Minutes of Spring 2004 Meeting of
Advisory Committee on Appellate Rules
April 13-14, 2004
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, April 13, 2004, at 4:00 p.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., Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee; Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

The meeting was called to order immediately following a day-long hearing at which over a dozen witnesses testified regarding the proposed amendments to the Appellate Rules that had been published for comment in August 2003. Judge Alito announced that Judge T.S. Ellis III had left the hearing early and would be unable to attend the Advisory Committee meeting because of a family emergency. Judge Alito also announced that the terms of Prof. Mooney and Mr. McGough would expire prior to the Committee's fall meeting, and he expressed hope that Prof. Mooney and Mr. McGough would attend that meeting so that the Committee could express its appreciation for their years of dedicated service. Judge Alito also congratulated Prof. Mooney on her recent appointment as President of St. Mary's College in Notre Dame, Indiana.

II. Approval of Minutes of November 2003 Meeting

The minutes of the November 2003 meeting were approved.

III. Report on January 2004 Meeting of Standing Committee

The Reporter said that this Advisory Committee did not seek action on any items at the Standing Committee's January 2004 meeting. However, Judge Levi invited Judge Roberts (who attended the meeting in place of Judge Alito) and the Reporter to lead a preliminary discussion regarding proposed Rule 32.1 (on unpublished opinions) and the proposed amendment to Rule 35(a) (on en banc voting). Because the agenda of the Standing Committee's June 2004 meeting is likely to be more crowded than the agenda of its January 2004 meeting, and because both

proposals are quite controversial, Judge Levi thought it advisable to begin the discussion of the proposals at the January 2004 meeting.

The Reporter said that, in the course of an hour-long discussion, several members of the Standing Committee, as well as several of the advisory committee chairs and reporters, spoke in support of new Rule 32.1 and the proposed amendment to Rule 35(a). No one expressed opposition to either proposal.

Judge Roberts said that, in his comments about Rule 32.1, he stressed that the rule and accompanying Committee Note were drafted to take no position on the issue of whether it is lawful for a court to refuse to give binding precedential effect to one of its opinions. With respect to Rule 35(a), Judge Roberts said that he highlighted the fact that the decision whether there should be a uniform standard has already been made by Congress. The Advisory Committee was merely trying to act consistently with Congressional intent in resolving the sharp circuit split over the interpretation of that standard.

IV. Action Items

A. Proposed Amendments Published for Comment in August 2003

1. New Rule 32.1 (citation of unpublished decisions) [Item No. 01-01]

Judge Alito introduced the following proposed rule and Committee Note:

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon 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, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible

electronic database must file and serve a copy of that opinion, order, judgment, or other written 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).

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

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

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

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

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

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

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

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of

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

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

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

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

their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

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

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

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help

their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

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

Judge Alito said that he was taking up proposed Rule 32.1 out of order because it had been the subject of almost all of the testimony that the Committee had heard earlier in the day, and he hoped it would be helpful to begin the discussion of the rule while the testimony was fresh in Committee members' minds. (The Committee discussed Rule 32.1 until about 5:30 p.m., and the Committee continued the discussion after reconvening at 8:30 a.m. the following day.)

Judge Alito outlined the options for the Committee as follows: (1) It could approve the rule as drafted. (2) It could approve the rule with changes. (3) It could postpone action on the rule in order to study some of the claims made by the commentators. (4) It could remove the rule from its study agenda.

The Committee discussed the merits of Rule 32.1 at considerable length, touching upon many of the arguments that had been made by the commentators, including the commentators who had testified earlier in the day. Every Committee member, save one, spoke in favor of the proposed rule. The members supporting the rule cited a number of considerations, but two were particularly prominent:

First, Committee members argued that the main problem with no-citation rules — and the main reason to approve Rule 32.1 — is that an Article III court should not be able to forbid parties from citing back to it the public actions that the court itself has taken. It is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court's attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case. One member called no-citation rules an "extreme" measure. Another member said that it was "ludicrous" that an attorney cannot cite a court's prior decisions to the court itself, but can cite those decisions to virtually everyone else in the world, including other courts. Yet another member — a judge — said that judges should not be the only government officials who can shield themselves from being confronted with their past actions. The member said that, if a party believes that he has acted inconsistently or unfairly, he *wants* to be told about it. Almost all Committee members agreed that, whatever the problems with unpublished opinions, the way to deal with those problems is not to gag attorneys.

Second, Committee members expressed great skepticism about the "parade of horribles" that commentators predict will result from the approval of Rule 32.1. Members pointed out that there was absolutely no evidence that any of these consequences had been experienced by any of the federal or state courts that have abolished or liberalized no-citation rules. One appellate judge said that he thought the arguments were considerably exaggerated; he said that, although his circuit has a relatively liberal citation rule, parties almost never cite unpublished opinions, and, when they do, he and his colleagues are quite capable of dealing with those citations. Another appellate judge said that he, too, was deeply skeptical of the predictions of doom. The briefs he reads almost never cite unpublished opinions, even though his circuit also has a liberal citation rule. A third appellate judge said that his experience was similar. His circuit, too, has a very liberal citation rule, yet attorneys rarely cite unpublished opinions, and those few citations have not caused any problems for him or his colleagues.

One Committee member argued against approving Rule 32.1. He stated that unpublished opinions are "junk law," and courts should be free to instruct parties not to cite them. He also pointed out that federal rulemaking has traditionally and appropriately been a consensus or near-consensus process. There is obviously not a consensus in favor of Rule 32.1; to the contrary, there was overwhelming opposition to it among commentators. Finally, he was struck by the testimony of Judge Diane P. Wood and particularly her description of the dramatically different caseloads that the circuits confront and the dramatically different publication rates and other practices that the circuits have adopted to deal with those caseloads. This is an area in which one size does not fit all.

