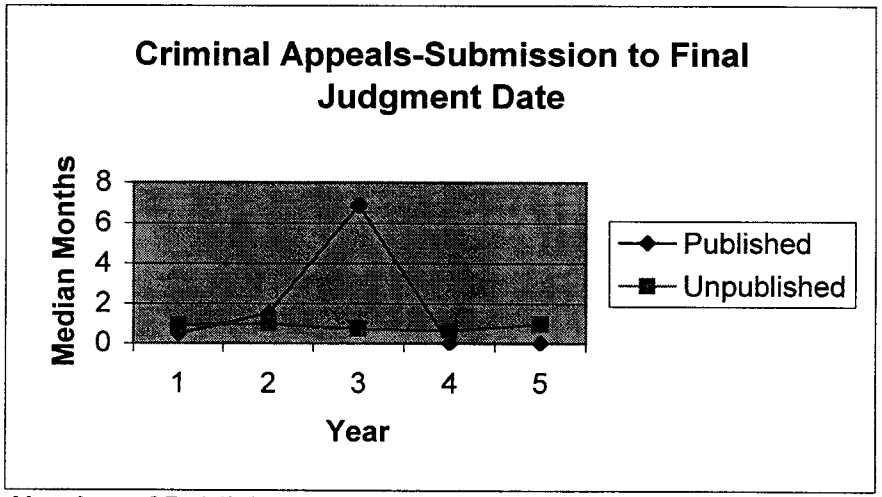
Number of Published or Unpublished Opinions Per Year:

	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

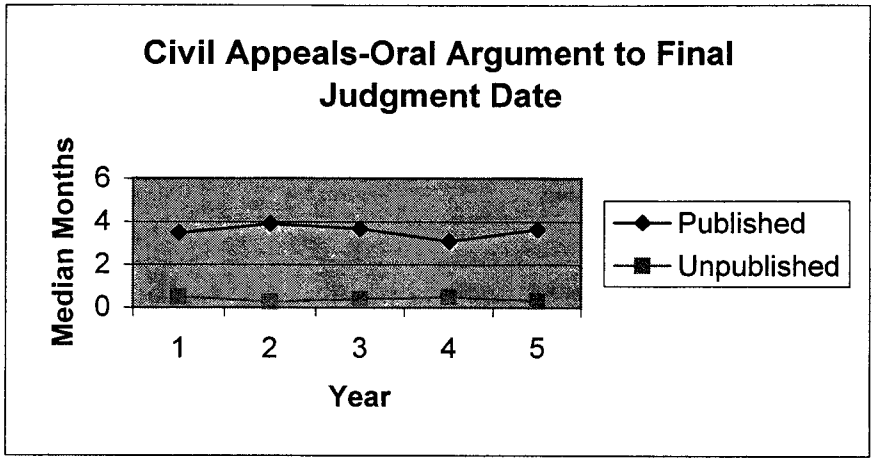


Number of Published or Unpublished Opinions Per Year:

	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

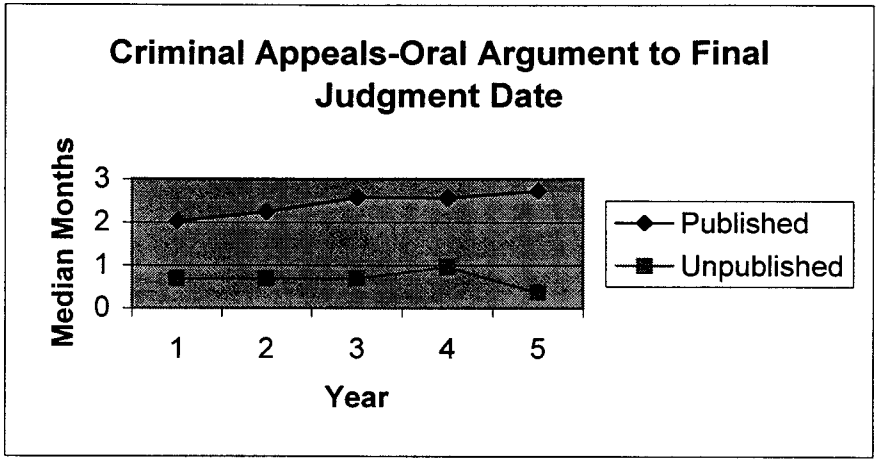
(Excludes Asbestos Cases)



Number of Published or Unpublished Opinions Per Year:

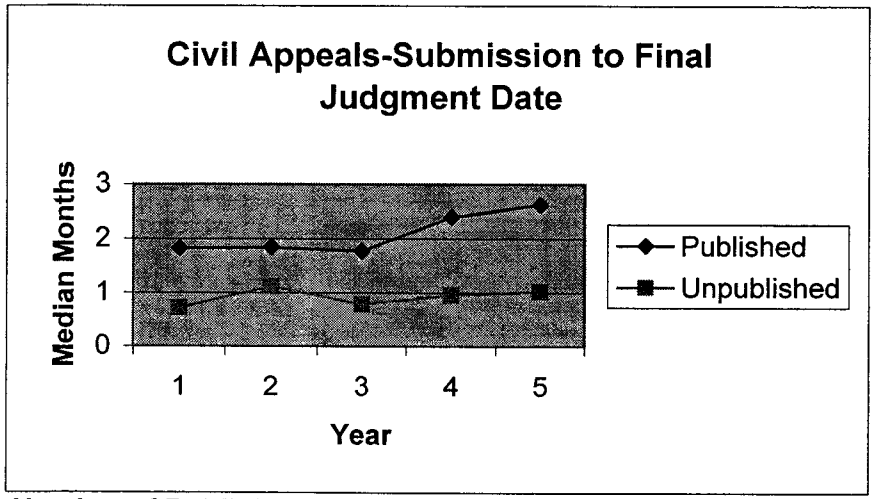
	Year 1	Year 2	Year 3	Year 4	Year 5
P	358	396	409	352	377*
U	238	368	353	340	229

* Excludes 322 asbestos cases (outliers).



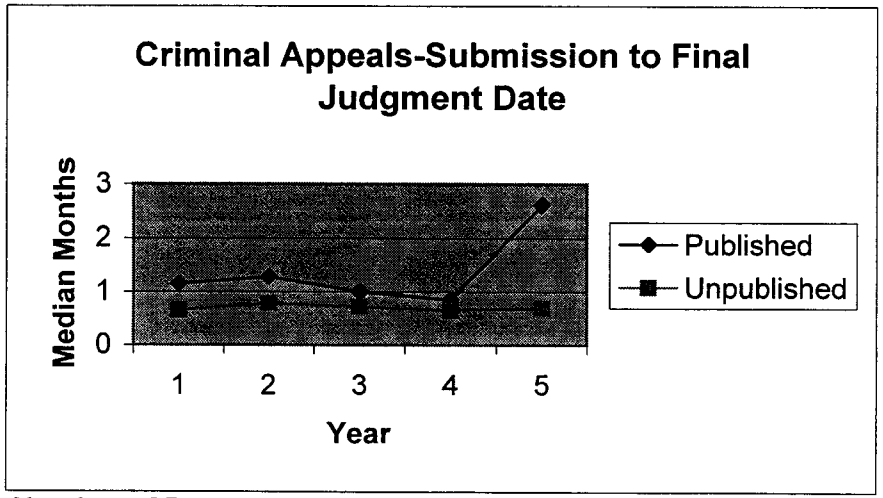
Number of Published or Unpublished Opinions Per Year:

	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:

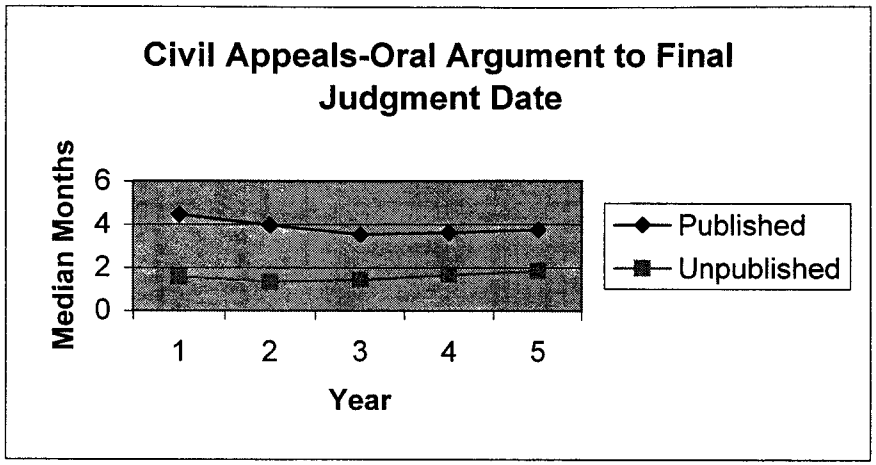
	Year 1	Year 2	Year 3	Year 4	Year 5
P	102	112	85	64	64
U	1625	1596	1753	1186	1265



Number of Published or Unpublished Opinions Per Year:

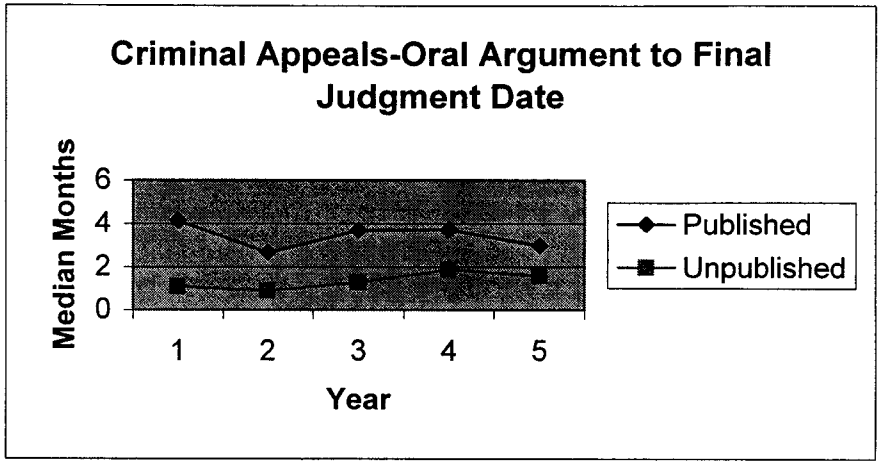
	Year 1	Year 2	Year 3	Year 4	Year 5
P	37	39	40	35	23
U	667	597	697	730	655

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



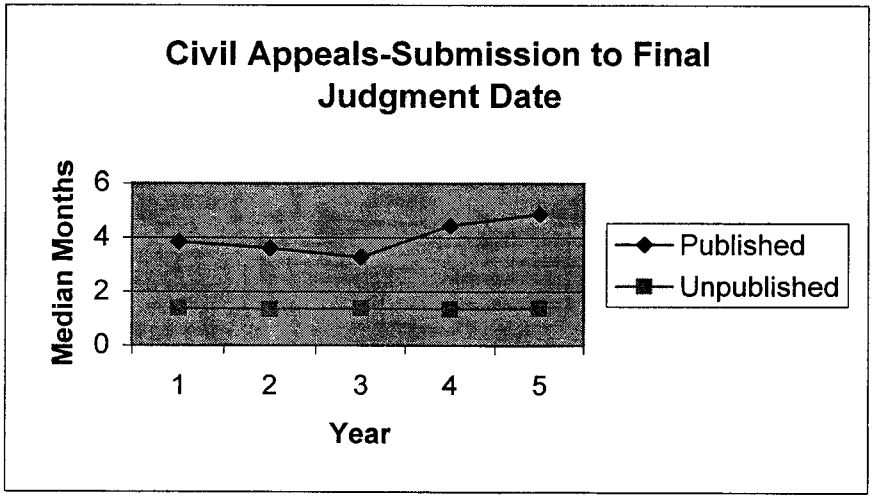
Number of Published or Unpublished Opinions Per Year:

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



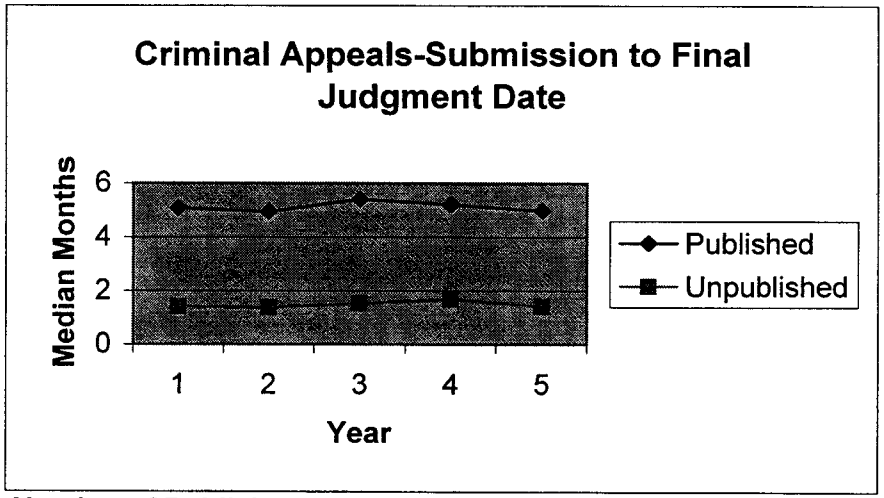
Number of Published or Unpublished Opinions Per Year:

	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:

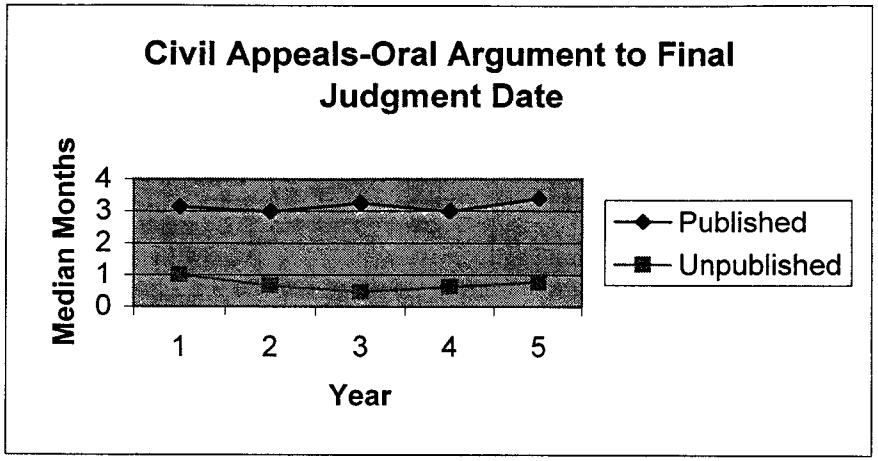
	Year 1	Year 2	Year 3	Year 4	Year 5
P	23	14	32	42	27
U	665	643	820	896	851



Number of Published or Unpublished Opinions Per Year:

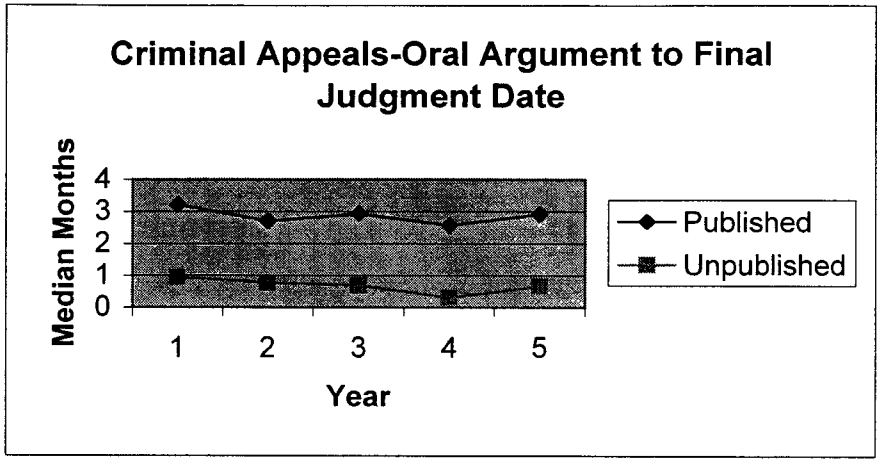
	Year 1	Year 2	Year 3	Year 4	Year 5
P	17	10	24	33	19
U	246	184	260	236	320

