

The Legal Intelligencer  
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**A Look at Proposed Appellate Procedural Changes**  
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Several important proposed amendments to the Federal Rules of Appellate Procedure have been released for public comment. One of the amendments, believe it or not, even happens to be controversial. The public comment period will draw to a close Feb. 16. The good news is that plenty of time remains to review and consider the proposed amendments, and comments are even being accepted over the Internet.

The most controversial of the proposed amendments introduces a new rule that will be designated Federal Rule of Appellate Procedure 32.1. Rule 32.1 will allow advocates to cite on appeal to decisions that the issuing court has identified as non-precedential and/or not-for-publication. Once this proposal takes effect, the local rules some federal appellate courts currently have that prohibit or discourage the citation of non-precedential or not-for-publication opinions will be rendered nullities.

As long-time readers of this column will recall, I have repeatedly urged federal appellate courts to eliminate both these no-citation rules and the practice of designating any decisions as non-precedential. Proposed Rule 32.1 accomplishes the first of these two goals but takes absolutely no position on the second. In other words, while federal appellate courts will not be able to prevent advocates from citing non-precedential opinions, some appellate courts may continue to treat such opinions as though they did not exist.

The rationale for eliminating no-citation rules is captured in the following snippet from the Advisory Committee on Appellate Rules' note: "It is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence except those contained in the court's own 'unpublished' opinions." The entire Advisory Committee's note to proposed Rule 32.1 is well worth reading.

What makes Rule 32.1 so controversial is the fear some federal appellate judges have that it will ineluctably lead to the abolition of non-precedential decisions. Unsurprisingly, the 9th U.S. Circuit Court of Appeals, which has a devil of a time ensuring that its precedential decisions are internally consistent, is one of Rule 32.1's most fervent opponents. On the other hand, I think this new rule is great and long overdue.

#### **Briefs Filed in Cross-Appeal**

Also great and long overdue are the changes found in proposed Rule 28.1. That rule will contain the requirements applicable to briefs filed in a cross-appeal. To understand the rules governing briefing in a cross-appeal, it is useful first to review the rules that apply in the absence of a cross-appeal.

In a case in which only one of the opposing parties appeals, typically three appellate briefs are filed: the appellant files an opening blue-covered brief, the appellee files a responding red-covered brief and the appellant then files a reply brief with a gray cover.

In a cross-appeal, typically a total of four appellate briefs are filed. The lead appellant begins by filing the Step 1 brief that raises the appellant's issues. The appellee/cross-appellant then files a Step 2 brief, responding to the appellant's appeal and raising the issues involved in the cross-appeal. In the Step 3 brief, the appellant can reply in support of its appeal and must respond to the appellee's cross-appeal. Finally, in the Step 4 brief, the appellee can reply in support of its cross-appeal.

Under current practice, in many circuits the briefs filed at Steps 1 to 3 of a cross-appeal have

exactly the same length limits, and the briefs filed at both Steps 2 and 3 have red covers even though they are filed by opposing parties.

Under new Rule 28.1, by contrast, the Step 2 brief will have a longer length limit than the Step 1 and 3 briefs. The Step 3 briefs must have yellow covers [alert the copy center to start stocking up, as these changes will take effect in December 2005]. The appellant in a cross-appeal will still receive under the proposed rule more text in which to brief the case than the appellee receives, but no one ever promised that life would always be entirely fair.

### **On en banc rehearings**

Speaking of which, the proposed amendments to Federal Rule of Appellate Procedure 35 will make life somewhat more fair for federal appellate judges who desire rehearing en banc in cases in which other of their active judge colleagues are recused. In order to obtain rehearing en banc, a majority of active judges on a circuit must vote in favor.

A split among the circuits has arisen over whether the majority requirement entails a fixed absolute majority of all active judges, regardless of whether any active judges are recused or whether only a majority of the non-recused active judges is required.

An illustration will help clarify the difference between these two alternatives. Assume a federal appellate court has a total of 13 judges in regular active service. In order for rehearing en banc to be granted in a case in which no active judge is recused, a total of seven votes in favor of rehearing en banc is needed.

Now take a case in which three of the 13 active judges are recused from participation. The "absolute majority" approach would require that seven of the 10 remaining non-recused judges vote in favor of rehearing en banc for it to be granted. The "case majority" approach would require that only a majority of the non-recused judges vote in favor of rehearing, so that six votes out of 10 would suffice.

I have previously argued in this column in favor of a rule that would require only a majority of the non-recused active judges, because [among other reasons] the "absolute majority" approach essentially counts recused judges as voting against rehearing en banc. The proposed amendment to Rule 35 sides with me and would allow a majority of non-recused active judges to order rehearing en banc.

The commentary accompanying the amendment involving rehearing en banc notes that while the Advisory Committee unanimously favored a nationwide rule, the committee split 5-3 [with one abstention] over which approach to adopt. The proposed amendment reflects the approach that a majority on the Advisory Committee favored.

### **Other requirements**

Rule 27 will be amended to specify that the typeface conventions that now apply to briefs will also apply to motions filed in the federal courts of appeals. Thus, 14-point type would appear to be the order of the day for federal appellate practitioners.

The two final amendments are intended to undo problems that arose when the Federal Rules of Appellate Procedure were restyled in order to read more clearly. Had the rules been restyled to read less clearly, presumably even more havoc would have resulted.

The first of these two changes requires very much explanation in exchange for a rather small payoff, so readers who must know every last detail of these amendments are left to their own devices. The remaining stylistic change is described as the "Washington's Birthday Package." Let's remove the wrapping and take a look inside.

When the appellate rules recently were restyled, all references to "Washington's Birthday" in rules listing court holidays were replaced with the term "Presidents' Day." While that change met

with acclaim from devotees of Honest Abe Lincoln, apparently in retrospect, the amendment turned out to be a huge mistake. As a result, all references to "Presidents' Day" in the current Federal Rules of Appellate Procedure will, as of Dec. 1, 2005, once again appear as "Washington's Birthday."

The full text of these proposed amendments to the Federal Rules of Appellate Procedure can be accessed online at [www.uscourts.gov](http://www.uscourts.gov). From there, simply click on the link for "Federal Rulemaking," followed by the links for "Proposed Rules Amendments Published for Comment." From that screen, you will be able to access the full text of the proposed appellate rule amendments and the accompanying commentary and notes. Also, you will be able to submit comments on the proposed rules electronically over the Internet.

The proposed amendments allowing citation to non-precedential opinions, clarifying the format of briefs filed in cross-appeals and specifying how the majority en banc voting requirement operates are excellent. The Advisory Committee, headed by 3rd Circuit Judge Samuel A. Alito Jr., deserves to be commended for its fine work.

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