The Committee discussed whether action on Rule 32.1 should be postponed and the FJC invited to study some of the claims made by the commentators. One member argued in favor of such a postponement. He said that conflicting empirical claims are at the heart of the dispute over Rule 32.1. Some of those issues could be studied by the FJC or another neutral party. For example, the FJC could study whether the courts that have liberalized or abolished no-citation

rules have been slower to issue opinions or have more frequently resorted to issuing one-line judgments. The member believes that most judges are willing to consider empirical evidence and reassess their positions if appropriate. The member cited himself as an example. He formerly favored no-citation rules, but, after his court liberalized its citation rules, parties did not often cite unpublished opinions, and the judges on his court did not spend more time drafting them. The member is afraid that other judges have not yet had an opportunity to be convinced by empirical evidence, as he was. Unless a better case is made for Rule 32.1, he fears that the proposed rule will not be approved by the Judicial Conference.

A majority of Committee members disagreed. They argued that such a study would be difficult to conduct. Many of the commentators' claims are incapable of being tested at all; others can be tested only with great effort and expense; and still others can be tested only through surveys, which would likely produce unreliable data. Members also thought that little good would come from such a study. Both those who support and those who oppose Rule 32.1 are motivated to a significant extent by philosophical or political beliefs that are not capable of being refuted by empirical evidence. Also, opponents of Rule 32.1 are unlikely to be persuaded by empirical evidence because they will insist that the problems of their circuits are unique. In short, the prospect of anything worthwhile coming out of a study is too remote to justify the considerable time and effort that would have to be invested by the FJC. The issue is "joined" now; it's time to send the rule to the Standing Committee.

A member moved that Rule 32.1 be approved. The motion was seconded. The motion carried. (The vote among members present was 6-1, but a member who was unavoidably absent later informed the Committee that he would have voted against the proposed rule.)

The Committee considered three suggested changes to Rule 32.1:

1. The first was a proposal to amend Rule 32.1 to make it prospective only — that is, to provide that it applies only to unpublished opinions issued after its effective date. The member who proposed the amendment noted that several commentators had argued for this change, and he pointed out that when the D.C. Circuit recently liberalized its citation rule, the court applied the new rule prospectively. He also said that it is not fair for judges who reasonably relied upon no-citation rules in deciding how to draft opinions to now see those opinions cited back to them.

Other Committee members opposed the amendment. They pointed out that a rule that applied only prospectively — that permitted circuits to continue to ban the citation of tens of thousands of their own opinions — 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, or that attorneys should not be forbidden from making the best arguments they can on behalf of their clients, or that uniformity among the circuits is important, and then approve a rule that allows Article III courts to bar such citation, allows attorneys to be forbidden to make such arguments, and leaves disuniformity in place? Moreover, a prospective-only rule would appear to endorse the argument that judges will have to spend much more time drafting unpublished opinions if they are citable, an

argument that has been rejected by virtually every Committee member and that is not supported by any empirical evidence. Any "reliance" interest of judges who drafted unpublished opinions under no-citation rules is weak, especially given that judges can continue to treat those opinions as non-binding under Rule 32.1. This weak reliance interest should not overcome the strong public interests that have persuaded the Committee to approve Rule 32.1.

Committee 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.

The proposed amendment was withdrawn after it became clear that it did not enjoy the support of more than one or two Committee members. But Committee members also agreed that a prospective-only rule would be better than no rule at all, and thus the Committee would be open to reconsidering the amendment if Rule 32.1 is not approved in its present form.

2. The second proposed change to Rule 32.1 related to what Prof. Stephen Barnett refers to as "discouraging words" — that is, provisions in local circuit rules that bar the citation of unpublished opinions when published opinions address the same point or that instruct attorneys that the citation of unpublished opinions under any circumstance is disfavored. One member suggested that Rule 32.1 be amended either to incorporate discouraging words itself or to permit the circuits to implement local rules that include discouraging words (the approach favored by Prof. Barnett). The member argued that such a rule would overrule the practices of only the four circuits that altogether forbid the citation of unpublished opinions for their persuasive value and would leave in place the practices of the other nine circuits. Thus, such a rule might stand a better chance of being approved than Rule 32.1, which would overrule the practices of all of the circuits to at least some extent.

Several Committee members and the Reporter expressed a number of concerns about such an approach:

First, virtually none of the reasons given by the Committee for approving Rule 32.1 could be given to justify a rule that permitted discouraging words. Under such a rule, an Article III court could still bar an attorney from citing the court's own words. A party could still be forbidden from asking the court to treat it consistently with a prior litigant. Attorneys could still be barred from making arguments that, in their professional judgment, would advance their clients' causes. Attorneys who practice in more than one circuit would still face an array of inconsistent rules.

Second, what would be the point of such a rule? The Committee has not been motivated to act by a desire to force the small minority of circuits who allow no citation of unpublished opinions for their persuasive value to instead allow a little bit. Rather, the Committee has

objected to the fact that virtually all of the circuits impose unjustifiable prohibitions or restrictions on such citation.

Third, a rule permitting circuits to use discouraging words would put the Committee in the position of taking the anti-*Anastasoff* side of the debate over the lawfulness of treating unpublished opinions as non-binding. Endorsing the use of discouraging words necessarily endorses the view that the actions of an Article III court can be divided into two categories: binding decisions that are fully citable and non-binding decisions that are not. Prof. Barnett favors the use of discouraging words precisely because he believes *Anastasoff* was wrong. But this Committee has gone out of its way to avoid expressing a view on *Anastasoff*.

