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

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MEMORANDUM

DATE: May 6, 2005

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

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

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

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

II. Action Items

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

A. Items for Final Approval

1. New Rule 32.1

a. Introduction

The Committee proposes to add a new Rule 32.1 that will require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished" or "non-precedential" by a federal court. New Rule 32.1 will also require parties who cite unpublished or non-precedential opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.

b. Text of Proposed Amendment and Committee Note

1 **Rule 32.1. Citing Judicial Dispositions**

2 **(a) Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial
3 opinions, orders, judgments, or other written dispositions that have been designated as
4 "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

5 **(b) Copies Required.** If a party cites a federal judicial opinion, order, judgment, or other written
6 disposition that is not available in a publicly accessible electronic database, the party must file
7 and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in
8 which it is cited.

9 **Committee Note**
10
11 Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other
12 written dispositions that have been designated by a federal court as "unpublished," "not for publication,"
13 "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions
14 collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many
15 "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of
16 judicial dispositions addressed by Rule 32.1.
17
18 The citation of unpublished opinions is an important issue. The thirteen courts of appeals have
19 cumulatively issued tens of thousands of unpublished opinions, and about 80% of the opinions issued by
20 the courts of appeals in recent years have been designated as unpublished. *See* Administrative Office
21 of the United States Courts, Judicial Business of the United States Courts 2004, tbl. S-3 (2004).
22 Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree
23 that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that
24 circuit.
25

1 Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or
2 forbid any court from doing so. It does not dictate the circumstances under which a court may choose
3 to designate an opinion as "unpublished" or specify the procedure that a court must follow in making
4 that determination. It says nothing about what effect a court must give to one of its unpublished
5 opinions or to the unpublished opinions of another court. In particular, it takes no position on whether
6 refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional.
7 *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*,
8 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). Rule
9 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as
10 "unpublished" or "non-precedential" — whether or not those dispositions have been published in some
11 way or are precedential in some sense.
12
13 **Subdivision (a).** Every court of appeals has allowed unpublished opinions to be cited in some
14 circumstances, such as to support a contention of issue preclusion, claim preclusion, law of the case,
15 double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not
16 all of the circuits have specifically mentioned all of these contentions in their local rules, but it does not
17 appear that any circuit has ever sanctioned an attorney for citing an unpublished opinion under these
18 circumstances.
19
20 By contrast, the circuits have differed dramatically with respect to the restrictions that they have
21 placed on the citation of unpublished opinions for their persuasive value. An opinion cited for its
22 "persuasive value" is cited not because it is binding on the court or because it is relevant under a
23 doctrine such as claim preclusion. Rather, it is cited because a party hopes that it will influence the
24 court as, say, the opinion of another court of appeals or a district court might. Some circuits have freely
25 permitted the citation of unpublished opinions for their persuasive value, some circuits have disfavored
26 such citation but permitted it in limited circumstances, and some circuits have not permitted such citation
27 under any circumstances.
28
29 Parties seek to cite unpublished opinions in another context in which parties do not argue that
30 the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an
31 argument by pointing to the presence or absence of a substantial number of unpublished opinions on a
32 particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most
33 no-citation rules do not clearly address the citation of unpublished opinions in this context.
34
35 Rule 32.1(a) is intended to replace these inconsistent and unclear standards with one uniform
36 rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished
37 opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule
38 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court
39 may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid
40 parties to cite unpublished opinions when a published opinion addresses the same issue.
41

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

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of unpublished opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In addition, every court of appeals is now required to post all of its decisions — including unpublished decisions — on its website "in a text searchable format." *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.

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

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied on by judges (again, even in circuits that have imposed no-citation rules). *See, e.g., Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). An exhaustive study conducted by the Federal Judicial Center ("FJC") at the request of the Advisory Committee found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. *See* FEDERAL JUDICIAL CENTER, CITATIONS TO

UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 15, 70 (2005) [hereinafter FJC REPORT]. Unpublished opinions are often read and cited by both judges and attorneys precisely because they do contain valuable information or insights. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about the unpublished opinions that both are reading.

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

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

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. To the contrary, a study of the federal appellate courts conducted by the Administrative Office of the United States Courts at the request of the Advisory Committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005). The FJC, as part of its study, asked the judges of the First and D.C. Circuits — both of which have recently liberalized their citation rules — what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload. All of the judges who responded — save one — reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See* FJC REPORT at 12-13, 67-68. In addition, when the FJC asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. Id. at 10, 63. It is, of course, true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished

opinions causes the harms predicted by defenders of no-citation rules. No such evidence exists, though.

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

The short answer to this argument is the same as the short answer to the argument about judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is simply no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that Rule 32.1 would not have an "appreciable impact" on their workloads. Id. at 17, 74. Moreover, the attorneys who expressed positive views about Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits. *See* id. at 17-18, 75.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

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

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty comprehending why they cannot tell a court that it has

addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule 32.1(a) abolishes those rules and requires courts to permit unpublished opinions to be cited.

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

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the unpublished opinions cited in their briefs or other papers. Unpublished opinions are widely available on free websites (such as those maintained by federal courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of unpublished opinions, requiring parties to file and serve copies of every unpublished opinion that they cite is unnecessary and burdensome and is an example of a restriction forbidden by Rule 32.1(a).

c. Changes Made After Publication and Comment

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

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

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

d. Summary of Public Comments

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

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

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

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

The attorneys received identical surveys. The judges did not. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which altogether forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C. Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. The response rate for both judges and attorneys was very high.

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

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote

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

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

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

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

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted

a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

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

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

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

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

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1

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

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

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

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

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

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

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

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

The Advisory Committee discussed the FJC and AO studies at great length at our April meeting. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, fail to support the main arguments against Rule 32.1. Some Committee members — including one of the two opponents of Rule 32.1 — went further and contented that the studies in some respects actually refute those arguments. Needless to say, for the seven members of the Advisory Committee who have supported Rule 32.1, the studies confirmed their views. But I should note that, even for the two members of the Advisory Committee who have opposed Rule 32.1, the studies were influential. Both announced that, in light of the studies, they were now prepared to support a national rule on citing unpublished opinions. Those two members still do not support Rule 32.1 — they prefer a discouraging citation rule to a permissive citation rule — but it is

worth emphasizing that, in the wake of the FJC and AO studies, not a single member of the Advisory Committee now believes that the no-citation rules of the four restrictive circuits should be left in place.

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

a. Introduction

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

b. Text of Proposed Amendment and Committee Note

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 * * * * *

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

5 * * * * *

6 (D) **Electronic filing.** A court of appeals may by local rule permit — or, if

7 reasonable exceptions are allowed, require — papers to be filed, signed, or

8 verified by electronic means that are consistent with technical standards, if any,

9 that the Judicial Conference of the United States establishes. A paper filed by

10 electronic means in compliance with a local rule constitutes a written paper for

11 the purpose of applying these rules.

12 * * * * *

1 **Committee Note**
2
3 **Subdivision (a)(2)(D).** Amended Rule 25(a)(2)(D) acknowledges that many courts have
4 required electronic filing by means of a standing order, procedures manual, or local rule. These local
5 practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that
6 mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes
7 a hardship on a party. Under Rule 25(a)(2)(D), a local rule that requires electronic filing must include
8 reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions.
9 Experience with the local rules that have been adopted and that will emerge will aid in drafting new local
10 rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an
11 amended Rule 25(a)(2)(D).
12
13 A local rule may require that both electronic and "hard" copies of a paper be filed. Nothing in
14 the last sentence of Rule 25(a)(2)(D) is meant to imply otherwise.

c. Changes Made After Publication and Comment

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

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

The Committee Note has been changed to reflect the addition of the "reasonable exceptions" clause to the text of the rule. The Committee Note has also been changed to add the final two sentences. Those sentences were added at the request of Judge Sandra L. Lynch, a member of CACM. Judge Lynch believes that there will be few appellate judges who will want to receive only electronic copies of briefs, but there will be many who will want to receive electronic copies in addition to hard copies. Thus, the local rules of most circuits are likely to require a "written" copy or "paper" copy, in addition to an electronic copy. The problem is that the last sentence of Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Judge Lynch's concern is that this sentence may leave attorneys confused as to whether a local rule requiring a "written" or "paper" copy of a brief requires

anything in addition to the electronic copy. The final two sentences of the Committee Note are intended to clarify the matter.

d. Summary of Public Comments

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

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

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

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

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

The **Access to Justice Technology Bill of Rights Committee of the Washington State Access to Justice Board** (04-AP-005) opposes the amendments. The Committee believes that permitting courts to mandate electronic filing is "premature" and argues that, "if mandatory filing is allowed, then there must be exceptions provided for in accordance with nationally applicable standards that assure equal and full access to the courts." Without such exceptions, the Committee asserts, the amendments "are a recipe for inconsistency, inequality, and inaccessibility." The Committee is particularly concerned about the impact of the amendments on pro se litigants, the disabled, the elderly, the incarcerated, those without access to technology, and those who may have access to technology

but do not know how to use it. The Committee is concerned not only with the absence of any hardship exception, but with the lack of "requirements . . . for in forma pauperis sta[tus]."

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

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

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

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

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

B. Items for Publication

1. New Rule 25(a)(5)

As you know, the advisory committees have been working under the guidance of the E-Government Subcommittee to comply with the mandate of the E-Government Act of 2002 that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." Most of that work has been directed toward developing a privacy-rule template that all of the advisory committees could adopt with minor changes.

At its November 2004 meeting, the Appellate Rules Committee decided that, rather than try to pattern an Appellate Rule after the template, the Committee would instead amend the Appellate Rules to adopt by reference the privacy provisions of the Bankruptcy, Civil, and Criminal Rules. In that way, the policy decisions can be left to CACM and to the other advisory committees — all of whom have far more of a stake in the privacy issues than the Appellate Rules Committee — and the Appellate Rules will not have to be amended continually to keep up with changes to the other rules of practice and procedure.

The Advisory Committee unanimously approved this amendment at our April 2005 meeting. I should note that we received assistance from the other reporters — particularly Profs. Cooper and Morris — in drafting this amendment, and, as always, we appreciate the support of our colleagues on the other advisory committees.

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1 **Rule 25. Filing and Service**

2 **(a) Filing.**

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4 (5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule

5 of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or

6 Federal Rule of Criminal Procedure 49.1 is governed by the same rule on

7 appeal. All other proceedings are governed by Federal Rule of Civil Procedure

8 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an

9 extraordinary writ is sought in a criminal case.

10 * * * * *

11 **Committee Note**

12

13 **Subdivision (a)(5).** Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law
14 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be
15 amended "to protect privacy and security concerns relating to electronic filing of documents and the
16 public availability . . . of documents filed electronically." In response to that directive, the Federal Rules
17 of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy

1 and security concerns raised by documents that are filed electronically, but also to address similar
2 concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV.
3 P. 5.2; and FED. R. CRIM. P. 49.1.
4
5 Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court,
6 bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will
7 continue to apply to the case on appeal. With one exception, all other cases — such as cases involving
8 the review or enforcement of an agency order, the review of a decision of the tax court, or the
9 consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only
10 exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the
11 related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1
12 will govern in the court of appeals as well.

III. Information Items

A. Local Rules on Briefs

You may recall that, at the January 2005 meeting of the Standing Committee, I reported on the efforts of the Advisory Committee to address persistent complaints from practitioners about the proliferation of local rules regarding briefs. I mentioned that the FJC had studied the problem at our request and produced a comprehensive report entitled *Analysis of Briefing Requirements in the United States Courts of Appeals*. The FJC found that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in the Appellate Rules, and that over half of the courts of appeals impose seven or more such requirements.

As I reported in January, the Advisory Committee has decided that, as a first step toward addressing this problem, it will mail a copy of the FJC's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the local rules identified by the FJC and, where possible, to repeal them. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

At our meeting in April, the Advisory Committee confirmed its plan and approved the text of the letter that will be mailed to the circuits. I have attached the letter for your information. We would, of course, welcome comments and suggestions from members of the Standing Committee. I should stress that this letter will not be mailed until after the dispute over proposed Rule 32.1 is resolved.

B. Justice for All Act of 2004

The "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. Section 102 of the Act creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. New § 3771(d) establishes enforcement mechanisms and is of concern to the Appellate Rules Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least three things about this are troubling:

First, § 3771(d)(3) provides that a single judge may issue a writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue a writ "pursuant to circuit rule or the [Appellate Rules]."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. It is difficult to imagine that a court can review a petition, order the respondent to file an answer, await the answer, read the answer, make a decision, and draft a written opinion — all within 72 hours.

Finally, the fact that the deadline is stated in hours rather than days raises interesting time-computation issues. For example, if the victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? It is not clear how the time-computation rules of Rule 26(a) will apply.

The Advisory Committee is considering three options for addressing these problems.

One option for the Committee is to propose systematic changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus, or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting an answer, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the Committee is to add a new subdivision (e) to Rule 21 — a subdivision that would specifically address mandamus petitions filed under § 3771(d)(3). That subdivision would supersede the other rules and set up a "fast-track" system that would apply to § 3771(d)(3) petitions.

A third option for the Committee is to do nothing for the time being. That would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be only a handful every year) and to get a better understanding of the problems that the courts of appeals will encounter in handling those petitions. In the meantime, a court of appeals has authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause."

The Advisory Committee discussed this issue at its April meeting and ultimately decided to request that the Department of Justice give the issue further study and prepare a recommendation for the Committee.

ATTACHMENT

SAMPLE

October 1, 2005

The Honorable Michael Boudin
United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
One Courthouse Way
Boston, MA 02210

Dear Chief Judge Boudin:

I write in my capacity as Chair of the Advisory Committee on the Federal Rules of Appellate Procedure ("FRAP").

Over the past few years, appellate practitioners and bar organizations — including the Department of Justice and both the Council of Appellate Lawyers and the Appellate Judges Conference of the American Bar Association — have expressed concern about the proliferation of local rules. These concerns have focused on local rules regarding the content of briefs. Practitioners contend that these local rules are numerous, vague, and confusing; that these local rules are often in tension, if not in conflict, with FRAP; and that it is difficult for practitioners to find, much less to follow, all local rules on briefing. Practitioners say that they must devote significant time — time that is often charged to clients — researching local briefing requirements and resubmitting briefs that have been "bounced" by clerks for failure to comply with a local briefing requirement. Practitioners have urged the Advisory Committee to take action to reduce or eliminate local rules on briefing.

In order to assist its deliberations, the Advisory Committee asked the Federal Judicial Center ("FJC") to assess the scope of this problem. Enclosed is the exhaustive report prepared by the FJC, entitled *Analysis of Briefing Requirements in the United States Courts of Appeals*. The FJC reported that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in FRAP. According to the FJC, over half of the courts of appeals impose seven or more such requirements, and some impose as many as ten.

The FJC has also described for us the difficulty it encountered in trying to identify all local requirements regarding briefing. Depending on the circuit, those requirements may be found in local rules, internal operating procedures, standing orders, practitioner guides, or briefing checklists. In some cases, it was impossible for the researchers employed by the FJC to be confident that they had located all local directives regarding briefing without calling the clerk's office.

The Advisory Committee has discussed the FJC's findings at great length. The Advisory Committee has determined that the best way to address the local-rules problem is to seek the assistance of the circuits. The Advisory Committee has two requests:

First, the Advisory Committee urges every circuit to collect all requirements regarding briefing in one clearly identified place on its website. The E-Government Act of 2002 requires every court to post all local rules, standing orders, general orders, and judges' individual rules on the court's website. Placing all briefing requirements, including those found in the court's internal operating procedures, in one centralized location — or even including a prominent notice that identifies and links to all briefing requirements — would be consistent with the Act's purpose. It would also help the bar, improve the administration of justice, and likely reduce the number of complaints about local rules.

Second, the Advisory Committee requests that you review the enclosed report and consider whether the additional requirements on briefing imposed by your circuit might be reduced or eliminated. The FJC identifies the additional requirements on briefing imposed by your circuit as including the following:

[LIST LOCAL RULES, IOPs, ETC.]

The Advisory Committee understands that the circuits differ and thus that some local variation might be appropriate. The Advisory Committee also understands that, especially in this era of rapidly changing technology, allowing circuits to experiment in their local rules can be beneficial to all. At the same time, the purpose of some of the local variations imposed by the circuits is not clear, and it seems likely that many of them could be eliminated.

Thank you for your attention to these requests.

Sincerely,

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

cc: First Circuit Clerk
First Circuit Executive
First Circuit Advisory Committee