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



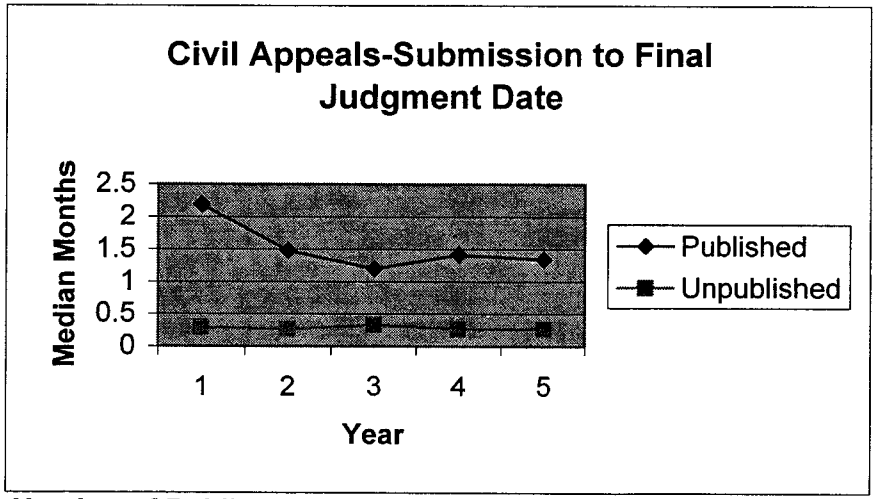
Number of Published or Unpublished Opinions Per Year:

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



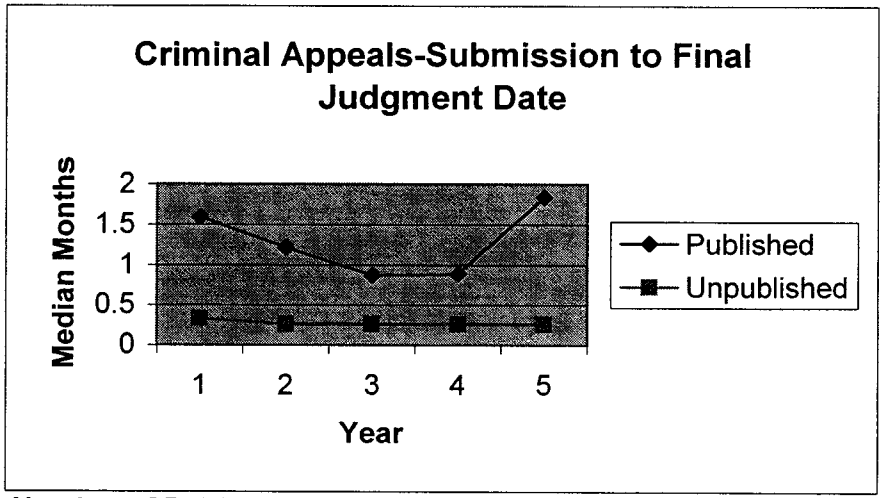
Number of Published or Unpublished Opinions Per Year:

	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:

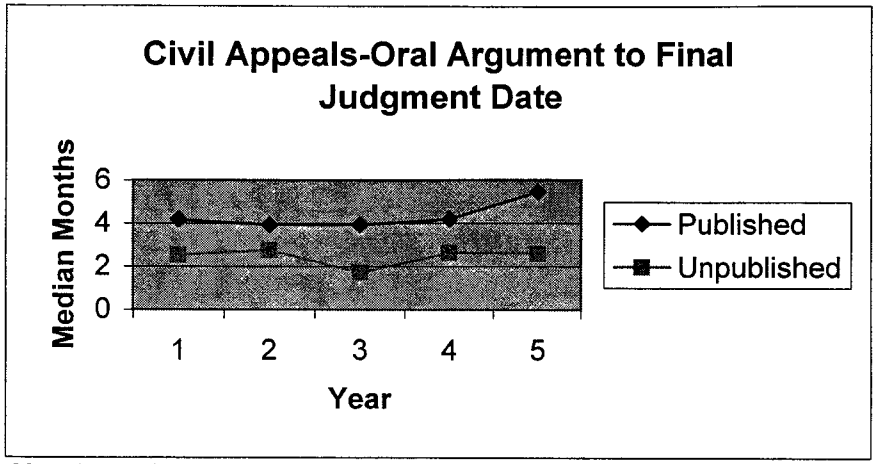
	Year 1	Year 2	Year 3	Year 4	Year 5
P	68	57	52	57	63
U	618	721	604	592	635



Number of Published or Unpublished Opinions Per Year:

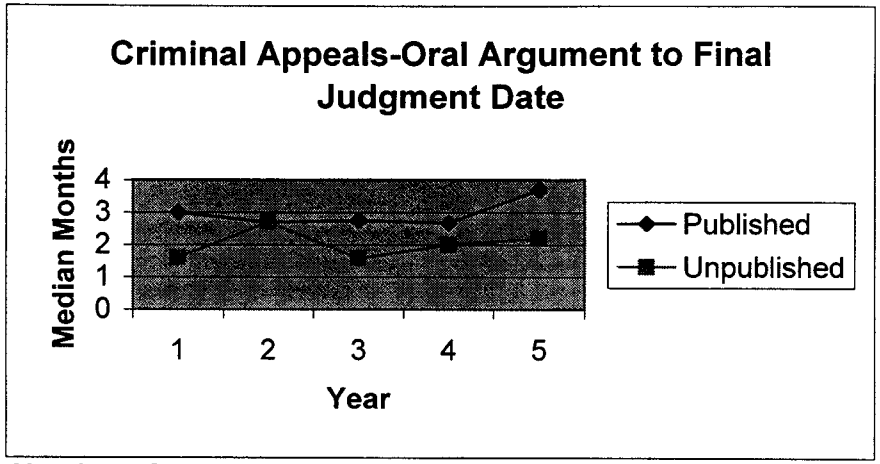
	Year 1	Year 2	Year 3	Year 4	Year 5
P	28	39	28	32	42
U	201	177	175	226	242

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



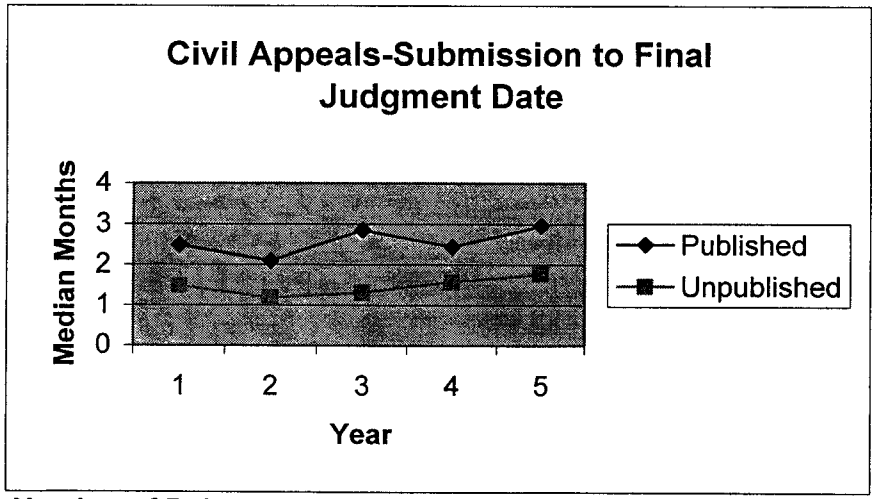
Number of Published or Unpublished Opinions Per Year:

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



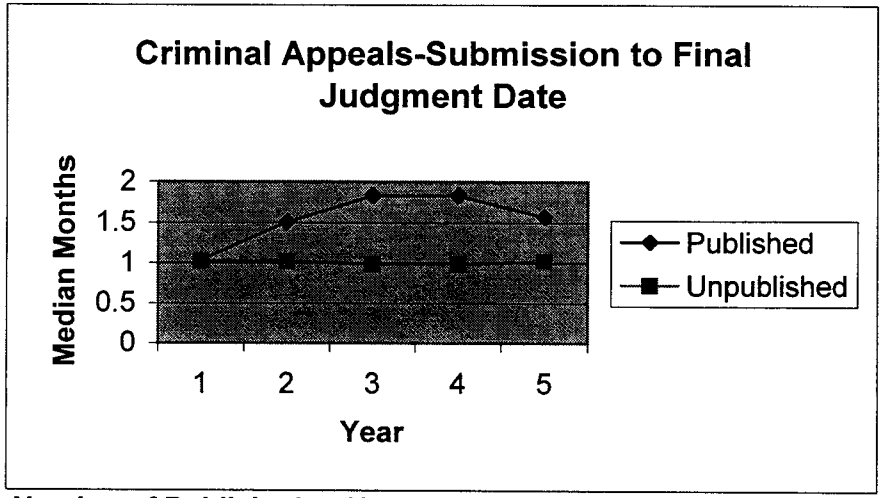
Number of Published or Unpublished Opinions Per Year:

	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:

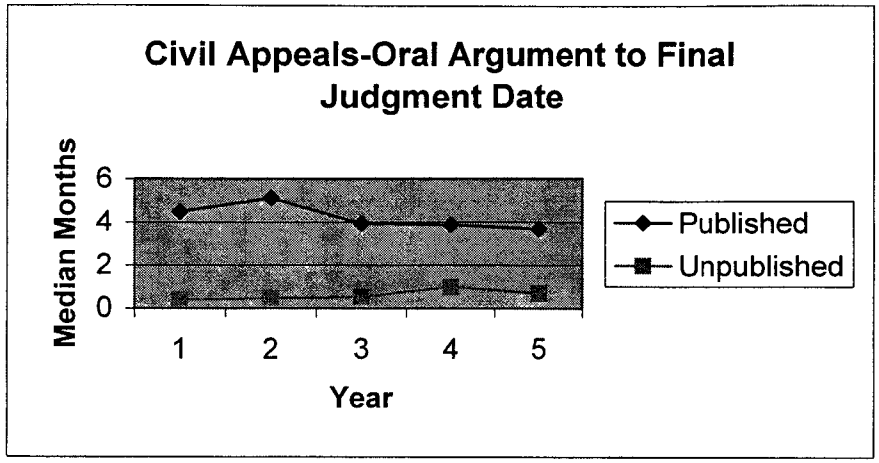
	Year 1	Year 2	Year 3	Year 4	Year 5
P	62	59	56	42	57
U	667	654	670	573	491



Number of Published or Unpublished Opinions Per Year:

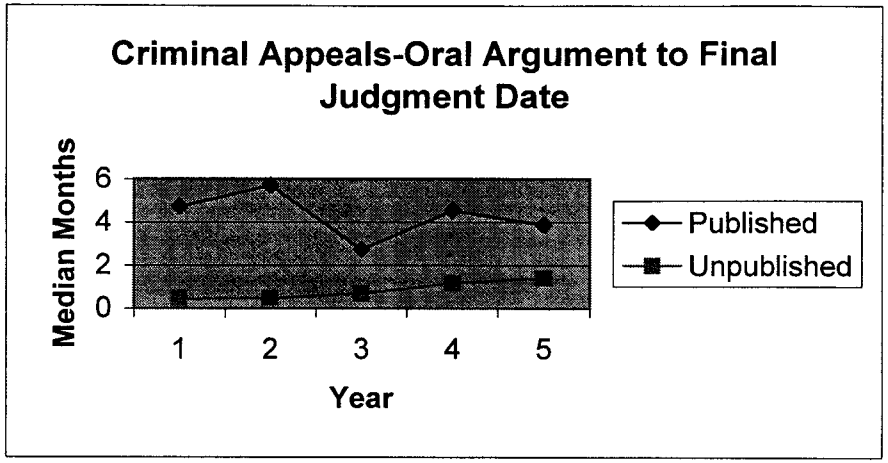
	Year 1	Year 2	Year 3	Year 4	Year 5
P	26	23	25	17	33
U	125	212	207	182	174

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



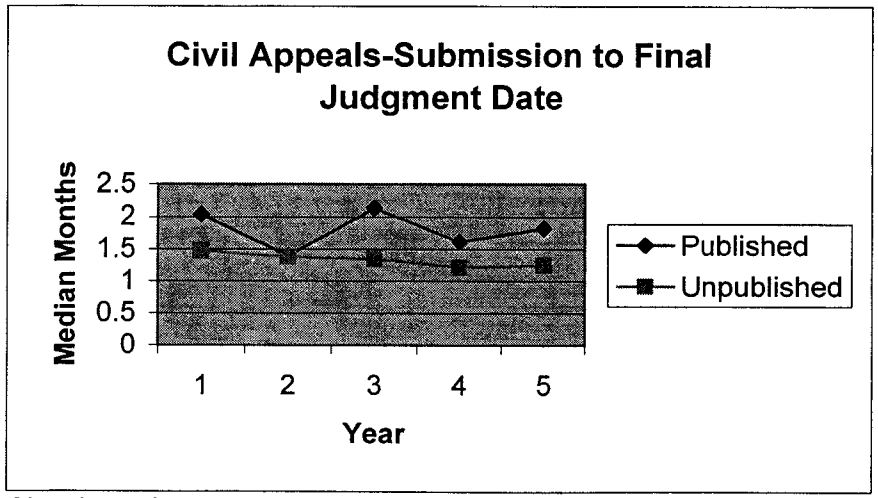
Number of Published or Unpublished Opinions Per Year:

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



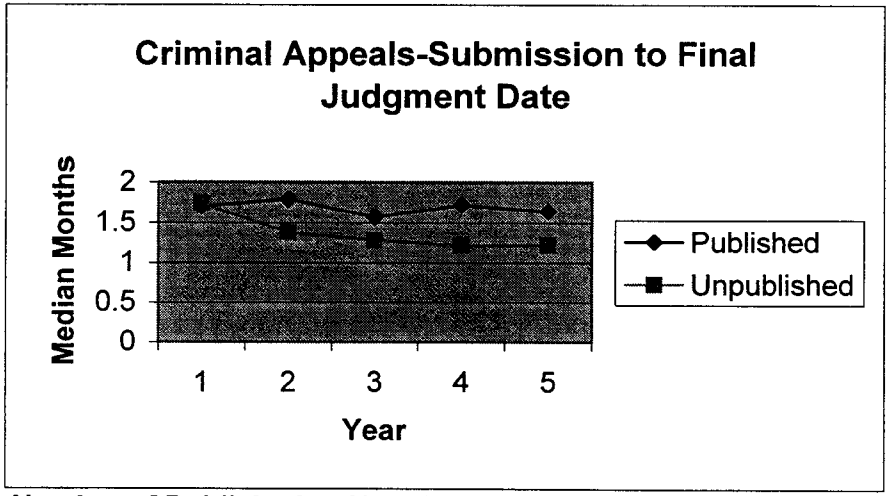
Number of Published or Unpublished Opinions Per Year:

	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:

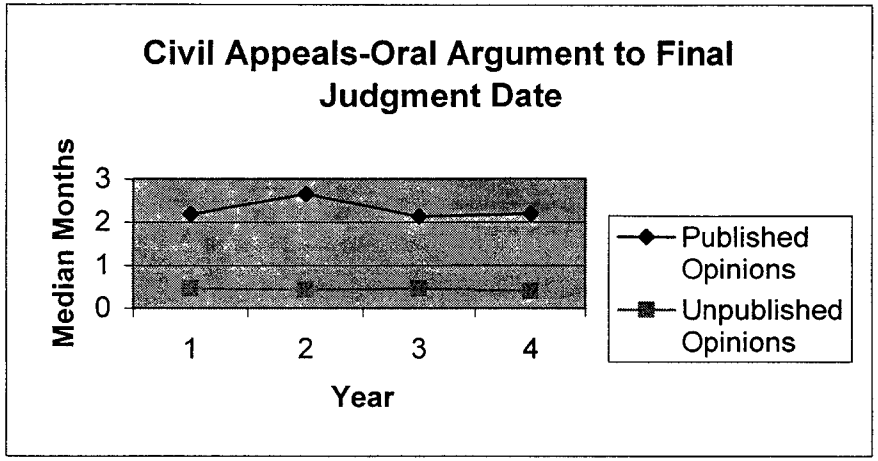
	Year 1	Year 2	Year 3	Year 4	Year 5
P	32	32	25	43	34
U	903	1196	1333	1243	1226



Number of Published or Unpublished Opinions Per Year:

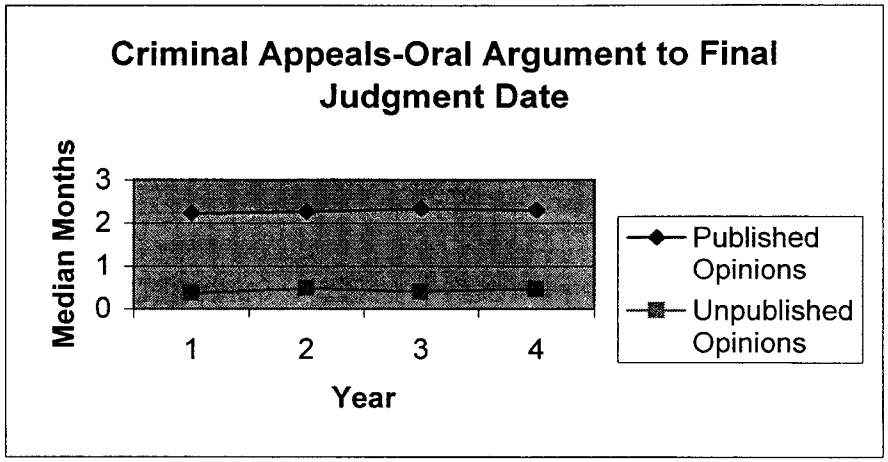
	Year 1	Year 2	Year 3	Year 4	Year 5
P	39	24	30	24	25
U	802	1066	1121	1083	1116

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



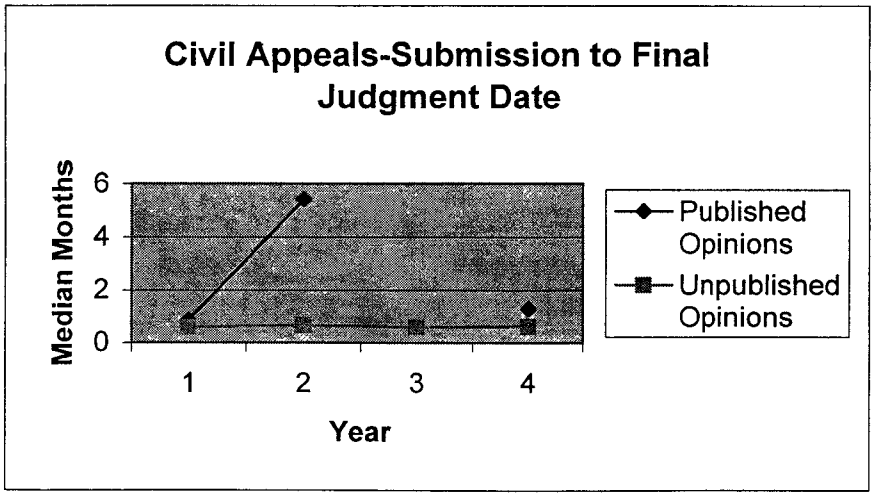
Number of Published or Unpublished Opinions Per Year:

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



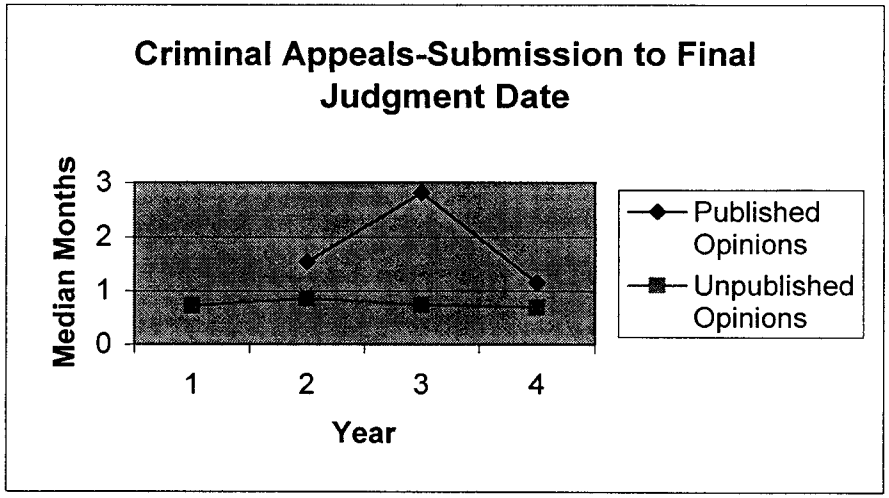
Number of Published or Unpublished Opinions Per Year:

	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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

TO: **COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

FROM: **HON. THOMAS S. ZILLY, CHAIR**
ADVISORY COMMITTEE ON BANKRUPTCY RULES

RE: **BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005**

DATE: **MAY 24, 2005**

The Advisory Committee on Bankruptcy Rules has reported to this Committee for the past eight years that significant bankruptcy reform was imminent. On April 20, 2005, President Bush signed the bill which generally becomes effective on October 17, 2005, 180 days after its enactment. A few provisions in the 500 plus page act became effective upon enactment, but none of those provisions require amendments or additions to the Bankruptcy Rules or Official Forms. The remaining provisions of the act, however, include a number of provisions that create a need either for new or amended rules and forms.

The Bankruptcy Rules Committee has been working diligently since the passage of the bill in the Senate (and prior to consideration in the House) to prepare the necessary additions and amendments to the rules and forms. Fortunately, the Committee had engaged in a substantial

effort to prepare the necessary changes in 2001 when a predecessor bankruptcy reform bill neared enactment. The Committee has now returned to that work to update and revise those proposals in light of the passage of the substantially identical bill in April. The Committee has six separate subcommittees working on these changes. The two subcommittees with the most extensive agendas are the Consumer and Business Subcommittees. These subcommittees also have the benefit of the substantial previous work from 2001. The other subcommittees currently are working on amendments and additions to the rules and forms to implement the provisions in the act relating to health care businesses, cross-border insolvency cases, and appeals. The work of the Forms Subcommittee cuts across all of these substantive areas.

The business and consumer subcommittees have met in Washington and are continuing to work both by teleconference and through email transmissions of draft proposals. The other subcommittees are meeting by teleconference to consider amendments to the rules and forms made necessary by the provisions of the act. The two primary subcommittees, Business and Consumer, along with the Subcommittee on Forms, also will be meeting in Boston on June 13-15, 2005, to consider drafts being prepared during the next two weeks. The full Advisory Committee will be meeting on August 3-4, 2005, in Washington, to make final recommendations for these amendments and any interim rules and forms that the courts might adopt to govern matters until the changes become finally effective.

The Consumer and Business Subcommittees will likely be proposing amendments to over twenty different rules. Some of these amendments are very minor or technical in nature, but some of the amendments are substantial. The subcommittees are making every effort to make the amendments as non-controversial as possible, but there are a number of provisions in the Act that

require careful judgments about the meaning of the statute, so controversy cannot be entirely avoided. The subcommittees considering amendments related to health care businesses, appeals, and cross-border insolvency cases are still in the initial stages of their work (these issues had not been addressed in the 2001 materials), and they each have teleconference meetings scheduled in the next ten days. It is likely that there could be another dozen or so rules affected by these amendments along with a few entirely new rules to address matters that previously did not exist in the Bankruptcy Code.

The lengthy amendments to the Bankruptcy Code also will require the creation of several new forms as well as amendments to a number of existing forms. Under the new act, Congress directed the Committee to provide form plans and disclosure statements for use in small business chapter 11 cases. These debtors also must file statements of profitability (both actual and anticipated) on a periodic basis, and all debtors must file statements of the profitability of entities in which they hold a substantial or controlling interest. Consumer debtors must demonstrate, by a form, that they meet the means test of eligibility for chapter 7 relief. Debtors must show that they have completed credit counseling before they file a bankruptcy petition, and they must also have completed a course in financial management in order to receive a discharge in the case. These obligations likely will be evidenced by some type of official form that the debtor or the provider of the program will have to file with the court. The official form of the notice that is sent to all creditors at the start of the case will be amended to include information about the application of the means test to each consumer debtor. In short, there will be significant amendments to some forms, and other new forms will be proposed to implement the act. The Forms Subcommittee is working in tandem with the other subcommittees to ensure that the

necessary forms will be available for this Committee's review and in time to permit publishers and software developers of the materials to have them ready for end use by the effective date of the act.

The Administrative Office has informed the courts that this effort to prepare necessary interim rules is underway and that we expect to have rules available to the courts for adoption prior to the effective date of the reform legislation. We hope that all of the courts will adopt the same rules so that all cases are subject to the same rules and to provide experience with those rules and forms so that we can evaluate them in action prior to adopting them in final form.

B. Items for Publication

1. New Rule 25(a)(5)

As you know, the advisory committees have been working under the guidance of the E-Government Subcommittee to comply with the mandate of the E-Government Act of 2002 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." Most of that work has been directed toward developing a privacy-rule template that all of the advisory committees could adopt with minor changes.

At its November 2004 meeting, the Appellate Rules Committee decided that, rather than try to pattern an Appellate Rule after the template, the Committee would instead amend the Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions can be left to CACM and to the other advisory committees — all of whom have far more of a stake in the privacy issues than the Appellate Rules 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 Advisory Committee unanimously approved this amendment at our April 2005 meeting. I should note that we received assistance from the other reporters — particularly Profs. Cooper and Morris — in drafting this amendment, and, as always, we appreciate the support of our colleagues on the other advisory committees.

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, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — 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.

III. Information Items

A. Local Rules on Briefs

You may recall that, at the January 2005 meeting of the Standing Committee, I reported on the efforts of the Advisory Committee to address persistent complaints from practitioners about the proliferation of local rules regarding briefs. I mentioned that the FJC had studied the problem at our request and produced a comprehensive report entitled *Analysis of Briefing Requirements in the United States Courts of Appeals*. The FJC found that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in the Appellate Rules, and that over half of the courts of appeals impose seven or more such requirements.

As I reported in January, the Advisory Committee has decided that, as a first step toward addressing this problem, it will mail a copy of the FJC's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the local rules identified by the FJC and, where possible, to repeal them. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

At our meeting in April, the Advisory Committee confirmed its plan and approved the text of the letter that will be mailed to the circuits. I have attached the letter for your information. We would, of course, welcome comments and suggestions from members of the Standing Committee. I should stress that this letter will not be mailed until after the dispute over proposed Rule 32.1 is resolved.

B. Justice for All Act of 2004

The "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. Section 102 of the Act 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. New § 3771(d) establishes enforcement mechanisms and is of concern to the Appellate Rules 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 a 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 a 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. It is difficult to imagine that a court can review a petition, order the respondent to file an answer, await the answer, read the answer, make a decision, and draft a written opinion — all within 72 hours.

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.

The Advisory Committee is considering three options for addressing these problems.

One option for the 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 an answer, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the 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

subdivision would supersede the other rules and set up a "fast-track" system that would apply to § 3771(d)(3) petitions.

A third option for the Committee is to do nothing for the time being. That 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 that the courts of appeals will encounter in handling those petitions. In the meantime, a court of appeals has 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."

The Advisory Committee discussed this issue at its April meeting and ultimately decided to request that the Department of Justice give the issue further study and prepare a recommendation for the Committee.

ATTACHMENT

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, appellate practitioners and bar organizations — including the Department of Justice and both the Council of Appellate Lawyers and the Appellate Judges Conference of the American Bar Association — have expressed concern about the proliferation of local rules. These concerns have focused on local rules regarding the content of briefs. Practitioners contend that these local rules are numerous, vague, and confusing; that these local rules are often in tension, if not in conflict, with FRAP; and that it is difficult for practitioners to find, much less to follow, all local rules on briefing. Practitioners say that they must devote significant time — time that is often charged to clients — researching local briefing requirements and resubmitting briefs that have been "bounced" by clerks for failure to comply with a local briefing requirement. 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 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 every court to post all local rules, standing orders, general orders, and judges' individual rules on the court's website. Placing all briefing requirements, including those found in the court's internal operating procedures, in 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 FJC identifies the additional requirements on briefing imposed by your circuit as including the following:

[LIST LOCAL RULES, IOPs, ETC.]

The Advisory Committee understands that the circuits differ and thus that 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 imposed by the circuits is not clear, and it seems likely that many of them could be eliminated.

Thank you for your attention to these requests.

Sincerely,

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

cc: First Circuit Clerk
First Circuit Executive
First Circuit Advisory Committee

DRAFT

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

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 18, 2005, at 9:15 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Robert D. McCallum, Jr., Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee, and his law clerk, Ms. Brook Coleman; Judge J. Garvan Murtha, liaison from the Standing Committee; Ms. Marcia M. Waldron, 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.

Judge Alito welcomed Justice Holland and Dean McAllister to the Committee. Judge Alito also said that the Committee was pleased to have Associate Attorney General McCallum representing the Solicitor General at this meeting.

II. Approval of Minutes of November 2004 Meeting

The minutes of the November 2004 meeting were approved.

III. Report on January 2005 Meeting of Standing Committee

The Reporter said that this Advisory Committee had not requested action on any items at the Standing Committee's January 2005 meeting.

The Reporter said that Judge Alito had described the intention of the Advisory Committee to take a "dynamic-conformity" approach to protecting the privacy of court filings, permitting the Bankruptcy, Civil, and Criminal Rules Committees to make the policy choices,

and incorporating those choices by reference in the Appellate Rules. The Reporter said that the Standing Committee expressed support for that approach.

The Reporter also said that Judge Alito had described the excellent study that the FJC had done on the proliferation of local rules regarding briefing. This provoked an animated discussion among members of the Standing Committee, with a couple of attorney members urging the Advisory Committee to aggressively pursue more uniformity, and a couple of judge members urging the Advisory Committee to instead exercise restraint and permit circuits leeway to reflect local conditions. It was clear that members of the Standing Committee were not of one mind on the question of whether substantially more uniformity in briefing rules would be either feasible or desirable.

IV. Action Items

A. Item No. 01-01 (new FRAP 32.1 — unpublished opinions)

Judge Alito introduced the following proposed amendment and Committee Note:

Rule 32.1. Citing Judicial Dispositions

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

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

Committee Note

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

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

Rule 32.1 is extremely limited. It 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).

Judge Alito reminded the Committee that, after publishing Rule 32.1 for public comment, the Committee approved the proposed rule at its April 2004 meeting. But the Standing Committee returned Rule 32.1 to the Advisory Committee for further study. The Standing Committee noted that many of the claims of Rule 32.1's opponents were capable of being tested empirically, and the Standing Committee wanted to make certain that every reasonable effort was made to gather information before making a final decision about Rule 32.1.

Judge Alito said that, over the past year, Dr. Reagan and his colleagues at the FJC have conducted an exhaustive study. The study is mostly, but not entirely, concluded. The research that has been completed was summarized in a 134-page report entitled *Citations to Unpublished Opinions in the Federal Courts of Appeals: Preliminary Report.* That report was distributed to members of the Advisory Committee before the meeting. A complete report will be circulated to members of the Standing Committee before their meeting in June.

Judge Alito said that, before calling on Dr. Reagan to describe the results of the study, he wanted to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research. Judge Alito acknowledged that the study was a major undertaking, but said that it had proven to be worth the effort, as it had supplied much-needed data to help the Advisory and Standing Committees assess the validity of arguments for and against Rule 32.1 that relied largely on speculation.

Dr. Reagan said that the FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. The FJC is done compiling the results of the two surveys (although a few more attorney responses might trickle in), but the FJC is not yet done with its analysis of the briefs and opinions.

Dr. Reagan said that the judges did not receive identical surveys. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C.

Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. Attorneys, by contrast, received identical surveys. Dr. Reagan said that the response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, on the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. On the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule

32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. On the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges on the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great "or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creases either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges on the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges on the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that

view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges of the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges of those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1 have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges of the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed to explain this anomaly, Dr. Reagan responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1), "a little less burdensome" (2), "no appreciable impact" (3), "a little bit more burdensome" (4), and "substantially more burdensome" (5). The average "score" was 3.1. In short, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

Judge Alito said that the AO had also done research for the Advisory Committee. Judge Alito said that, before calling on Mr. Rabiej to describe the AO's findings, he wanted to thank everyone at the AO for their hard work.

Mr. Rabiej said that the AO had identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). Mr. Rabiej reported that the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of

summary dispositions. The data failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Committee discussed the FJC and AO studies at length. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, demonstrated that the arguments against Rule 32.1 were "not proven." Some Committee members — including one opponent of Rule 32.1 — went further and said that the studies in some respects actually refuted those arguments.

A few members cautioned that it was important not to overstate the results of the studies. The studies relied to a substantial extent on predictions, and predictions are inherently unreliable. One member said that the claims of Rule 32.1's opponents were not only "not proven," but "not provable." Other members pointed out, though, that the AO's work did not rely at all on predictions, and that a good part of the FJC's work involved asking judges and attorneys what *had happened*, not what *will happen*.

A member pointed out — and Mr. Rabiej agreed — that the AO's data were inherently limited. Over a one- or two-year period, there could be many reasons why case disposition times might increase or decrease. The AO's study makes it fairly clear that liberalizing or abolishing no-citation rules does not cause an immediate and substantial increase in disposition times or in summary dispositions, but it does not show much more than that.

A member said that, in his view, one shortcoming of the FJC study is that it was not precise about the different *types* of unpublished opinions. Unpublished opinions vary dramatically, from one short paragraph that says little more than "we affirm for the reasons given by the district court" to 20 or more pages of detailed factual and legal analysis. The member said that simply asking judges about "unpublished opinions" — without differentiating among types of unpublished opinions — might fail to capture some shifts in judicial behavior that would be occasioned by Rule 32.1. For example, the member thought it likely that judges would issue the same number of unpublished opinions, but that more of those opinions would be of the one-paragraph variety.

Dr. Reagan responded that, in designing its study, the FJC had to sacrifice some precision for brevity. In general, the longer the survey, the lower the response rate. The FJC tried to design a survey that was long enough to be helpful but short enough to be answered. Asking about "long" unpublished opinions and "medium" unpublished opinions and "short" unpublished opinions would have added a lot of length and complexity to the survey and likely reduced the response rate.

Dr. Reagan and a couple of members also pointed out that the FJC had asked judges about the impact of liberalizing citation rules on the *length* of unpublished opinions. For example, the FJC asked the judges in the four restrictive circuits and in the six discouraging

circuits whether approval of Rule 32.1 would result in changes to the length of unpublished opinions. That question would seem to get at the point that concerned the member.

One member who had voted against Rule 32.1 in the past said that he had changed his mind in light of the FJC and AO studies and in light of his own further reflections. Although he was not yet prepared to support a permissive rule such as Rule 32.1, he was prepared to support a discouraging rule, such as the rule that had originally been proposed by the Solicitor General. He proposed that Rule 32.1 be amended to provide:

> (a) Citation of a written decision or disposition by the court that it determines is "not for publication" or "non-precedential" or the like is disfavored, and permitted only when: (a) it has persuasive value on a material issue [that has not been (adequately) addressed in a published decision] [and no published decision would serve as well], (b) it demonstrates the existence of a [conflict] [lack of consistency] among the court's decisions, (c) relevant to establish res judicata, collateral estoppel or law of the case, and (d) relevant for factual purposes to show double jeopardy, notice, abuse of the writ, entitlement to attorneys' fees, sanctionable conduct, related cases, or the like.

The member said that imposing a discouraging rule on the circuits would adopt the approach now taken by six circuits — a near majority — rather than the approach taken by only three circuits. Moreover, the approach would reflect what the member said he took to be the bottom line of the FJC study: that citation of unpublished opinions is generally not very useful, but that there are some unpublished opinions that should be citable. The member said that, although this approach raised the possibility of satellite litigation over whether the citation of a particular unpublished opinion was proper, he thought that much of that satellite litigation could be prevented if the Committee Note would state clearly that a party who objected to the citation of an unpublished opinion should just state the objection in the party's brief and not file a motion to strike.

A second member said that he, too, had voted against Rule 32.1, but that he, too, was willing to support a version of a discouraging citation rule. He does not believe that circuits should be free to altogether prohibit the citation of unpublished opinions in unrelated cases. He believes that unpublished opinions are sometimes useful. Moreover, he believes that opinions are sometimes designated as unpublished for reasons that are improper or mistaken, and that allowing parties to cite unpublished opinions would provide a check on this practice. At the same time, he does not support Rule 32.1 because he believes that circuits should be free to require parties to provide a good reason for citing an unpublished opinion.

The second member said that he cannot support the proposal by the first member because it would force the permissive circuits to become discouraging circuits. In the second member's view, if a circuit wants to freely permit the citation of unpublished opinions, it should be able to

do so. Judge Levi asked whether the goals of the second member might be accomplished by removing the words "or restrict" from proposed Rule 32.1(a), so that the rule would read:

> (a) **Citation Permitted.** A court may not prohibit 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.

A couple of members pointed out that such a rule would not require a single circuit to change its current practice. No circuit altogether prohibits the citation of unpublished opinions; for example, every circuit allows unpublished opinions to be cited to establish res judicata. To accomplish the member's goals, Rule 32.1 would have to do more than bar circuits from "prohibiting" the citation of unpublished opinions.

After further discussion, the second member suggested that the first member's proposal be changed to provide as follows:

> (a) Citation of a written decision or disposition by the court that it determines is "not for publication" or "non-precedential" or the like shall not be prohibited, except that courts may, by local rule, permit the citation of such opinions only when: (a) it has persuasive value on a material issue [that has not been (adequately) addressed in a published decision] [and no published decision would serve as well], (b) it demonstrates the existence of a [conflict] [lack of consistency] among the court's decisions, (c) relevant to establish res judicata, collateral estoppel or law of the case, and (d) relevant for factual purposes to show double jeopardy, notice, abuse of the writ, entitlement to attorneys' fees, sanctionable conduct, related cases, or the like.

The other members of the Committee said that they would not support a discouraging version of Rule 32.1, regardless of how it was worded. These members said that a discouraging version would be inconsistent with almost all of the reasons that the Committee has given for proposing Rule 32.1, such as disagreement with the proposition that courts can dictate when their official public actions may be cited. These members gave additional reasons for not supporting a discouraging version of Rule 32.1, including:

- The version proposed by the first member would force the permissive circuits to restrict the citation of unpublished opinions. Judge Levi stressed that, although the Standing Committee has not yet voted on Rule 32.1, it is clear that there are several members who strongly support the rule, and who would strongly oppose any rule that seemed to endorse restrictions on the citation of unpublished opinions, such as the discouraging versions proposed by the two members.

— The restrictions in a discouraging version are likely to be ignored. For years, Rule 35(b) has instructed parties not to petition for rehearing unless an opinion conflicts with another opinion or addresses a question of "exceptional importance." And yet parties routinely petition for rehearing in cases that do not come close to meeting those criteria. A discouraging version would accomplish little, while at the same time putting the Committee in the position of endorsing the view that unpublished opinions may be treated as "second-class precedent" — a question on which the Committee has been careful to take no position.

— A discouraging version would do little to ease the concerns of the judges who have opposed Rule 32.1. Those judges have said that, if their unpublished opinions can be cited, they will spend much more time preparing those opinions. Under a discouraging version, a judge will not know whether his or her opinion will be cited in the future. Thus, he or she will have to behave no differently than he or she would under a permissive rule.

Justice Holland said that his court — the Delaware Supreme Court — had adopted a rule similar to Rule 32.1 about 15 years ago, and the court's experience has been entirely positive. He said that unpublished opinions are not cited much, and citation of unpublished opinions is not often helpful, but he and his colleagues nevertheless *want* to know if their court has addressed an issue in the past.

Judge Stewart said that he disagrees with those who dismiss the FJC and AO studies as involving mere predictions. The fact is that three of the circuits — including his own, the Fifth Circuit — have real-world experience with rules similar to Rule 32.1, and these circuits have experienced none of the problems predicted by Rule 32.1's opponents. The Fifth Circuit is one of the largest circuits, and its per-judge caseload is always the highest or second-highest in the nation. It has a huge prisoner population, and it confronts a huge amount of pro se litigation. And yet it has had absolutely no problem living under a rule similar to Rule 32.1.

Several other members agreed with Justice Holland and Judge Stewart that Rule 32.1 should be approved.

At Judge Levi's request, the Committee moved on to the question of retroactivity: Should Rule 32.1 apply only to unpublished opinions issued after the effective date of the rule? Although one member said that he would support a prospective-only rule, other members disagreed. They pointed out that a rule that applied only prospectively would be inconsistent with almost all of the reasons why the Committee had approved Rule 32.1. How can the Committee argue, for example, that Article III courts should not be able to bar citation of their own opinions, and then approve a rule that allows Article III courts to bar citation of tens of thousands of their own opinions?

In addition, a prospective-only rule would appear to endorse the argument that judges will have to spend much more time drafting unpublished opinions — or would draft unpublished opinions much differently — if those opinions were citable. The Committee has consistently rejected this argument, and the argument now seems even weaker in light of the FJC and AO studies.

Members also expressed concern that a prospective-only rule would create a patchwork of rules and make the disuniformity problem even worse. A single court such as the D.C. Circuit might end up with one rule that governs the citation of one group of unpublished opinions, a second rule that governs the citation of another group, and a third rule (Rule 32.1) that governs the citation of yet another group.

After further discussion, the Committee agreed that, if Rule 32.1 is approved, it should be applied to all unpublished opinions — past and future. If either the Standing Committee or the Judicial Conference were to defeat Rule 32.1, and if it were to appear that a prospective-only version would pick up the necessary votes, the Committee would consider a change. For now, though, the Committee will stick with Rule 32.1 as written.

The final issue addressed by the Committee was the question of Rule 32.1's applicability to the unpublished opinions of state courts. At its June 2004 meeting, the Standing Committee asked the 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.

Members were of two minds. On the one hand, members did not think that the concerns of the state judges were well founded. The unpublished opinions of state courts already can be cited in most federal appellate courts, as state judges do not have the power to tell litigants what they may or may not cite in federal court. There is no evidence that such citation has caused any problems. Moreover, it is clear that under *Erie R.R. Co. v. Tompkins* 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. It is therefore difficult to know why state judges would be concerned about Rule 32.1.

On the other hand, the focus of the Committee from the beginning has been on federal opinions. Most federal appellate courts do not now restrict the citation of state court opinions, and it is highly unlikely that federal courts will do so if Rule 32.1 is approved. Removing state court opinions from the scope of Rule 32.1 would thus be a costless way of providing assurance to state court judges and eliminating one more objection to Rule 32.1.

A member moved that Rule 32.1 be amended by inserting the word "federal" in front of "judicial opinions" in subdivision (a) and in front of "judicial opinion" in subdivision (b), and

that the Reporter be instructed to make conforming changes to the Committee Note. The motion was seconded. The motion carried (8-0, with one abstention).

A member moved that Rule 32.1 be approved as amended. The motion was seconded. The motion carried (7-2).

A member asked that the Reporter insert into the Committee Note a citation to the FJC study. The Reporter said that he would do so.

B. Item No. 03-10 (new FRAP 25(a)(5) — electronic filing/privacy protections)

The Reporter introduced the following proposed amendment and Committee Note:

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.

The Reporter reminded the Committee that the E-Government Act 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, Judge Levi appointed an E-Government Subcommittee to work with the advisory committees to develop a privacy-rule template that all of the advisory committees could then adopt with minor changes. That template has been through two rounds of review by the advisory committees, and several issues still need to be resolved.

At its November 2004 meeting, this Committee decided that, rather than try to pattern an Appellate Rule after the template, the Committee would instead amend the Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions can be left to the Committee on Court Administration and Case Management ("CACM") 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 the Reporter to draft a rule reflecting this "dynamic-conformity" approach.

The Reporter said that drafting such a rule proved more difficult than he had anticipated, in part because of complications caused by bankruptcy cases. But with the assistance of the other reporters — particularly Prof. Ed Cooper (Civil) and Prof. Jeff Morris (Bankruptcy) — he was able to draft a rule. That rule has been circulated to the other reporters, and all agree that it should work nicely.

Several members said that they continue to believe that the Appellate Rules should adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. They believe that the rule drafted by the Reporter should work well.

A member asked how trial exhibits will be treated under the proposed rule, given that they are not filed in the district court, but often filed in the court of appeals. The Reporter said that it depended on what rule governed the case in the district court. For example, if the case was governed by Civil Rule 5.2 in the district court, then Civil Rule 5.2 will apply to the exhibits filed in the court of appeals.

Another member asked why the second sentence was necessary. The Reporter said that the first sentence applies to "[a]n appeal." Although the first sentence will cover most of the business of the courts of appeals, it will not cover some things, such as original proceedings commenced by the filing of a petition for extraordinary relief under Appellate Rule 21.

A member suggested that the second sentence of the second paragraph of the Committee Note be amended by adding an explicit reference to petitions for extraordinary relief. By consensus, the Committee asked the Reporter to make the change.

A member moved that proposed Rule 25(a)(5) be approved for publication. The motion was seconded. The motion carried (unanimously).

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

Judge Alito introduced the following proposed amendment 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 <u>or require</u> 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).

Judge Alito said that the proposed amendment to Appellate Rule 25(a)(2)(D) would authorize the courts of appeals to enact local rules that would require all papers to be filed electronically. At its last meeting, the Committee approved the proposed amendment for publication on an expedited basis. 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). The three proposed amendments were published in November 2004 and accompanied by virtually identical Committee Notes. The question now before this Committee is whether to give final approval to the proposed amendment to Appellate Rule 25(a)(2)(D).

A member said that, although the comments on the proposed amendment were not many, most of those comments made the same argument: that the national rule should either include a hardship exception or require that local rules include a hardship exception. The member said that he thought the concerns raised by the commentators were legitimate. Judge Levi responded that the advisory committees initially thought that it would be sufficient to caution in the Committee Notes that exceptions should be made to accommodate those for whom electronic filing would be impossible or difficult. However, a number of thoughtful commentators disagreed, and their arguments persuaded the Bankruptcy and Civil Rules Committees. At their recent meetings, both Committees agreed that the national rules should require that local rules mandating electronic

filing include a hardship exception. Both Committees agreed that the national rules should not spell out the scope of the hardship exception, but merely require that *a* hardship exception be included in local rules mandating electronic filing.

After a brief discussion, the Committee agreed that the national rule should include a hardship exception. The Reporter noted that the hardship exception approved by the Civil Rules Committee differed from the hardship exception approved by the Bankruptcy Rules Committee, and thus that the chairs and reporters of the advisory committees would have to get together to work out common language. The Reporter asked Judge Levi whether, given that fact, it would be sufficient for the Appellate Rules Committee simply to agree that a hardship exception should be incorporated, but leave the drafting of the exception to the advisory committee chairs and reporters — and, ultimately, to the Standing Committee. Judge Levi said that he thought it made sense to proceed in that manner.

A member asked about a concern raised by Judge Sandra L. Lynch of the First Circuit. Judge Lynch believes that many of the courts of appeals are likely to enact local rules that require parties to file their briefs electronically, but that also require parties to file one or more paper copies of their briefs. On her circuit, for example, no judge wants to receive *only* an electronic copy of a brief, although there are some who would like 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. Judge Lynch 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 'hard' copies of a paper be filed; nothing in the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise."

A couple of members, as well as Judge Levi, said that they would like to accommodate Judge Lynch. A member asked whether Judge Lynch's concern should be addressed in the text of the rule. The Reporter said that addressing the concern in the text of Rule 25(a)(2)(D) would likely result in differences between the Appellate Rule and the corresponding Bankruptcy and Civil Rules. Those rules are now virtually identical, and the Standing Committee would like to keep them as close as possible. The Reporter also said that a sentence in the Committee Note is highly likely to solve the problem — and, if it does not, the Committee always has the option of amending the rule again.

A member moved that the proposed amendment to Rule 25(a)(2)(D) be approved, with the understanding that a hardship exception will be added to the rule and a sentence addressing Judge Lynch's concern will be added to the Committee Note. The motion was seconded. The motion carried (unanimously).

Before leaving the topic of electronic filing, members of the Committee provided comments on *Draft Model Local Appellate Rules for Electronic Filing*, which Mr. Rabiej had distributed to the Committee, and which will be considered by CACM at its next meeting. Mr. Rabiej said he would communicate the Committee's comments to CACM.

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 about variations in local circuit rules regarding briefing. The Committee discussed the problem at its November 2003 meeting and decided to ask the FJC to collect further information. 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*. That report was discussed at length by the Committee at its November 2004 meeting. The Committee determined that it would not undertake a major effort to bring about uniformity or near-uniformity in briefing requirements. Members disagreed about the importance of uniformity in this area, but agreed that, desirable or not, uniformity is simply not achievable. At the same time, the Committee agreed that Judge Alito should 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 repeal them. The letter should also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local requirements relating to briefing.

At the Committee's request, the Reporter had prepared a draft letter, with the assistance of Judge Alito, Mr. Letter, and Mr. Rabiej. That draft letter appeared under Tab V-A in the Committee's agenda book.

The Committee discussed the draft letter at length, focusing on three issues:

First, several members suggested that the letter would be more effective if it included an "executive summary" for each circuit — pointing out, in the text of the letter, exactly which of the circuit's local rules concerned the Committee. A letter that was specific in pointing chief judges to problem rules is more likely to spur action than a letter that simply asks chief judges to read an attached report, most of which addresses the rules of other circuits. The Committee agreed, by consensus, that the letter should be revised in this manner.

Second, the draft letter asserted that "[t]he FJC confirms that many of these local rules are inconsistent with FRAP." The impression of members — confirmed by Ms. Leary — is that the local rules identified by the FJC do not directly conflict with any of the national rules, in the sense of requiring *x* when the national rules require *not x*. Instead, the problem was that the local

rules imposed requirements that are not imposed by the Appellate Rules. Judge Levi and the Reporter said that the two major Local Rules Projects conducted by the Standing Committee had defined "conflict" very narrowly, being careful not to characterize a local rule as "conflicting" with a national rule unless the conflict was direct. Members agreed that this Committee should follow the lead of the Local Rules Projects and that the letter should be revised so that it does not imply that any local rules on briefing are in conflict with or inconsistent with any of the Appellate Rules.

Finally, members discussed whether the letter should be stronger. For example, should the letter not only ask the chief judges to review the problematic local rules, but, if they choose to retain those rules, to justify that decision? Or should the letter ask the chief judges to let the Committee know whether the circuit decides to repeal any of the problematic local rules?

Some members expressed the fear that being too aggressive might create resentment, which, in turn, might make progress less likely. Members said that, if the letter did nothing more than cause circuits to clearly identify all local variations in one place on their websites, that would be a major accomplishment. It is hard to imagine that the circuits will object to the request that all local variations be clearly identified, unless the letter goes too far and creates a backlash. Other members agreed, but said that they believe that most chief judges will appreciate having these local rules called to their attention and appreciate the fact that the Committee is trying to use collaboration rather than coercion to address the problem.

By consensus, the Committee agreed that the letter was fine as drafted, except that it should be revised so that it does not imply that any local rules are in conflict with the Appellate Rules, and it should include a circuit-specific "executive summary" when it is mailed. Judge Alito said that, as previously agreed, he or his successor will mail the letter after the controversy over Rule 32.1 subsides.

B. Items Awaiting Initial Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) — conform to Justice for All Act)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that the "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. Section 102 of the Act 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 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 a 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 a 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. It is difficult to imagine that a court can review a petition, order the respondent to file an answer, await the answer, read the answer, make a decision, and draft a written opinion — all within 72 hours.

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.

The Reporter said that, at this point, the Committee has at least three options for addressing the problems created by the Act:

One option for the 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 an answer, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the 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 subdivision 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 Committee is to do nothing for the time being. That 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 that the courts of appeals will 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.

Mr. Letter said that the Department of Justice believes that the Appellate Rules should not be amended at this time. He said that the Department hopes there will be very few proceedings under the Act and that the Department believes that the Committee should wait to see whether and what problems actually develop before amending the rules.

Mr. Rabiej said that the Criminal Rules Committee has decided to take a wait-and-see approach, for the reasons given by Mr. Letter and the Reporter.

A member said that he, too, favors doing nothing for the time being. He predicted, though, that victims will seek relief from the appellate courts in two situations. First, victims will assert the right to be protected from defendants, and victims will be unhappy with the level of protection that can practically be afforded. Second, victims will assert the right to full and timely restitution, but soon will grow frustrated at the inability to collect restitution from largely judgment-proof defendants.

A member said that he was not convinced that the Committee should do nothing. What would be the harm in amending the Appellate Rules to authorize a single judge to issue a writ of mandamus? Or to create a fast-track procedure for § 3771(d)(3) petitions?

Members responded that, while there would likely be no harm in the first amendment, there could be harm in the second. Members said that putting a fast-track procedure in the Appellate Rules would encourage Congress to add additional types of cases to the fast track. Before long, the courts of appeals will have an array of cases that require fast-track consideration. One member said that fast-track provisions raise substantial separation-of-powers concerns when they do not give federal judges adequate time to exercise "judicial Power" under Article III.

The member responded that, while he understood those concerns, he thought the Committee could move forward on a more modest set of amendments, such as amendments to permit a single judge to issue a writ of mandamus, to specify how deadlines stated in hours should be calculated, and perhaps to authorize the courts of appeals to use their local rules to establish a fast-track procedure for § 3771(d)(3) petitions.

After further discussion, the Committee agreed to ask the Department of Justice to study this matter further and present a recommendation to the Committee at a future meeting.

2. Item No. 05-02 (FRAP 35 and 40 — replace page limits with word limits)

Attorney Roy H. Wepner has proposed 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 Committee at its last meeting and rejected by vote of 2 to 5. By consensus, the Committee agreed to remove Item No. 05-02 from its study agenda.

3. Item No. 05-03 (FRAP 5 — reflect bankruptcy reform legislation)

The Reporter said that Judge Alito had asked him to investigate whether the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 will require any changes in the Appellate Rules.

The Reporter said that, as far as he can determine, only one section of the Act has a direct impact on the Appellate Rules. 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 Rule 5 was restyled in 1998, the 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.

The Reporter said that neither he nor Prof. Morris (the Reporter to the Bankruptcy Rules Committee) believes that anything in § 1233 requires this Committee to amend Rule 5. With the clarifications made by § 1233 itself, Rule 5 should suffice to handle the new permissive appeals.

The Committee discussed § 1233, with Mr. McCabe and Ms. Waldron describing some of the background to the provision. Several members agreed with the Reporter that no action

was necessary. Mr. Letter reported that he had spoken with the Justice Department's representative on the Bankruptcy Rules Committee, and he concurred that there was no need to amend the Appellate Rules.

By consensus, the Committee agreed to remove Item No. 05-03 from its study agenda.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Date and Location of Fall 2005 Meeting

The Committee will next meet in Santa Fe, New Mexico. The date will be set by Judge Alito after Mr. Rabiej canvasses the members of the Committee about their availability in October and November.

VIII. Adjournment

The Committee adjourned at 12:45 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — May 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 Approved by Supreme Court 04/05
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 Approved by Supreme Court 04/05
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 Approved by Supreme Court 04/05

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 Approved by Supreme Court 04/05
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 Approved with further changes by Advisory Committee 04/05
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 Approved by Supreme Court 04/05

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 Discussed and retained on agenda 04/05
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 Discussed and retained on agenda 04/05
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 Draft approved 04/05 for submission to Standing Committee
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 Published for comment 11/04 Approved with changes by Advisory Committee 04/05
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice

FRAP Item	Proposal	Source	Current Status
05-04	Amend FRAP 41 to address *Bell v. Thompson* issue.	John G. Kester, Esq.	Awaiting initial discussion

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Thomas S. Zilly, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 2, 2005**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 10-11, 2005, in Sarasota, Florida. The purpose of this report is to outline actions taken by the Advisory Committee at its spring meeting. The Advisory Committee considered public comments regarding the preliminary draft of proposed amendments to Bankruptcy Rules 1009, 2002(g), 4002, 5005(c), 7004(b)(9), 7004(g), 9001, and 9036, and Schedule I of Official Form 6 that were published in August 2004 and the preliminary draft of the proposed amendment to Rule 5005(a)(2) that was published in November 2004. After review of the public comments, the Committee gave its final approval to various proposed amendments which we ask the Standing Committee to approve. The proposed amendments to Rules 2002(g), 9001, and 9036 were approved by the Committee by an email ballot and by the Standing Committee before the meeting.

The Advisory Committee also studied a number of proposals to amend the Bankruptcy Rules. After careful consideration, the Advisory Committee requests that the Standing Committee approve for publication a preliminary draft of proposed amendments to Bankruptcy Rules 3001, 3007, 4001, and 6006, and new Rules 6003, 9005.1, and 9037. The Style Consultants to the Standing Committee offered a number of suggestions that were considered by

the Advisory Committee's Style Subcommittee, and the proposals set out below in the Action Items section of the report reflect those joint efforts.

The Advisory Committee has also been following the status of the pending Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Public Law 109-8. The act was passed by the Senate on March 10, by the House of Representatives on April 14, and signed by the President on April 20. As a result the Committee considered both at the meeting and in subsequent telephone conference call meetings the issue of whether the new law would conflict with any pending proposed amendments to the Bankruptcy Rules.

II Rules previously approved or pending and possible conflict with the pending legislation.

(1) Rule 2002(g)(4) - Notices to creditors.

This amendment is now pending before Congress with a fast track effective date of December 1, 2005. The Committee reviewed the proposed rule in light of the recently enacted bankruptcy legislation and concluded that there was no conflict. The Committee has previously advised the Standing Committee of this conclusion.

(2) Rule 4008 - Reaffirmation Agreements.

This amendment was previously pending before the Supreme Court with a proposed effective date of December 1, 2005. The Committee reviewed this proposed rule in light of the legislation and concluded the proposed rule would conflict with the new law. The Committee recommended to the Standing Committee that the proposed Rule 4008 be withdrawn. As a result, the Supreme Court did not send the rule to Congress.

III Action items

(A) Proposed Amendments to Bankruptcy Rules 1009, 4002, 5005(a)(2), 5005(c), 7004(b)(9), and 7004(g) Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the following amendments for submission to the Judicial Conference.

1. *Public Comment.*

The proposed amendments to Bankruptcy Rules 1009, 4002, 5005(c), 7004(b)(9), and 7004(g), and Schedule I of Official Form 6 were published for comment in August 2004. The proposed amendment to Rule 5005(a)(2) was published for comment in

November 2004. Public hearings on the proposed amendments were scheduled for February 3 and February 7, 2005. There was only one timely request to appear at a hearing and that commentator agreed to submit his comments in writing. The comments on the proposals are summarized immediately following the text of each rule to which the particular comment applied. After review of the comments, the Advisory Committee approved the following proposed amendments either as published or with slight changes that are described in the Changes Made After Publication section. The Committee recommends to the Standing Committee that final approval be given to each of the following amendments:

2. *Synopsis of Proposed Amendments:*

(a) Rule 1009. This amendment would require the debtor to submit a corrected social security number when the debtor becomes aware of an error in a previously submitted statement.

(b) Rule 4002. This amendment would require a debtor to bring certain documentation to the section 341 first meeting of creditors to establish current income and ownership of financial accounts, as well as the debtor's most recently filed federal income tax return. After reviewing many public comments to this proposal the Advisory Committee added three amendments to the published rule and modified the Committee Note.

(c) Rule 5005(a)(2). This amendment would allow courts to permit or require electronic filings. The Advisory Committee voted to amend the published rule to add a new second sentence as follows: "Courts requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with the mandatory electronic filing rule". This change was made in light of the public comments expressing concerns about the burden upon pro se and other litigants who would find it difficult to comply with mandatory filing requirements.

(d) Rule 5005(c). This amendment adds district judges and the clerk of the bankruptcy appellate panel to a list of persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court.

(e) Rule 7004(b)(9). This amendment removes "or statement of affairs" from the rule. The Advisory Committee voted to amend the Committee Note to explain the removal of this language.

(f) Rule 7004(g). This amendment revises the method of service of a summons and complaint on the attorney for the debtor whenever an entity serves the debtor with a summons and complaint.

(g) An amendment to Schedule I to Form 6 was approved by the Advisory Committee. After the meeting, however, the amendment was referred back to the Forms Subcommittee for further review in light of the bankruptcy legislation.

3. *Text of Proposed Amendments to Rules 1009, 4002, 5005(a)(2), 5005(c), 7004(b)(9), and 7004(g)*

The text of the proposed amendments and Committee Notes, summaries of the comments which apply to each of the proposed amendments, and changes made since publication are attached to this report.

(B) Request Approval for Publication of Preliminary Draft of Proposed Amendments to Bankruptcy Rules 3001, 3007, 4001, and 6006, and new Rules 6003, 9005.1, and 9037

The Advisory Committee approved the following proposed rule amendments and recommends to the Standing Committee that these proposals be published in August 2005.

(1) Rule 3001. The Advisory Committee approved amendments to Rule 3001(c) and (d) to add page limitations on proof of claims filings and require summaries if over the page limitations.

(2) Rule 9005.1. The Advisory Committee approved this new rule dealing with a constitutional challenge to a statute or law to make pending new Civil Rule 5.1 applicable to all contested matters and other proceedings in a case.

(3) Rule 9037. The Advisory Committee approved the new privacy rule which modified the proposed template rule and Committee Note considered by each Advisory Committee. This proposed rule is intended to protect privacy and security concerns relating to electronic filing and the public availability of documents filed electronically, as required by the E-Government Act of 2002. The proposed rule tracks the Revised Privacy Template Rule developed by the E-Government Subcommittee with modifications deemed necessary for bankruptcy purposes.

(4) The Advisory Committee approved amendments to Rules 3007, 4001, and 6006, and new Rule 6003. These proposals, with some amendments by the Advisory Committee, were the result of the efforts of the Joint Subcommittee on Chapter 11 and Venue issues. This is a joint effort of the Committee on the Administration of the Bankruptcy System and the Advisory Committee to analyze choice of venue and other aspects of large chapter 11 cases.

(a) Rule 3007. The proposed amendment would place restrictions upon, and provide procedures for, omnibus objections to claims. In summary, the proposal would prohibit omnibus objections unless the court permits it or the objection is one of the class of permitted omnibus objections generally consisting of non-substantive objections , such as duplicate claims or late claims.

(b) Rule 4001. The proposed amendment relates to the use of cash collateral, obtaining debtor-in-possession financing, and approval of related agreements.

(c) Rule 6003. The proposed new rule would limit the type of motions and relief that can be granted during the first 20 days of a case.

(d) Rule 6006. The proposed amendment would place restrictions upon, and provide procedures for, omnibus assumptions, assignments and rejections of executory contracts and unexpired leases.

A copy of these proposed amendments are attached to this report.

IV Information items

(A) Proposed Rules Previously Approved by the Standing Committee for Publication in August 2005

The Standing Committee has previously approved for publication in August 2005 amendments to the following bankruptcy rules:

(1) Rule 1014 - a proposed amendment to confirm that a court on its own motion may initiate (after notice and a hearing) a change of venue.

(2) Rule 3007 - a proposed amendment to clarify the procedure when a party objects to a claim and also attempts to seek affirmative relief at the same time.

(3) Rule 7007.1 - a proposed amendment to clarify that a party must file a corporate ownership statement with its initial paper filed with the court in an adversary proceeding.

(B) Draft Minutes

Draft minutes of the March 2005 meeting of the Advisory Committee are attached.

ATTACHMENTS:

Text of proposed amendments recommended for approval and Committee Notes, summaries of the comments on each proposed amendment, and changes made since publication
Text of proposed amendments recommended for publication and Committee Notes
Draft Minutes of March 2005 Advisory Committee Meeting

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 3001. Proof of Claim

* * * * *

(c) CLAIM BASED ON A WRITING. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, ~~the original or a duplicate~~ a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the proof of claim. If the writing exceeds 25 pages, the claimant shall instead file a copy of relevant excerpts of the writing and a summary of the writing which together shall not exceed a total of 25 pages. If the claimant has not filed a copy of the complete writing, on request of a party in interest, the claimant shall promptly serve on that party a copy of the complete writing.

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

(d) EVIDENCE OF PERFECTION OF SECURITY INTEREST. If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected. If the evidence of perfection is a writing, the claimant shall file a copy of the writing with the proof of claim. If the writing exceeds five pages, the claimant shall instead file a copy of relevant excerpts of the writing and a summary of the evidence of perfection, which together shall not exceed a total of five pages. If the claimant has not filed a copy of the complete writing, on request of a party in interest, the claimant shall promptly serve on that party a copy of the complete writing.

* * * * *

COMMITTEE NOTE

Subdivisions (c) and (d) of the rule are amended to provide that claimants must file duplicates of writings upon which a claim is based or which evidence perfection of any claimed security interest. The rule previously authorized the claimant to file either the original writing or a duplicate thereof. If the writings that support the claim are 25 pages or less, the claimant must attach a copy of the writings

to the proof of claim, whether or not the claimant provides a summary of the writings. The attached writings and summary together must not exceed 25 pages. Similarly, if the writings that evidence perfection of a security interest do not exceed five pages, the claimant must file a copy of those writings with the proof of claim. The claimant also may attach a summary of the writings evidencing perfection, but the total of the summary and the writings evidencing perfection of a security interest must not exceed five pages.

Subdivisions (c) and (d) are amended to establish limits on the length of documents being attached to a proof of claim. Some documents can be extremely lengthy and may pose particular problems, especially when they are filed electronically. Voluminous documents can cause undue delays both in the filing of the proof of claim as well as in searches of the court's record. Shortened versions of the writings should prevent these problems. Consequently, the rule directs the claimant to file a summary of the writing upon which the claim is based along with copies of the relevant portions of the writing. For example, if a writing must be signed by the debtor to be enforceable, the relevant excerpts likely would include the debtor's signature. The claimant makes the initial determination of relevancy, but to the extent that the attachment does not include relevant excerpts, the evidentiary effect of the proof of claim under subdivision (f) would be limited.

Under subdivision (c), writings on which the claim is based may not exceed 25 pages in length, and if they do, the claimant must instead attach a duplicate of relevant excerpts of the writings and a summary of the complete writings. The summary and the relevant excerpts also may not exceed 25 pages in the aggregate. Similarly, under subdivision (d), any attachment to the proof of claim to provide evidence of perfection of a security interest may not exceed five pages in length. If the writings exceed five pages, the claimant must instead file a summary of the writings and a duplicate of relevant excerpts.

The summary and relevant excerpts of evidence of perfection may not exceed five pages in the aggregate.

Under both subdivisions (c) and (d), if the claimant files a summary rather than a duplicate of the complete writing, the claimant must serve a copy of the complete writing upon any party in interest that requests a copy.

Rule 3007. Objections to Claims

(a) OBJECTIONS TO CLAIMS. An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing. ~~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.~~

(b) DEMAND FOR RELIEF REQUIRING AN ADVERSARY PROCEEDING. A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but an objection

to the allowance of a claim may be included in an adversary proceeding.

(c) LIMITATION ON JOINDER OF CLAIMS OBJECTIONS. Unless otherwise ordered by the court, or permitted by subdivision (d), objections to more than one claim shall not be joined in a single objection.

(d) OMNIBUS OBJECTION. Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, for one or more of the following reasons:

(1) they duplicate other claims;

(2) they have been filed in the wrong case;

(3) they have been replaced by subsequently filed proofs of claim;

(4) they have been transferred in accordance with Rule 3001(e);

(5) they were not timely filed;

(6) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;

(7) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;

(8) they are interests, rather than claims; and

(9) they assert priority in an amount that exceeds the maximum amount under § 507 of the Code.

(e) REQUIREMENTS FOR OMNIBUS OBJECTION. An omnibus objection under subdivision (d) shall:

(1) state in a conspicuous place that claimants receiving the objection should locate their names and claims as listed in the objection;

(2) list claimants alphabetically, provide a cross-reference to claim numbers, and, if appropriate, list claimants by category of claims;

(3) state the grounds of the objection to each claim and provide a cross-reference to the pages in the omnibus objection pertinent to the stated grounds;

(4) state in the title of the omnibus objection the identity of the objector and the grounds for the objections;

(5) be numbered consecutively with other omnibus objections filed by the same objector; and

(6) contain objections to no more than 100 claims.

(f) FINALITY OF OBJECTION. The finality of any order regarding a claim objection included in an omnibus objection shall be determined as though the claim had been subject to an individual objection.

COMMITTEE NOTE

The rule is amended in a number of ways. First, the amendment prohibits a party in interest from including in a claim

objection a request for relief that requires an adversary proceeding. A party in interest may, however, include an objection to the allowance of a claim in an adversary proceeding. Unlike a contested matter, an adversary proceeding requires the service of a summons and complaint which puts the defendant on notice of the potential for an affirmative recovery. Permitting the plaintiff in the adversary proceeding to include an objection to a claim would not unfairly surprise the defendant as might be the case if the action were brought as a contested matter that included an action to obtain relief of a kind specified in Rule 7001.

The rule as amended does not require that a party include an objection to the allowance of a claim in an adversary proceeding. If a claim objection is filed separately from a related adversary proceeding, the court may consolidate the objection with the adversary proceeding under Rule 7042.

The rule also is amended to authorize the filing of a pleading that joins objections to more than one claim. Such filings present significant opportunity for efficient administration of large cases, but the rule includes restrictions on the use of these omnibus objections to ensure the protection of the due process rights of the claimants.

Unless the court orders otherwise, objections to more than one claim may be joined in a single pleading only if all of the claims were filed by the same entity, or if the objections are based solely on the grounds set out in subdivision (d) of the rule. Objections of the type listed in subdivision (d) often can be resolved without material factual or legal disputes. Objections to multiple claims permitted under the rule must comply with the procedural requirements set forth in subdivision (e). Among those requirements is the requirement in subdivision (e)(5) that these omnibus objections be consecutively numbered. Since these objections may not join more than 100 objections in any one omnibus objection, there may be a need for

several omnibus objections to be filed in a particular case. Consecutive numbering of each omnibus objection and the identification of the objector in the title of the objection is essential to keep track of the objections on the court's docket. For example, the objections could be titled Debtor in Possession's First Omnibus Objection to Claims, Debtor in Possession's Second Omnibus Objection to Claims, Creditors' Committee's First Omnibus Objection to Claims, and so on. Titling the objections in this manner should avoid confusion and aid in tracking the objections on the docket.

Use of omnibus objections does not preclude the objecting party from raising other objections to claims listed on an omnibus objection. Section 502(j) of the Code authorizes reconsideration of claims, so this rule likewise recognizes the splitting of objections to claims. See Restatement (Second) of Judgments § 26 (1982). Consequently, a claim included in an omnibus objection based on one or more grounds set out in subdivision (d) could be included in another omnibus objection based on a different ground. The claim might also be subject to an objection on any other ground.

Subdivision (f) provides that an order resolving an objection to any particular claim is treated, for purposes of finality, as if the claim had been the subject of an individual objection. A party seeking to appeal any such order is neither required, nor permitted, to await the court's resolution of all other joined objections. The rule permits the joinder of objections for convenience, and that convenience should not impede timely review of a court's decision with respect to each claim. Whether the court's action as to a particular objection is final, and the consequences of that finality, are not addressed by this amendment.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

* * * * *

(b) USE OF CASH COLLATERAL.

(1) Motion; Service.

(A) *Motion.* A motion for ~~authorization~~ authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order ~~served on any entity which has an interest in the cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~.

(B) *Contents.* The motion shall include an introductory statement, not to exceed three pages, summarizing all material provisions of the motion, including:

(1) the name of each entity with an interest in the cash collateral;

(2) the purposes for the use of the cash collateral,

(3) the terms, including duration, of the use of the cash collateral, and

(4) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

(C) *Service.* The motion shall be served on any entity with an interest in the cash collateral, any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality

case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d), and any other entity that the court may direct.

* * * * *

(c) OBTAINING CREDIT.

(1) Motion; Service.

(A) *Motion.* A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order ~~served on any entity which has an interest in the cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant~~

~~to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.~~

(B) *Contents.* The motion shall include an introductory statement, not to exceed three pages, summarizing all material provisions of the proposed credit agreement, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or proposed order includes any of the following provisions, the motion shall describe the nature and extent of each provision, explain the reasons for each provision, and identify the specific location of the provision in the proposed form of order, agreement, or other document:

(1) the granting of priority or a lien on property of the estate under § 364(c) or (d);

(2) the providing of adequate protection or priority with respect to a claim that arose before the

commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under section 364 to make cash payments on account of the claim;

(3) a determination with respect to the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;

(4) a waiver or modification of the provisions of the Code or applicable rules relating to the automatic stay;

(5) a waiver or modification of any entity's authority to file a plan, to seek an extension of time in which the debtor has the exclusive right to file a plan, or the right to request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364;

(6) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on

property of the estate, or on the foreclosure or other enforcement of the lien;

(7) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

(8) indemnification of any entity;

(9) a release, waiver, or limitation of any right under § 506(c); or

(10) the granting of a lien on any claim or cause of action arising under § 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

(C) *Application of Rule 9024.* The court may grant appropriate relief under Rule 9024 if it determines that the introductory statement did not adequately disclose a material element of the agreement.

(D) *Service.* The motion shall be served on any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d), and on such other entities as the court may direct.

* * * * *

(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, AND OBTAINING CREDIT.

(1) Motion; Service.

(A) *Motion.* A motion for approval of an agreement (~~A~~1) to provide adequate protection, (~~B~~2) to prohibit or condition the use, sale, or lease of property, (~~C~~3) to modify or

terminate the stay provided for in § 362, (~~D~~4) to use cash collateral, or (~~E~~5) between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be ~~served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be~~ accompanied by a copy of the agreement and a proposed form of order.

(B) *Contents.* The motion shall include an introductory statement, not to exceed three pages, summarizing all material provisions of the agreement. The motion also shall state whether the relief requested includes

any of the provisions listed in subdivision (c)(1)(B) and, if so, shall describe the nature and extent of each provision, explain the reasons for each provision, and identify the specific location of the provision in the proposed form of order, agreement, or other document.

(C) *Application of Rule 9024.* The court may grant appropriate relief under Rule 9024 if it determines that the introductory statement did not adequately disclose a material element of the agreement.

(D) *Service.* The motion shall be served on any committee elected under § 705 or appointed under § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d), and on such other entities as the court may direct.

* * * * *

COMMITTEE NOTE

The rule is amended to require that parties seeking authority to use cash collateral, to obtain credit, and to obtain approval of agreements to provide adequate protection, modify or terminate the stay, or to grant a senior or equal lien on property, submit with those requests a proposed order granting the relief, and that they provide more extensive notice to interested parties of a number of specified terms. The motion must include a summary, not to exceed three pages, which will assist the court and interested parties in understanding the nature of the relief requested. In addition to the summary, the rule requires that motions under subdivisions (c) and (d) state whether the movant is seeking approval of any of the provisions listed in subdivision (c)(1)(B), and where those provisions are located in the documents. These provisions are frequently included in agreements of these types, and the rule is intended to enhance the ability of the court and interested parties to find and evaluate those provisions.

The rule limits the introductory summary to three pages. The parties to agreements and lending offers frequently have concise summaries of their transactions that contain a list of the material provisions of the agreements, even if the agreements themselves are very lengthy. A similar summary should allow the court and interested parties to understand the relief requested. The court may grant relief under Rule 9024 if it determines that a material element of the requested financing, or agreement regarding the stay or cash collateral usage, was not adequately disclosed in the introductory statement.

Other amendments are stylistic.

Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case – Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumptions, Assignments, and Rejections of Executory Contracts

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:

(a) an application under Rule 2014;

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and

(c) a motion to assume, assign, or reject an executory contract or unexpired lease in accordance with § 365.

COMMITTEE NOTE

There can be a flurry of activity during the first days of a bankruptcy case. This activity frequently takes place prior to the formation of a creditors' committee, and it also can include substantial amounts of materials for the court and parties in interest

to review and evaluate. This rule is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.

The rule provides that the court cannot grant relief on applications for the employment of professional persons, motions for the use, sale, or lease of property of the estate other than such a motion under Rule 4001, and motions to assume, assign, or reject executory contracts and unexpired leases for the first 20 days of the case, unless it is necessary to avoid immediate and irreparable harm. This standard is taken from Rule 4001(b)(2) and (c)(2), and decisions under those provisions should provide guidance for the application of this provision.

This rule does not govern motions and applications made more than 20 days after the filing of the petition.

Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease

* * * * *

(e) LIMITATIONS. The trustee shall not seek authority to assume or assign multiple executory contracts or unexpired leases in one motion unless all executory contracts or unexpired leases to be assumed or assigned are between the same parties or are to be assigned to the same assignee, or the

court otherwise authorizes the motion to be filed. Subject to subdivision (f), the trustee may join requests for authority to reject multiple executory contracts or unexpired leases in one motion.

(f) OMNIBUS MOTIONS. A motion to reject or, if permitted under subdivision (e), a motion to assume or assign multiple executory contracts or unexpired leases that are not between the same parties shall:

(1) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;

(2) list parties alphabetically and identify the corresponding contract or lease;

(3) specify the terms, including the curing of defaults, for each requested assumption or assignment;

(4) specify the terms, including the identity of each assignee and the adequate assurance of future performance by each assignee, for each requested assignment;

(5) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and

(6) be limited to no more than 100 executory contacts or unexpired leases.

(g) FINALITY OF DETERMINATION. The finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion.

COMMITTEE NOTE

The rule is amended to authorize the use of omnibus motions to reject multiple executory contracts and unexpired leases. In some cases there may be numerous executory contracts and unexpired leases, and this rule permits the combining of up to one hundred of these contracts and leases in a single motion to initiate the contested matter.

The rule also is amended to authorize the use of a single motion to assume or assign executory contracts and unexpired leases (i) when such contracts and leases are with a single nondebtor party, (ii) when such contracts and leases are being assigned to the same assignee, or (iii) the court authorizes the filing of a joint motion to assume or to assume and assign executory contracts and unexpired leases under other circumstances that are not specifically recognized in the rule.

An omnibus motion to assume, assign, or reject multiple executory contracts and unexpired leases must comply with the procedural requirements set forth in subdivision (f) of the rule, unless the court orders otherwise. These requirements are intended to ensure that the nondebtor parties to the contracts and leases receive effective notice of the motion. Among those requirements is the requirement in subdivision (f)(5) that these motions be consecutively numbered (*e.g.*, Debtor in Possession's First Omnibus Motion for Authority to Assume Executory Contracts and Unexpired Leases, Debtor in Possession's Second Omnibus Motion for Authority to Assume Executory Contracts and Unexpired Leases, etc.). There may be a need for several of these motions in a particular case. Thus, consecutive numbering of each motion is essential to keep track of these motions on the court's docket. Numbering the motions consecutively should avoid confusion that might otherwise result from similar or identically titled motions.

Subdivision (g) of the rule provides that the finality of any order respecting an executory contract or unexpired lease included in an omnibus motion shall be determined as though such contract or lease had been the subject of a separate motion. A party seeking to appeal any such order is neither required, nor permitted, to await the court's resolution of all other contracts or leases included in the omnibus motion to obtain appellate review of the order. The rule permits the listing of multiple contracts or leases for convenience, and

that convenience should not impede timely review of the court's decision with respect to each contract or lease.

Rule 9005.1.Constitutional Challenge to a Statute – Notice, Certification, and Intervention

Rule 5.1 F.R.Civ.P. applies in cases under the Code.

COMMITTEE NOTE

The rule is added to adopt the new rule added to the Federal Rules of Civil Procedure. The new Civil Rule replaces Rule 24(c) F.R.Civ.P., so the cross reference to Civil Rule 24 contained in Rule 7024 is no longer sufficient to bring the provisions of new Civil Rule 5.1 into adversary proceedings. This rule also makes Civil Rule 5.1 applicable to all contested matters and other proceedings within the bankruptcy case.

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; 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

(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 subdivision (a) does not apply to the following:

(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;

(3) filings covered by subdivision (c) of this rule; and

(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.

(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 under the Code

(1) require redaction of additional information, or

(2) limit or prohibit remote electronic access by a 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.

(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.

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

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 copy of the notice 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.

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 on its own motion, 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 reference list 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 (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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUTPCY PROCEDURE*

Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements.

* * * * *

(c) STATEMENT OF SOCIAL SECURITY NUMBER

If a debtor becomes aware that the statement of social security number submitted under Rule 1007(f) is incorrect, the debtor shall promptly submit an amended verified statement setting forth the correct social security number. The debtor shall give notice of the amendment to all of the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2).

~~(c)~~ (d) TRANSMISSION TO UNITED STATES TRUSTEE

The clerk shall ~~forthwith~~ promptly transmit to the United States trustee a copy of every amendment filed or submitted under ~~pursuant to~~ subdivision (a), (b), or (c) ~~or (b)~~ of this rule.

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

COMMITTEE NOTE

Rule 2002(a)(1) provides that the notice of the § 341 meeting of creditors include the debtor's social security number. It provides creditors with the full number while limiting publication of the social security number otherwise to the final four digits of the number to protect the debtor's identity from others who do not have the same need for that information. If, however, the social security number that the debtor submitted under Rule 1007(f) is incorrect, then the only notice to the entities contained on the list filed under Rule 1007(a)(1) or (a)(2) would be incorrect. This amendment adds a new subdivision (c) that directs the debtor to submit a verified amended statement of social security number and to give notice of the new statement to all entities in the case who received the notice containing the erroneous social security number.

Former subdivision (c) becomes subdivision (d) and is amended to include new subdivision (c) amendments in the list of documents that the clerk must transmit to the United States trustee.

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 1009:

1. Comment 04-BK-039 Submitted by the State Bar of California Committee on Federal Courts. The Committee supports the amendment without qualification.

Changes Made After Publication: No changes since publication.

Rule 4002. Duties of Debtor.

(a) GENERAL DUTIES. In addition to performing other duties prescribed by the Code and rules, the debtor shall:

(1) attend and submit to an examination at the times ordered by the court;

(2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness;

(3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;

(4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and

(5) file a statement of any change of the debtor's address.

(b) INDIVIDUAL DEBTOR'S DUTY TO PROVIDE DOCUMENTATION.

(1) *Personal Identification.* Every individual debtor shall bring to the meeting of creditors under § 341 a picture identification issued by a governmental unit and evidence of social security number(s), or provide a written statement that the documentation does not exist or is not in the debtor's possession;

(2) *Financial Information.* Unless the trustee or the United States trustee directs the debtor not to do so, every individual debtor shall bring to the meeting of creditors under § 341 and make available to the trustee an original or copy of the following documents, or provide a written statement that the documents do not exist or are not in the debtor's possession:

(A) evidence of current income, such as the most recent pay stub;

(B) the debtor's most recently filed federal income tax return (including any attachments), or a transcript of the tax return; and

(C) statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition.

COMMITTEE NOTE

The rule is amended to implement the directives of § 521 (3) and (4) of the Bankruptcy Code that the debtor cooperate with the trustee to permit the trustee to perform the trustee's duties and to provide the trustee with materials and documents as necessary to the administration of the estate or to determine if the debtor is entitled to a discharge. Nothing in the rule, however, is intended to limit or restrict the debtor's duties under § 521. The rule does not require that the debtor create documents or obtain documents from third parties; rather, the debtor's obligation is to bring to the meeting of creditors under § 341 the documents which the debtor possesses. Any written statement that the debtor provides indicating either that documents do not exist or are not in the debtor's possession must be verified or contain an unsworn declaration as required under Rule 1008.

Because the amendment implements the debtor's duty to cooperate with the trustee, the materials would not be made available to any other party in interest at the § 341 meeting of creditors. Some of the documents may contain otherwise private information that

should not be disseminated. For example, the debtor's tax return may include social security numbers of the debtor and the debtor's spouse and dependents, as well as the names of the debtor's children. This type of information would not usually be needed by creditors and others who may be attending the meeting. If a creditor perceives a need to review specific documents or other evidence, the creditor may proceed under Rule 2004.

Public Comment on Proposed Amendments to Rule 4002:

The Committee received a significant number of comments on the proposed amendments to Rule 4002. The commentary was relatively evenly split between those who supported and those who opposed the proposals. The comments are described below and are subdivided into those in support of the amendments and those in opposition to the amendments.

Supporting Comments:

1. **Comment 04-BK-011 Submitted by Daniel J. Dell'Orto, Principal Deputy General Counsel of the Department of Defense** stated that he had no suggested changes to the proposed amendments of any of the rules (including Appellate and Civil Rules).

2. **Comment 04-BK-002 Submitted by Mr. Jack Horsley** offered a slightly more specific comment noting that the proposal was "well put," and that he would suggest also requiring the debtor "to submit a verified full financial statement." Since the schedules and statement of financial affairs essentially include a full financial statement that the debtor signs under penalty of perjury, it seems that Mr. Horsley's suggestion is already a part of the rules and forms.

3. **Comment 04-BK-07 Submitted by Mr. Raymond P. Bell, Jr., Vice President, Bankruptcy & Probate Division of Creditors Interchange**, supports the proposal and stated that it will increase the accuracy of data submitted in bankruptcy cases. He also indicates that the requirements of the proposal would not be burdensome on debtors. Finally, he states that he agrees with the suggestions offered by Judge Steven W. Rhodes (see the discussion of Judge Rhodes' comments below), and he

proposes that debtors should be penalized for any inaccuracies in the information that they provide.

4. Comment 04-BK-018 Submitted by Mr. John G. Redwine of the Knoxville TVA Employees Credit Union supports the proposal because debtors should be required to support the information contained in the schedules.

5. Comment 04-BK-004 Submitted by Ms. Maureen Scully of Kansas City, Missouri, supports the amendment because it requires debtors to bring to the meeting of creditors information that the debtor should already have compiled in preparation of the schedules and statement of financial affairs. Thus, this should not be burdensome for debtors. She also suggests that the availability of this information to trustees will expedite the process by eliminating the need for requests for the production of those documents after the meeting of creditors.

6. Comment 04-BK-006 Submitted by Anthony Michael Sabino, Associate Professor of Business Law at St. John's University and a partner in Sabino & Sabino, P.C., supports the proposed amendments to Rule 4002. He believes that the amendments improve the rule by stating plainly what a debtor must bring to the meeting of creditors. This will lead to better prepared debtors who will have the materials available. He states that unscrupulous debtors will fail to bring the documents thereby compelling adjournments and inefficiency. Mr. Sabino then states, however, that the amendments will "stamp out such abuses." He strongly supports the amendments.

7. One comment was submitted by the National Association of Chapter 13 Trustees (NACTT) and seven others were submitted by individuals who serve as chapter 13 trustees. These comments were very similar, and in several instances were identical. The individual trustees and the NACTT support the amendments because they will assist the trustees in fulfilling their responsibility to ensure the debtor's compliance with the Code while still providing sufficient flexibility for the trustee to relieve the debtor of the obligation to deliver the materials when, in the trustee's judgment, it may be too cumbersome for the debtor to comply. The comments also asserted that the rule amendment will "bring veracity and reliability to the schedules" without requiring formal and more costly methods of obtaining document production. The comments and their authors are:

Comment #	Date Received	Author
04-BK-028	2/15/05	NACTT (submitted by Henry Hildebrand & Paul Davidson)
04-BK-021	2/11/05	Amrane Cohen (Chapter 13 Trustee, Orange, CA)
04-BK-024	2/15/05	Paul Davidson (Chapter 13 Trustee, Shreveport, LA)
04-BK-029	2/17/05	Michael Kaplan (Chapter 13 Trustee, Robbinsville, NJ)
04-BK-030	2/17/05	Craig Shopneck (Chapter 13 Trustee, Cleveland, OH)
04-BK-031	2/17/05	Rod Danielson (Chapter 13 Trustee, Riverside, CA)
04-BK-032	2/17/05	Walter O'Cheskey (Chapter 13 Trustee, Lubbock, TX)
04-BK-033	2/17/05	Nancy Curry (Chapter 13 Trustee, Los Angeles, CA)
04-BK-042	2/22/05	Ms. Marilyn O. Marshall (Chapter 13 Trustee, Chicago, IL)
04-BK-043	2/28/05	Mr. Keith A. Rodriguez (Chapter 13 Trustee in Lafayette, LA)

8. Comment 04-BK-035 Submitted by Mr. James W. Boyd, Traverse City, Michigan. Mr Boyd, a chapter 7 trustee, supports the proposed amendment. He notes that the debtor needs to rely on pay stubs to accurately state his or her income, so requiring the debtor to bring that information to the meeting of creditors should not be burdensome. The same is true for bank statements and tax returns. They are readily available and permit the trustee to check the accuracy of the debtor's filings.

9. Comment 04-BK-001 Submitted by Hon. Steven W. Rhodes (Bankr. E.D. Mich.). Judge Rhodes submitted a very lengthy comment. His written comments on the proposed amendments to Rule 4002 total forty-two pages. He does not support the adoption of the proposed amendments, as such, but his commentary generally supports the concept of expanding the obligation of debtors to provide additional materials to trustees 10 days prior to the § 341 meeting of creditors. He proposes requiring that the debtor submit the materials in advance of the creditors' meeting so that both the

meeting and the case can be concluded as quickly as possible. In addition to the documents that the amended rule would require the debtor to bring to the meeting of creditors, Judge Rhodes recommends expanding the list to include, at the very least, the following additional documents

- certificates of title for vehicles, boats, and motor homes
- leases, mortgages, deeds, and other documents relating to real property
- life and property damage insurance policies
- asset appraisals
- divorce judgments and property settlements
- lawsuit papers and
- stock certificates.

10. Comment 04-BK-009 Hon. John A. Ninfo (Bankr. W.D.N.Y.) Judge Ninfo's submission to the Committee states that he is in complete agreement with Judge Rhodes' comments. He also notes that a standing order for the Western District of New York requires debtors to produce at the meeting of creditors titles to motor vehicles and boats, proofs of balances due on mortgages, the past two years' federal tax returns, and any real estate appraisals issued in the past two years. He indicates that the standing order has worked well for both trustees and debtors' counsel. The meetings are concluded without the need to adjourn them so that the materials can be examined.

Opposing Comments:

1. Comment 04-BK-003 Submitted by Mr. Henry Sommer. Mr. Sommer states that the proposal is an "abandonment of the presumption that debtors tell the truth in their sworn schedules." He compares the schedules to tax returns in which taxpayers are not required to supply evidence in support of their filed tax return. He also asserts that he is unaware of any studies that show that misstatements in bankruptcy schedules and statements of financial affairs "are due to widespread intentional concealment." He also states that, in his experience, debtors are as likely to innocently omit monthly expenses as they are to omit income. Mr. Sommer also argues that adoption of the proposal will increase the cost of filing for bankruptcy relief because it will require debtors to compile additional documents, including some that may not be available until after the commencement of the case, and, in some instances, may not even be available by the time of the meeting of creditors. In particular, he notes that debtors may not have bank records showing the

status of their accounts as of the date of the commencement of the case. He also expresses concern about the use of tax returns that include relatively dated information and may include otherwise private information about medical expenses of debtors and their dependents. Finally, he challenges whether there is evidence that the benefits that would follow from adoption of the proposals would exceed the costs that debtors would incur.

2. Comment 04-BK-005 Submitted by Mr. Walter Dahl opposes the proposal on several grounds. He indicates that he has been practicing for 22 years and has represented both debtors and creditors. His experience is that "the vast majority of debtors make materially honest disclosures to the court." He says that this is because they are "honest and good people [and their attorneys] cherish their bar admission and reputation far more than any transient gain obtainable by suborning perjury." He also suggests that trustees develop a sense that enables them to spot fraud and they address it when it appears. He also asserts that he has not witnessed any problem with trustees acquiring documents and materials through informal requests, and he has never heard of a court denying a trustee's request for a Rule 2004 examination. He concludes by suggesting Rule 4002 is not the way to improve the recovery of property, but that other resources be made available to trustees to seek hidden assets and the like.

3. Comment 04-BK-008 Submitted by Mr. William Jaworski, Jr. Mr Jaworski primarily represents debtors, and he believes that the proposed amendments will be unduly burdensome for debtors. He notes that these documents are routinely provided to trustees upon informal request, and he indicates that the changes could be particularly difficult for the unemployed and poorer debtors who are frequently poor record keepers.

4. Comment 04-BK-010 Submitted by Mr. Cary Gluesenkamp opposes the proposal. He represents debtors and states that the proposed rule would be unduly burdensome with little or no benefit to the estate. He also notes that the informal discovery process works sufficiently both in chapter 7 and chapter 13 cases.

5. Comment 04-BK-014 Submitted by Mr. Leonard Copeland did not indicate whether he is an attorney or whether he represents any particular category of participants in bankruptcy cases. He opposes the rule indicating that it is burdensome and would yield no meaningful benefit to the system. He also suggests that informal discovery is sufficient as compared to a process in which every participant must bring the materials to the meeting. He asserts that the rule could lead to more

disputes about whether the debtor has the materials and that this will simply increase costs.

6. Comment 04-BK-015 Submitted by Mr. David Andersen, Chairman of the Debtors Bar of West Michigan, is in opposition to the proposed amendments to Rule 4002. His comment included a chart of filing information for the Western District of Michigan which showed a 3% drop in the number of chapter 13 filings in 2004. He attributes that drop, at least in part, to a new policy among chapter 13 trustees to adjourn cases when debtors fail to provide certain documentation. This has led to increased expenses for debtors and their counsel making the process too costly for some debtors. He suggests that most debtors are not good record keepers and the need for the documents for many of them is minimal or nonexistent. He also notes that if a trustee believes that he or she needs a particular document in a particular case, it is made available if it can be found. While it is not clear from his comment which portion of the proposed amendment is most troublesome, he concludes that the increased requirements are improper and would likely cause a further reduction in the percentage of cases that proceed under chapter 13.

7. Comment 04-BK-019 submitted by Ms. Janet Lawson, a private attorney in California. She also states that the proposed amendments would be unduly burdensome since "few debtors have assets worth looking at." She suggests that internet searches for a debtor's assets is more cost effective especially since so few debtors have assets that would be appropriate to administer.

8. Comment 04-BK-026 Submitted by Ms. Julie Stodolka, a consumer debtors' attorney in California. Ms. Stodolka also believes that the requested information will be of limited use to the trustee and that many debtors will not be able to locate such documents, if they even exist. She also suggests that the submission of these documents will lengthen § 341 meetings. She suggests instead that funding for trustees be increased to support their efforts to identify problems with schedules and other disclosures. Finally, she notes that trustees will be faced with problems in handling the documents being provided to them. This could lead to increased susceptibility of debtors to identity theft contrary to the recent amendments intended to protect against that very thing (i.e. redaction of social security numbers and account numbers).

9. Comment 04-BK-027 Submitted by Ms. Cathy Moran, a California attorney who represents debtors. She notes that she also previously represented trustees. She believes that the rule is unnecessary and should be left to informal resolution between trustees and debtors' counsel. She notes that she was able to persuade the court in her area to adopt a local rule that requires the debtor

to produce documents identified by the trustee, and that the rule has worked well. She sees no need to adopt a rule that requires this production in each case.

10. Comment 04-BK-034 Submitted by Mr. Ronald Wilcox, another bankruptcy attorney from California. He notes his agreement with the position of Mr. Sommer in Comment 04-BK-003 that he is unaware of any study showing widespread intentional concealment of assets by debtors. He also cites a recent study that demonstrates, in his view, that bankruptcy is "less of a choice, and more of a last ditch effort to stay afloat." He asserts that there is a lack of evidence to support the need for a change in the rule.

11. Comment 04-BK-012 Submitted by Mr. John Anthony Malan objects to Rule 4002 as it relates to the concept of "income." Mr. Malan argues that since "income" is not defined in the Bankruptcy Code (or the Internal Revenue Code, in Mr. Malan's view), the rule should not require debtors to disclose such information. He notes that these disclosures can be used against a "person" in both civil and criminal actions. According to his comment, Mr. Malan is currently incarcerated in the Lake County, Indiana, jail.

12. Comment 04-BK-107 Submitted by the Chicago Bar Association. The Chicago Bar Association expressed a general objection to the proposed amendments to Rule 4002 on the grounds that the amendments constitute an undue burden on a debtor's right to privacy and are "an unwarranted burden shifting from a debtor to a trustee," as compared to current practice that effectively requires the trustee to request information whenever the trustee sees a need for the material. In many instances, this will result in the unnecessary production of materials that trustees neither need nor want. Notwithstanding its concerns, the Association offered suggestions to improve the proposal if the Committee decides to go forward with the rule. The Bar Association expressed concern that the proposed amendment may lead to inconsistent application due to the discretion given to trustees to waive the requirement to produce the materials. They suggest that while the Committee Note indicates that the rule provides flexibility for the trustee, the impact will be inconsistent practices even in the same district. They recommend deleting the waiver. The Association also has concerns about the protection of confidential or private information and proposes that the rule be further amended to state specifically that the trustee must treat the information "as confidential and shall not disclose such information to any party in interest unless required under Rule 2004." This proposal may run afoul of § 704(7) of the Code which requires the trustee to furnish information about the estate to parties in interest. The Association also

recommends that the materials be provided to the trustee at least five days prior to the meeting of creditors. As to tax returns, the Bar Association proposes that the rule be changed to provide for the production of a tax transcript rather than the tax returns themselves. The Association also asserts that the rule regarding the production of bank and similar accounts may require a debtor to do the impossible. These statements may not have been issued by the time of the meeting of creditors, so the Association suggests that the rule instead require the production of such a statement if it is available, and if it is not available, then the most recent statement of those accounts be produced. Finally, the Association expressed concern that the rule as proposed may include an exception that will swallow the rule. Specifically, it notes that the debtor can provide a written statement that the documents do not exist or that they debtor does not possess them. The Association is concerned that this will be used improperly by debtors to avoid their obligation to produce the documents. The comment suggests that the rule and note state that debtors must produce documents that a debtor can obtain without cost or that are available to the debtor electronically.

13. Comment 04-BK-023 Submitted by the National Bankruptcy Conference states that the proposed amendments will impose costs that outweigh the benefits from the rule. For example, they note that the rule requires the production of pay stubs but that the debtor's income may be from other sources such as the income from a business operated by the debtor or from a pension or social security. The rule, however, identifies pay stubs only as an example. The rule would seem to require a debtor engaged in business to show some evidence of income, and that may require more extensive effort than would be the case for a debtor who is an employee rather than an owner of a business. The Conference also expresses concern that the need to obtain and produce these materials will increase the number of times that a debtor and his or her counsel will have to meet to ensure that they have the necessary materials for production at the meeting of creditors. This will increase attorney fees for debtors with limited resources. They suggest as well that the information is unlikely to generate a sufficient benefit to the estate to justify the costs. Another cost identified is the additional time for § 341 meetings for trustees to review and evaluate the information and to conduct questioning on the materials supplied. They also express concern that the rule as proposed seems to recognize that these materials are available only to the trustee, but that any person present at the meeting will be able to hear the questions raised by the trustee regarding this information. They also assert that creditors would be able to obtain this information from the trustee creating a "new class of discovery materials." The Conference also expressed concern about the introductory language in the rule that permits the trustee to "instruct" otherwise as to the production of the documents.

They question whether the rules are giving the trustee a power that trustees do not have currently under the Code and Rules. Section 521(4), however, requires the debtor to surrender these materials to the trustee, so it seems that the rule is supported by a Code provision rather than being in opposition of the Code in some way. The Conference also objects to the amendments because in their view the amendments reverse the presumption of the honest debtor and insufficiently recognize that debtors must submit their disclosures under penalty of perjury. Since most debtors are of modest means, it is unlikely that there would be substantial recoveries as compared to the costs imposed by the amendments. The Conference states, as did the Chicago Bar Association, that if the Committee decides to proceed, it should amend the proposed rule to state that debtors need not obtain documents not in their possession, that the trustee and United States trustee cannot order debtors to take specific action or produce specific documents, and that provisions be built in to the rule to protect the privacy interests of the debtors and non-debtors.

14. Comment 04-BK-25 Submitted by the National Association of Consumer Bankruptcy Attorneys. The National Association of Consumer Bankruptcy Attorneys (NACBA) is an association of attorneys who represent consumer debtors. NACBA states generally that the bankruptcy system is in many ways similar to the tax system (a position noted by several others) in that it relies on declarations by the filer with respect to the required information, and that there is no reason to assume that bankruptcy debtors are any more dishonest than American taxpayers. Furthermore, these declarations are made under penalty of perjury and with the advice of counsel that criminal sanctions exist for false or fraudulent filings. More specifically, NACBA also identified the discretion granted to trustees as a shortcoming of the rule. They note that the introductory language might more aptly state that the trustee or United States trustee could inform debtors that they need not comply with the production requirements of the rule rather than state it as if the trustee has a greater authority to require the production of other material or the same material at another time. They also suggest moving the statement that debtors need not create documents that they do not have from the Committee Note to the text of the rule. As for bank statements, NACBA notes (as have others) that much of the material may not be available at the time of the meeting of creditors. This could lead to delays in the completion and filing of schedules so that the debtor's attorney can be sure of the status of these accounts as of the moment of the commencement of the case. As for tax returns, NACBA expressed concern that these documents contain sensitive information about not just the debtor, but dependents of the debtor. They also assert that the delivery of these documents to trustees could lead to increased risk of identity theft. While the comment states that NACBA recognizes that trustees "strive to employ honest staff," the potential still exists

for identity theft to occur. Presumably this same risk, however, would exist in the debtor's attorney's office as well. The additional information being provided to the trustee will also, in NACBA's estimation, extend the time for § 341 meetings and will place additional time burdens on trustees who will seek additional compensation thereby driving up the costs of bankruptcy filings.

15. Comment 04-BK-022 Submitted by Professors Robert Lawless, Steve Johnson, and Katherine Porter of the University of Nevada-Las Vegas. The professors object to the requirement that debtors bring their tax returns to the meeting of creditors. They assert that the amendment would render § 6103 of the Internal Revenue Code irrelevant and would upset the balance that Congress set under that provision for the confidentiality of tax returns. Specifically, they note that § 6103(e)(5) permits access to a debtor's tax returns by a trustee essentially for the purpose of preparing the bankruptcy estate's tax return. As for general requests for the return § 6102(e)(4) provides that the trustee can obtain the debtor's prior tax returns from the Secretary of the Treasury only if the Secretary determines, on the written request of the bankruptcy trustee, that the trustee has a material interest which will be affected by the information in the tax return.

Changes Made After Publication: The Advisory Committee, in response to a number of comments on the proposed amendment, revised subdivision (b) at lines 25 to 26. The published version of the rule provided that the debtor must bring certain materials to the § 341 meeting of creditors, "unless the trustee, United States trustee, or bankruptcy administrator instruct otherwise." The new language provides that the debtor's obligation to bring these materials to the meeting is inapplicable if "the trustee or the United States trustee directs the debtor not to do so." Some of the comments asserted that the published language could be read to mean that trustees could order or direct debtors to take other action or submit other materials. This would be an expansion of the power of the trustee, and that was not the Advisory Committee's intention. Therefore, the new language was adopted to recognize the authority of the trustee or United States trustee to control whether debtors need to bring the stated materials to the § 341 meeting, but not to require the submission of other materials by the debtor under the authority of Rule 4002 (b)(2).

The Advisory Committee also was persuaded that the debtor should be given the option of providing to the trustee or the United States trustee either the debtor's tax return or a transcript of the return. This change is set out on lines 32-33 of the rule.

The Rule also was changed to delete the reference to the bankruptcy administrator that was included in the opening phrase of subdivision (b) of the rule. The reference is unnecessary in light of Rule 9035, and including the reference in subdivision (b) could create difficulties in other rules which do not include a reference to bankruptcy administrators, but instead rely on the operation of Rule 9035.

Rule 5005. Filing and Transmittal of Papers

(a) FILING

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents 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. Courts requiring electronic filing shall provide reasonable exceptions for parties who cannot feasibly comply with the mandatory electronic filing rule. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable

13 by these rules, and § 107 of the Code.

14 * * * * *

COMMITTEE NOTE

Amended Rule 5005(a)(2) 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 filings. Courts requiring electronic filing must make reasonable accommodations for persons for whom electronic filing of documents constitutes an unreasonable denial of access to the courts. Experience with the rule will facilitate convergence on uniform exceptions in an amended Rule 5005(a)(2).

Public Comment on Proposed Amendment to Rule 5005(a):

1. Comment 04-BK-003 Submitted by Mr. Henry Sommer. Mr. Sommer asserts that the rule should provide exceptions for both pro se filers and attorneys who do not generally appear in bankruptcy cases. These attorneys may be assisting debtors through pro bono programs, or they may just happen to have an occasional client who may need bankruptcy relief, or who is a creditor in a case, and the cost of participating electronically in the matter in the bankruptcy court is prohibitive. He urges the Committee to consider amending the proposal to provide in the rule itself for such exceptions.

2. Comment 04-BK-013 Submitted by the Defense Contract Management Agency, an Agency of the Department of Defense. The Agency expressed concern that the mandatory electronic filing rule would constitute a form of consent to be served electronically. The memorandum transmitting the proposed amendment indicates that the rule is not intended to constitute such a form of consent, and that the courts with electronic filing have uniformly allowed entities to "opt out" of the electronic service system. The Agency suggests that this uniform practice be codified in the rule rather than left unsaid on the assumption that current practices will continue.

3. Comment 04-BK-016 Submitted by the American Bar Association. The ABA has adopted a policy standard which it suggests the Committee should consider in proposing amendments to Rule 5005(a)(2). Specifically, Standard 1.65(c)(ii) provides that a mandatory electronic filing rule must either be at no cost or must include a provision for waiver of such fees as appropriate, and it must include exceptions to assure equal access to the courts for those who are disabled or otherwise face barriers to entry into the court system. The policy also requires adequate advance notice of the implementation of mandatory electronic filing programs and that the courts provide adequate training for use of these processes. The ABA asks that these standards be imported into the rule to ensure as complete access to the courts as possible.

4. Comment 04-BK0-020 Submitted by Mr. Eliot S. Richardson. Mr. Richardson indicates that he has had experience as a pro se litigant, and he suggests that the rule provide for full access to the court records both at the courthouse and remotely, as well as providing filing assistance for pro se parties. He also asserts that any file standards adopted to implement mandatory electronic filing should be limited to non-proprietary files such as PDF and RTF.

5. Comment 04-BK-025 Submitted by the National Association of Consumer Bankruptcy Attorneys. NACBA recognizes the many advantages to electronic filing, and it notes that since many of its members are regular users of electronic filing systems it is somewhat against their self-interest to oppose the proposed amendment. Nonetheless, they assert that the rule should be revised to protect access to the courts for attorneys who may handle only a few cases a year, perhaps as a part of a volunteer lawyer program, as well as legal services attorneys with limited resources. They also propose that the adoption of the amendment be deferred until exceptions to its reach are set out in the rule itself.

6. Comment 04-BK-036 Submitted by the Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board. The Committee offered a lengthy comment on the proposed amendment to Rule 5005(a)(2). The group has engaged in a multi-year study of these issues that led to the promulgation by the Washington State Supreme Court of an Order adopting the Committee's Access to Justice Technology Principles. The comments, authored by Former Superior Court Judge Donald J. Horowitz as chair of the Committee, note that the courts need to act efficiently and economically. Nevertheless, the courts are not a business, and access to the courts is a more important principle than judicial economy or efficiency. He also lists groups that would be particularly disadvantaged by the proposed amendments. In addition to the pro se filers

identified by other comments, this comment lists the incarcerated, the elderly, the disabled, persons who don't know how to use the technology, persons in rural areas, and persons who cannot gain access to the technology, wherever they may reside. He notes especially that lawyers in rural areas may have the hardware to file electronically, but that there may be issues of broadband capacity to handle the amount of data that may need to be filed electronically. The comment asserts that the rule should include specific exclusions for appropriate circumstances, and it offers the Washington State Rule GR 30 as an example. That rule, however, specifically provides that electronic filing is purely permissive. Any person may file documents in hard copy, and the filing must be accepted.

7. Comment 04-BK-037 Submitted by HALT, An Organization of Americans for Legal Reform. This organization represents the interests of consumers of legal services and seeks to make the civil justice system more accessible and accountable. It expressed concern that the rule, as proposed, will limit access to the courts by pro se litigants, a group that the organization notes is more significant in bankruptcy than in general civil litigation. They suggest that the material in the Committee Note to the Rule should be moved into the text of the rule and suggest adding the following sentence to the end of subdivision (a)(2) of Rule5005:

> 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.

8. Comment 04-BK-038 Submitted by the Self Help Committee of the Northwest Women's Law Center. This Comment also asserts that the rule should not apply to pro se litigants. The Center assists 3,000 to 5,000 telephone callers annually by providing information and directing them to resources, including attorneys. In their experience, approximately 25% of the callers do not or cannot hire an attorney, so they are aware of the need for access to the courts by pro se parties. They have surveyed their callers and their data indicates that at least 65% of their survey participants prefer hard copies of documents rather than email or other electronic versions of the materials. They also suggest increasing technical assistance at the courts.

9. Comment 04-BK-039 Submitted by The State Bar of California Committee on Federal Courts. This Committee of the State Bar generally favors the proposed amendments to Civil Rule 5, Appellate Rule 25, and Bankruptcy Rule 5005(a)(2). The Committee recognizes the advantages

of electronic filing and concludes that the references in the Committee Notes that courts should be sensitive to the needs of those who may not be able to access the court and that local experience should be used to determine the extent and nature of exceptions to the requirement that documents be filed electronically is sufficient. The Committee also agrees with the statement contained in the transmittal memorandum for the amendments that the filing of a document electronically does not constitute agreement to be served electronically. Therefore, this Committee supports the proposal and suggests no changes.

10. Comment 04-BK-040 Submitted by The State Bar of California Standing Committee on the Delivery of Legal Services. The Committee supports the proposal but states that there should be exceptions made for pro se filers and attorneys who lack the technological resources to file papers electronically. They note in particular that legal aid offices and some pro bono attorneys may not have the technological capacity to file documents electronically. They also suggest that the courts ensure that sufficient technical support personnel are available to help persons unfamiliar with the electronic filing process.

11. Comment 04-BK-041 Submitted by Mr. Richard Zorza. Mr. Zorza, an attorney in Washington, D.C., noted that he "works extensively with many groups dealing with issues facing the unrepresented" although his comments are submitted individually. Mr. Zorza notes that the courts have thus far taken a practical approach to ensuring access to the courts for the unrepresented, but he suggests that it is inadvisable to rely on this experience as opposed to including an appropriate provision in the rule itself. He further argues that leaving the crafting of exceptions to the local courts may lead to further inconsistencies, and that attempts to codify specific exceptions will face a wide range of pitfalls. Instead, Mr. Zorza proposes that the rule be amended to limit its application to parties represented by counsel. Thus, his comment is consistent with a number of others that urged the Committee to include within the rule a specific exception for pro se parties.

Changes Made After Publication: The published version of the Rule did not include the sentence set out on lines 7-10 above. The Advisory Committee concluded, based on the written comments received and additional Advisory Committee consideration, that the text of the rule should include a statement regarding the need for courts to protect access to the courts for those whose status might not allow for electronic participation in cases. The published version had relegated this notion to the Committee Note, but further deliberations led to the conclusion that this matter is too important to leave to the Committee Note and instead should be included in the text of the rule.

Rule 5005. Filing and Transmittal of Papers

* * * * *

(c) ERROR IN FILING OR TRANSMITTAL. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or

transmitted to the United States trustee as of the date of its original delivery.

COMMITTEE NOTE

The rule is amended to include the clerk of the bankruptcy appellate panel among the list of persons required to transmit to the proper person erroneously filed or transmitted papers. The amendment is necessary because the bankruptcy appellate panels were not in existence at the time of the original promulgation of the rule. The amendment also inserts the district judge on the list of persons required to transmit papers intended for the United States trustee but erroneously sent to another person. The district judge is included in the list of persons who must transmit papers to the clerk of the bankruptcy court in the first part of the rule, and there is no reason to exclude the district judge from the list of persons who must transmit erroneously filed papers to the United States trustee.

Public Comment on Proposed Amendments to Rule 5005(c):

1. Comment 04-BK-039 Submitted by the State Bar of California Committee on Federal Courts.

The Committee supports the amendment without qualification.

Changes Made After Publication: No changes since publication.

Rule 7004. Process; Service of Summons; Complaint

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(b) SERVICE BY FIRST CLASS MAIL.

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(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition ~~or statement of financial affairs~~ or to such other address as the debtor may designate in a filed writing ~~and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address~~.

* * * * *

(g) ~~[abrogated]~~ SERVICE ON DEBTOR'S ATTORNEY. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P.

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COMMITTEE NOTE

Under current Rule 7004, an entity may serve a summons and complaint upon the debtor by personal service or by mail. If the entity chooses to serve the debtor by mail, it must also serve a copy of the summons and complaint on the debtor's attorney by mail. If the entity effects personal service on the debtor, there is no requirement that the debtor's attorney also be served.

The rule is amended to require service on the debtor's attorney whenever the debtor is served with a summons and complaint. The amendment makes this change by deleting that portion of Rule 7004(b)(9) that requires service on the debtor's attorney when the debtor is served by mail, and relocates the obligation to serve the debtor's attorney into new subdivision (g). Service on the debtor's attorney is not limited to mail service, but may be accomplished by any means permitted under Rule 5(b) F. R. Civ. P.

The rule also is amended to delete the reference in subdivision (b)(9) to the debtor's address as set forth in the statement of financial affairs. In 1991, the Official Form of the statement of financial affairs was revised and no longer includes a question regarding the debtor's current residence. Since that time, Official Form 1, the petition, has required the debtor to list both the debtor's residence and mailing address. Therefore, the subdivision is amended to delete the statement of financial affairs as a document that might contain an address at which the debtor can be served.

Public Comment on Proposed Amendments to Rule 7004:

1. Comment 04-BK-039 Submitted by the State Bar of California Committee on Federal Courts. The Committee supports the amendment without qualification.

Changes Made After Publication: The Committee Note was amended to add the final paragraph of the Note. The new paragraph describes the reason for the deletion of the reference in the rule to the statement of affairs as a source for the debtor's address. This was a secondary reason for amending the rule, and even in the absence of public comment on the proposed amendment, the Advisory Committee believes that the additional explanation in the Committee Note is appropriate.