Finally, it would be difficult to draft a rule that permitted courts to restrict, but not altogether to prohibit, the citation of unpublished opinions. No circuit completely prohibits such citation; all circuits allow unpublished opinions to be cited for at least some purposes. Thus, a rule that merely provided that a court could not prohibit the citation of unpublished opinions would not require any circuit to change its current practices. To be effective, then, the rule would have to instruct courts that they must permit unpublished opinions to be cited for more than just "case-specific" reasons (such as res judicata), while also making clear that courts are free to restrict such citation as much as they want (short of prohibiting it altogether). That would be a difficult concept to capture in a rule of appellate procedure.

Other Committee members did not disagree with these objections, but suggested that, if the choice is between no rule and a rule that allows discouraging words, the latter would be preferable. It would move courts in the right direction and lay the groundwork for approval of a more sweeping rule in a few years. In addition, such a rule would, as a *practical* matter, have almost the same effect as Rule 32.1. A typical attorney is not going to cite unpublished opinions if there are published opinions on point, and, even if he does, it is highly unlikely that he will be sanctioned. After all, the attorney's opponent will have no incentive to point out to the court that a published opinion supports the same proposition, and the courts are too busy to get involved in disputes over whether a particular published opinion was as closely on point as a particular unpublished opinion.

Members who opposed amending Rule 32.1 to permit discouraging words responded that, for exactly these reasons, a watered-down version of Rule 32.1 was unlikely to win the approval of those who support no-citation rules. They will recognize it for the camel's nose that it is, and oppose it just as vigorously as they have opposed Rule 32.1. If political expediency is the only argument that can be made for the watered-down version, and if the watered-down version is unlikely to be politically expedient, then why support it?

No member of the Committee moved to amend Rule 32.1 to permit courts to implement local rules that restrict or discourage citation of unpublished opinions. It was clear that most members would not support such an amendment at this time. But the Committee agreed that, if either the Standing Committee or the Judicial Conference declines to approve Rule 32.1, the possibility of approving a more limited version of the rule would remain open.

3. The final proposed change to Rule 32.1 was recommended by the Reporter. He suggested that the Committee amend the text of Rule 32.1(a) to delete everything after "or the like," so that Rule 32.1(a) would provide as follows:

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon 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.

The published version of Rule 32.1(a) was trying to do two things. On the one hand, the Committee wanted to require courts to permit the citation of unpublished opinions. The Committee did not want a court to be able to permit such citation as a formal matter but then, as a practical matter, make such citation nearly impossible by imposing various restrictions upon it. On the other hand, the Committee did not want to preclude circuits from imposing general requirements of form or style upon the citation of *all* authorities.

The Reporter said that he had been persuaded that the clause "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions" was not necessary. First, Rule 32(e)[1] was intended to put the circuits out of the business of imposing general requirements of form or style. It is hard to identify a requirement of form or style that could be both endangered by Rule 32.1 and enforced under Rule 32(e). Second, Rule 32.1 is most naturally read as precluding only prohibitions and restrictions on the citation of unpublished opinions *as such* — that is, prohibitions and restrictions aimed *exclusively* at the citation of unpublished opinions. A page limit on a brief could be said indirectly to "restrict" the citation of unpublished opinions, but no one is likely to read Rule 32.1 to forbid page limits on briefs, especially if the Committee Note is clear about the scope of the rule.

A member moved that Rule 32.1 be amended as the Reporter had recommended. The motion was seconded. The motion carried (6-0, with one abstention).

The Reporter said that he would revise the Committee Note to reflect the amendment and to strengthen the arguments for the new rule. After Judge Alito has an opportunity to review the revised Note, the Reporter will circulate it to Committee members via e-mail.

2. Rule 4(a)(6) (clarify whether verbal communication provides "notice") [Item No. 00-08]

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

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

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier;

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

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

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Committee Note

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

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

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

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

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil

Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

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

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

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

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

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g.*, *Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g.*, *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

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

The Reporter reminded the Committee that the proposed amendment is intended to do two things:

First, proposed subdivision (A) is intended to clarify what type of notice precludes a party from taking advantage of Rule 4(a)(6)'s safe harbor. Proposed subdivision (A) makes clear that only Civil Rule 77(d) notice disqualifies a party from later moving to reopen the time to appeal under Rule 4(a)(6). All commentators agreed that proposed subdivision (A) made sense, and the Reporter recommended that it be approved.

Second, proposed subdivision (B) is intended to clarify what type of notice triggers the 7-day period to move to reopen. Proposed subdivision (B) provides that the 7-day deadline begins to run when a party "receives or observes written notice of the entry from any source." The Reporter said that he agreed with commentators — formal and informal — who objected to this proposed formulation. Above all else, the Reporter said, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a lot of factfinding by district courts. Subdivision (B) could do better on both counts.

The standard — "receives or observes written notice of the entry from any source" — is awkward and, despite the guidance of the Committee Note, seems likely to give courts problems. Even if the standard is sufficiently clear, district courts will be left having to make factual findings about whether a particular attorney or party "received" or "observed" notice that was written or electronic.

The Reporter recommended that the Committee adopt the solution recommended by two committees of the California bar: using Civil Rule 77(d) notice to trigger the 7-day period. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And using Civil Rule 77(d) as the trigger would not unduly delay appellate proceedings, mainly because Rule 4(a)(6) applies a "hard cap" of 180 days. The wording of subdivision (B) will only determine when *within* those 180 days the 7-day deadline is triggered.

For these reasons, the Reporter recommended that the Committee amend the text of proposed subdivision (B) to provide as follows:

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

He also recommended that the Committee Note to proposed subdivision (B) be amended to read as follows:

> **Subdivision (a)(6)(B).** Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.
>
> Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g.*, *Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably,

could have included verbal notice that was not "the functional equivalent of written notice." *See, e.g.*, *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

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

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases — cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, no appeal can be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, by later serving notice, the winning party can trigger the 7-day deadline to move to reopen.

The Committee briefly discussed the Reporter's recommendation. All Committee members concurred that the recommendation should be adopted. Most of the discussion related to the length of the Committee Note, with some members arguing that the Note should just briefly describe the effect of the amendment, and others arguing that the Note should also explain the background to and reasons for the amendment. The Committee compromised by agreeing that the Note would be changed so that the effect of the amendment is briefly described at the beginning of each section of the Note, and then the background and reasons would follow.

A member moved that the amendment to Rule 4(a)(6) be approved, with the changes recommended by the Reporter, and with the understanding that the Reporter would revise the Committee Note as agreed. The motion was seconded. The motion carried (unanimously).

3. Washington's Birthday Package: Rules 26(a)(4) and 45(a)(2) [Item No. 00-03]

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 26. Computing and Extending Time

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

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

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

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

The Reporter said that no commentator objected to the amendments and that he recommended that they be approved.

A member moved that the amendments to Rules 26(a)(4) and 45(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

4. New Rule 27(d)(1)(E) (apply typeface and type-style limitations to motions) [Item No. 02-01]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

* * * * *

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

(1) **Format.**

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

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

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

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

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

* * * * *

Committee Note

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

The Reporter said that only two objections had been made to the proposed amendment:

First, two commentators argued that all of the page limits in the Appellate Rules should be replaced by word limits. The Reporter reminded the Committee that it had recently removed the same suggestion from its study agenda at the request of the appellate clerks. The clerks reported that page limits are much easier for clerks to enforce and that abuses are rarely a problem with respect to papers governed by page limits. If the rules were to apply word limits to all papers (not just briefs), then parties would have to file certificates of compliance with all papers (not just briefs). That would result in tens or hundreds of thousands of additional pieces of paper being served and filed every year — all for no purpose.

Second, one commentator objected that, because most circuits now allow motions to be filed in 12- or even 11-point proportional font, the proposed amendment will substantially reduce the content of motion papers in most circuits. The commentator argued that the page limits on motion papers should be increased to compensate for this reduction.

A member said that, while he disagreed with the second suggestion, he would like the Committee to consider replacing all page limits in the Appellate Rules with word limits. He believes that the suggestion is worth considering, and he was not a member of the Committee when it removed the suggestion from its study agenda. That said, he did not want to hold up approval of the amendment to Rule 27(d)(1). The Committee agreed by consensus that it would restore the suggestion to its study agenda.

A member moved that the amendment to Rule 27(d)(1) be approved as published. The motion was seconded. The motion carried (unanimously).

5. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d) [Item No. 00-12]

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

* * * * *

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

* * * * *

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

* * * * *

Committee Note

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

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

Rule 28.1. Cross-Appeals

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

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

are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order.

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

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

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

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

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

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

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

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

(e) Length.

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

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

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

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

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

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

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

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

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

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

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

Committee Note

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

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

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

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary.

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

> The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).
>
> The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal,

it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.

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

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

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

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

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

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

(a) Form of a Brief.

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

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

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

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

* * * * *

Committee Note

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

Rule 34. Oral Argument

* * * * *

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

* * * * *

Committee Note

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

The Reporter said that the Style Subcommittee had made three recommendations, which were described in the Reporter's memorandum to the Committee. The Reporter recommended that the Committee accept these suggestions. By consensus, the Committee agreed.

The Reporter also said that the Department of Justice had made three recommendations, and deferred to Mr. Letter for an explanation. Mr. Letter explained that the Department recommended that Rule 28.1 be amended in the following respects: (1) Add a sentence to the Committee Note to Rule 28.1(b) to clarify that the terms "appellant" (and "appellee") as used by rules other than Rules 28.1, 30, and 34, refer to both the appellant in an appeal and the cross-

appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Amending Rule 28.1(d) to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae. (3) Modify the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief. The Reporter recommended that the Committee accept these suggestions. By consensus, the Committee agreed.

Finally, the Reporter said that no commentator — save one — objected to any aspect of the proposed amendments except the word limits. For the most part, judges argued that the word limits should be reduced (to 14,000, 14,000, 7,000, and 7,000), while practitioners argued that the word limits should be increased (to as much as 14,000, 28,000, 21,000, and 7,000). The Reporter said that, while he sympathized with the arguments of the judges, he thought that, no matter what word limit was chosen, the proposed amendments should be approved.

The Committee discussed the word limits. Although some support was expressed for the proposal that the word limits be decreased to 14,000, 14,000, 7,000, and 7,000, the consensus of the Committee was that the rule should be approved as published — that is, with word limits of 14,000, 16,500, 14,000, and 7,000. Committee members recognized that the almost universal circuit practice is to limit the second brief to 14,000 words, but argued that a longer word limit is appropriate in light of the fact that the second brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. At the same time, Committee members did not believe that expanding the size of the second brief beyond 16,500 words was appropriate, in light of the fact that the issues raised on a cross-appeal are usually not as many or as complex as the issues raised on appeal — and the fact that the appellee can always ask for additional words if necessary. Although Committee members thus regarded the published word limits as appropriate, they also concurred that disagreement over the word limits should not be allowed to endanger approval of the package of rules.

A member moved that the cross-appeals package of amendments be approved as published, except that the changes suggested by the Style Subcommittee and Department of Justice be made. The motion was seconded. The motion carried (unanimously).

6. Rule 35(a) (disqualified judges/en banc rehearing) [Item No. 00-11]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

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

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

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

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

* * * * *

Committee Note

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

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8-9 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in

calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

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

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

Both the absolute majority approach and the case majority approach are reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

The Reporter recommended that the amendment be approved as published. He said that none of those who opposed the amendment had addressed the fact that Congress (in enacting § 46(c)) and the Supreme Court (in approving Rule 35(a)) have already decided to impose a uniform standard. It is highly unlikely that either Congress or the Court intended that "majority" mean one thing in half of the circuits and another thing in the other half. The Reporter said, however, that he did recommend that three changes be made to the Committee Note:

First, he recommends that the Note put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). One of the strongest arguments in favor of the amendment is that the existence of § 46(c) means that there should be a consistent national practice. In addition, Standing Committee members have argued that, in deciding what approach to adopt, this Committee should choose the approach that represents the best interpretation of § 46(c), whether or not that approach is the one that the Committee would choose as an original matter.

Second, he recommends that the Committee accommodate the request of one commentator that language be added to the Note to clarify that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d)[2] to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service — disqualified or not — are eligible to participate.

Finally, he recommends that a couple of arguments made by commentators who favored the amendment to Rule 35(a) be incorporated into the Note.

The Reporter presented the following revised draft of the Committee Note:

> **Subdivision (a).** Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.
>
> The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at

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[2]Section 46(d) provides: "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

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

Six of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to vote.)

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

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

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

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

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

A Committee member said that, although he had not decided how to vote, he is troubled by two things. First, he is concerned that *Shenker v. Baltimore & Ohio R.R. Co.* could be read to hold that § 46(c) gives courts precisely the discretion that the amendment to Rule 35(a) seeks to take away. Second, he views both the absolute majority and case majority approaches as reasonable interpretations of § 46(c). Both present a "worst case" scenario, and neither of the two worst case scenarios is obviously worse than the other. Why not allow each circuit to chose which worst case scenario it wants to risk?

A member responded that, as to the first point, he has read *Shenker* several times, and he does not believe that the Supreme Court held that the word "majority" in § 46(c) should mean different things in different circuits. The Reporter agreed; he said that he reads *Shenker* primarily as a private right of action case, holding that § 46(c) does not confer any rights upon litigants. Although the case contains broad dicta about courts having flexibility in setting up internal processes for considering rehearing requests, the case does not go so far as to hold that the threshold standard that must be met — a "majority" of judges — can be interpreted by circuits as they see fit.

A member agreed. He thinks that the status quo — in which "majority" means one thing in half of the circuits and another thing in the other half — is indefensible. He also pointed out that this is not a case in which the Committee is acting pursuant to its general policy of promoting uniformity in federal appellate practice and thereby reducing the burdens on attorneys who practice in more than one circuit. Rather, here Congress imposed uniformity, and the Committee is implementing Congress's decision.

A member said that he agreed that uniformity was the overriding objective. In fact, he said, he did not care whether Rule 35(a) was amended to adopt the absolute majority approach or the case majority approach; he cared only that parties were treated consistently in all federal appellate circuits. Other members disagreed in part. They expressed opposition to the absolute majority approach on the grounds that it counts each recusal as a vote against rehearing.

A member expressed his strong support for the amendment to Rule 35(a). He said that none of the commentators had suggested any reason why local conditions of the circuits justify inconsistent practices. He also said that Rule 35(a) should be amended through the Rules Enabling Act process before a disgruntled litigant contacts a member of Congress and Congress starts rewriting § 46(c).

A member noted the concern expressed by some of the commentators that adoption of the case majority rule would result in too many en banc proceedings. He said that he doubted that the change from the absolute majority approach to the case majority approach would make much of a real-world difference; at most, it might result in one additional en banc proceeding every few years. Moreover, if a circuit's judges do not want too many en banc proceedings, they can simply decline to vote to hear cases en banc.

A member moved that the proposed amendment to Rule 35(a) be approved, with the changes to the Committee Note recommended by the Reporter. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)

Judge Alito invited Mr. Letter to introduce this item.

Mr. Letter reminded the Committee that this item arose out of a suggestion by Judge Stanwood R. Duval, Jr., that Rule 4 be amended to resolve a circuit split over whether appeals of orders granting or denying applications for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) are governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). In the course of the first Committee discussion of Judge Duval's proposal, several members pointed out that the circuit split over the Hyde Amendment closely resembled the circuit split over whether appeals of orders granting or denying applications for a writ of error *coram nobis* were "civil" or "criminal" — a circuit split that was resolved by the amendment of Rule 4(a)(1) in 2002. The Department of Justice agreed to study the general question of whether Rule 4 should be amended to make it unnecessary or at least easier to distinguish "civil" appeals from "criminal" appeals.

Over the past three years, the Committee had suggested, and the Department had studied, a number of possible approaches. The latest such suggestion was that Rule 4 be amended to provide, in essence, that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals. For example, Rule 4 could be amended to provide something like the following: "As used in this rule, 'appeal in a civil case' means every appeal except a direct appeal from a judgment of conviction entered under Fed. R. Crim. P. 32(k)."

Mr. Letter reported that the Department opposed this latest proposal. The Department identified a number of appeals in criminal proceedings — including appeals brought by defendants, appeals brought by the government, and even appeals brought by uncharged individuals — that must now be filed within a relatively brief period of time (usually 10 days, sometimes more). The proposal would apply a 60-day deadline to these appeals and thus inject considerable delay into criminal proceedings. Such delay could be avoided only if the Committee included a "laundry list" of exceptions to the basic principle, but the Committee has already determined that such a laundry-list approach would not represent much of an improvement over current law.

Mr. Letter also stressed that the circuit split over the Hyde Amendment appears to be the only existing split over whether a particular type of appeal is "civil" or "criminal" for purposes

of Rule 4. That single circuit split does not justify a fundamental reworking of Rule 4 — a reworking that could cause unanticipated problems, given Rule 4's importance.

After a brief discussion, members quickly reached consensus that, despite the best efforts of the Committee and the Department, a workable solution to the problem of distinguishing "civil" from "criminal" appeals appears to be out of reach.

A member moved that Item No. 00-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

B. Item No. 03-06 (FRAP 3 — defining parties)

Judge Alito invited Mr. Letter to introduce this item.

The Department of Justice has proposed an amendment to Rule 3. Under the amendment, all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could "opt out" of the case by filing a notice of withdrawal with the clerk.

The Committee discussed the proposed amendment at both its May 2003 and November 2003 meetings. At the November 2003 meeting, the Committee asked the Department and Ms. Waldron to study the possibility of amending the Appellate Rules to implement an "opt-in" system, such as that used by the Third Circuit. Under such a system, all parties to the district court action are initially presumed to be parties to the appeal. However, those who are interested in *remaining* parties must file a notice of appearance. Those who do not are dropped from the appeal.

Mr. Letter reported that, after giving the matter considerable thought, the Department believed that the opt-out system that it had proposed was preferable to the opt-in system used by the Third Circuit. The Department had a number of concerns about an opt-in system. For example, what would happen if parties were given 10 days to opt in, and a party did not receive notice of the appeal or the notice was delayed? This is a real concern for the Department, as its mail is routinely delayed for several days so that it can be irradiated. The Department believes that its proposal would create less confusion and less work for the clerks.

Ms. Waldron said that the appellate clerks disagree. The consensus among appellate clerks is that the status quo works fine. In most circuits, the clerks' offices determine who are parties to the appeal and whether each party is an appellant or appellee by examining the district court docket, the notice of appeal, the order being appealed, and the rest of the record. The clerks rarely have difficulty figuring out who is a party or whether a party is an appellant or appellee. On the rare occasions when a question arises, it is easily dealt with by the court and the parties. Whatever problems exist are not serious enough to justify the major change in

appellate practice — and the major new burdens on clerks and parties — that would be imposed by the adoption of either an opt-in or opt-out system.

The Committee debated the three options: maintaining the status quo, adopting an opt-out system such as that proposed by the Department, or adopting an opt-in system such as that used by the Third Circuit. Committee members identified the potential costs and benefits of each option. In the end, all Committee members, save one, spoke in favor of maintaining the status quo. Members cited the following reasons, among others:

First, the problem addressed by the Department's proposal does not appear to be serious. There is rarely any doubt about whether someone is a party to an appeal or about whether a party is an appellant or appellee. In the rare cases in which there is doubt, the parties can easily ask the court for clarification.

Second, the Department's proposal would burden the clerks and the parties. Few parties are likely to take the trouble to opt out of a case — even a case in which they have little interest. Rather, parties are likely to remain in the appeal so that they can receive the briefs and other papers and keep an eye on the case. As a result, there will be cases in which hundreds of parties in the district court will be deemed parties in the court of appeals — and every one of those hundreds of parties will have to be served with briefs and other papers — even though very few of those parties will have a real stake in the appeal.

Third, the Department's proposal would increase the number of conflicts of interest faced by attorneys and the number of recusals faced by judges. At present, when an appellate attorney decides whether she has a conflict, or an appellate judge decides whether she must disqualify herself, the attorney or the judge takes into account only the "real" parties to the appeal, not all of those who were parties in the district court. By defining all parties to the district court action as parties to the appeal — including those (potentially numbering in the hundreds) who have no plans to actively participate in the appeal but who do not bother to opt out — the Department's proposal would complicate conflict-of-interest and recusal determinations.

Mr. Letter defended the Department's proposal. He argued that the problem is serious enough to merit an amendment to the Appellate Rules; questions regularly arise about who is a party or whether a party is an appellant or appellee. Furthermore, the Department's proposal should actually ease the burden on the clerks. Under the current system, they must examine the district court docket, notice of appeal, order being appealed, and rest of the record and make an educated guess about the configuration of parties on appeal. Under the Department's proposal, all of that work would be done for them by the rule. Finally, the conflict-of-interest and recusal issues raised by Committee members argue in favor of a rule that leaves no doubt about the parties to the appeal. Perhaps an opt-in system would be preferable to an opt-out system, but either system would provide clearer guidance to attorneys and judges than the status quo.

A member moved that the Department's proposal be approved. The motion failed for lack of a second.

A member moved that Item No. 03-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (6-1).

C. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit)

Judge Alito invited Mr. Letter to introduce this item.

Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits. Under the prison mailbox rule, a paper is considered timely filed if it is deposited by an inmate in his prison's internal mail system on or before the last day for filing. The rule provides that "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding — holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.

The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.

Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.

A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

A member moved that Item No. 03-08 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

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

Judge Alito invited Mr. Letter to introduce this item.

Under Rule 4(a)(1)(B), the 30-day deadline to bring an appeal in a civil case is extended to 60 days "[w]hen the United States or its officer or agency is a party." Similarly, under Rule 40(a)(1), the 14-day deadline to petition for panel rehearing is extended to 45 days in a civil case in which "the United States or its officer or agency is a party." (By virtue of Rule 35(c), the extended deadline of Rule 40(a)(1) also applies to petitions for rehearing en banc).

Mr. Letter said that it is unclear whether the extended deadlines provided in Rule 4(a)(1)(B) and Rule 40(a)(1) apply when an officer or employee of the United States is sued in her *individual* capacity. Mr. Letter said that this ambiguity does not exist in the Civil Rules. Civil Rule 12(a)(3)(A) extends the deadline for responding to a summons and complaint from 20 to 60 days for "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity," and Civil Rule 12(a)(3)(B) goes on specifically to provide that:

> An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

At its November 2003 meeting, the Committee considered a proposal by the Department that Appellate Rule 4(a)(1)(B) and Appellate Rule 40(a)(1) be amended so that the Appellate Rules are as clear as the Civil Rules about the deadlines that apply when an officer or employee of the United States is sued in an individual capacity. Although no Committee member objected to the substance of the proposal, Committee members did point out that the proposed amendments drafted by the Department were too broad. Read literally, those amendments would have provided extensions in *any* case in which an officer or employee of the United States was sued, even if the case had nothing to do with the officer's or employee's performance of duties on behalf of the United States. The Department agreed to redraft the proposed amendments.

Mr. Letter said that the Department had redrafted the proposed amendments to Rule 4(a)(1)(B) and Rule 40(a)(1) so that they now provide extensions only when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." (The full text of the amendments, as well as draft Committee Notes, appear in the Committee's agenda book under Tab V-D.) Committee members agreed that the Department's changes met the Committee's concerns.

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

The Reporter agreed that he would review the draft amendments and Committee Notes and present "cleaned up" versions for the Committee to consider at its fall 2004 meeting.

E. Items Awaiting Initial Discussion

1. Item No. 03-10 (new FRAP 25.1 — privacy protections)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Section 205 of the E-Government Act of 2002 requires every federal court to maintain a website and to make specific information available through that website. The Act specifically provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)). The Act thus establishes broad access to documents that are filed in or converted to electronic form.

The Act also recognizes that such broad access raises important privacy concerns. To address those concerns, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically" (§ 205(c)(3)(A)(i)). This Committee and the other advisory committees have been charged with implementing rules to "provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)).

To coordinate the response to this directive, the Standing Committee has appointed an E-Government Subcommittee. That Subcommittee met in January 2004 and agreed upon a plan for developing the privacy rules mandated by the E-Government Act. Pursuant to that plan, each reporter has prepared a draft privacy rule for his advisory committee, based upon a common template. Each reporter will collect the comments of his advisory committee, and the chairs and reporters will meet in June to compare notes and to attempt to agree upon common language that can be presented to all of the advisory committees in the fall.

The Reporter presented the following draft of a new Rule 25.1 for this Committee to consider:

Rule 25.1 Privacy in Court Filings

(a) Limits on Disclosing Personal Identifiers. If a party includes any of the following personal identifiers in an electronic or paper filing, the party is limited to disclosing:

(1) only the last four digits of a person's social-security number;

(2) only the initials of a minor child's name;

(3) only the year of a person's date of birth;

(4) only the last four digits of a financial-account number; and

(5) only the city and state of a home address.

(b) Exception for a Filing Under Seal. A party may include complete personal identifiers in a filing if it is made under seal. But the court may require the party to file a redacted copy for the public file.

(c) Social-Security Appeals; Access to Electronic Files. In an appeal involving the right to benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

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

(2) a person who is not a party or a party's attorney may have remote electronic access to:

(A) the docket maintained under Rule 45(b)(1); and

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

Committee Note

This rule is adopted in compliance with § 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." This rule goes further than the E-Government Act in protecting personal identifiers, as this rule applies to paper as well as electronic filings. Paper filings in many districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore they raise the same privacy and security concerns when filed with the court.

This 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 provides that — with the exception of Social Security appeals — documents in civil case files 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. Because case files are available over the internet through PACER, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings and by altogether prohibiting electronic access to the files in Social Security cases by members of the general public. (Social Security appeals are unique in their great number, their extensive records, and their focus on medical records and other intensely private information.)

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must

remember that any personal information not otherwise protected will be made available over the internet through PACER. 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.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act.

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.

The Reporter told the Committee that the draft Committee Note was copied from the Committee Note that accompanied the template rule. Because both the Style Subcommittee and the Reporter had made substantial changes to the template rule, the template Committee Note does not match up well with the draft Appellate Rule. The Reporter suggested that the Committee not concern itself with the Note, as the Note will have to be rewritten once the advisory committees agree upon how the privacy rules should be drafted. The Reporter invited the Committee to comment on the proposed rule.

In the discussion that followed, Committee members raised a number of concerns about draft Rule 25.1:

1. The rule is underinclusive in exempting only Social Security appeals from electronic access. Many categories of cases — including immigration cases, Black Lung cases, medical malpractice cases, employment cases, and bankruptcy cases — differ little from Social Security cases in the sensitivity of the information contained in their records. Why are Social Security cases exempt from electronic access but not, say, Black Lung cases?

2. The rule imposes an onerous burden on parties — and particularly on the federal government. Subdivision (a) of the rule requires personal identifiers to be redacted from every "filing" whether or not that "filing" is made on paper or electronically. Assuming that "filing" means everything filed in a case — including appendices and administrative records — parties often will have to review and redact thousands of pages of documents. The government does not have the resources to, for example, redact every personal identifier on every piece of paper filed in every immigration case.

