PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

I. Appellate Rule 32.1

A. Brief Description

The present practices governing citation of unpublished opinions vary among the circuits, with some permitting citation, others disfavoring citation but permitting it in certain circumstances, and others prohibiting citation. Nine circuits now permit citation of unpublished opinions, at least when, in the judgment of counsel, there is no precedential opinion on point.

Proposed new Rule 32.1 permits the citation in briefs of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like and supersedes limitations imposed on such citation by circuit rules. The new rule is very limited. The rule expressly takes no position on whether unpublished opinions should have any precedential value, leaving that issue exclusively for the circuits to decide.

B. Arguments in Favor

- In 2001, the Department of Justice requested the advisory committee to amend the rules to establish uniform procedures permitting citation of unpublished opinions. Many bar associations, attorneys, and members of the public, and numerous law review and bar journal articles had been urging a review of the disparate citation practices, which caused confusion.[1]

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[1] A thorough discussion of the subject can be found in *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers in the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002). The American College of Trial Lawyers recommended that "the rules governing access to and use of 'unpublished' opinions in the circuit courts should be uniform. The existing circuit-by-circuit patchwork is confusing, perilous, and getting worse."

- Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying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 public 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.

- The rules committees found the evidence overwhelming that unpublished opinions can be a valuable source of "insight" and "information." Unpublished opinions are widely read by both attorneys and judges, and often cited by attorneys, district court judges, and appellate court judges, even in circuits that purport to forbid such citation. Unpublished opinions can be particularly helpful to district court judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. That may explain why only four of the 1000-plus active and senior district judges have expressed concerns about Rule 32.1.

- No-citation rules forbid attorneys from bringing to the court's attention information in unpublished opinions that might help their client's cause. No-citation rules prohibit attorneys from explaining how substantive legal rules have actually been applied by the court and in what actual — not hypothetical — circumstances the issue at hand has been coming before the court.

- No-citation rules are especially troublesome when an unpublished opinion has been erroneously characterized as routine, even though some courts mitigate this problem by adopting procedures allowing a court to reconsider publishing a particular opinion.

C. Objections

- There is nothing of value in unpublished opinions. These opinions 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 are necessary for busy courts because they take much less time to draft than published opinions. Judges do not spend as much time on drafting unpublished opinions because they know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, 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.

- Abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will increase the size of the body of case law that will have to be researched by attorneys. Second, it will make the body of case law more difficult to understand.

D. Rules Committees' Consideration

The Federal Judicial Center (FJC) conducted an empirical study to assess the rule's potential impact on the courts' workload and the Administrative Office conducted a comparative statistical study of the median case disposition time and the number of summary dispositions in the nine circuits that permit citation of unpublished opinions. Both studies failed to support the main arguments against proposed Rule 32.1.

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). Many unpublished opinions include lengthy discussions of legal issues and may include a dissenting opinion. The Supreme Court has granted review of several unpublished decisions.[2] The FJC findings showed that a large minority of surveyed judges (55) found citations to unpublished opinions to be "occasionally," "often," or "very often" helpful. It also 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.

Numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has been significantly burdened. The rules committees received no comment from any judge from a circuit that permitted citation of unpublished opinions asserting that the citation policy has had bad consequences. When the FJC asked the judges of the nine circuits that permit citation of unpublished opinions 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. The AO's study 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."

Attorneys surveyed as part of the FJC study reported that proposed Rule 32.1 would not have an "appreciable impact" on their workloads. Moreover, the attorneys who expressed positive views about proposed Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits.

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[2] *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing unpublished decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing unpublished decision of Second Circuit); and *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004) (reversing unpublished decision of Sixth Circuit).

Whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today in changed circumstances. 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.

Federal Rules of Civil Procedure

The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents; computer networks store information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text. Computer information, unlike paper, is also dynamic; merely turning a computer on or off can change the information it stores, and computers operate by overwriting and deleting information, often without the operator's specific direction or knowledge. A third important difference is that electronically stored information, unlike words on paper, may be incomprehensible when separated from the system that created it. These and other differences are causing problems in discovery that are difficult to address under the present rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of varying local rules is likely to develop in areas in which the federal civil rules are designed to provide uniformity.

I. Civil Rule 26(b)(2)

A. Brief Description

The proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, a recurring area of dispute in such discovery. Examples from current technology of information that is not reasonably accessible include information that has been "deleted" but may be restored using computer forensics; information on some backup-tape systems that are intended for disaster-recovery and are not susceptible to electronic searching; and legacy data remaining from systems no longer in use. Under the amendment, a party is authorized to respond to a discovery request by identifying sources of potentially responsive electronically stored information that are not reasonably accessible because of undue burden or cost. The responding party need not search or produce information from those sources absent court order. If the requesting party seeks

discovery from such sources, the responding party has the burden to show that the sources are not reasonably accessible. Even if that showing is made, the court may order discovery if, after considering the limitations established by present Rule 26(b)(2), including proportionality, the requesting party shows good cause. The court may impose terms and conditions for the discovery.

B. Arguments in Favor

- The proposed amendment responds to problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage can facilitate discovery, some forms of computer storage make it very burdensome and expensive to access, search for, and retrieve the information they contain.

- The proposed amendment incorporates a common-sense approach by requiring parties to identify sources of information that may be responsive to discovery requests but are not reasonably accessible and to examine information that can be provided from more easily-accessed sources to determine whether it is necessary to search the more difficult-to-access sources, and by facilitating judicial supervision when necessary to resolve disputes.

C. Objections

- The rule allows a party to self-designate information not produced because it is not reasonably accessible.

- The rule may lead to parties making information inaccessible to avoid producing it in discovery.

D. Rules Committees' Consideration

All party-managed discovery rests on self-designation. The amendment is an improvement over present practice, in which responding parties simply object or do not respond to a request for information that is not reasonably accessible, because the amendment requires the responding party to identify the sources of potentially responsive information that it is neither searching nor producing because of the costs and burdens of accessing the information. The amendment codifies the best practices of parties and courts sophisticated in these problems and supports the application of the proportionality factors in present Rule 26(b)(2) to problems that are unfamiliar to many and that, without appropriate supervision, can result in significant cost and delay.

The amended rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes. A party that makes information "inaccessible" because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed amendment

II. Civil Rule 26(b)(5)

A. Brief Description

The proposed amendment to Rule 26(b)(5) clarifies the procedure to apply when a responding party asserts a claim of privilege or of work-product protection after production. Under the proposed amendment, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, it may notify the receiving party of the claim, stating the basis for it. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. The amendment does not address the substantive questions of whether privilege or work-product protection has been waived or forfeited.

B. Arguments in Favor

- The inadvertent production of privileged or protected material is a substantial risk in all forms of discovery, but that risk is particularly acute with discovery of electronically stored information. The volume of electronically stored information searched and produced in response to discovery can be enormous, and certain features of the forms in which such information is stored make it more difficult to review for privilege and work-product protection than paper. Because of the potential consequences of such production, a consistent and clear procedure for litigating such claims is increasingly important.

C. Objections

- The new procedure could be used to disrupt litigation, particularly if the claim of privilege or work-product is made late in the case.

D. Rules Committees' Consideration

The amended rule received general support. The rules committees did not believe that parties would be likely deliberately to delay asserting claims of

privilege or work-product protection, because to do so would waive the protection under the applicable substantive law of many jurisdictions. The amendment does not affect the substantive law of waiver; courts will continue to examine whether a privilege or work-product protection claim was made at a reasonable time when delay is part of the substantive law on waiver. The amendment does not create opportunities for delaying claims of privilege or protection in order to disrupt pretrial discovery or trials, and courts are fully capable of recognizing and responding to such tactics if they are used.

III. Civil Rule 37(f)

A. Brief Description

The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. The proposed amendment states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.

B. Arguments in Favor

- Computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper. To control the amount of information stored, computer systems regularly purge e-mail and other communications and information. To continue operations, systems must be able to filter the communications they store. To have certain databases function, they must continually revise the information they manage. Such information destruction features are an integral part of computer system design and operation.

- The proposed rule recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, and in many cases unnecessary for the reasonable discovery needs of a particular case.

- There is considerable uncertainty as to whether a party must, at risk of severe sanctions, interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that the information might be sought in discovery.

C. Objections

- The rule provides an incentive for a party to set up a records destruction policy that systematically destroys relevant information harmful to its interests.

D. Rules Committees' Consideration

The rules committees recognized the need to ensure litigants' ability to obtain evidence through discovery. At the same time, the rules committees recognized the need for limited protection from sanctions in the narrow circumstance of an inability to provide electronically stored information lost as a result of the routine operation of an electronic information system operated in good faith. The amendment strikes this balance. The primary objection assumes that responding parties will invariably want to destroy information, which in turn assumes that all such information is damaging. In most cases, responding parties have both favorable and unfavorable information and need to retain information for a variety of reasons ranging from legal and regulatory requirements to business and organizational needs. The proposed amendment does not provide a shield for a party that intentionally destroys specific information because of its relationship to litigation, or for a party that allows such information to be destroyed in order to make it unavailable in discovery by exploiting the routine operation of an information system. Selective loss of unfavorable information is not good faith, as the rule and note make clear. Depending on the circumstances, good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation.

Federal Rules of Evidence

I. Evidence Rule 408

A. Brief Description

The proposed amendment to Rule 408 published for comment provided that a statement or conduct regarding a claim made in the course of settlement negotiations in a civil dispute may be admitted in any subsequent criminal case. The amendment distinguishes statements and conduct in settlement negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise settlement of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded from all criminal cases if offered against the defendant as an

admission of fault because a defendant may offer or agree to settle a litigation for reasons other than a recognition of fault.

B. Arguments in Favor

- Statements of fault may provide the sole or critical evidence of guilt in a subsequent criminal prosecution.

C. Objections

- The rule would deter settlement discussions.
- It would create a trap for the poorly counseled who might not know that statements of fault made in a settlement of a civil case might be later used against them in a criminal case.
- It is often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred by the government and used as an admission of guilt, such an apology would not be made in the first place.

D. Rules Committees' Consideration

The proposed amendment published for comment contained a broader exception, which would have permitted a statement or conduct regarding a claim made during settlement negotiations to be admitted in any subsequent criminal case. In light of the concern that such a broad exception would chill settlement negotiations in a civil case, a compromise provision was adopted to admit such a statement or conduct in a later criminal prosecution only if made in a civil dispute initiated by a government regulatory agency. When an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected.