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

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: **May 6, 2005 (Revised October 7, 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.

* * * * *

II. Action Items

* * * * *

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the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished" or "non-precedential" by a federal court. New Rule 32.1 will also require parties who cite unpublished or non-precedential opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

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

Committee Note

* New material is underlined; matter to be omitted is lined through.

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion or claim preclusion. But the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. Some circuits have freely permitted such citation, others have discouraged it but permitted it in limited circumstances, and still others have forbidden it altogether.

Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on

the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rule 32.1(a) applies only to unpublished opinions issued on or after January 1, 2007. The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits.

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 a commercial database maintained by a legal research service or a database maintained by a court. 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. Rule 32.1(b) applies to all unpublished opinions, regardless of when they were issued.

---

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.

---

*At its June 15-16, 2005, meeting, the Standing Rules Committee with the advisory committee chair's concurrence agreed to delete sections of the Committee Note, which provided background information on the justification of the proposal.

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.

* * * * *

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

a. Introduction

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

b. Text of Proposed Amendment and Committee Note

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

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

16 * * * * *

Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under Rule 25(a)(2)(D), a local rule that requires electronic filing must include reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 25(a)(2)(D).

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

---

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

*At its June 15-16, 2005, meeting, the Standing Rules Committee with the concurrence of the advisory committee chair agreed to set out the "reasonable exception" clause as a separate sentence in the rule, consistent with drafting conventions of the Style Project.

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.

* * * * *