3. The rule will pose difficulty in cases in which a personal identifier is central to the case. For example, in forfeiture cases or cases in which the sufficiency of a warrant is at issue, the parties may need to refer repeatedly to a personal identifier. How will this litigation be conducted under Rule 25.1?

4. The rule may need to be amended to provide both an "opt-in" procedure — that is, a procedure under which a party (e.g., a plaintiff in a medical malpractice case) can ask that her case be treated with a high degree of privacy — and an "opt-out" procedure — that is, a procedure under which a party (e.g., the government in a forfeiture case) can ask that the privacy rules not apply at all to a case.

5. The title of the rule is misleading in referring to "Privacy in Court Filings." It implies that the rule protects the privacy of the paper files at the courthouse. In fact, the rule does nothing to limit access to such files. The rule or Note should make that clear.

6. The rule (or at least the Note) needs to explain more clearly that, even when electronic access to a record is forbidden (such as in Social Security cases), "non-electronic" access to the record is still permitted. In other words, unless the record is sealed, it will still be available to the public and the media at the courthouse, even if electronic access to the record is forbidden.

7. A member warned that the media are likely to raise strong objections to both the provision requiring that personal identifiers be redacted and the provision exempting Social Security files from electronic access.

8. Finally, a member suggested that Rule 25.1(c)(2) would be clearer if the word "only" was inserted after "electronic access," so that the rule would read: "a person who is not a party or a party's attorney may have remote electronic access *only* to."

Judge Alito thanked the Committee members for their comments and said that the Reporter and he would convey them to the other advisory committee chairs and reporters in June.

VI. Additional Old Business and New Business

The Committee addressed one item of old business:

The Reporter reminded the Committee that both the Civil Rules Committee and the Appellate Rules Committee have been working on amendments that would clarify how the 3-day extension provided by Civil Rule 6(e) and Appellate Rule 26(c) should be calculated. The Civil Rules Committee has been taking the lead; in August 2003, it published for comment a proposed amendment to Rule 6(e). Under that amendment, a party who is required or permitted to act within a prescribed period would first calculate that period, without reference to the 3-day extension provided by Rule 6(e), but with reference to the other time computation provisions of the Civil Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 6(e), the party would add 3 days. The party would have to act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in

which case the party would have to act by the next day that is not a Saturday, Sunday, or legal holiday.

At its November 2003 meeting, the Appellate Rules Committee approved for publication a proposed amendment to Appellate Rule 26(c) that would follow the approach of the proposed Civil Rule. A complication has arisen, though. Some of the commentators on the proposed amendment to Civil Rule 6(e) complained that it gives parties too much time, and suggested that time be calculated differently. In particular, commentators suggested that a party should have to count the prescribed number of days and then, even if the last of those days falls on a Saturday, Sunday, or legal holiday, immediately count the three extra days. The paper would be due on the third extra day, unless that day fell on a Saturday, Sunday, or legal holiday.

Prof. Edward Cooper, the Reporter to the Civil Rules Committee, drafted an alternative amendment to Rule 6(e) that would implement the approach urged by the commentators. That amendment was distributed via e-mail to members of the Appellate Rules Committee. The Civil Rules Committee has informed Judge Alito that, before it considers the alternative amendment, it would like to get the input of the Appellate Rules Committee. Judge Alito invited reactions to the alternative.

The Committee quickly reached consensus that the alternative draft was inferior to the original draft for three reasons:

First, the alternative draft is not as clear as the original draft. In drafting time-counting rules, clarity is the most important goal. An extra day or two of delay is an acceptable price to pay for clarity. The alternative draft is difficult to understand. Without the Committee Note, it would be almost impossible to understand.

Second, the alternative draft is not as forgiving as the original draft. The original draft adds the three days in the most generous manner; mistakes are likely to result in papers being filed earlier than necessary. The alternative draft does not add three days in the most generous manner; mistakes could result in blown deadlines.

Third, in some circumstances, the alternative draft would render the three-day extension meaningless. Consider the situation in which the last "prescribed day" is a Saturday, and Monday is a legal holiday. Without the extension, the paper would be due on Tuesday. With the extension, the paper would be due on Tuesday. What's the point of the extension? (And, if Monday is not a legal holiday, the three-day extension provides only one extra day, rendering it almost meaningless.)

Judge Alito asked the Reporter to communicate the Committee's views to the Civil Rules Committee.

Mr. Letter asked to raise one item of new business. He said that the Department of Justice was considering proposing that the Appellate Rules be amended to permit parties to use

both sides of the page in submitting briefs and other papers. Such a practice would save paper and file space. The agenda books of the advisory committees are printed on both sides of the page; why couldn't the same practice be followed by the courts of appeals?

One member said that a similar proposal was floated a few years ago, and the circuit judges were violently opposed. Many of them use the blank sides of the pages to make notes, and others use highlighting or other marking that bleeds through the page. She advised the Committee not to stir up this hornet's nest again. Other members of the Committee concurred.

VII. Dates and Location of Fall 2004 Meeting

Judge Alito asked the Committee to hold November 9 and 10 for the fall meeting. It is likely that the Committee will need to meet only on November 9, but Judge Alito asked the Committee also to hold November 10 for the time being. Judge Alito said that the location of the meeting will be announced after the AO has an opportunity to explore some of the suggestions made by Committee members.

VIII. Adjournment

The Committee adjourned at 12:30 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter