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April 27. 2007

Clerk of the Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: **Comments on Proposed Rule GR 14.1**

To The Honorable Supreme Court of the State of Washington:

I would like to submit the following comments regarding the proposed Rule GR 14.1.

I have also enclosed, as a separate volume, the detailed Federal Judicial Conference committee report that led to the adoption of Federal Rule of Appellate Procedure 32.1. I previously provided a copy of this report to the WSBA Court Rules and Procedure Committee ("WSBA Rules Comm."), but I am not sure whether or not this material would have been passed on to this Court. This report details the exhaustive investigation and analysis of the committee that recommended FRAP 32.1 to the Supreme Court. The committee was chaired by Samuel A. Alito, Jr. then Judge of the Circuit Court of Appeals for the Third Circuit and now Justice of the U.S. Supreme Court and vice chaired by John G. Roberts, Jr. then Judge of the Circuit Court of Appeals for the D.C. Circuit and now Chief Justice of the U.S. Supreme Court. It should be noted that the then proposed FRAP 32.1 was subsequently modified before being submitted to the U.S. Supreme Court by limiting its effect to unpublished opinions issued after January 1, 2007, but the committee at the time of the modification referenced but did not repeat this report. The Federal Judicial Conference report addresses the same arguments asserted by the proponents of GR 14.1 that were also raised against the proposed FRAP 32.1. The report also addresses the lack of any supporting evidence for those arguments, and the conflict of those argument with the actual experiences of courts.

My Background for Making These Comments

I graduated from the University of Michigan Law School in 1959 and stayed on at that law school as an Instructor of Law, to help create and then teach that law school's first formal research and writing course. I was also an Adjunct Professor of Law at the University of Puget Sound Law School (now Seattle University Law School) in 1974-1976 to help establish its initial research and writing and moot court programs.

I joined the law firm that became known as Bogle & Gates PLLC in 1960 and remained with that firm until it dissolved in 1999.[1] I was the Chair of that firm's Appellate Practice Group.

I am admitted to practice before: the Supreme Court of Washington (since February 1961); the United States Supreme Court; the Ninth Circuit Court of Appeals; and the United States District Courts for the Western and Eastern Districts of the Washington. I have also practiced before: the Supreme Court of Alaska; the United States District Courts for the District of Alaska, the Northern District of California, the Central District for California, the Southern District for California, the District of Hawaii, the District of Idaho, and the District of Oregon; the Federal Maritime Commission; and the National Labor Relations Board.

I served on the WSBA Rules Comm. for the 2004-2005 and 2005-2006 terms and opposed GR 14.1 as it is presently being proposed.

My Comments in Opposition to Proposed GR 14.1

It is important to distinguish between an opinion that is a binding precedent and an opinion that is not a binding precedent but is being cited as having persuasive value. Whether intentionally or inadvertently, the proponents of GR 14.1 repeatedly seek to ignore or confuse this distinction.

GR 14.1(a)

A published opinion of a Division of the Washington Court of Appeals is a precedent **within that Division** and binding upon that Division and the lower courts within that Division. It is not a precedent or binding in any other Division. Within the other Divisions it may be cited but only for its persuasive value. Different Divisions of the Washington Court of Appeals frequently disagree with each other – as they should be free to do.

At the time of creation of the Washington Court of Appeal as a new level of appellate courts, a concern was the increase in publishing costs and the ever rapidly expanding need for shelf space to house appellate reports. Since the Court of Appeal would be a court to which any litigant would have an appeal as a matter of right, it was felt that there could be repetitive, routine cases that need not be published. Thus RCW 2.06.040 states with regard to the Court of Appeal:

> "In the determination of causes all decisions of the court shall be given in writing and the grounds of the decisions shall be stated. All decisions having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published."

[1] Since then I have been in-house counsel for two related privately held companies: Cedar Grove Composting, Inc. and Emerald Services, Inc.

You will note that the statute only addresses what shall be published and contains to restriction on the citation or discussion of unpublished decisions. I am unaware of any legislative history that would support an argument that the legislature intended to prohibit parties and their counsel from citing or discussing unpublished opinions they felt would have some persuasive value – and certainly no proponent of the proposed GR 14.1 ever identified any such legislative history to the WSBA Rules Comm. RAP 10.4(h), it should be noted, was not added to the court rules until approximately two decades later in 1985.

If the various panels of the Court of Appeals over the years would have strictly limited their designations of "not to be published" to truly repetitive, routine dispositions there would probably be no controversy. Even with the subsequent guidance of RAP 12.3 (d), however, various panels over the years have been unable to restrict themselves to designating only the truly repetitive, routine dispositions as "not for publication." Indeed, at times it would appear that the actual presence of the criteria listed in RAP 12.3(d) acts perversely to increase the chances that a decision will be designated as "not for publication." It is discouraging the number of times I have received or reviewed unpublished decisions containing phrases such as "a matter of first impression", "a unique issue" or other phrases indicating that the panel was in fact aware that it was not deciding repetitive, routine issues of law.

A random review of recent Court of Appeal advance sheets would indicate that the majority of decisions are now designated as "not for publication" and a very significant number of unpublished decisions involve the reversal, in whole or in part, of the Superior Court. The Superior Court being reversed is unlikely to have felt it was making a decision in conflict with a routine issue of established law when it made its decision.

Further, no matter what words are used to describe the effect of an unpublished decision, it clearly will have a de facto precedential effect on the Superior Court involved. That Superior Court judge (and probably other judges of the same court) is unlikely to rule in the future other than in accordance with that unpublished Court of Appeals decision even though it is never cited. Yet, an attorney or party in a future case knowing of that unpublished opinion but wishing to argue to the Superior Court for a different result is not permitted to even mention the unpublished opinion in an argument attempting to distinguish it.

A random review of this Court's advance sheets would indicate that a very significant portion (if not a majority) of the Court of Appeals decisions granted review involve unpublished decisions. Unless this Court is deemed to have so little to do that it is granting frivolous review to merely repetitive, routine decisions, every time this Court grants review of an unpublished decision it is, in fact, certifying that the Court of Appeals decision was improperly designated "not for publication."

The liaison from the Court of Appeals to the WSBA Rules Comm. raised a number of arguments in favor of the proposed GR 14.1 that were outside (if not in conflict with) the criteria set forth in RAP 12.3(d) -- such as: too little time to write a decent opinion; an undisclosed concern about the quality of the briefing; no harm by prohibiting citation; etc. I forwarded to the judge, as examples, references to three unpublished Court of Appeals decisions and asked how

the judge's arguments could justify both their non-publication and prohibiting any citation and discussion of them (even as non-precedent authorities).

1. The first involved a situation where this Court issued two opinions on the same day (indeed, appearing back-to-back in the advance sheets), authored by the same justice, involving the same issue of law (under what circumstances, if any, a person could bring suit in this state and still recover punitive damages based upon foreign law), and reaching opposite results – without either opinion discussing the other opinion. Almost immediately after the publication of those opinions, a Superior Court judge in Tacoma based upon an unarticulated analysis of those two opinions instructed a jury they were entitled to return punitive damages and entered judgment on a punitive damage award approximately forty times any actual damages relying on California law. Division Two of the Court of Appeals reversed the award of punitive damages based upon its own detailed analysis of those two opinions as applied to the case before it – in an unpublished opinion. At the time of that unpublished opinion there clearly was no other appellate opinion discussing and applying those two opinions from this Court.[2] While subsequent published opinions have referred to one or the other of those two opinions of this Court, to the best of my knowledge that unpublished Division Two opinion remains the only appellate decision expressly dealing with the interrelationship of those two opinions. (*Sexton et al v. Albany Frozen Express et al,* Court of Appeals, Division Two, Cause No. 6678-5-II, November 8, 1984) – copy attached.

2. Phillips Service Company (a company doing business in the State of Washington, including under the previous name Burlington Environmental, Inc.) filed for bankruptcy protection in the Southern District of Texas, Houston Division. At the time of the bankruptcy filing, there was pending litigation in this state between the debtor (under its previous name) and the City of Bremerton ("Bremerton Litigation"). The Bankruptcy Court lifted the automatic stay to permit the Bremerton Litigation to proceed. Subsequently, the City of Seattle filed a claim in an adversarial proceeding in the Bankruptcy Court in Houston that involved a common major issue with the Bremerton Litigation -- the apportionment requirements that applies to a B&O tax as a gross receipts tax. Division Two of the Court of Appeals resolved the apportionment issue in favor of the debtor – in an unpublished opinion. The Bankruptcy Court in Houston resolved the same apportionment issue against the debtor – refusing to consider Division Two's unpublished opinion because of the language of our RAP 10.4(h).[3] We thus had a Texas Bankruptcy Court decision on an issue of Washington law that could be cited to the courts in this state, even though it was in fact in conflict with an unpublished Division Two decision which attorneys would be prohibited from even mentioning to a court in this state. Fortunately, the U.S. District Court has

[2] Division Two denied motions to publish the decision.
[3] Material submitted to the WSBA Rules Comm. identified Texas as a state that supposedly permitted citation to unpublished decisions.

just recently overruled the Bankruptcy Court on that issue based upon its own analysis of Washington law and stating in a footnote:

> "This finding is consistent with, but not dependant on, the unpublished opinion cited by Philip Services in it motion for reconsideration to the Bankruptcy Court. *Burlington Environmental, Inc. v City of Bremerton*, No. 31923-3-II (Court of Appeals, Washington, Division II, February 15, 2006)"

Philip Services Corporation et al v. City of Seattle (United States District Court for the Southern District of Texas, Houston Division, Civil Action No. H-06-2518, March 2, 2007) – copy attached. Thus we are least spared having to deal with a citable Texas Bankruptcy Court decision on Washington law in conflict with a Division Two decision that we would be prohibited from even discussing.

3. The third unpublished option was the Division One unpublished opinion in *Vestenberg et al v. City of Seattle et al*, 2005 Lexis 290, involving admitted issues of first impression and briefed by numerous lawyers for the different parties and for amicus curiae. I have not attached a copy of that unpublished opinion since it is already before this Court as a result of this Court's subsequent grant of review and presumably the Court is well aware of it.

Needless to say, I never did hear any attempted justifications.

There are obviously additional problems with both the existing RAP 10.4(h) and the proposed GR 14.1(a), including, for example:

- Both rely upon the ambiguity of the phrase "may not cite **as an authority**" (emphasis supplied) to preserve the independent use of an unpublished decision as a necessary element of various legal doctrines. Outside of a subsequent proceeding in the same case, attorneys still seek to convince lower courts and arbitrators that the use of unpublished decisions for such purposes is improper – particularly in matters such judicial estoppel or collateral estoppel.

- Increasingly, legal articles in law reviews and elsewhere (including in the Washington State Bar News) rely upon and cite unpublished decisions in support of their analysis. Presumably the citation of, and quotations from, those articles remains proper – although ironically opposing counsel is unable to discuss the unpublished decisions in order to argue that they do not support the article's analysis.

- RAP 10.4(h) has led to some strained rationales. See, for example, *State v Golden*, 112 Wn. App. 68, 80-81 (2002) (an attorney may call a trial court's attention to an unpublished opinion as "guidance" during oral argument, the

rule only prohibits citing unpublished opinions as authority in a brief). I.e., sandbag opposing counsel at oral argument.

Lastly, an interesting comment in the cover sheet information is worth noting: "The rule will continue to apply only to unpublished opinions of the Court of Appeals; it does not apply to citation to opinions or orders of other tribunals, such as orders issued by a superior court or court of limited jurisdiction." Retranslated: superior court judges and other lower court judges, in spite of their workloads and without law clerks and other resources of the Court of Appeals, are competent to produce unpublished decisions which are not binding precedents but which have sufficient value to permit them to be cited for whatever persuasive value they may have – but Court of Appeals judge are not competent to do so.

It is submitted that the limitations on publication and the ability of Court of Appeals panel to designate decisions as non-precedential can be preserved, and the other problems eliminated by substituting the following language for the proposed GR 14.1(a):

> **(a) Washington Court of Appeals.** Unpublished opinions of the Court of Appeals are those not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals are not precedents and are not binding upon any court, including the Division of the Court of Appeals issuing the unpublished decision. Unpublished opinions of the Court of Appeals, however, may be cited as non-binding authorities for whatever persuasive value they may be considered to have. An unpublished opinion of the Court of Appeals may also be independently used to establish a necessary element of a legal doctrine, such as law of the case, res judicata, collateral estoppel, judicial estoppel and similar doctrines.

GR 14.1 (b)

Except for the opinions of the United States Supreme Court, every opinion from any federal court or any state court other than those in the State of Washington are clearly not "precedents" in our courts and have no binding effect upon any of our state courts. Such opinions (published or unpublished) are cited to our courts only for what persuasive value they may have – along with a vast multitude of other non-precedential materials. The wide-spread availability and citation of unpublished opinions is not a new creation of computers or the internet, but existed for at least well over half a century through various loose leaf services such as CCH, BNA and the various federal rules services (not to mention the multitude of references and quotations in treatises, law review articles, etc.).

Perhaps I have a higher opinion and respect for the members of our judiciary than do those proposing GR 14.1(b). I truly to believe that all of them (or at least virtually all of them) are fully capable of distinguishing between what is and what is not a "precedent" and to appropriately and effectively evaluate and deal with non-precedential materials cited to them as having persuasive value. The cover sheet information provided by those proposing GR 14.1

attempts to create a contrary impression, but, if anything, discloses their own inability or unwillingness to recognize and make the appropriate distinction:

> "*Starypan v. Metro Park Dist. of Tacoma* 105 Wn. App. 1025, 2001 WL 285827, at *3 n.3 (2001) (Division II) (under Washington law unpublished decisions from other jurisdictions **have no precedential value**). Without resolving the issue of whether or not parties may cite to unpublished federal opinions, the Washington Supreme Court has both embraced and rejected such opinions. *Compare WeyerhaeuserCo. V Commercial Union Ins. Co.*, 142 Wn.2d 654, 678, 15 P.3d 115 (2000) (citing unpublished federal district court decisions **as persuasive**) with *Wash. Banker's Assn's v. Wash. Mut. Sav. Bank*, 92 Wn.2d 453, 462-63, 598 P.2d 719 (1979) (noting that unpublished federal decision cited by party **had no precedential value**.)" (emphasis by bolding supplied)

Each of those opinions correctly recognized the distinction between precedent and authority cited for persuasive value (which may or may not be accepted by the court as persuasive). Our Court of Appeals continues to cite and rely upon unreported federal decisions in their analysis **when they find the authority persuasive** and to consider an reject them **when they find the authority is not persuasive..** See, for example, *State of Washington ex rel P.D.C. v Permanent Offense,* 136 Wn. App. 277, 283 (Division One, November 6, 2006) and *Oltman v Holland Am. Line,* 136 Wn. App. 110, 125 (Division One, September 11, 2006)

However, in light of the unfortunate and unjustified comments in *Mendez v Palm Harbor Homes, Inc.*, 111 Wn. App.446, 472-473, 45 P.3d 594 (2002), it is essential that the issue of citing unpublished opinions from other jurisdictions be expressly addressed. The proposed GR 14.1(b), however, is not the appropriate solution.

The structure of proposed GR 14.1(b) is to define a class of specifically designated unpublished opinions which can be cited "as an authority" and then impose a limitation that citation to the opinion is permitted "only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." This structure has three problems:

1. It is unnecessary, and should be unnecessary, to define what decisions may be cited in terms of designating language being used. Some opinions, such as federal district court opinions, for example, are never "designated" as not for publication in any manner – although many of them are in fact never published in any official reporter system, may be published only in a loose leaf service or may only appear in an internet service or on a web site. Some Illinois opinions, for example, are published but in "Syllabus only" format.

2. The reference to citing "as an authority" could be confusing. Is the proposed rule stating, or implying, that they have some precedential value.

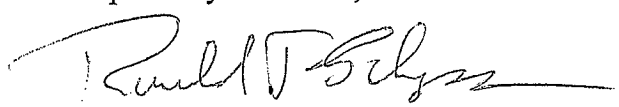
3. The most critical problem is the attempt to create satellite litigation by imposing a condition that "citation to that opinion is permitted under the law of the jurisdiction of the issuing court." This limitation is totally unnecessary. Such opinions are not precedents and are cited only for any persuasive value they may

have. Whether or not a given unpublished opinion has any persuasive value and the manner in which a Washington court would not deal with it would not differ depending upon whether or not it could be cited in another jurisdiction. Furthermore, the question of whether or not the jurisdiction of the issuing court would permit its citation is not necessarily a simple, straight forward question – it is not necessarily in a rule or statute, but may be in case law; it is not necessarily a flat "yes" or "no" but at times is a "maybe" depending upon the circumstances or whether or not counsel feels there is no fully adequate published decision; and it may vary over different periods of time. Must the citing attorney "prove" the condition has been met at the time of citing the opinion or is it up to opposing counsel to challenge whether the condition has been met? What happens if there is disagreement or a lack of clarity? Instead of avoiding the motions to strike and/or for sanctions spawned by the *Mendez* opinion, it actually encourages them and creates a new cottage industry for litigating attorneys, adding expenses to the costs of litigation to the client and increasing the workload of the judiciary. For what? Those proposing the restriction never articulated any reasonable need or rationale for it and to the best of my knowledge no similar restriction exists in other jurisdictions – at least certainly no comparable restriction from any other jurisdiction was presented to the WSBA Rules Comm..

It is submitted that the following language should be substituted for the language of the proposed GR 14.1(b):

> **(b) Other Jurisdictions.** A party may cite opinions (published or unpublished) issued by any court for a jurisdiction other than Washington. Except for opinions of the United States Supreme Court, such opinions shall not be precedents binding upon the courts of Washington but may be cited for what persuasive value they may be deemed to have. Such opinions may also be independently used to establish a necessary element of legal doctrines such as law of the case, res judicata, collateral estoppel, judicial estoppel and other similar doctrines.
>
> **(c) Copies of Unpublished Opinions.** The party citing an unpublished opinion shall file with the court and serve upon opposing counsel a copy of the unpublished opinion, with the brief or other paper in which the unpublished opinion is cited.

Respectfully submitted,



Ronald T. Schaps, WSBA # 2203

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UNPUBLISHED
Not Authority

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICK SEXTON and PRINCESS M. SEXTON, husband and wife, d/b/a RICKY R. SEXTON LEASING, a sole proprietorship,	)	6678-5-II
	)	DIVISION TWO
Appellants,	)	
v.	)	
ALBANY FROZEN EXPRESS, INC., a foreign corporation and TRANSIT CASUALTY CO., a foreign corporation,	)	UNPUBLISHED OPINION
Respondents,	)	
and	)	
BENJAMIN F. CHADWICK and JANE DOE CHADWICK, his wife, d/b/a CHADWICK INSURANCE COMPANY; and BENJAMIN MOKUS and JANE DOE MOKUS, his wife,	)	
Third Party Defendants.	)	FILED: November 8, 1984

PETRICH, C.J. -- Transit Casualty Company appeals from a jury verdict determining that Rick Sexton is entitled to collision insurance coverage and awarding Sexton approximately

$20,000 in general damages for physical loss or damage and consequential damages for wrongful denial of coverage and $650,000 in punitive damages for wrongful denial of coverage. Sexton cross-appeals from a denial of attorney's fees. The main issues presented to this court on appeal include whether the trial court erred in failing to rule, as a matter of law, that Sexton was not entitled to insurance coverage by Transit, and whether the trial court erred in ruling that California law, rather than Washington law, was applicable in determining punitive damages. After careful consideration of these issues, we reverse the trial court's ruling that the California law of punitive damages applies and modify the judgment accordingly.

The events which gave rise to Sexton's claim for wrongful denial of insurance coverage are as follows.

Transit Casualty Co. (Transit) is an insurance company qualified to do business in each state with its headquarters in California. Transit issued a liability and collision policy to Albany Frozen Express, Inc. (Albany), an ICC licensed carrier with operations out of Seattle and Portland, Oregon. This policy was issued to Albany through Ben Chadwick, Transit's exclusive Washington insurance agent.

Rick Sexton operated a truck sales and leasing business in Washington, known as Ricky R. Sexton Leasing. In January 1977, Sexton purchased a truck and leased it to a driver, Benjamin Mokus. Sexton gave Mokus exclusive possession and control of the truck as well as the right to purchase the truck at the end of the lease period. Mokus then leased this truck to Albany for one year and began working as a driver in Albany's carrier operations.

APPENDIX 2

Albany's insurance policy with Transit provided for two basic types of coverage, liability and collision coverage. Under these coverages, Albany is the named insured. The policy also contains an omnibus clause which extends coverage to additional insureds, e.g., partners and executive officers of the named insured, and permittees, lessees or employees of the named insured. The omnibus clause specifically excludes the "owner or lessee (of whom the named insured is a sub-lessee) of a hired automobile" from coverage. Albany would, however, customarily obtain endorsements from Transit naming owners of vehicles leased by Albany "additional insureds."

Bodily injury and property damage liability under Albany's policy was provided for all vehicles actually engaged in Albany's business. Collision coverage was provided if (a) the vehicle was a "covered" vehicle, i.e., designated in a schedule as owned by Albany, or used by Albany under a long-term lease (1 year); or (b) the vehicle was newly acquired by Albany during the policy period and replaced a covered vehicle. Also, Transit must have had notice of the replacement vehicle within 30 days of delivery of the vehicle to Albany.

As noted above, in early 1977, Mokus leased his truck to Albany for 1 year and began driving for it. The lease named Mokus as the owner. Albany requested and Transit provided an endorsement naming Mokus as an additional insured. In April 1977, Mokus left Albany and left the State of Washington. Albany returned his truck to him and released him from the lease. Albany notified Transit and Transit deleted the additional insured coverage on Mokus and Mokus' truck.

APPENDIX 3

On October 6, 1977, Mokus returned to Albany with his truck and was dispatched to load a trailer and begin driving again. Albany's bookkeeper, Cindy Smith, testified she then called Chadwick, Transit's Washington agent, and asked to have Mokus' endorsement as additional insured reinstated. Chadwick's only action in response to Albany's request was to send a memorandum to Transit on December 19, over 2 months later, stating that Mokus was back on the lease with Albany. Transit did not reissue an endorsement naming Mokus an additional insured.

Mokus again left Albany after only 1 day of work. Albany's dispatcher took a power of attorney from Mokus which gave him control of Mokus' truck. Sexton discovered this transaction and after asserting his right as legal owner of the truck, the dispatcher surrendered the power of attorney to Sexton.

Sexton then entered into an oral lease agreement with Albany wherein Albany would lease the truck from Sexton for the rest of the year. Albany's bookkeeper Smith testified she again called Chadwick and asked Chadwick to obtain an additional insured endorsement for Sexton and his truck. Chadwick's telephone logs did not corroborate this testimony, nor did Transit issue such an endorsement.

The truck was driven in Albany's operations from early October until November 22, 1977, when a driver collided with two other vehicles on I-5 on a snowy night. The driver was returning home with the truck after completing his haul for the day.

APPENDIX 4

Albany reported the accident and Sexton made a claim under Transit's policy as an additional insured for collision coverage. In December 1977, Transit's regional claims supervisor in California denied Sexton's claim for two reasons:

> (1) The truck had been deleted from coverage in April 1977, and no requests had been made to add it back to the policy; and
> (2) The accident occurred while bobtailing.[1]

Sexton complained to the Washington Insurance commissioner, who requested Transit to reconsider its denial. In March 1978, Transit's Major Claims Review Committee in California again denied coverage. The Review Committee did not state its reasons, but it was noted in the denial letter that Transit's insured, Albany, had not made a claim.

Sexton then brought suit against Transit for breach of insurance contract, tortious conduct and also claimed punitive damages under California law.

After plaintiff closed his case in chief, Transit moved to dismiss plaintiff's claim in its entirety and also sought dismissal of the punitive damage claim. Transit argued that the issue of breach of the insurance contract should not go to the jury because collision coverage required either a long-term lease or replacement of a scheduled vehicle, none of which existed in this case as a matter of law; that evidence to support a bad faith denial of coverage was lacking; and that in any event

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[1] "Bobtailing" is use of a truck for personal purposes rather than business purposes. No bobtail coverage was provided by Transit to Albany.

punitive damages were not recoverable. The motions were renewed at the close of all the evidence. The trial court denied Transit's motions and submitted the question of coverage to the jury. The jury rendered a special verdict as follows: (a) Sexton was insured for physical damage coverage on his truck; (b) Transit failed to deal fairly and in good faith by refusing unreasonably to pay Sexton's claim; and (c) Transit acted with malice, fraud or oppression in so denying the claim. The jury awarded Sexton $9,800 for collision damage for the truck; $10,000 for consequential damages of pain, suffering, stress, etc. because of the denial of coverage; and $650,000 in punitive damages.

On appeal, Transit presents several theories as to why the trial court erred in not ruling, as a matter of law, that collision coverage did not exist for Sexton. First, Transit claims there was not adequate evidence that Sexton was an additional insured under the insurance contract between Transit and Albany, thereby entitling him to any insurance coverage. Second, assuming Sexton was an additional insured, the additional insured endorsement itself excludes collision coverage for additional insureds; it provides only liability coverage. Third, even if collision coverage was available under the endorsement, the prerequisites for collision coverage were not met, i.e., no long-term lease of exclusive possession and control was in effect between Sexton and Albany at the time of the loss, nor did conditions exist to qualify the truck as a newly-acquired replacement vehicle.

The trial court did not err in submitting the issue of coverage to the jury insofar as determining whether Sexton was

an additional insured under the endorsement issued by Transit for owners of Albany's leased vehicles. Undisputed testimony by Albany's bookkeeper shows that the normal procedure to obtain an additional insured endorsement from Transit was merely to call Transit's agent, Chadwick, and request one. The record reveals a factual dispute over whether this procedure occurred. The bookkeeper testified she called Chadwick and requested the endorsement while Chadwick's telephone logs do not corroborate such a telephone call. This question was properly submitted to the jury.

The question of whether collision coverage is even available under the additional insured endorsement does appear to fall under the general rule that insurance contracts are a question of law for courts to determine. See United Pacific Ins. Co. v. Van's Westlake Union, Inc., 34 Wn.App. 708, 664 P.2d 1262 (1983). The additional insured endorsement provided as follows:

> It is agreed that such insurance as is afforded by the policy for automobile bodily injury liability and property damage liability applies to the above additional insured but only as respects the above described automobile.
>
> . . .
>
> All other terms of this policy remain unchanged.

Transit argues that the language in this endorsement is exclusionary, providing only liability coverage for third party claims. This argument, however, was not presented to the trial court below in support of Transit's motion to dismiss and is subject to the rule that issues not raised in the trial court will not be considered for the first time on appeal. Ruddach v. Don Johnston Ford, Inc., 97 Wn.2d 277, 644 P.2d 671 (1982); Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 617 P.2d 704 (1980). It appears that Transit's argument fails on the merits

as well, for Transit's interpretation of the endorsement is subject to the universal rule of strict construction against the insurer. Yakima Cement Products Co. v. Great Am. Ins. Co, 22 Wn.App. 536, 590 P.2d 371 (1979). The general presumption arises that what is not clearly excluded from the insurance policy is included therein. Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wn.2d 65, 659 P.2d 509 (1983). From our reading the endorsement does not clearly exclude collision coverage for additional insureds.

Finally, Transit argues that even if collision coverage was available under the endorsement, the prerequisites necessary for such coverage were not present as a matter of law. We agree with Transit that this issue is also one that is properly decided as a matter of law. Although the trial court in the instant case erred in submitting this part of the ultimate question of coverage to the jury, this error was not prejudicial since the jury decided the question correctly.

As noted above, collision coverage was provided for (a) covered vehicles, i.e., vehicles owned by Albany or leased for a 1-year term by Albany; and (b) newly-acquired vehicles during the policy period which replaced a covered vehicle subject to 30 days' notice to Transit after delivery of the vehicle to Albany.

Transit argues first, that the vehicle was not a covered vehicle since it was not leased for a 1-year term to Albany, but was leased from Sexton in October for the rest of the year. Second, Transit argues that for Sexton's vehicle to qualify as a newly-acquired replacement vehicle, the replacement vehicle must also meet the requirements of a

covered vehicle, i.e., owned by Albany or under a 1-year lease with Albany. Since the oral lease between Sexton and Albany was for only 2 months, no collision coverage would apply. Transit is arguing, in effect, that as a matter of law, "replacement" should be interpreted as an exact substitution. In Transit's motion to dismiss, this particular interpretation of the contract language was not presented to the court; rather, Transit argued only that a long-term lease was not in effect and that Sexton's vehicle did not replace any vehicle noted on the August 1977 schedule. It is not clear from the contract language that a newly-acquired replacement vehicle must also become a "covered" vehicle for purposes of collision coverage. When language in a policy is reasonably susceptible of different interpretations, that interpretation most favorable to the insured must be adopted. Government Employees Ins. Co. v. Titus, 18 Wn. App. 208, 566 P.2d 990 (1977).

Transit's argument that the trial court's denial of its motion to withdraw the bad faith claim for lack of evidence must fail. Viewing the evidence most favorable to Sexton as we must, Cherberg v. Peoples Nat'l Bk. of Wash., 88 Wn.2d 595, 564 P.2d 1137 (1977), this issue was properly submitted to the jury.

Transit's next argument is that the trial court erred in ruling that California law, rather than Washington law, is applicable in determining Sexton's prayer for punitive damages

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against Transit for unreasonably refusing to pay his claim[2]. Under Washington law, punitive damages are not allowed unless expressly authorized by statute. Kammerer v. Western Gear Corp., 96 Wn.2d 416, 635 P.2d 708 (1981). Under the law of California, however, punitive damages may be awarded. Cal. Civ. Code, Damages § 3294 (West).

In determining the appropriate choice of law, the Washington Supreme Court has adopted the most significant relationship rule for contracts and tort choice-of-law problems. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997 (1976). The following factors are to be taken into account:

(a) the place where the injury occurred;

(b) the place where the conduct causing the injury occurred;

(c) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their

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[2] At oral argument on appeal Sexton argued that Transit's failure to except to the court's instructions on punitive damages precludes appellate consideration of the denial of Sexton's motions for a directed verdict on this issue. The failure to object to instructions, does not preclude appellate consideration of a trial court's denial of a motion for a directed verdict. Johnson v. United States, 434 F. 2d 340 (C.A. 8th 1970); Coca Cola Bottling Co. of Black Hills v. Hubbard, 203 F. 2d 859 (C.A. 8th 1953); 9 C. Wright and A. Miller, Federal Practice and Procedure, Civil § 2524 (1971).

relative importance with respect to the particular issue. Barr v. Interbay Citizens Bank, 96 Wn.2d 409, 635 P.2d 441 (1981) as amended January 4, 1982, 96 Wn.2d 692 (1981), 649 P.2d 827 (1982). The law selected by the application of the above factors determines the right to exemplary damages. Barr v. Interbay Citizens Bank, supra.

In Kammerer v. Western Gear Corp., supra, the Washington Supreme Court determined that California law was applicable with respect to punitive damages. In Kammerer, the plaintiffs were residents of California. The plaintiffs entered into a licensing agreement with defendant, a Washington corporation, which conducted much of its business in California. Plaintiffs' agreement with defendant provided that California law would govern the contract. Defendant's negotiations on the contract with the plaintiffs took place in California. Defendant's fraudulent representations to the plaintiffs also took place in California. The court held California's interest in protecting its citizens from fraud as well as deterring fraudulent activities by corporations doing substantial business within its borders was dominant over the interest of the forum state, Washington. The court also noted the parties had agreed that California law would govern their rights under the contract.

In Barr v. Interbay Citizens Bank, supra, the Washington Supreme Court determined that Washington law was applicable with respect to punitive damages. In Barr, plaintiff was a resident of Washington. Defendant was incorporated in Florida and allegedly wrongfully repossessed plaintiff's car in

Washington. The court reasoned that since the rationale behind the law in Florida allowing punitive damages was punishment and deterrence, the example of punishment would not be furthered when the conduct causing the injury occurred outside of Florida. The court determined Washington, the residence of the plaintiff and the place where the injury occurred, had the most significant relationship.

In the instant case, Sexton is also a resident of Washington. The insurance agent who issued the policy to Albany, Ben Chadwick, is a Washington resident. Defendant Transit is a California corporation which does business in Washington through its exclusive agent, Ben Chadwick. Transit's decisions to deny Sexton's claim occurred in California and Sexton urges that upon this basis, California law should apply according to Kammerer, which stated that California has an interest in deterring fraudulent activities by corporations doing substantial business within its borders. In this case however, the injury was suffered by a Washington resident. California has no interest in protecting foreign residents from fraud. Moreover, the insurance policy did not provide that California law would govern the parties' rights. Washington's interests are dominant over California's interests in this case. The trial court's denial of Transit's motion to dismiss plaintiff's claim for punitive damages is reversed.

Finally, we address Sexton's claimed error because of the trial court's denial of attorney's fees. Sexton's claim was based entirely on California law. Having ruled that Washington law applies, allowance of attorney's fees is governed by the law of this state. In the absence of contract,

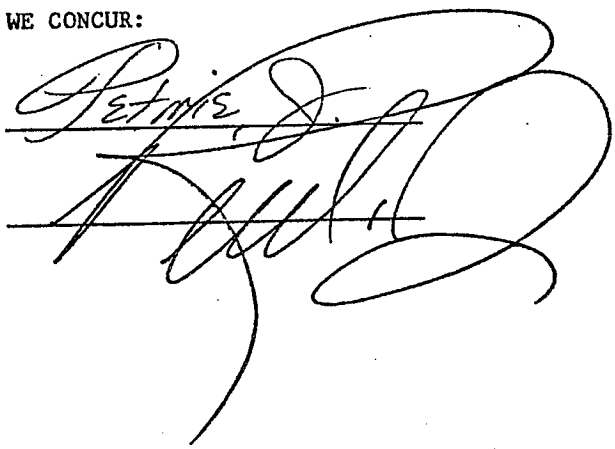
statute or recognized ground of equity, the court has no power to award attorney's fees. Armstrong Constr. Co., Inc. v. Thompson, 64 Wn.2d 191, 390 P.2d 976 (1964). None of the exceptions apply to this case. The trial court's denial of attorney's fees is affirmed.

The trial court's judgment is modified in accordance with this opinion by allowing the amounts awarded for physical damage and/or loss of the truck and for wrongful denial of coverage but deleting the punitive damage award.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Petrich C.J.

WE CONCUR:



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PHILIP SERVICES CORPORATION, *et al.*	§	
	§	
	§	
VS.	§	CIVIL ACTION NO. H-06-2518
	§	
	§	
CITY OF SEATTLE	§	

MEMORANDUM AND OPINION

The debtor in a Chapter 11 bankruptcy proceeding, Philip Services Corporation, has a hazardous-waste management business in the City of Seattle. In the bankruptcy proceeding, the City made claims for unpaid transfer and collection taxes from 1998 through 2002. Philip Services objected. The Bankruptcy Court held an evidentiary hearing and overruled the objection. Philip Services appeals, arguing that its waste-management operations did not qualify as taxable activities or incidents under the language of the City's tax ordinance; that the amounts assessed were incorrect because they did not properly apply exceptions and exclusions set out in the ordinance; and that aspects of the taxes violate the Commerce Clause and the Due Process Clause of the United States Constitution. Based on a careful review of the record, the parties' submissions, and the applicable law, this affirms the order of the Bankruptcy Court overruling the objections to the claims for unpaid taxes with one exception. This court reverses the Bankruptcy Court's ruling denying the objection to the way in which the collection tax was calculated. This case is remanded to the

Bankruptcy Court for proceedings consistent with this memorandum and opinion. The reasons are set out below.

I. Background

Philip Services filed voluntary petitions for relief under Chapter 11, 11 U.S.C. § § 101 *et seq.*, in June 2003. The Bankruptcy Court confirmed an amended reorganization plan that became effective on December 31, 2003. The City of Seattle filed four claims for excise taxes and for interest on these taxes. Claim No. 2287 was filed on September 8, 2003, covering the period 1998 through June 2, 2003. The revised amount of that claim was $694,658.47. Claims No. 5461, 1205, and 6074, filed postpetition as administrative expense claims for the period June 3, 2003 through December 1, 2003, totaled $58,150.45 as revised.

The excise taxes are a transfer tax imposed under Seattle Municipal Code 5.48.055(A) and a collection tax imposed under SMC 5.48.055(B). The issues in this case are whether and how these code sections apply to Philip Services.

Chapter 5.48 of the Seattle Municipal Code is entitled: "Business Tax – Utilities." Section 5.48.055 in effect during the relevant period stated:

> SMC 5.48.055 Solid waste activities subject to tax – AMOUNT. There is levied upon, and shall be collected from everyone including The City of Seattle, on account of the following business activities engaged in or carried on with respect to solid waste, an annual license fee or occupation tax in the amount to be determined by the application of the rates given below:
> A. Upon everyone engaged in or carrying on the business of operating a garbage transfer station or upon the business of transferring solid waste generated in or outside of Seattle from one (1) mode of transportation to another a fee or tax equal to Six Dollars and Twenty-five Cents ($6.25) per ton of the waste

handled for transportation or transported for garbage disposal, landfill, or incineration purposes. Effective January 1, 2003, upon everyone engaged in or carrying on the business of operating a garbage transfer station or upon the business of transferring solid waste generated in or outside of Seattle from one (1) mode of transportation to another a fee or tax equal to Six Dollars and Forty-five Cents ($6.45) per ton of the waste handled for transportation or transported for garbage disposal, landfill, or incineration purposes. To prevent pyramiding of the tax under this subsection when two (2) or more transfers occur in Seattle, the fee or tax is imposed only upon the last transferor and shall not apply to earlier transfers. Waste is transferred from one (1) mode of transportation to another whenever it is moved from a motor vehicle (including, for example, landgrading or earthmoving equipment), barge, train or other carrier to another motor vehicle (including landgrading or earthmoving equipment), barge, train or other carrier, irrespective of whether or not temporary storage occurs in the process, provided that waste shall not be considered transferred if it has been placed in a sealed shipping container prior to being moved from one mode of transportation to another in the City. Solid waste transported for recycling or reuse as recovered material (which solid waste shall contain no more than ten (10) percent non-recyclable material, by volume), yardwaste destined for composting, items to be scrapped for salvage, and sand and gravel for construction of a public improvement shall not be included in the tonnage by which the fee or tax is measured.

B. Upon everyone, including The City of Seattle, engaged in or carrying on the business of the collection of garbage, rubbish, trash, CDL Waste, and other solid waste, a fee or tax measured by the total of components 1 and 2 below:

1. Eleven and one-half (11.5) percent of the total gross income from the collection of solid waste in Seattle, less income derived from the activities identified in subsection C of this section; and

2. a. Twelve Dollars and Five Cents ($12.05) per ton of solid waste collected in Seattle, excluding the tonnage from recycling when such recycling contains no more than ten (10) percent non-recyclable material by volume, yardwaste destined for composting, items to be reused or scrapped for salvage, and/or sand and gravel for construction of a public improvement; or

> b. Effective January 1, 2003, Twelve Dollars and Forty Cents ($12.40) per ton of solid waste collected in Seattle, excluding the tonnage from recycling when such recycling contains no more than ten (10) percent non-recyclable material by volume, yardwaste destined for composting, items to be reused or scrapped for salvage, and/or sand and gravel for construction of a public improvement.

SMC § 5.48.055.

Section 5.48.055D of the Code provided as follows:

> The tax imposed under subsection A of this section applies to transferring in the City of all solid waste generated in or outside the City and the tax imposed under subsection B of this section applies only to collecting solid waste in the City. The taxes imposed under subsections A and B of this section are cumulative as to solid waste collected and transferred in the City, even though the same tonnage of solid waste may be involved at each successive stage in the disposal process and the economic burden of the two (2) taxes may aggregate.

Id. at § 5.48.055D.

The facts material to this appeal are largely undisputed, although the parties do dispute the legal characterization of those facts. The City of Seattle conducted an audit of Philip Services and issued tax assessments for unpaid collection and transfer taxes for 1998 to 2002. After Philip Services filed bankruptcy, the City filed claims for the unpaid taxes. Those claims were subsequently revised, taking into account exceptions and exclusions that Philip Services identified. Philip Services objected to the revised claims and the Bankruptcy Court conducted a trial on the objections. Two witnesses testified, Glen Dillman for Philip Services, and Joseph Cunha, the tax audit supervisor from the City of Seattle. The parties

submitted extensive documentary evidence and a detailed stipulation of a number of critical facts and propositions of law. (Docket Entry No. 5).

The record disclosed the following facts. Philip Services conducted its hazardous-waste management business under a Washington State Hazardous Waste Identification number. Its business was picking up, treating, and properly disposing of hazardous wastes, alternative fuels, and waters. (Docket Entry No. 3 at 4). Philip Services competed with other companies in the hazardous-waste management business and did not operate under a franchise from the City. Philip Services did not publish rates for services and did not run a regular pick-up schedule. It charged varying rates, sometimes a flat fee and sometimes an itemized bill that included transportation costs.

Philip Services picked up hazardous waste from its customers in the City of Seattle, by appointment. Once Philip Services picked up the waste, Philip Services was responsible for transporting, treating, and disposing of it in a manner that met regulatory requirements and documenting that compliance. The waste was placed into sealed containers, such as drums, and transported to one of Philip Services's regional facilities, including one located in Seattle during 1998 through the fourth quarter of 2002, or to a third-party facility outside Seattle. (Docket Entry No. 5-9 at Stipulations 17–20).

When containers of waste were brought to one of Philip Services's operational facilities, including the Seattle facility, most of the containers were opened and the contents sampled and mixed or combined with other waste, treated, and placed in another sealed container. Some of the containers were opened, the contents sampled, and the container

resealed, without the contents being processed or treated. All of the waste taxed was in sealed containers that Philip Services at some point opened before the waste was placed in another container or the original container was resealed. (Docket Entry No. 5-9 at Stipulation 22). The sealed containers of sampled or treated waste were then placed on a truck or other vehicle for transport to a disposal facility or recycling facility, some located outside the City. All the waste that was taxed left the City of Seattle; some left the State of Washington. (Docket Entry No. 5-9 at Stipulations 19–21; Docket Entry No. 5-23 at 71).

Of the waste brought to the Philip Services Seattle facility, approximately 25% was transported in sealed containers larger than 330 gallons, such as dumpsters, railway cars, tankers, and trailers. (Docket Entry No. 5-9 at 5, Stipulation 19). The remaining 75% was transported in smaller sealed shipping containers. Of the smaller containers, approximately 75% was 55 gallon drums, 10% was 30 gallon drums, 5% was 85 gallon drums, and 5% was 20 gallon drums. Containers that were 15 gallons or smaller made up the remainder. (*Id.*)

Philip Services was also paid to handle contaminated water, which it treated and discharged. Water treated at the Seattle facility went into alternative fuels, was incinerated, or went to Philip Services's facilities in Kent or Tacoma, Washington, for treatment and discharge into the sanitary sewer system of those cities. Water that entered a municipal sewer system was ultimately discharged into navigable waters. (*Id.* at Stipulations 21, 34).

The Bankruptcy Court overruled the objections to the revised tax assessments, concluding that Philip Services was properly subjected to the collection and transfer taxes; the exclusion from the transfer tax for sealed containers was properly applied; the exemption

in the transfer and collection tax for recycled material did not apply to water treated and discharged or incinerated; the bulky-items exemption from the collection tax was properly applied; the collection tax was correctly measured; and the transfer tax did not discriminate against interstate commerce. (Docket Entry No. 5, Ex. 1). Philip Services filed a motion for reconsideration. One basis was an unpublished opinion, *Burlington Environmental, Inc. v. City of Bremerton*, No. 31923-3-II (Court of Appeals, Washington, Division II, Feb 15, 2006), which Philip Services presented as new authority for the claim that the collection tax was improperly calculated to include income from services beyond collecting solid waste within the City of Seattle. (Docket Entry No. 5-15). The Bankruptcy Court denied Philip Services's motion for reconsideration. Philip Services timely appealed.

II. The Applicable Legal Standards

In reviewing a bankruptcy court decision, a district court functions as an appellate court and applies the standards of review generally applied in federal courts of appeal. *In re Webb*, 954 F.2d 1102, 1103-04 (5th Cir.1992). A bankruptcy court's findings of fact are reviewed for clear error, with proper deference to that court's opportunity to make credibility determinations. FED. R. BANKR. P. 8013; *In re McDaniel*, 70 F.3d 841, 842-43 (5th Cir.1995). A finding of fact is clearly erroneous if, after review of all the evidence, the court is left with a firm and definite conviction that the bankruptcy court erred. *In re McDaniel*, 70 F.3d at 843. Legal conclusions are reviewed de novo. *Id.; In re Herby's Foods, Inc.*, 2 F.3d 128, 130 (5th Cir.1993).

"A proof of claim constitutes prima facie evidence of its validity and amount." *In re ProMedCo of Los Cruces*, 275 B.R. 499, 503 (N.D. Tex. 2002) (citing FED. R. BANKR. P. 3001(f); 9 *Collier on Bankruptcy* ¶ 3001.09[1] (15th ed. rev.2001)). "Once that burden is met, whichever party would have the burden of proof respecting the claim outside the bankruptcy will bear that burden in bankruptcy. With respect to contest of a claim for [federal] income taxes, the burden of proof falls on the objecting party." *Id.* (citing *In re Domme*, 163 B.R. 363, 366 (D. Kan.1994); *In re Placid Oil Co.*, 988 F.2d 554, 557 (5th Cir.1993)). This court must "give full faith and credit to the state law upon which the tax is based." *In Re Wolverine Radio Co.*, 930 F.2d 1132, 1148 (6th Cir. 1991) (citing *Arkansas Corp. Comm'n v. Thompson*, 313 U.S. 132 (1941)).

Recent cases applying Washington law clarify the burdens of proof in this case. In *Simpson Inv. Co. v. State Dept. of Revenue*, 3 P.3d 741, 746 (Wash. 2000), a business owner challenged whether his business qualified as a "financial business" that was subject to certain taxes under the state tax code. *Id.* at 744. The Washington Supreme Court found that although under Washington law tax statutes are generally construed against the taxing authority, "when interpreting exemption or deduction provisions, 'the burden of showing qualification for the tax benefit . . . rests with the taxpayer . . . [and] in the case of doubt or ambiguity, [the provisions are] to be construed strictly, though fairly and in keeping with the ordinary meaning of their language, against the taxpayer." *Id.* at 149–150 (citing *Group Health Coop. of Puget Sound, Inc. v. Washington State Tax Comm'n*,433 P.2d 201 (Wash. 1967)). The Washington Supreme Court stated that a court must evaluate the language of

a tax ordinance in the context of the entire statute so as to "avoid interpretations that are '[s]trained, unlikely, or unrealistic[.]'" *Id.* at 745–46; *see also In re Sehome Park Care Ctr., Inc.*, 903 P.2d 443 (Wash. 1995)).

III. Analysis

A. Do the Transfer and Collection Taxes Apply to Philip Services?

Philip Services argues that the transfer tax and the collection tax do not apply to it because these ordinances are "intended to tax utilities and only utilities." (Docket Entry No. 3 at 20). It is undisputed that Philip Services is not a utility that is licensed, has a franchise, or is given exclusivity by the City. The City responds that the ordinance language makes it clear that the taxes do not only apply to a "utility."

Philip Services cites Chapter 5.48's title, "Business Tax–Utilities," to support its contention that only a "utility" can be subject to the taxes at issue. However, Section 5.48.055 states that it applies to "everyone . . . on account of the following business activities engaged in or carried on with respect to solid waste, an annual license fee or occupational tax. . . ." Both Section 5.48.055(A) and (B) apply to "everyone engaged in or carrying on the business" relating to solid waste. The collection tax and transfer tax sections make it clear that they are not limited to licensed or franchised utilities. The Bankruptcy Court correctly rejected this argument. (Docket Entry No. 5, Ex. 13 at 3).

B. Was Philip Services Engaged in "Transfers" under Section 5.48.055A?

Philip Services argues that its activities do not meet the code definition of "transfer" because the waste Philip Services handled was not "transferred from one (1) mode of transportation to another." Section 5.48.055A provides:

> Waste is transferred from one (1) mode of transportation to another whenever it is moved from a motor vehicle (including, for example, landgrading or earthmoving equipment), barge, train or other carrier to another motor vehicle (including landgrading or earthmoving equipment), barge, train or other carrier, irrespective of whether or not temporary storage occurs in the process, provided that waste shall not be considered transferred if it has been placed in a sealed shipping container prior to being moved from one mode of transportation to another in the City

Seattle Municipal Code § 5.48.055A (1998).

1. Was there a "Transfer?"

The record showed that Philip Services moved much of the waste from a "mode of transportation" to an operational facility, where containers were opened. Some of the waste was treated and placed in another sealed container. Some was treated and consolidated with other waste and then placed in another sealed container. Some of the waste was left in the container and resealed or placed in another container that was sealed. All of these sealed containers were then placed on another "mode of transportation." (Docket Entry No. 5-9, Stipulations 18, 22). Philip Services argues that the ordinance requires "direct movement from one carrier to another interruptible only by temporary storage," and that because the waste at issue was processed and treated between transfer from one carrier to another, the waste was not "transferred." (Docket Entry No. 3 at 13; Docket Entry No. 7 at 2).

This argument contradicts the language of the ordinance, the stipulations, and the testimony at trial. "[T]ransferred from one (1) mode of transportation to another" is broadly defined as "whenever" waste is "moved from a motor vehicle . . . to another motor vehicle." The ordinance does not state that if any interim step occurs other than temporary storage, there is no "transfer." Instead, the ordinance states that a transfer occurs "irrespective of whether or not temporary storage occurs in the process." The undisputed evidence was that Philip Services used motor vehicles to transport waste in sealed containers to a facility where the containers were opened and the contents sampled and/or treated. The waste was then placed in containers which were sealed and then transferred to another motor vehicle for transportation to a "final disposal facility or a recycling facility." (Docket Entry No. 5, Ex. 8 at 7, Ex. 21 at 69–71). The Bankruptcy Court correctly interpreted and applied the ordinance in concluding that Philip Services was transferring waste from one mode of transportation to another and therefore subject to the transfer tax.

2. *Was the Sealed-Container Exclusion Properly Applied?*

Philip Services argues that it is not subject to the transfer tax because of the sealed-container exclusion. The ordinance states that "waste shall not be considered transferred if it has been placed in a sealed shipping container prior to being moved from one mode of transportation to another in the City." Philip Services argues that because the waste enters the facility in sealed containers, is treated or tested, and leaves the facility in sealed containers, there is no "transfer." (Docket Entry No. 3 at 13). The City of Seattle responds that the sealed-container exclusion applies only when the waste stays in the same sealed container at

all times. (Docket Entry No. 6 at 9–12). The City adjusted the transfer tax so that it the taxes were not applied to waste transported in a single sealed container that was not opened after it was first sealed. (Docket Entry No. 6 at 10, Docket Entry No. 5-9 at Stipulation 22).

The Bankruptcy Court concluded that because the ordinance referred to "'a' sealed container, one container," the sealed-container exclusion applied only to waste that was in a sealed shipping container before it was transferred and remained sealed in that container. (Docket Entry No. 5 at 4). This court agrees. Philip Service's interpretation that the exclusion applies if at any point the hazardous waste was in a sealed container—even if it was placed in a sealed container, which was transported on a motor vehicle, unsealed, the waste removed, and the waste then placed in a different container that was sealed and placed on a motor vehicle—would lead to the result that ultimately no transfers of hazardous waste would be taxable.

This court affirms the Bankruptcy Court's conclusion that the sealed-container exclusion from the transfer tax was properly limited to waste that was in a single sealed shipping container.

C. Does the Collection Tax Apply to Philip Services?

The collection tax is imposed "on the business of the collection of garbage, rubbish, trash, CDL Waste, and other solid waste." SMC § 5.48.055B. Philip Services argues that the word "and" requires that the taxpayer collect all five enumerated types of waste to qualify for the tax. (Docket Entry No. 3 at 17–20).

Of the five enumerated types of waste, "garbage," "rubbish," "CDL," and "solid waste" are defined in the Seattle Municipal Code."[1] "Trash" is not a defined term. Philip Services contends that the ordinance can only apply to an entity that collects all the enumerated categories of waste because "and" is conjunctive. The City responds that it is clear that the tax applies to the collection of any of the enumerated categories. The Bankruptcy Court specifically addressed this issue, after allowing posttrial submissions, in the order denying the motion for reconsideration. The court found that reading "and" to limit the ordinance to the collection of all the enumerated categories of waste was an absurd result.

The potentially confusing uses of "and" and "or" has long been noted in students of legal writing. *See* Kenneth A. Adams and Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting*, 80 ST. JOHN'S L. REV. 1167 (2007). The argument raised by Philip Services is that "and" must be a conjunction and not disjunction. But Philip Services ignores the fact that "and" can convey not only that members of a group are to be considered together or collectively, but also that they be considered separately or individually. "[I]n most

[1] "Garbage" is "all discarded putrescible waste matter, including small dead animals weighing not over fifteen (15) pounds, but not including sewage or sewage sludge or human or animal excrement or yardwaste." Seattle Municipal Code § 21.36.014. "Rubbish" is "all discarded nonputrescible waste matter excluding yardwaste." *Id.* at § 21.36.016. CDL waste is "Construction, Demolition and Landclearing Waste," defined at length in section 21.36.012. "Solid waste" is defined to include "all putrescible and nonputrescible solid and semisolid wastes, including but not limited to garbage, rubbish, yardwaste, ashes, industrial wastes, infectious wastes, swill, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials. This includes all liquid, solid and semisolid materials which are not the primary products of public, private, industrial, commercial, mining and agricultural operations. Solid waste includes, but is not limited to sludge from wastewater treatment plants, seepage from septic tanks, wood waste, dangerous waste, and problem wastes, as well as other materials and substances that may in the future be included in the definition of 'solid waste' in RCW 70.95.030. Solid waste does not include recyclable materials (including compostable waste) collected from commercial establishments." *Id.* at § 21.36.016(12).

cases . . 'and' is used in the several rather than the joint sense," to convey the sense of together or separately. *See id.* at 1172-73, *quoting* F. Reed Dickerson, *The Fundamentals of Legal Drafting* § 6.2, at 105 (2d ed. 1986).

The ordinance makes it clear that the enumerated categories of waste are a group that is to be considered separately and individually, not together or collectively. The inclusion of "other solid waste" in the listed categories means that if the categories were considered only collectively, the result would defy common sense. "Other solid waste" includes—but is not limited to—all the other enumerated categories of waste. To interpret "and" to require collective consideration would mean that the only business to which the collection tax applied could be businesses that collected every possible type of solid waste. To interpret "and" as is usually done, in the "several rather than the joint sense," means that the ordinance applies to a business that collects any of the categories of enumerated waste, which is consistent with the words used and common sense.

Philip Services also argues that it does not "collect" waste but instead merely "picks it up." (Docket Entry No. 3 at 19). Philip Services draws a distinction between "collect" as requiring a regularly scheduled route—like that used by a municipal garbage truck—and individually arranged pick-ups of waste from customers. As the Bankruptcy Court noted, the ordinance does not limit "collection" to a regular route and does not "distinguish between 'picks up' and 'collects' as used in this context." (Docket Entry No. 5, Ex. 13 at 4). This court agrees. The Bankruptcy Court correctly interpreted the collection tax ordinance.

D. Was the "Bulky Items" Exclusion from the Collection Tax Properly Applied?

The collection tax ordinance excludes income from "[c]ollection and disposal of bulky items and white goods." SMC § 5.48.055C(4). Philip Services argues that "bulky items" is not defined by the ordinance and that common usage controls. (Docket Entry No. 3 at 23).

"Bulky items and white goods" are defined in the Seattle Municipal Code chapter on solid waste. Section 5.48.055B defines "bulky items" and "white goods" as follows:

> "White goods" are large household appliances, such as refrigerators, iceboxes, stoves, washing machines, dryers, dishwashing machines and air conditioners.
>
> "Bulky items" include and are illustrated by such articles for household use as furniture, mattresses, box springs, television sets, stereos, and wardrobes. Neither term includes motor vehicles or hulks; car parts and tires; commercial machinery or equipment; lumber and building materials; or hazardous wastes.

SMC § 21.36.087B (1998). Philip Services asserts that these definitions do not apply because "the absence of a cross reference means using [the Seattle Municipal Code § 21.36] definition is incorrect." Philip Services inconsistently argues that the § 21.36 definition of "solid waste" applies to the section 54.48. (Docket Entry No. 3 at 20, 23).

The Seattle Municipal Code defines "bulky items" to exclude hazardous waste. Washington law does not require an explicit cross-reference for a closely related statutory definition to apply. *See, e.g., Gontmakher v. City of Bellevue*, 85 P.3d 926 (Wash. 2004). The Bankruptcy Court correctly held that the "bulky items" exclusion did not apply.

E. Was the Collection Tax Properly Calculated?

Philip Services argues that the City incorrectly calculated the collection tax by including in the taxed gross income revenues for activities that were not "collection" and revenues for activities that occurred outside the City of Seattle. The City responds that all the income Philip Services received was for "collection" and that the subsequent activities of transferring, treating, and disposing of the waste were expenses that cannot be deducted.

The collection tax applies to "everyone, including The City of Seattle, engaged in or carrying on the business of the collection of garbage, rubbish, trash, CDL Waste, and other solid waste." During the relevant period, the tax had two components: (1) a specified percent "of the total gross income from the collection of solid waste in Seattle, less income derived from the activities identified in subsection C of this section";[2] and (2) a specified dollar amount for each ton of "solid waste collected in Seattle, excluding the tonnage from recycling when such recycling contains no more than ten (10) percent non-recyclable material by

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[2] The activities excluded from "gross income" under Subsection C are:

> 1. Collection and/or sale of recycled materials and/or recovered materials, including charges for the lease or rental of containers used in the collection of recycled/recovered materials; 2. Collection and/or sale after processing of yardwaste products, including charges for the lease or rental of containers used in the collection of yardwaste products; 3. Sale of containers used for collection of residential solid waste; 4. Collection and disposal of bulky items and white goods; 5. Grants and contracts from governmental agencies; 6. The City of Seattle for collecting or disposing of residential garbage and other solid waste; 7. The portion of the City's solid waste collection receipts expended for collection of recyclable materials and yardwaste; and 8. Transportation or deposit of sand and gravel for construction or a public improvement."

SMC § 5.48.055(C).

volume, yardwaste destined for composting, items to be reused or scrapped for salvage, and/or sand and gravel for construction of a public improvement." SMC § 5.48.055. Section 5.48.055D of the code carefully limits subsection B, the collection tax, "only to collecting solid waste in the City." Subsection D explains the relationship of the collection and transfer taxes imposed under subsections A and B: "The taxes imposed under subsections A and B of this section are cumulative as to solid waste collected and transferred in the City, even though the same tonnage of solid waste may be involved at each successive stage in the disposal process and the economic burden of the two (2) taxes may aggregate." *Id.* at § 5.48.055D. The ordinance is drafted to comply with constitutional limits on income taxes. The United States Constitution bars taxation of extraterritorial income. *See Container Corp. v. Franchise Tax Board* 463 U.S. 159, 164 (1983); *ASARCO Inc. v. Idaho State Tax Com.*, 458 U.S. 307, 315 (1982). However, it permits taxation of "an apportionable share of the multistate business carried on in part in the taxing State," *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 778 (1992), and grants taxing jurisdictions some leeway in separating out their respective shares of this multistate income. *Container Corp.*, 463 U.S. at 164. "[W]hen considering the constitutionality of a gross receipts tax, it is the activities that generate those gross receipts that are determinative in an apportionment analysis as it is only the receipts generated from the in-state component of the underlying activity that the Township may properly tax under constitutional apportionment principles." *See Jefferson Lines*, 514 U.S. at 190 (gross receipts tax is "simply a variety of tax on income, which [is] required to be apportioned to reflect the location of the various interstate activities by which it was earned").

While the Supreme Court has characterized the principle of fair apportionment as "the lineal descendent of *Western Live Stock*'s prohibition of multiple taxation," *Jefferson Lines*, 514 U.S. at 184 (referring to *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938)), the external consistency requirement ultimately mandates that a tax not "reach[ ] beyond that portion of value that is fairly attributable to economic activity within the taxing State," whether there is a genuine risk of multiple taxation or not. *Id.* at 185; *see also Southern Pac. Transp. Co. v. Arizona, Dep't of Revenue*, 44 P.3d 1006, 1012 (Ariz. Ct. App. 2002) (rejecting "proposition that a state's tax on interstate commerce must be deemed externally consistent unless the aggrieved taxpayer establishes that a multiple tax burden actually exists").

The ordinance at issue makes two distinctions. The first is between "collection" and other activities. The second is between activities that occur "in Seattle" and those that do not. The City argues that the collection tax can be applied to all the gross income Philip Services receives from its customers in Seattle for whom Philip Services picks up waste. The problem with the City's argument is that the only income Philip Services receives is from customers that pay to have their waste picked up, but the services Philip Services provide those customers go far beyond picking up the waste. The evidence is clear that after Philip Services collects the waste from customers in Seattle, it transfers, treats, and disposes of the waste, documenting these steps to comply with regulatory requirements. (Docket Entry No. 5-9 at Stipulations 15, 18, 19, 20, 32; Docket Entry No. 5-23 at 59–61). All of the taxed waste was transported out of Seattle at some stage of treatment and disposal. (Docket Entry No. 5-9, Stipulation 43, 44).

The plain language of the ordinance distinguishes among stages in the disposal process. Under the statute, "the tax imposed under subsection B [the collection tax] of this section applies only to collecting solid waste in the City." The stages identified include but are not limited to "collection." "Transfer" is a separate activity that is seperately taxed. Philip Services receives gross income not only for its collection of hazardous waste, but also for transferring, treating, and disposing of the waste. (Docket Entry No. 5-9, Stipulations 32–33). The plain language of the ordinance states that the collection tax is limited to gross income "from the collection of solid waste." *See City of Spokane ex rel. Wastewater Management v. Washington State Dept. of Revenue*, 145 Wash.2d 445, 449 (interpreting regulation that distinguished between sewage collection and transfer, treatment, or disposal).

The City cites *In the Matter of CWM Chemical Services, Inc.*, 2003 WL 22989161 (N.Y. Tax App. Trib. Dec. 11, 2003), to support its argument that it is improper to tax "some components" of an "integrated tax service." In that case, the court rejected New York's attempt to impose a sales tax on waste treatment and disposal services provided in New York, by a waste-management company that collected the waste in other states and transported it to New York for treatment and disposal. The issue was whether any sales tax was due on the waste treatment and disposal services provided in the state for waste picked up out of state. The court held that New York did not have a sufficient nexus to the taxable transaction and the taxpayer customer to impose a sales tax on that customer or, as a result, obligate the waste company to collect and remit such a tax. The court analyzed the New York sales tax under the *Complete Auto Trasit v. Brady*, 430 U.S. 274 (1977), test to determine what state could

impose a sales tax for a transaction that involved services in more than one state. In the *CWM* case, the court emphasized that the sale was consumated outside New York, and the place where the performance began—the real property where the waste was picked up—was located outside New York. As a result, New York lacked the requisite nexus to impose a sales tax. 2003 WL 22989161 at *5–6.

The City emphasizes that in the *CMW* case, the court held that the sales tax was imposed on the taxable receipt for an "integrated trash removal service, which may include pickup began outside by pick-up of the waste product, transportation, processing and disposal of waste." 2003 WL 22989161 at *7. The "integrated service" was a "real property maintenance service"; the sales tax on the gross receipts for that service could only be imposed where the real property was located, which was where the service was sold and performance begun. This approach avoided the problem of multiple sales taxation of customers, because only one state would have the predicate nexus with the localized sales transaction. *Id.*

The nature of the tax in the present case, and the issues that result, are different from the tax and issues in *CMW* in important ways. The tax here is a tax imposed on gross income from a specified activity—collection of solid waste in the City of Seattle—not a sales tax imposed on a customer. The United States Supreme Court has made it clear that a sales tax paid in the taxing state on an interstate transaction need not be apportioned, but that an income, gross receipts, or transaction privilege tax on such a transaction will violate the Commerce Clause in the absence of fair apportionment. *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 114 U.S. 175, 188–91 (1995). In *Jefferson Lines*, the Court held that an Oklahoma retail sales tax applied to

the entire proceeds of bus ticket sales for travel from Oklahoma to destinations in other states did not violate the Commerce Clause. *Id.* The *Jefferson Lines* Court observed that, in contrast to the approach it had taken toward the taxation of business income from interstate activities, it had "consistently approved taxation of sales without any division of the tax base among different States, and [has] instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." *Id.* In *Jefferson Lines*, the Court stated that a sales tax imposed on the buyer for purchases of services can ordinarily be treated as a local state event and that such "sales with at least partial performance in the taxing State justify that State's taxation of the transaction's entire gross receipts in the hands of the seller." *Id.* at 189. A gross receipts tax on a business, rather than a sales tax on a purchaser, does raise the apportionment issue. A gross receipts tax is a " variety of tax on income," which must be apportioned to reflect the location of the various interstate activities by which it was earned. *Id.* at 190.[3]

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[3] As a prominent treatise has stated:

> While *Jefferson Lines* sustained states' power to impose unapportioned retail sales taxes on the sale of services involving interstate activities, it strengthened taxpayers' ability to assert the position that gross receipts taxes imposed on business activity must be fairly apportioned if they are measured by receipts from interstate business activity. By drawing a sharp line between gross receipts taxes and retail sales taxes and characterizing the gross receipts tax in Central Greyhound Lines, Inc. v. Mealey, as akin to an income tax, the Court has called into question some of its earlier decisions that approved, with little analysis, unapportioned gross receipts taxes merely because they were imposed on a "local" subject and could loosely be analogized to retail sales taxes.

2 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 18.08 [5], at 18-65 to -66 (3d ed.1998) (footnote omitted).

Because of the sharp distinction that *Jefferson Lines* has drawn between sales and gross receipts taxes, the City's reliance on *CMW* is misplaced.

The City argues that Philip Services is simply deducting expenses to calculate gross income, which the code forbids. The Seattle Municipal Code defines "gross income" as follows:

> "Gross income" means the value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses, including the amount of credit losses actually sustained by the taxpayer whose regular books or accounts are kept upon an accrual basis.

SMC § 5.48.020(B). The evidence does not support the City's argument. Philip Services is not arguing that it should be able to deduct from the gross income it receives for collecting hazardous waste materials in Seattle expenses such as the cost of operating the collection vehicles or paying its employees. Instead, Philip Services presented evidence showing that the gross income it receives is not generated only from collecting the hazardous wastes in Seattle, but also from transferring, treating, and disposing of that waste, which occurs both in and out of Seattle. (Docket Entry No. 5-23 at 59–65).

The City's ordinance is carefully crafted to comply with the apportionment requirement that applies to a gross receipts tax. The City's ordinance, as noted, is limited to gross income

from the collection of solid waste in the City of Seattle. The record makes it clear that some of the gross income on which the collection tax was imposed was generated by activities other than collection and that occurred outside the taxing jurisdiction. The language of the ordinance and the undisputed testimony make it clear that the gross income Philip Services receives may be taxed, but only that portion of the income generated from the collection of solid waste in the City of Seattle.[4] This court reverses the Bankruptcy Court's finding that the City of Seattle correctly calculated the collection tax because the City calculated the tax based on all the gross income Philip Services received rather than allocating the income between collection services provided in the City and other services, many of which were provided outside the City.

F. Did the Recycling Exceptions to the Transfer Tax and Collection Tax Apply?

The ordinance excepts from the transfer tax amounts of waste that are recycled materials, stating that: "solid waste transported for recycling or reuse as recovered material (solid waste containing no more than ten (10) percent non-recyclable material, by volume) . . . shall not be included in the tonnage by which the fee or tax is measured." Seattle Municipal Code § 5.48.055A. Solid waste transported for "recycling or reuse as recovered material" is not subject to the transfer tax. The collection tax is measured in part "per ton of solid waste collected in Seattle, excluding the tonnage from recycling." SMC § 5.48.055B(2). The gross-receipts measure of the collection tax excludes income from the collection of "recycled materials and or recovered materials." *Id.*

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[4]This finding is consistent with, but not dependant on, the unpublished opinion cited by Philip Services in its motion for reconsideration to the Bankruptcy Court. *Burlington Environmental, Inc. v. City of Bremerton*, No. 31923-3-II (Court of Appeals, Washington, Division II, Feb 15, 2006)

The ordinance defines "recycling" in section 5.30.040N:

> "Recycling"or "recycle" means transforming or remanufacturing waste materials into usable or marketable materials for use other than incineration (including incineration for energy recovery) or other methods of disposal.

SMC 5.30.040N (cross-referencing SMC 21.26.016(2)). "'Recyclable' means material: 1. That is collected for recycling or reuse, such as papers, glass, plastics, used wood, sand, building debris, metals, yardwaste, used oil and tires; and 2. That if not collected for recycling would otherwise be destined for disposal at a landfill or incineration." *Id.* at § 5.30.040L. "'Recycled material' means material: 1. That is in fact recycled, re-used, or reprocessed after collection; and 2. If not recycled, re-used or reprocessed, would have been destined for disposal at a landfill or incineration." *Id.* at § 5.30.040M. "'Recovered material' means a usable or marketable product or commodity that results from recycling or material owned or acquired from another, but excludes use for landfill or incineration." *Id.* at § 5.30.040K.

The City reduced the amount of its tax assessment claim to reflect the fact that some of the waste was recycled materials, including some water and alternative fuel. (Docket Entry No. 5, Ex. 8 at Stipulations 34–35). The City based the amount of the reduction on the amounts of treated waste labeled as "recycled" in Philip Services's records. The City refused to reduce the claim to include other treated water. (*Id.* at Stipulation 34). Philip Services argues that all contaminated water that was collected, treated, and discharged into a sanitary sewer and ultimately released into navigable waters, or that was added as an ingredient to alternative fuels are "recovered" and "reused" and excepted from taxation. (Docket Entry No. 3 at 23).

The Bankruptcy Court rejected Philip Services's argument, finding that Philip Services had not met its burden of showing that taking contaminated water and treating it enough for discharge into a municipal sewer system for further treatment and ultimate discharge into Puget Sound was "recycling" or "recovering." The evidence showed that when water was discharged into the City of Kent's municipal sewer, it was not simply released into Puget Sound. Instead, that water had to be treated with other waste in the municipal sewer before it could be discharged into navigable waters. That water was not recycled or recovered by Philip Services but instead discharged into a third-party's treatment system.

The evidence also showed that some of the water Philip Services treated was added to other waste and burned. Such waste is not "recycled" or "reused" because the terms "recycling" and "recovered material" exclude materials that are incinerated. SMC § 5.30.040K, N. Philip Services failed to show that it was entitled to further tax adjustments based on excluding water used make the showing for recycling exemptions from the transfer tax or the collection tax.

G. Are the Transfer Tax and Collection Tax Provisions Unconstitutional?

In the Bankruptcy Court, Phillip Services raised a constitutional challenge to the transfer tax provision designed to "prevent pyramiding." The transfer tax is imposed "upon the business of transferring solid waste generated in or outside of Seattle from one (1) mode of transportation to another a fee or tax . . . per ton of the waste handled for transportation or transported for garbage disposal, landfill, or incineration purposes. To prevent pyramiding of the tax under this subsection when two (2) or more transfers occur in Seattle, the fee or tax is imposed only upon the last transferor and shall not apply to earlier transfers." Section 5.480. According to Philip

Services, the result is discrimination prohibited by the Commerce Clause because the transfer tax applies to all waste transfers leaving Seattle and not to waste transfers remaining in Seattle. (Docket Entry No. 3 at 14). Philip Services points out that it disposes of all the taxed waste outside Seattle and much of it outside the State of Washington.

A state tax on interstate commercial activity violates the Commerce Clause unless it (1) is fairly apportioned, (2) is applied to an activity with a substantial nexus to the taxing state, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services or benefits provided by the state. *Matter of Eagle Bus Mfg., Inc.*, 50 F.3d 317, 317–18 (5th Cir. 1995) (citing *Complete Auto Transit v. Brady*, 430 U.S. at 279)." The Bankruptcy Court rejected Philip Services's argument, concluding that the purpose of the antipyramiding provision was to tax transfers only once, whether there are single or multiple transfers. Because the tax applied in the same way whether the transfer was for "disposition in Seattle or out of Seattle," the Bankruptcy Court found no constitutional violation.

This court agrees. The transfer tax is imposed on the last transfer, whether it is intrastate or interstate. The City's transfer tax provision does not reach movements in interstate commerce while exempting movements in intrastate commerce, but instead only taxes the last of two or more transfers that occur in the City. There is no unconstitutional discrimination against interstate commerce. *Cf. Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Or.*, 511 U.S. 93, 108 (1994) (striking down as discriminatory a $2.25 per ton surcharge on "waste generated in other States," as opposed to $0.85 per ton surcharge on in-state waste); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (discriminatory tax

imposed on disposal of out-of-state hazardous waste); *Waste Management, Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 130 F.3d 731 (6th Cir. 1997) (striking disposal fee for disposing waste at unapproved facilities outside Nashville).

Philip Services also argues that the collection tax was unconstitutionally applied because it was based on all the income received from Seattle customers, which includes revenues from activities performed outside Seattle, the taxing jurisdiction. As a result, it is "discriminatory (because interstate commerce bears a potential burden not borne by local commerce), unfairly apportioned (because the tax measure is of out of [sic] all proportion to the activities engaged in within the City) and not reasonably related (because the activities engaged within the City are not reasonably related to income derived from activities performed outside the City)." (Docket Entry No. 3 at 28). Philip Services argues that $95,200 of the gross income taxed was improperly included because it is generated by services performed outside Seattle. (*Id.* at 27). This court's ruling that the collection tax is limited to collection services that are performed in the City of Seattle, reversing this aspect of the Bankruptcy Court's opinion and remanding to permit recalculation of the collection tax, makes it unnecessary to reach the constitutional issue.

IV. Conclusion

The Bankruptcy Court's rulings denying Philip Services's objection to the City of Seattle's tax claims are affirmed with the exception of the ruling denying the objection to the calculation of the collection tax.

This case is remanded to the Bankruptcy Court for proceedings consistent with this memorandum and opinion. This appeal is dismissed.

SIGNED on March 2, 2007, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

REPORT OF FEDERAL JUDICIAL CONFERENCE COMMITTEE RECOMMENDING ADOPTION OF FRAP 32.1

Submitted with Comments on Proposed Rule GR 14.1 of Ronald T. Schaps, dated April 27, 2007.

E. New Rule 32.1

1. 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," "non-precedential," or the like. 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.

2. Text of Proposed Amendment and Committee Note

Rule 32.1. Citing Judicial Dispositions

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

(b) Copies Required. If a party cites a 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

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of unpublished opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an unpublished opinion as binding precedent is constitutional. *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under

which a court may choose to designate an opinion as unpublished or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

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

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because a party hopes that it will influence the court as, say, the opinion of another court of appeals or a district court might. Some circuits have freely permitted the citation of unpublished opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances.

Parties seek to cite unpublished opinions in another context in which parties do not argue that the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an

argument by pointing to the presence or absence of a substantial number of unpublished opinions on a particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most no-citation rules do not clearly address the citation of unpublished opinions in this context.

Rule 32.1(a) is intended to replace these inconsistent and unclear 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 or state 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 unpublished opinions. For example, a court may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

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. 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 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 almost all of the circuits, unpublished opinions are as readily available as "published" opinions, and soon every court of appeals will be 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. 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 all 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 upon 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). Unpublished opinions are often read and cited precisely because they can 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 unpublished opinions.

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 decisions (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. It is, of course, true that every court is different. But the federal courts of appeals are enough alike, and have enough in common with state supreme courts, that there should be *some* evidence that permitting citation of unpublished opinions results in, say, opinions being issued more slowly. 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 the impact on judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences.

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 make 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, Rule 32.1 abolishes such rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion must provide a copy of that opinion to the court 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 and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of unpublished opinions, 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).

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3. Changes Made After Publication and Comments

No changes were made to the text of subdivision (b) or to the accompanying Committee Note.

The text of subdivision (a) was changed. The proposed rule, as published, provided that a prohibition or restriction could not be placed upon the citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions." The Committee was trying to accomplish two goals by drafting the rule in this manner: On the one hand, the Committee did not want a court to be able to permit the citation of unpublished opinions as a formal matter, but then, as a practical matter, make such citation nearly impossible by imposing various restrictions on it. On the other hand, the Committee did not want to preclude circuits from imposing general requirements of form or style upon the citation of *all* authorities.

After reflecting on the comments — particularly those of Judge Easterbrook — the Committee concluded that this clause was unnecessary. First, as Judge Easterbrook pointed out, Rule 32(e)** was intended to put the circuits out of the business of imposing general requirements of form or style. It is hard to identify a requirement of form or style that could be both endangered by Rule 32.1 and enforced under Rule 32(e). Second, Rule 32.1 is most naturally read as precluding only prohibitions and restrictions on the

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

citation of unpublished opinions *as such* — that is, prohibitions and restrictions aimed *exclusively* at the citation of unpublished opinions. A page limit on a brief could be said indirectly to "restrict" the citation of unpublished opinions, but no one is likely to read Rule 32.1 to forbid page limits on briefs.

For these reasons, the "generally imposed" clause was removed, leaving the rule simply to forbid courts from prohibiting or restricting the citation of unpublished opinions. What remained of the subdivision was also restyled so that it is now stated in the active rather than passive voice. The published version of the rule had been written passively — contrary to style conventions — because some Committee members hoped that a passively written rule would be less controversial. That strategy did not work, and all Committee members now agree that the rule should be written in active voice.

The Committee Note accompanying subdivision (a) has been substantially rewritten. The revised Note reflects the changes made in the text of the rule, states more forcefully the normative case for the rule, and responds directly to the major arguments against the rule. It is admittedly an unusual Note, in that it is almost entirely devoted to defending rather than explaining the rule. Such a Note seems advisable, though, given the controversial nature of proposed Rule 32.1.

4. Summary of Public Comments

As I explained in the introduction to this memorandum, I will not summarize all of the testimony that we received about Rule 32.1, nor will I summarize each of the 513 comments that were submitted. Rather, I will describe the major arguments that witnesses and commentators made for and against adopting the proposed rule. I will then describe the suggestions that commentators made regarding the wording of Rule 32.1. I will conclude by listing those who

commented in favor of and those who commented against adopting the proposed rule.

Please note that Sanford Svetcov, one of two members of the Advisory Committee who oppose Rule 32.1, asked that his dissenting views be communicated to the Standing Committee. A letter from Mr. Svetcov describing his reasons for opposing Rule 32.1 is attached to this memorandum.

a. Summary of Arguments Regarding Substance

i. Arguments Against Adopting Proposed Rule

1. A circuit should be free to conduct its business as it sees fit unless there is a compelling reason to impose uniformity. This is particularly true with respect to measures such as no-citation rules, which reflect decisions made by circuits about how best to allocate their scarce resources to meet the demands placed upon them. Circuits confront dramatically different local conditions. Among the features that vary from circuit to circuit are the size, subject matter, and complexity of the circuit's caseload; the number of active and senior judges on the circuit; the geographical scope of the circuit; the process used by the circuit to decide which cases are designated as unpublished; the time and attention devoted by circuit judges to unpublished opinions; and the legal culture of the circuit (such as the aggressiveness of the local bar). These features are best known to the judges who work within the circuit every day. No advisory committee composed entirely or almost entirely of outsiders should tell a circuit that it cannot implement a rule that the circuit has deemed necessary to handle its workload, unless that advisory committee has strong evidence that a uniform rule would serve a compelling interest.

2. The Appellate Rules Committee does not have such evidence with respect to Rule 32.1. The Committee Note fails to identify a single serious problem with the status quo that Rule 32.1 would solve.

a. The main problem identified by the Committee Note is that no-citation rules impose a "hardship" on attorneys by forcing them to "pick through the conflicting no-citation rules of the circuits in which they practice."

i. This is not much of a hardship.

— Every circuit has implemented numerous local rules, and attorneys will continue to have to "pick through" those rules whether or not Rule 32.1 is approved. It is not unreasonable to ask an attorney who seeks to practice in a circuit to read and follow that circuit's local rules — local rules that are readily available online.

— Among local rules, no-citation rules are particularly easy to follow, as they are clear and, in most circuits, stamped right on the face of unpublished opinions. A lawyer who reads an unpublished opinion is told up front exactly what use he or she can make of it.

— It is not surprising that the Committee has not identified a single occasion on which an attorney was in fact confused about the no-citation rule of a circuit, much less a single occasion on which an attorney was "sanctioned or accused of unethical conduct for improperly citing an 'unpublished' opinion." Attorneys have no difficulty locating, understanding, and following no-citation rules.

ii. Rule 32.1 would do little to alleviate whatever hardship exists.

— Most litigators practice in only one state and one circuit. Thus, most litigators are inconvenienced far more by differences between the rules of their *state* courts and the rules of their *federal* courts than they are by differences among the rules of various federal courts. The minority of attorneys who practice regularly in multiple circuits tend to work for the Justice Department or for large law firms and thus have the time and resources to learn and follow each circuit's local rules.

— Although Rule 32.1 would help these Justice Department and big firm lawyers by creating uniformity among federal circuits, it would *harm* the typical attorney who practices in only one state by creating *disuniformity* between, for example, the citation rules of the California courts and the citation rules of the Ninth Circuit.

— Even within the federal courts, Rule 32.1 would create uniformity only with respect to citation. The rule would not create uniformity with respect to the *use* that circuits make of unpublished opinions. Thus, those who practice in multiple federal circuits would still have to become familiar with inconsistent rules about unpublished opinions.

iii. If uniformity is the Committee's concern, it would be far better, for the reasons described below, for the Committee to propose a rule that would uniformly *bar* the citation of unpublished opinions.

b. The Committee Note alludes to a potential First Amendment problem. No court has found that no-citation rules violate the First Amendment, and no court will. Courts impose myriad restrictions on what an attorney may say to a court and how an attorney may say it. A no-citation rule no more threatens First Amendment values than does a rule limiting the size of briefs to 30 pages.

3. Not only has the Committee failed to identify any problems that Rule 32.1 would solve, it has failed to identify any other benefits that would result from Rule 32.1.

a. Rule 32.1 would not, as the Committee Note claims, "expand[] the sources of insight and information that can be brought to the attention of judges." Unpublished opinions provide little "insight" or "information" to anyone; to the contrary, they are most often used to mislead.

i. To understand why unpublished opinions do not provide much "insight" or "information," one needs to appreciate when and how unpublished opinions are produced.

— Appellate courts have essentially two functions: error correction and law creation. Unpublished opinions are issued in the vast majority of cases that call upon a court only to perform the former function.

— Unpublished 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 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. As one judge wrote: "[O]ur uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. They do *not* make or alter or nuance the law. The principles we use to decide cases in memorandum dispositions are already on the books and fully citable." [03-AP-129]

— Unpublished opinions are also issued in cases that *do* present important legal questions, but in which the court is not confident that it answered those questions correctly — most often because the facts were unusual or because the advocacy was poor or lopsided. In such circumstances, a court may not want to speak authoritatively or comprehensively about an issue — or foreclose a particular line of argument — when a future case may present more representative facts or more skilled advocacy.

— Because an unpublished opinion functions solely as a one-time explanation to the parties and the lower court, judges are careful to make sure that the result is correct, but they spend very little time reviewing the opinion itself. Usually the opinion is drafted by a member of the circuit's staff or by a law clerk; often, the staff member or law clerk simply converts a bench memo into an opinion. The opinion will generally say almost nothing about the facts, because its intended audience — the parties and the lower court — are already familiar with the facts. It is common for a panel to spend as little as five or ten minutes on an unpublished opinion. The opinions usually do not go

through multiple drafts, members of the panel usually do not request modifications, and the opinions are not usually circulated to the entire circuit before they are released.

— An unpublished opinion may accurately express the views of *none* of the members of the panel. As long as the result is correct, judges do not care much about the language. As one judge explained: "What matters is the result, not the precise language of the disposition or even its reasoning. Mem dispos reflect the panel's agreement on the outcome of the case, nothing more." [03-AP-075]

ii. Because of these features, citing unpublished opinions will not only provide little "insight" or "information," but will actually result in judges being *misled*.

— Unpublished opinions are poor sources of law. A court's holding in any case cannot be understood outside of the factual context, but unpublished opinions say little or nothing about the facts (because they are written for those already familiar with the case). Thus, it is difficult to discern what an unpublished opinion held.

— Because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate. Even slight variations in the way that a legal principle is stated can have significant consequences. If unpublished opinions could be cited, courts would often be led to believe that the law had been changed in some way by

an unpublished opinion, when no such change was intended.

— Unpublished opinions are also a poor source of information about a judge's views on a legal issue. As noted, it is possible that an unpublished opinion does not accurately express the views of any judge. Citing unpublished opinions might mislead lower courts and others about the views of a circuit's judges.

iii. Even in the rare case in which an unpublished opinion might be persuasive "by virtue of the thoroughness of its research or the persuasiveness of its reasoning," Rule 32.1 is not needed.

— First, any party can petition a court of appeals to publish an opinion that has been designated as unpublished. Courts recognize that they sometimes err in designating opinions as unpublished and are quite willing to correct those mistakes when those mistakes are brought to their attention.

— Second, and more importantly, nothing prevents any party in any case from borrowing — word-for-word, if the party wishes — the "research" and "reasoning" of an unpublished opinion. Parties want to cite unpublished opinions not because they are inherently persuasive, but because parties want to argue (explicitly or implicitly) that a panel of the circuit *agreed* with a particular argument — and for *that* reason, and not because of the opinion's "research" or "reasoning," the circuit should agree with the argument again. As one judge commented: "[N]othing prevents a party from copying wholesale the thorough research or persuasive reasoning of an

> unpublished disposition — without citation. But that's not what the party seeking to actually cite the disposition wants to do at all; rather, it wants the added boost of claiming that *three court of appeals judges endorse that reasoning*." [03-AP-169]

> This, however, is a dishonest and misleading use of unpublished opinions. As described, judges often sign off on unpublished opinions that do not accurately express their views; indeed, it will be the rare unpublished opinion that will precisely and comprehensively describe the views of any of the panel's judges.

iv. In short, no-citation rules merely prevent parties from using unpublished opinions illegitimately — to *mislead* a court. All legitimate uses of unpublished opinions — such as mining them for nuggets of research or reasoning — are already available to parties.

b. Rule 32.1 would not, as the Committee Note claims, "mak[e] the entire process more transparent to attorneys, parties, and the general public."

i. As the Committee Note itself describes, unpublished opinions are already widely available and widely read by judges, attorneys, parties, and the general public — and sometimes reviewed by the Supreme Court. Those opinions can be requested from the clerk, reviewed on the websites of the circuits and other free Internet sites, and researched with Westlaw and Lexis. Unpublished opinions are no less "transparent" than published opinions. They are not hidden from anyone.

ii. Although proponents of Rule 32.1 often cite suspicions that courts use unpublished opinions to duck difficult issues or to hide decisions that are contrary to law, there is no evidence

whatsoever that these suspicions are valid. Even those (very few) judges who have expressed support for Rule 32.1 have cited only the *perception* that unpublished opinions are used improperly; they agree that the perception is not accurate. Since the Ninth Circuit changed its no-citation rule to allow parties to bring to the court's attention in a rehearing petition any unpublished opinions that were in conflict with the decision of the panel, almost no parties have been able to do so. Every judge makes mistakes, but there is no evidence that judges are intentionally and systematically using unpublished opinions for improper purposes.

4. Although Rule 32.1 would not address any real problem with the status quo — and although Rule 32.1 would not result in any real benefit — Rule 32.1 would inflict enormous costs on judges, attorneys, and parties.

a. Judges

i. The judges of many circuits are now overwhelmed. The number of appeals filed has increased dramatically faster than the number of authorized judgeships, and Congress has been slow to fill judicial vacancies. Judges and their staffs are already stretched to the limit; there is no "margin for error" when it comes to imposing new responsibilities on them.

ii. Drafting published opinions takes a lot of time. Because judges know that such opinions will bind future panels and lower courts — and because judges know that those opinions will be widely cited as reflecting the views of the judges who write or join them — published opinions are drafted with painstaking care. A published opinion provides extensive information about the facts and the procedural background, because it is written for strangers to the case, and because those strangers will not be able to identify its precise holding without such information. The author of a published

opinion will devote dozens (sometimes hundreds) of hours to writing, editing, and polishing multiple drafts. Although law clerks may help with the research or produce a first draft, the authoring judge will invest a great deal of his or her own time into drafting the opinion. The final draft will be reviewed carefully by the other members of the panel, who will often request revisions. Before the opinion is released, it will be circulated to all of the members of the court, and other judges will sometimes request changes.

iii. By contrast, as described above, unpublished opinions generally take very little time. They are written quickly by court staff or law clerks, and judges give them only cursory attention — precisely because judges know that the opinions need to function only as explanations to those involved in the cases and will not be cited to future panels or to lower courts within the circuit.

iv. Rule 32.1 would force judges to spend much more time writing unpublished opinions just to make them suitable to be cited as persuasive authority. Judges will also take the time to write concurring and dissenting opinions, to prevent courts from misunderstanding their views. The Committee cannot:

> — change the *audience* for unpublished opinions (from the parties, their attorneys, and the lower court under the current system to future panels, district courts within the circuit, and the rest of the world under Rule 32.1), and
>
> — change the *purpose* of unpublished opinions (from giving a brief, one-time explanation to those already familiar with the case under the current system to being used forever to persuade courts to rule a particular way under Rule 32.1), and *not*

— not change the *nature* of unpublished opinions.

As one judge commented, "[the] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand." [03-AP-329]

v. Because judges will spend much more time writing unpublished opinions, at least two consequences will follow:

— Judges will have less time available to devote to published decisions — the decisions that really matter. The quality of published opinions will suffer. The law will be less clear. Apparent inconsistencies will abound. Inadvertent intra- and inter-circuit conflicts will arise more frequently. All of this will result in more litigation, more appeals, and more en banc proceedings, which will result in even more demands on judges, which will give them even less time to devote to writing published opinions.

— Parties will have to wait much longer to get unpublished decisions. Parties now often get an unpublished decision in a few days; under Rule 32.1, they may have to wait for a year or more.

vi. Although Rule 32.1 will reduce the time that judges have available to spend on opinions, it will increase the amount of attention that drafting opinions will require.

— Parties will cite more cases to the courts, meaning that conscientious judges and their law clerks will have

more opinions to read, explain, and distinguish in the course of writing opinions. As one judge wrote: "Once brought to the court's attention, . . . there is no way simply to ignore our memorandum dispositions." [03-AP-285]

— This will be a time-consuming process, because to fully understand an unpublished opinion — which, as described above, will usually say little about the facts — the judge or the law clerk will have to go back and read the briefs and record in the case.

— The result will be that parties — who now often wait a year or more to get a published decision — will have to wait even longer.

vii. Of course, Rule 32.1 can't change the fact that there are only 24 hours in a day. Judges are already stretched to the limit. If they have to spend more time on both published and unpublished opinions, they will have to compensate in some way. One way that judges will compensate is by issuing *no* opinion in an increasing number of cases — i.e., by disposing of an increasing number of cases with one-line orders.

— One-line dispositions are unfair to the parties, who are entitled to some explanation of why they won or lost an appeal, as well as to some assurance that their arguments were read, understood, and taken seriously. Parties who are not told why they won or lost an appeal — and who are not provided with any evidence that their arguments were even read — will lose confidence in the judicial system.

— One-line dispositions are unfair to lower court judges, who are entitled to know why they have been affirmed or reversed. Lower court judges cannot correct their mistakes unless those mistakes are made known to them.

— One-line dispositions deprive parties of a meaningful chance to petition for en banc reconsideration by the circuit or certiorari from the Supreme Court. Without any explanation of the panel's decision, it is almost impossible for the en banc court or the Supreme Court to know if a case is worth further review.

— When judges issue an unpublished opinion, they have to discuss the basic rationale for the disposition. That provides at least some discipline. That discipline is completely lacking when a panel issues a one-line disposition.

b. Attorneys

i. Critics of no-citation rules represent only a small fraction of the bar — although, because they are very vocal, they have created the illusion that there is widespread dissatisfaction with such rules. In fact, most lawyers support no-citation rules, and for good reason.

ii. Abolishing no-citation rules would vastly increase the body of case law that would have to be researched. If unpublished opinions can be cited, then they might influence the court; and if unpublished opinions might influence the court, then an attorney must research them. As one oft-repeated "talking point" put it: "As a matter of prudence, and probably professional ethics, practitioners

could not ignore relevant opinions decided by the very circuit court before which they are now litigating." [03-AP-025]

iii. Even an attorney who understands that unpublished opinions are largely useless and who does not want to waste time researching them will have to prepare for the possibility that his or her opponent will use them. One way or another, attorneys will have to read unpublished opinions.

iv. An attorney will be faced with a difficult dilemma when he or she runs across an unpublished opinion that is contrary to his or her position. Even if unpublished opinions are formally treated as non-binding, "the advocate is faced with the Hobson's choice of either using up precious pages in her brief distinguishing the unpublished decisions, or running the uncertain risk of condemnation from her opponent (or worse, the court) for ignoring those decisions. In other words, even if it were possible to maintain some sort of *formal* distinction between permissively citable unpublished decisions and mandatory, precedential published opinions, the *substance* of the distinction would quickly erode." [03-AP-462]

v. The hardship imposed on attorneys is not just a function of the dramatic increase in the *number* of opinions that they will have to read; it is also a function of the *nature* of those opinions. Because unpublished opinions say so little about the facts, attorneys will struggle to understand them. Attorneys will often have to retrieve the briefs or records of old cases to be certain that they understand what unpublished opinions held.

vi. Attorneys already find it almost impossible to keep current on the law — even the law in one or two specialities. So many courts are publishing so many opinions — and there are so many ambiguities and inconsistencies in those opinions — that it is often very difficult for a conscientious attorney to know what the law

"is" on a particular question. Rule 32.1 will compound this problem many times over, not only because the number of opinions that will "matter" will multiply, but because the unpublished opinions that will have to be consulted are "a particularly watery form of precedent." [03-AP-169] Because so little time goes into writing them, 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 circuits.

vii. Litigators are not the only attorneys who will be burdened by Rule 32.1. Transactional attorneys and others who counsel clients about how to structure their affairs will have more opinions to read and, because more law means more uncertainty, will have difficulty advising their clients about the legal implications of their conduct. This problem will be particularly acute for attorneys who must advise large corporations and other organizations that operate in multiple jurisdictions.

viii. While all attorneys — litigators and non-litigators — will be harmed by Rule 32.1, some will be harmed more than others.

— Unpublished opinions are not as readily available as published opinions. Not all libraries and legal offices can afford to purchase the Federal Appendix and rent space to store it. And not all lawyers can afford to use Westlaw or Lexis. (Indeed, not all attorneys have access to computers.) The E-Government Act will help, but it will not level the playing field entirely. For example, the Act will not require circuits to provide electronic access to their *old* unpublished decisions, and it is unlikely that researching unpublished opinions on circuit websites will be as

easy as researching those opinions on Westlaw or Lexis.

— Even if the day arrives when unpublished opinions become equally available to all, attorneys will still have to *read* them. Some attorneys are already overwhelmed with work or have clients who cannot pay for more of their time. These attorneys — including solo practitioners, small firm lawyers, public defenders, and CJA-appointed counsel — will bear the brunt of Rule 32.1. Rule 32.1 will thus increase the already substantial advantage enjoyed by large firms, government attorneys, and in-house counsel at large corporations.

c. Parties

i. As described above, all parties in all cases — both those that terminate in published opinions and those that terminate in unpublished opinions — will have to wait longer for their cases to be resolved. Delays are bad for everyone, but they are particularly harmful for the most vulnerable litigants — such as plaintiffs in personal injury cases who can no longer pay their medical bills or habeas petitioners who are unlawfully incarcerated.

ii. As described above, Rule 32.1 will result in more one-line dispositions. More parties will never be given an explanation for why they lost their appeal or even assurance that their arguments were taken seriously. This will result in *less* transparency and *less* confidence in the judicial system.

iii. As described above, Rule 32.1 will increase the already high cost of litigation. Clients will have to pay more attorneys to read more cases.

iv. Increasing the cost of litigation will, of course, harm the poor and middle class the most, adding to the already considerable advantages enjoyed by the powerful and the wealthy.

v. Rule 32.1 will particularly disadvantage pro se litigants and prisoners, who often do not have access to the Internet or to the Federal Appendix.

5. Rule 32.1 could harm state courts. For example, the rule would permit litigants to cite and federal courts to rely upon the unpublished opinions of the California *state* courts in diversity and other actions, even though the California courts themselves have determined that these cases should not be looked to for expositions of state law. This, in turn, will enable litigants to use the unpublished decisions of the California state courts to influence the development of California law, through the "back door" of the federal courts. Thus, many of the costs imposed by Rule 32.1 on federal courts — such as the need for judges to spend more time writing unpublished opinions — will also be imposed on state courts.

6. The assurances provided in the Committee Note that Rule 32.1 will not inflict the costs described above are unpersuasive.

a. The Committee Note admits that Rule 32.1 would inflict substantial costs of the type described above if it required courts to treat their unpublished opinions as binding precedent, but then gives assurance that Rule 32.1 does not do so. The Committee is naive in believe that a clear distinction between "precedential" and "non-precedential" will be maintained.

i. As noted, parties will be citing unpublished opinions precisely for their precedential value — that is, as part of an argument (implicit or explicit) that because a panel of a circuit decided an issue one way in the past, the circuit should decide the issue the same way now. The only real interest that proponents of Rule 32.1 have in citing unpublished opinions is as precedent.

ii. When circuits are confronted with this argument, they will not be able to say simply that the prior unpublished opinion is not binding precedent and therefore can be ignored. Rather, the court will have to distinguish it or explain why it will not be followed. As one group of judges commented: "As a practical matter, we expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions." [03-AP-396] From the point of view of the court's workload, then, the Committee Note's assurance that courts will not have to treat their unpublished opinions as binding precedent will make little difference.

iii. This phenomenon will be even more apparent in the lower courts. It will be a rare district court judge who will ignore an unpublished opinion of the circuit that will review his or her decision. If unpublished opinions are cited to lower courts, lower courts will have to treat them as though they were binding, even if that is not technically true.

iv. In sum, all of the consequences described above — such as courts having to spend more time writing unpublished opinions and attorneys having to spend more time researching them

— will occur, whether or not the unpublished opinions are labeled "non-binding."

b. The Committee Note's argument that there is no compelling reason to treat unpublished opinions different than such sources as district court opinions, law review articles, newspaper columns, or Shakespearian sonnets misses a few important distinctions:

i. The fact that law review articles or newspaper columns can be cited in a brief will not have any effect on the *author* of such materials. The author of a law review article or a newspaper column is going to do precisely the same amount of work — and write precisely the same words — whether or not his or her work can later be cited to a court. By contrast, making the unpublished opinions of a court of appeals citable *will* affect their authors, as described above.

ii. There is no chance that law review articles or newspaper columns will be cited by parties for their precedential value — that is, as part of an argument that, because a circuit did *x* once, it should do *x* again. Law review articles, newspaper columns, and the like are cited *only* for their persuasive value because that is the only value they have. An unpublished opinion, by contrast, is cited by a party who wants a future panel of the circuit or a lower court within the circuit to decide an issue a particular way — not because the unpublished opinion, like a law review article, is powerfully persuasive, but because the unpublished opinion, unlike the law review article, was at least nominally issued in the name of the circuit.

iii. The same point can be made about the opinions of other circuits, lower federal courts, state courts, or foreign jurisdictions. As one commentator wrote:

> "When the opinions, even the unpublished ones, of another court are cited, the underlying argument is as follows: the other court accepted or advanced a particular reasoning and, therefore, this court should too — it can, and should, trust the other court's judgment. When an unpublished opinion of the same court is cited, however, the underlying argument is invariably a precedential one, in the most basic sense: this court accepted or advanced a particular reasoning in another case and, therefore, it would be fundamentally unfair not to

apply that same rationale in the instant case. Such opinions *are* cited for their precedential value." [03-AP-478]

iv. There is also no chance that a lower court will feel bound to adhere to the views of the author of a law review article or newspaper column. As one judge wrote, "Shakespearian sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value." [03-AP-169] Or, as one bar committee wrote, "unlike unpublished decisions, there is no risk these other materials will be mistaken for the law of the circuit or given undue weight by the lower courts or litigants." [03-AP-319]

v. According to commentators, this risk is particularly acute in the lower courts, which is why some no-citation rules apply to those courts, as well as to parties. "The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist." [03-AP-322]

c. The Committee Note is wrong in suggesting that, because some circuits have liberalized no-citation rules without experiencing problems, the concerns about Rule 32.1 are overblown.

i. The conditions of each circuit vary significantly, making it hazardous to assume that the experience of one circuit will be duplicated in another. As noted above, circuits vary with respect to such things as the size, subject matter, and complexity of the caseload; the number of judges; and the local legal culture. Just because the Fifth Circuit is able to permit the citation of unpublished opinions does not mean that the Ninth Circuit can do so.

ii. No circuit has gone as far as Rule 32.1 would in permitting the citation of unpublished opinions. All circuits discourage such citation, forbid it in some circumstances, or both. And three circuits with relatively liberal citation rules — the Third, Fifth, and Eleventh — either do not make or have only recently made their unpublished opinions widely available. It is virtually costless for a circuit whose unpublished opinions do not appear in the Federal

Appendix or in the Westlaw and Lexis databases to allow those opinions to be cited.

iii. Some circuits that have liberalized no-citation rules have done so only recently, so it is too early to know whether they will experience difficulties.

iv. Some of the circuits that permit liberal citation of unpublished opinions also make frequent use of one-line dispositions. This supports — rather than refutes — the arguments of those who oppose Rule 32.1.

7. Rule 32.1 is not a "general rule[] of practice and procedure" because, if Rule 32.1 is adopted, "some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material." Because Rule 32.1 would "affect the construction and import of opinions," the rule is "beyond the scope of the rulemaking authority of 28 U.S.C. § 2072." [03-AP-329]

8. If, despite all of these arguments, the Committee decides to forge ahead with Rule 32.1, it should at least amend the rule so that it applies only prospectively — that is, so that it applies only to unpublished decisions issued after the rule's effective date. It is unfair to allow citation of opinions that judges wrote under the assumption that they would never be cited. The D.C. Circuit's decision to abolish its no-citation rule was applied prospectively only; the Committee should follow the D.C. Circuit's lead.

ii. Arguments For Adopting Proposed Rule

1. It is not Rule 32.1, but no-citation rules, that require a compelling justification. In a democracy, the presumption is that citizens may discuss with the government the actions that the government has taken. Under the First Amendment, the presumption is that prior restraints of speech — especially speech *about* the government made *to* the government — are invalid. In a common law system, the presumption is that judicial decisions are citable. In an adversary system, the presumption is that lawyers are free to make the best arguments available. No-citation rules — through which judges instruct litigants, "You may not even *mention* what we've done in the past, much less engage us in a discussion about whether what we've done in the past should influence what we do in this case" — are profoundly antithetical to American values. The burden

should not be on the Committee to defend Rule 32.1 but on opponents of Rule 32.1 to defend no-citation rules.

2. The main problem created by no-citation rules — a problem that Rule 32.1 would eliminate — is that no-citation rules deprive the courts, attorneys, and parties of the use of unpublished opinions. The evidence is overwhelming that unpublished opinions are indeed a valuable source of "insight" and "information."

a. First, unpublished opinions are often read. "[L]awyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so." [03-AP-406] Numerous commentators — supporters and opponents of Rule 32.1 alike — said that they regularly read unpublished opinions.

b. Second, unpublished opinions are often cited by attorneys. One commentator wrote: "My own experience has been that the prohibition on [citation] currently in effect in the lower courts of the Ninth Circuit is utterly disregarded, not just by bad lawyers but also by good ones — even by leading lawyers, not always, to be sure, but in many cases when there is no binding, published authority available." [03-AP-473]

c. Third, unpublished decisions are often cited by judges. Researchers have identified hundreds of citations to unpublished opinions by appellate courts and district courts — including appellate courts and district courts in jurisdictions that have adopted no-citation rules. One of the most pointed of those citations appears in *Harris v. United Federation of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002):

> "There is apparently no published Second Circuit authority directly on point for the proposition that § 301 does not confer jurisdiction over fair representation suits against public employee unions. In the 'unpublished' opinion in *Corredor*, which of course is published to the world on both the Lexis and Westlaw services, the Court expressly decides the point . . . . Yet the Second Circuit continues to adhere to its technological-outdated rule prohibiting parties from citing such decisions . . . thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least

as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one."

d. Fourth, there are some areas of the law in which unpublished opinions are particularly valuable. One appellate judge, after describing a recent occasion on which a staff attorney had cited many unpublished decisions in advising a panel of judges about how to dispose of a case, commented as follows:

> "Judges rely on this material for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions. . . . We have all encountered the situation in which there is no precedent in our own circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an unpublished order. I see no reason why we ought not be allowed to consider such material, and I certainly do not understand why counsel, obligated to present the best possible case for his client, should be denied the right to comment on legal material in the public domain." [03-AP-335]

e. Fifth, 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. For example, district courts are instructed to strive for uniformity in sentencing, and thus they are often anxious for *any* evidence about how similarly situated defendants are being treated by other judges. Many unpublished opinions provide this information. The value of unpublished opinions to district court judges may explain why only 4 of the 1000-plus active and senior district judges in the United States — including only 2 of the 150-plus district judges in the Ninth Circuit — submitted comments opposing Rule 32.1.

f. Sixth, there is not already "too much law," as some opponents of Rule 32.1 claim. As one distinguished federal appellate judge wrote in one of his books: "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but

because there are too few on point."*** Attorneys are most likely to cite — and judges are most likely to consult — an unpublished opinion not because it contains a sweeping statement of law (a statement that can be found in countless published opinions), but because the facts of the case are very similar to the facts of the case before the court. Parties should be able to bring such factually-similar cases to a court's attention, and courts should be able to consult them for what they are worth.

g. For all of these reasons, no-citation rules should be abolished. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it makes no sense to prohibit attorneys and judges from talking about the opinions that both are reading.

3. In addition to the evidence that unpublished opinions do indeed often serve as sources of "insight" and "information" for both attorneys and judges, there are other reasons to doubt the oft-repeated claim that unpublished opinions merely apply settled law to routine facts and therefore have no precedential value:

a. It is difficult for a court to predict whether a case will have precedential value. "Only when a case comes along with arguably comparable facts does the precedential relevance of an earlier decision-with-opinion arise. This point naturally leads one to question how an appellate panel can, ex ante, determine the precedential significance of its ruling. Lacking omniscience, an appellate panel cannot predict what may come before its court in future days." [03-AP-435] As one attorney commented: "[W]e can and do expect a lot from our judges, but the assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes me as hero-worship taken beyond the cusp of reality." [03-AP-454]

b. Even if a court could reliably predict whether an opinion establishes a precedent worth being cited, making that decision would *itself* take a lot of time. "The very choice of treating an appealed case as non-precedential, if done conscientiously, has to be preceded by

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***Richard A. Posner, The Federal Courts: Challenge and Reform 166 (1996). I should note that Judge Posner opposes Rule 32.1.

thoughtful analysis of the relevant precedents." [03-AP-435] Time, of course, is precisely what courts who issue unpublished opinions say they do not have.

c. Given these limitations, it is not surprising that courts often designate as "unpublished" decisions that should be citable. The most famous example involves the Fourth Circuit's declaring an Act of Congress unconstitutional in an unpublished opinion — something that the Supreme Court labeled "remarkable and unusual." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993). Other examples abound. For example, in *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), the court described how 20 inconsistent unpublished opinions on the same unresolved and difficult question of law had been issued by Ninth Circuit panels before a citable decision settled the issue.

d. More evidence of the unreliability of these designations can be found in the many unpublished decisions that have been reviewed by the Supreme Court. (A recent example is *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004), in which the Supreme Court reversed an unpublished decision that "was flawed as a matter of fact" — suggesting that the facts were neither clear nor straightforward — "and as a matter of law" — because the opinion took what the Supreme Court regarded as the wrong side of a circuit split.) The fact that the Supreme Court decides to review a case does not necessarily mean that the circuit made a mistake in designating the opinion as unpublished, but the fact that an opinion was deemed "certworthy" by the Supreme Court does suggest that *something* worthy of being cited may have occurred in that opinion.

e. Many unpublished opinions reverse the decisions of district courts or are accompanied by concurrences or dissents — implying that their results may not be clear or uncontroversial.

f. Researchers who have studied unpublished opinions have found that the decision to designate an opinion as unpublished is influenced by factors other than the novelty or complexity of the issues. For example, the background of judges plays a role. The more experience that a judge had with an area of law in practice, the less likely the judge is to publish opinions in that area (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).

4. Even if, despite all of this evidence, it remains unclear whether unpublished opinions offer much insight or information, Rule 32.1 has a major advantage over no-citation rules: It lets the "market" function and determine the value of unpublished opinions.

a. A glaring inconsistency runs through the arguments of the opponents of Rule 32.1. On the one hand, they argue that unpublished opinions contain nothing of value — that such opinions are useless, fact-free, poorly-worded, hastily-converted bench memos written by 26-year-old law clerks. On the other hand, they argue that, if Rule 32.1 is approved, attorneys will be devoting thousands of hours to researching these worthless opinions, briefs will be crammed with citations to these worthless opinions, district courts will feel compelled to follow these worthless opinions, and circuit judges will have no alternative but to carefully analyze and distinguish these worthless opinions.

b. Opponents of Rule 32.1 can't have it both ways. Either (i) unpublished opinions contain something of value, in which case parties *should* be able to cite them, or (ii) unpublished opinions contain nothing of value, in which case parties *won't* cite them.

c. Under no-citation rules, judges make this decision; they bar the citation of unpublished decisions. If they're wrong in their assessment, the "market" cannot correct them because there is no "market." Under Rule 32.1, the "market" makes this decision. Unpublished opinions will be cited if they are valuable, and they will not be cited if they are not valuable.

5. No-citation rules create several other problems — problems that Rule 32.1 would eliminate:

a. No-citation rules lead to arbitrariness and injustice. Our common law system is founded on the notion that like cases should be decided in a like manner. It helps no one — not judges, not attorneys, not parties — when attorneys are forbidden even to *tell* a court how it decided a similar case in the past. Such a practice can only increase the chances that like cases will not be treated alike.

b. No-citation rules undermine accountability. It is striking that judges opposing Rule 32.1 have argued, in essence: "If parties could tell us what we've done, we'd feel morally obliged to justify ourselves. Therefore, we are going to forbid parties from telling us what we've done." Put differently, judges opposing Rule 32.1 have

insisted on the right to decide *x* in one case and "not *x*" in another case and not even be asked to reconcile the seemingly inconsistent decisions. Judges always have the right to explain or distinguish their past decisions or to honestly and openly change their minds. But judges should not have the right to forbid parties from mentioning their past decisions. As one judge wrote: "Public accountability requires that we not be immune from criticism; allowing the bar to render that criticism in their submissions to us is one of the most effective ways to ensure that we give each case the attention that it deserves." [03-AP-335]

c. No-citation rules undermine confidence in the judicial system.

i. No-citation rules make absolutely no sense to non-lawyers. It is almost impossible to explain to a client why a court will not allow his or her lawyer to mention that the court has addressed the same issue in the past — or applied the same law to a similar set of facts. Clients just don't get it.

ii. Because no-citation rules are so difficult for the average citizen to understand, they create the appearance that courts have something to hide — that unpublished opinions are being used for improper purposes. As one judge wrote:

> "It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to 'revised and extended remarks' inserted into the Congressional Record to op-ed pieces in local newspapers; why should the 'unpublished' judicial orders be the only matter off limits to citation and argument? It implies judges have something to hide.
>
> "In some corners, there is a perception that they do — that unpublished orders are used to sweep under the rug departures from precedent. [This judge is confident that, at least in his circuit, unpublished opinions are not used improperly.] Still, to the extent that . . . the bar *believes* that this occurs, whether it does or not . . . allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice." [03-AP-367]

iii. No-citation rules also give rise to the appearance — if not the reality — of two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low-quality justice for "no-name appellants represented by no-name attorneys." [03-AP-408]

— Large institutional litigants — and the big firms that represent them — disproportionately receive careful attention to their briefs, oral argument, and a published decision written by a judge. Others — including the poor and the middle class, prisoners, and pro se litigants — disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk.

— Defenders of no-citation rules insist that, although judges pay little attention to the language of unpublished opinions, they are careful to ensure that the results are correct. The problem with this argument is that it "assumes that reasoning and writing are not linked, that is, that clarity characterizes the panel's thinking about the proper decisional rule, but writing out that clear thinking is too burdensome." [03-AP-435] As every judge who has had the experience of finding that an initial decision just "won't write" — and that is every judge — it is manifestly untrue that reasoning and writing can be separated. One judge put it this way: "There is . . . a wholesome, and perhaps necessary, discipline in our ensuring that unpublished orders can be cited to the courts. . . . [R]elegating this material to non-citable status is an invitation toward mediocrity in decisionmaking and the maintenance of a subclass of cases that often do not get equal treatment with the cases in which a published decision is rendered." [03-AP-335]

d. The inconsistent local rules among circuits do indeed create a hardship for attorneys who practice in more than one circuit — a hardship that opponents of Rule 32.1 too quickly dismiss.

i. The suggestion of some opponents of Rule 32.1 that the Committee is insincere in its concern for the impact of inconsistent

local rules on those who practice in more than one circuit is belied by the fact that perhaps no problem has been the focus of more of the Advisory Committee's and Standing Committee's attention over the past few years. The Appellate Rules have been amended several times — most recently in 2002 — to eliminate variations in local rules. Rule 32.1 and other of the rules published in August 2003 would do the same. The Advisory Committee and the Standing Committee believe strongly that an attorney should be able to file an appeal in a circuit without having to read and follow dozens of pages of local rules.

ii. Inconsistent local rules can only be eliminated one at a time. Any rule that makes federal appellate practice more uniform by eliminating one set of inconsistent local rules is obviously going to leave other inconsistent local rules untouched. That is not an excuse for opposing the rule.

e. Opponents of Rule 32.1 have also been too quick to dismiss the First Amendment problems posed by no-citation rules.

i. No-citation rules offend First Amendment values — if not the First Amendment itself — in banning truthful speech about a matter of public concern — indeed, about a governmental action that is in the public domain. They also offend First Amendment values in forbidding an attorney from making a particular type of argument in support of his or her client — a type of argument that is forbidden, at least in part, because it would put the court to the inconvenience of having to defend, explain, or distinguish one of its own prior actions. What the Supreme Court said in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544-45 (2001), about restrictions that Congress had placed on legal services attorneys could be said about the restrictions that no-citation rules place on all attorneys:

> "Restricting LSC attorneys in . . . presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys. . . . An informed, independent judiciary presumes an informed, independent bar. . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."

ii. No-citation rules are not like limits on the size of briefs. They differ in the character of the restriction and in the interest purportedly being served by the restriction. A 30-page limit on briefs does not forbid an attorney from making a particular argument or citing a particular action of the court, and page limits — which every court in America imposes — are necessary if courts are to function. No-citation rules, by contrast, forbid particular arguments (arguments that ask a court to follow one of its prior unpublished decisions), are imposed by only some courts, and are imposed by courts in order to protect themselves from having to take responsibility for their prior actions.

6. In opposing Rule 32.1, commentators offer a "parade of horribles" that they claim will be suffered by judges, attorneys, and parties if no-citation rules are abolished.

a. Many of the "horribles" in this parade are the same "horribles" that were paraded out when unpublished opinions became available on Westlaw and Lexis — and then again when unpublished opinions started being published in the Federal Appendix. None of the predictions was accurate.

b. The predictions regarding Rule 32.1 are no more reliable. Dozens of state and federal courts have already liberalized or abolished no-citation rules, and there is absolutely no evidence that the dire predictions of Rule 32.1's opponents have been realized in those jurisdictions. There is no evidence, for example, that judges are spending more time writing unpublished opinions or that attorneys are bombarding courts with citations to unpublished opinions or that legal bills have skyrocketed for clients. While it is true that there are differences among circuits, the circuits that permit citation are similar enough to the circuits that forbid citation that there should be *some* evidence that liberal citation rules cause harm, and yet no such evidence exists.

c. It is no accident that most of the opposition to permitting citation to unpublished opinions comes from judges and attorneys who have no experience permitting citation to unpublished opinions. It is likewise no accident that little opposition to Rule 32.1 was heard from the judges and attorneys who have such experience. As one judge commented: "What *would* matter are adverse effects and adverse reactions from the bar or judges of the 9 circuits (and 21 states) that now allow citation to unpublished opinions. And from that quarter no protest has been heard. This implies to me that the

benefits of accountability and uniform national practice carry the day." [03-AP-367]

7. Regarding the argument that Rule 32.1 would dramatically increase the workload of judges:

a. First, there is no evidence that this has occurred in jurisdictions that have abandoned or liberalized citation rules. One reason why liberalizing citation rules does not seem to result in more work for judges is that unpublished opinions have never been written just for parties and counsel, as proponents of no-citation rules insist. Those decisions have also been written for the en banc court and the Supreme Court. "This may be why the nine circuits that allow citation to these documents have not experienced difficulty: the prospect of citation to a different panel requires no more of the order's author than does the prospect of criticism in a petition for a writ of certiorari." [03-AP-367]

b. Second, judges already have available to them options that would reduce their workloads far more than no-citation rules.

i. Judges now spend too much time on drafting published opinions.

— The overwork that judges cite in arguing against Rule 32.1 is in part a function of increasing caseloads — which are largely outside of judges' control — but also a function of a particular style of judging. Some of the arguments against Rule 32.1 reflect an attitude toward judging that has become too common in the federal appellate courts and that should be changed.

— A judge who claims that he or she sometimes needs to go through 70 or 80 drafts of an opinion before getting every word exactly right has confused the function of a judge with the function of a legislator. Judges are appointed not to draft statutes, but to resolve concrete disputes. What they hold is law; everything else is dicta. Lower court judges understand this; they know how to read a decision and extract its holding.

— Judges could save a lot of time if they would abandon "the discursive, endless federal appellate opinion."

> [03-AP-435] Judges should write short, direct opinions that address only the one or two issues that most need substantial discussion. Instead, judges too often trudge through every issue mentioned anywhere in a brief. Judges should also spend less time obsessing over every footnote and comma.

ii. Judges also now spend too much time on drafting unpublished opinions.

> — If unpublished opinions were written as judges claim — if they were two- or three-paragraph opinions that started with "the parties are familiar with the facts" and then very briefly described why the court agreed or disagreed with the major contentions — then parties would not *want* to cite them. But many unpublished decisions go far beyond this. They are 10 or 12 pages long, they contain a great deal of discussion of the facts, and they go on and on about the law. If an opinion looks like a duck and quacks like a duck, parties are going to want to cite it like a duck.
>
> — It is odd to fix the problems with unpublished opinions not by fixing the problems with unpublished opinions but by barring people from talking about unpublished opinions. Judges would not need no-citation rules if they would confine themselves to issuing (1) full precedential opinions in cases that warrant such treatment or (2) two- or three-paragraph explanations in cases that do not. The problem is that judges insist on "a third, intermediate option: a full and reasoned but unprecedent[ial] appellate opinion." [03-AP-219] Judges have only themselves to blame.

c. Third, if abolishing no-citation rules had the impact on judges' workload that Rule 32.1's opponents fear, then no-citation rules would not be on the wrong side of history. But they are. "The citadel of no-citation rules is falling. There is a clear trend, both in the individual federal circuits and in the states, toward abandoning those rules. Nine of the thirteen circuits now allow citation of unpublished opinions. And while a majority of the states still prohibit such citation, the margin is slim and dwindling." [03-AP-032] As courts have uniformly gotten more busy, the trend has

uniformly been toward liberalizing rules regarding the citation of unpublished opinions. Obviously even busy courts have been able to handle their caseloads despite abolishing no-citation rules.

d. Rule 32.1 would, in some respects, *reduce* the workload of judges, because no-citation rules require judges and litigants to treat as issues of first impression questions that have already been addressed many times by the circuit.

i. Take, for example, *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), in which the Ninth Circuit admitted that various panels had issued at least 20 unpublished opinions resolving the same unsettled issue of law at least three different ways — all before any published opinion addressed the issue. To quote *Rivera-Sanchez*,

> "Our conclusion that this decision meets the criteria for publication was prompted by the fact that it establishes a rule of law that we had not previously announced in a published opinion. Various three-judge panels of our court, however, have issued a number of unpublished memorandum decisions taking different approaches to resolving the question whether the Supreme Court's opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), requires a district court faced with a defendant convicted of illegal re-entry after deportation whose indictment refers to both 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2) to resentence or merely correct the judgment of conviction. These conflicting mandates undoubtedly have created no small amount of confusion for district judges who serve in border districts. While our present circuit rules prohibit the citation of unpublished memorandum dispositions, see 9th Cir. R. 36-3, we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis.
>
> "During oral argument, we asked counsel to submit a list of the unpublished dispositions of this court that have confronted this issue. The parties produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct the problem. Under our rules, these unpublished memorandum dispositions have no precedential value, see 9th Cir. R. 36-3, and this opinion now reflects the law of the circuit. To avoid even the possibility that someone might rely upon them,

however, we list these unpublished memorandum decisions below so that counsel and the district courts will know that each of them has been superseded today."

ii. It is hard to know how the Ninth Circuit's no-citation rule saved the court any time in this instance. An issue that could have been settled authoritatively on the first or second occasion instead was litigated at least 21 times. Had an attorney representing a party in, say, the sixth case been able to draw the court's attention to its five prior decisions, it seems likely that the court would have issued a published opinion settling the issue. And attorneys likely would not have litigated the issue over and over again if the court's rules had not required them to treat an issue that had already been addressed 20 times as an issue of first impression. No-citation rules keep issues "in play" — and thus encourage litigation — much longer than necessary.

8. Regarding the argument that Rule 32.1 would result in more one-line dispositions:

a. Opponents of Rule 32.1 have argued both (i) that one-line dispositions would be harmful because parties would not get an explanation of why they won or lost *and* (ii) that the explanation that many unpublished opinions give parties about why they won or lost is not accurate. What judges are arguing is that they need to be able to keep up the *illusion* of giving parties adequate explanations for the results of cases. This is not a compelling reason to maintain no-citation rules.

b. It would be better for courts to issue no opinion at all than an opinion that so poorly reflects the views of the judges that those judges are unwilling to have it cited back to them. If, as many judges claim, unpublished opinions accurately report only a result — and not necessarily the reason for the result — then the court should just issue a result. As one commentator wrote: "If the result of adopting the proposed rule is to force judicial *staff* to write less in unpublished orders, then so be it. It is better to have a one-sentence disposition written by an actual judge th[a]n three pages written by a recent law school graduate masquerading as a judge. There is no point . . . for offering an explanation of the court's reasoning to litigants when the court itself is unwilling to be bound by that reasoning." [03-AP-414]

9. Regarding the argument that Rule 32.1 would result in unpublished opinions being used to mislead courts — or that courts would misuse or misunderstand unpublished opinions:

a. The circuit judges who write unpublished opinions do not need this protection. Whatever the flaws of unpublished opinions, those flaws are best known to the judges who write them. It is unlikely that a court will give its own opinion "too much" weight or not understand the limitations of an opinion that it wrote.

b. Lower court judges also do not need this protection.

i. Some of the comments against Rule 32.1 take a dim view of the abilities of district court judges. Commentators suggest, for example, that no-citation rules are needed to keep district court judges from being "distracted" by citations to unpublished opinions and to prevent judges from giving those opinions too much weight.

ii. This concern is misplaced. District court judges are entrusted on a daily basis with the lives and fortunes of those who appear before them. They regularly grapple with the most complicated legal and factual issues imaginable. They are quite capable of understanding and respecting the limitations of unpublished opinions.

iii. District courts have nonbinding authorities cited to them every day. For example, a district court in Oregon may have a decision of the Ninth Circuit, a decision of the Second Circuit, a decision of the Illinois Supreme Court, and a law review article cited to it in the course of one brief. It is not terribly difficult for the district court to understand the difference between the Ninth Circuit cite and the other cites. Likewise, it will not be terribly difficult for the district court to understand the difference between a published opinion of the Ninth Circuit that it is obligated to follow and an unpublished decision that it is not.

iv. District judges have the courage to disagree with unpublished decisions that they believe are wrong. Moreover, given that numerous circuit judges have commented publicly about the poor quality of unpublished decisions, it may not even take much courage to disagree with those decisions. In several circuits, unpublished decisions can be cited to district courts, and there is no evidence that district courts have felt compelled to treat those decisions as binding for fear of provoking the appellate courts.

10. Regarding the argument that Rule 32.1 would result in attorneys having to do much more legal research and clients having to pay much higher legal bills:

a. To begin with, if no-citation rules really spared attorneys and their clients from the fate predicted by opponents of Rule 32.1, then those rules would be widely supported by the bar. They are not, at least outside of the Ninth Circuit:

i. The ABA House of Delegates declared in 2001 that no-citation rules are "contrary to the best interests of the public and the legal profession" and called upon the federal appellate courts to "permit citation to relevant unpublished opinions."

ii. The former chair of the D.C. Circuit's Advisory Committee on Procedures wrote: "Probably more than any other facet of appellate practice, these [no-citation] policies have drawn well-deserved criticism from the bar and from scholars. When I chaired the D.C. Circuit's Advisory Committee on Procedures, this kind of practice was perennially and uniformly condemned — all to no avail." [03-AP-016]

iii. Rule 32.1 is supported by such national organizations as the ABA and the American College of Trial Lawyers, by bar organizations in New York and Michigan, and by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice.

iv. By contrast, only lawyers who clerked for or who appear before Ninth Circuit judges have complained in great number about Rule 32.1. If Rule 32.1 were likely to create the predicted problems, lawyers from throughout the United States should be rising up against it, led by such organizations as the ABA.

b. In any event, Rule 32.1 would not create serious problems for attorneys and their clients:

i. Opponents of Rule 32.1 are simply wrong in arguing that they now have no duty to research unpublished opinions, but, if those opinions could be cited, they would then have a duty to research all unpublished opinions.

ii. It is not the ability to *cite* unpublished opinions that triggers a duty to research them.

— If unpublished opinions contain something of value, then attorneys already have an obligation to research them — so as to be able to advise clients about the legality of their conduct, predict the outcome of litigation, and get ideas about how to frame and argue issues before the court.

— If unpublished opinions do not contain something of value, then attorneys will not have an obligation to research them even if they can be cited. No rule of professional responsibility requires attorneys to research useless materials.

iii. In researching unpublished opinions, attorneys already 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 will not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney will look at unpublished opinions, as he or she should.

11. Several of those who commented in favor of Rule 32.1 made clear that they were doing so only because they view it as a valuable "first step." These commentators argued that the practice of issuing unpublished decisions should be abolished and criticized the Committee for "legitimizing" or "tacitly endorsing" the practice in Rule 32.1. At the same time, at least one judge said that he did not object to Rule 32.1, but that he wanted to put the Committee on notice that he would strongly oppose any future rule requiring that unpublished opinions be treated as precedential.

b. Summary of Arguments Regarding Form

Not surprisingly, the comments that we received about Rule 32.1 focused on the substance, not on the drafting. Most of the remarks about the drafting were off-hand, such as the occasional comment that Rule 32.1 was "clear" or "well drafted." The commentators did not seem to have any trouble understanding the rule.

The only confusion about the meaning of the rule that appeared with any frequency in the comments was the assumption

that the rule would require courts to treat unpublished opinions as binding precedent. (I am not referring to the commentators who explained why they thought Rule 32.1 would do so *de facto*; I am referring only to those who seemed to assume that it would do so *de jure*.) It is difficult to know how much confusion exists on this point, as the commentators used the word "precedent" loosely. Some used it to mean binding precedent; others used it to mean merely non-binding guidance; and still others were not clear about how they were using it. In any event, I do not believe that this confusion can be traced to the drafting of either the rule or the Committee Note. Rather, I suspect that, to the extent that there was confusion on the point, it was confined to commentators who had heard about the rule but had not read it themselves.

Several commentators — in reference to the sentence in the Committee Note about the "conflicting" local rules of the courts of appeals — pointed out that the rules do not "conflict," in the sense of demanding inconsistent conduct from any person, because each circuit's rule applies only to that circuit's unpublished opinions.

Only **three commentators** — all supporters of Rule 32.1 — suggested that it be rewritten in some respect:

Philip Allen Lacovara, Esq. (03-AP-016) supports Rule 32.1, but recommends a couple of changes:

1. Mr. Lacovara objects that, by referring to dispositions that have been "designated as . . . 'non-precedential," Rule 32.1(a) "necessarily implies that such designations have legal force and effect" — something Mr. Lacovara disputes. So as to avoid "legitimizing" the attempts by judges to label some of their opinions "non-precedential," Rule 32.1(a) should end with the word "dispositions": "No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions."

2. Mr. Lacovara argues that, even if that suggestion is rejected, the Committee should eliminate the "generally imposed" clause in Rule 32.1(a). He thinks it is "ludicrous" for the Committee to approve a proposed rule "that appears to license the circuits by local rule to ban *all* citations to all prior decisions." He also dismisses the concern, mentioned in the Committee Note, that a circuit might promulgate a local rule requiring that copies of all

unpublished opinions cited in a brief be served and filed. He believes that such a local rule is already foreclosed by Rule 32.1(b).

Prof. Stephen R. Barnett of the University of California at Berkeley School of Law (Boalt Hall) (03-AP-032) strongly supports the substance of Rule 32.1(a), but, in a recent law review article, was very critical of its drafting — and, in particular, of the decision to forego what he calls a "permissive" approach (that is, to state affirmatively that unpublished opinions may be cited) in favor of a "prohibitory" approach (that is, to bar restrictions on the citation of unpublished opinions):

1. Despite acknowledging that the text of the rule addresses only the "citation" of unpublished opinions, and despite acknowledging that the Committee Note "is at pains to make clear that [the] proposed Rule 'says nothing whatsoever about the effect that a court must give' to an unpublished opinion," Prof. Barnett still believes that it is "not clear" whether Rule 32.1(a) would force courts to treat unpublished opinions as binding precedent. He argues that a local rule deeming unpublished opinions to be "non-precedential" could be seen as a "restriction" placed upon the "citation" of those opinions — and, because this "restriction" would be placed only upon unpublished opinions, it would be barred by Rule 32.1(a) as drafted. Prof. Barnett argues this problem — and others — could be avoided if Rule 32.1(a) would simply state affirmatively: "Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court."

2. Prof. Barnett acknowledges that his alternative would not prevent courts from placing restrictions upon the citation of unpublished opinions, such as branding them as "disfavored" or providing that they can be cited only when no published opinion will serve as well. But Prof. Barnett makes three points about these restrictions (which he refers to as "discouraging words"):

   a. First, Prof. Barnett argues that it is not clear whether a local rule that disfavors the citation of unpublished opinions or that restricts the citation of unpublished opinions to situations in which adequate published opinions are lacking imposes a "restriction" upon the citation of unpublished opinions — and thus it is unclear whether Rule 32.1(a) as drafted is effective in barring such local rules. He argues that to instruct counsel that citation of unpublished opinions is "disfavored" is not

necessarily to "restrict" their citation. He also points out that some restrictions on citation are worded in terms of counsel's "belief" about the adequacy of published opinions on an issue — and that such rules are more "admonitory" than "enforceable." He concedes, though, that some local rules do appear to impose a "restriction" on citation, and thus would be barred by Rule 32.1(a) as drafted — but not by his alternative.

b. Second, Prof. Barnett downplays the possibility that a circuit dominated by "adamant anti-citationists . . . might impose some 'prohibition or restriction' that would make it difficult or impossible for attorneys to cite unpublished opinions." In Prof. Barnett's view, "[f]ederal circuit judges can be expected to obey the Federal Rules of Appellate Procedure, and to do so in spirit as well as in letter."

c. Finally, Prof. Barnett argues that, in any event, circuits *should* be able to discourage the citation of unpublished opinions and *should* be able to impose restrictions upon them — such as the restriction that they can be cited only when adequate published opinions are absent. Prof. Barnett repeats the familiar arguments about the lesser quality of unpublished opinions and argues that there is nothing wrong with treating them as "second-class precedents" — "as long as the[ir] citation is *allowed*."

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) supports the rule, but generally agrees with Prof. Barnett's comments about drafting. He also singles out for criticism the following sentence in the Committee Note: "At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions.") Judge Easterbrook points out that Rule 32(e) *does* bar circuits from imposing typeface or other requirements, and thus the Committee Note to Rule 32.1 should not imply that circuits retain this authority.

The **Style Subcommittee** (04-AP-A) makes the following suggestions:

1. Change the heading from "Citation of Judicial Dispositions" to "Citing Judicial Dispositions."

2. In subdivision (a), change "upon the citation of" to "on citing" both places where the phrase occurs.

3. In subdivision (b), change "A party who cites" to "If a party cites," insert a comma after "database," insert "the party" before "must file," and delete "other written."

c. List of Commentators

i. Commentators Who Oppose Proposed Rule

Federal Circuit Court Judges

First Circuit

Chief Judge Michael Boudin (03-AP-192) (did not expressly oppose Rule 32.1, but said that almost all of the First Circuit's judges believe that restricting citation to situations in which no published opinion adequately addresses the issue is "a reasonable local limitation")

Second Circuit

Chief Judge John M. Walker, Jr. (03-AP-329) (on behalf of himself and 18 active and senior judges on the Second Circuit) (Chief Judge Walker testified at 4/13 hearing)

Third Circuit

Senior Judge Ruggero J. Aldisert (03-AP-293)

Fourth Circuit

Judge M. Blane Michael (03-AP-401)

Fifth Circuit

Senior Judge Thomas M. Reavley (03-AP-170)

Sixth Circuit

Judge Boyce F. Martin, Jr. (03-AP-269)

Seventh Circuit

Judges John L. Coffey, Richard D. Cudahy, Terence Evans, Michael S. Kanne, Daniel A. Manion, Richard A. Posner, Ilana Diamond Rovner, Diane P. Wood, and Ann Claire Williams (03-AP-396) (joint letter) (Judge Wood testified at 4/13 hearing)

Eighth Circuit

Senior Judge Myron H. Bright (03-AP-047) (Judge Bright testified at 4/13 hearing)

Chief Judge James B. Loken (03-AP-499) (reporting that 7 of 9 active judges and 3 of 4 senior judges expressing a view on Rule 32.1 opposed it)

Ninth Circuit

Senior Judge Arthur L. Alarcón (03-AP-290)

Judge Carlos Tiburcio Bea (03-AP-130)

Senior Judge Robert R. Beezer (03-AP-292)

Judge Marsha S. Berzon (03-AP-134)

Senior Judge Robert Boochever (03-AP-046)

Senior Judge James R. Browning (03-AP-076)

Judge Jay S. Bybee (03-AP-327)

Judge Consuelo M. Callahan (03-AP-318)

Senior Judge William C. Canby, Jr. (03-AP-110)

Senior Judge Jerome Farris (03-AP-156)

Senior Judge Warren J. Ferguson (03-AP-167)

Senior Judge Ferdinand F. Fernandez (03-AP-061)

Judge Raymond C. Fisher (03-AP-366)

Judge William A. Fletcher (03-AP-059)

Senior Judge Alfred T. Goodwin (03-AP-026)

Judge Susan P. Graber (03-AP-400)

Senior Judge Cynthia Holcomb Hall (03-AP-133)

Judge Michael Daly Hawkins (03-AP-291)

Senior Judge Procter Hug, Jr. (03-AP-063)

Judge Alex Kozinski (03-AP-169)

Senior Judge Edward Leavy (03-AP-289)

Judge M. Margaret McKeown (03-AP-350)

Senior Judge Dorothy W. Nelson (03-AP-131)

Senior Judge Thomas G. Nelson (03-AP-067)

Senior Judge John T. Noonan, Jr. (03-AP-052)

Judge Diarmuid F. O'Scannlain (03-AP-285)

Judge Richard A. Paez (03-AP-273)

Judge Stephen Reinhardt (03-AP-402)

Judge Pamela Ann Rymer (03-AP-233)

Judge Barry G. Silverman (03-AP-075)

Senior Judge Otto R. Skopil, Jr. (03-AP-135)

Senior Judge Joseph T. Sneed (03-AP-077)

Judge Richard C. Tallman (03-AP-081)

Judge Sidney R. Thomas (03-AP-398)

Senior Judge David R. Thompson (03-AP-403)

Judge Stephen S. Trott (03-AP-129)

Senior Judge J. Clifford Wallace (03-AP-082)

Judge Kim McLane Wardlaw (03-AP-132)

Tenth Circuit

None

Eleventh Circuit

Judge Stanley F. Birch, Jr. (03-AP-496)

Federal Circuit

Judge Timothy B. Dyk (03-AP-397)

Senior Judge Daniel M. Friedman (03-AP-506)

Chief Judge Haldane Robert Mayer (03-AP-086) (on behalf of all Federal Circuit judges) (Chief Judge Mayer and Judge William Curtis Bryson testified at 4/13 hearing)

Judge Paul R. Michel (03-AP-505)

Senior Judge S. Jay Plager (03-AP-297)

Federal District Court Judges

Northern District of California

Senior Judge William W. Schwarzer (03-AP-065)

District of Hawaii

Chief Judge David Alan Ezra (03-AP-250)

Northern District of Illinois

Judge Robert W. Gettleman (03-AP-054)

Senior Judge Milton I. Shadur (03-AP-066)

Federal Magistrate Judges

District of Arizona

Magistrate Judge Virginia A. Mathis (03-AP-136)

Central District of California

Magistrate Judge Jeffrey W. Johnson (03-AP-399)

Magistrate Judge Joseph Reichmann (Retired) (03-AP-484)

Federal Bankruptcy Judges

Central District of California

Judge Alan M. Ahart (03-AP-351)

Judge Ellen Carroll (03-AP-278)

Judge Geraldine Mund (03-AP-074)

Chief Judge Barry Russell (03-AP-405)

Judge John E. Ryan (03-AP-252)

Judge Maureen A. Tighe (03-AP-294)

Judge Vincent P. Zurzolo (03-AP-174)

Southern District of California

Chief Judge John J. Hargrove (03-AP-281) (on behalf of himself and 3 other judges on his court)

Eastern District of Washington

Judge Patricia C. Williams (03-AP-056)

Other Federal Judges

U.S. Court of International Trade

Chief Judge Jane A. Restani (03-AP-137)

U.S. Tax Court

Judge Mark V. Holmes (03-AP-359)

State Appellate Judges

California

Justice William W. Bedsworth, California Court of Appeal, Fourth Appellate District (03-AP-280) (on behalf of himself and 5 colleagues)

Justice Paul Boland, California Court of Appeal, Second Appellate District (03-AP-295)

Chief Justice Ronald M. George, Supreme Court of California (03-AP-471)

Presiding Justice Laurence D. Kay, California Court of Appeal, First Appellate District (03-AP-404)

Justice Richard C. Neal (retired), California Court of Appeal, Second Appellate District (03-AP-126)

Presiding Justice Robert K. Puglia (retired), California Court of Appeal, Third Appellate District (03-AP-155)

Justice Maria P. Rivera, California Court of Appeal, First Appellate District (03-AP-048)

Justice W.F. Rylaarsdam, California Court of Appeal, Fourth Appellate District (03-AP-193)

Presiding Justice Arthur G. Scotland, California Court of Appeal, Third Appellate District (03-AP-372)

Justice Gary E. Strankman (retired), California Court of Appeal, First Appellate District (03-AP-296)

Wisconsin

Judge Ralph Adam Fine, Wisconsin Court of Appeals (03-AP-068)

State Trial Judges

California

Judge N.A. "Tito" Gonzales, Superior Court, Santa Clara County (03-AP-038)

Law Professors

Dean Scott A. Altman, University of Southern California Law School (03-AP-314)

Prof. Jerry L. Anderson, Drake University Law School (03-AP-078)

Prof. Stuart Banner, UCLA School of Law (03-AP-072)

Prof. Brian Bix, University of Minnesota Law School (03-AP-021)

Prof. Charles E. Cohen, Capital University Law School (03-AP-298)

Prof. Ross E. Davies, George Mason University School of Law (03-AP-392)

Prof. Michele Landis Dauber, Stanford Law School (03-AP-029)

Prof. Ward Farnsworth, Boston University School of Law (03-AP-221) (neither supports nor opposes rule, but raises concerns)

Prof. Victor Fleischer, UCLA School of Law (03-AP-062)

Prof. Thomas Healy, Seton Hall University Law School (03-AP-380)

Prof. Michael S. Knoll, University of Pennsylvania Law School (03-AP-093)

Prof. Mark Lemley, Boalt Hall School of Law (03-AP-153)

Prof. Rory K. Little, Hastings College of the Law (03-AP-334)

Prof. Gregory N. Mandel, Albany Law School (03-AP-274)

Prof. Fred S. McChesney, Northwestern University School of Law (03-AP-507)

Prof. Brett H. McDonnell, University of Minnesota Law School (03-AP-467)

Prof. Richard W. Painter, University of Illinois College of Law (03-AP-091)

Prof. Ethan Stone, University of Iowa College of Law (03-AP-198)

Prof. George M. Strickler, Tulane Law School (03-AP-100)

Prof. Daniel P. Tokaji, Moritz College of Law, Ohio State University (03-AP-045)

Prof. Eugene Volokh, UCLA School of Law (03-AP-158)

Prof. Nhan Vu, Chapman University School of Law (03-AP-477)

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Raoul D. Kennedy, Esq., Skadden Arps et al., San Francisco, CA (03-AP-255)

Kelly M. Klaus, Esq., Munger, Tolles & Olson LLP, Los Angeles, CA (03-AP-336)

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Theodore J. Kozloff, Esq., Skadden, Arps, et al., San Francisco, CA (03-AP-141)

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Karen L. Landau, Esq., Oakland, CA (03-AP-247)

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Ingrid Leverett, Esq., Krieg, Keller, et al., San Francisco, CA (03-AP-276)

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Elwood Lui, Esq., and Alan E. Friedman, Esq., Jones Day, Los Angeles, CA (03-AP-444)

Christian E. Mammen, Esq., San Francisco, CA (03-AP-345) (on behalf of himself and 2 colleagues)

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Robert A. Merring, Esq., Newport Beach, CA (03-AP-098)

Daniel E. Mitchel, Esq., Reference Librarian, Witkin California State Law Library, Sacramento, CA (03-AP-004)

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H. Joseph Nourmand, Esq., Los Angeles, CA (03-AP-128)

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Christopher R.J. Pace, Esq., San Diego, CA (03-AP-249)

Holly R. Paul, Esq., Clerk to U.S. Magistrate Judge, Burbank, CA (03-AP-328)

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Robert H. Rotstein, Esq., McDermott, Will & Emery, Los Angeles, CA (03-AP-036)

Andrew E. Rubin, Esq., Los Angeles, CA (03-AP-270)

Harvey I. Saferstein, Esq., Mintz Levin et al., Santa Monica, CA (03-AP-186)

Kelli L. Sager, Esq., Davis Wright Tremaine LLP, Los Angeles, CA (03-AP-343)

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K. John Shaffer, Esq., Los Angeles, CA (03-AP-376)

Rosetta Shatkin, Esq., Oakland, CA (03-AP-127)

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Victor Sherman, Sherman & Sherman, Santa Monica, CA (03-AP-488)

Robert Sargent Shriver III, Esq., Beverly Hills, CA (03-AP-031)

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John Trasvina, Esq., San Francisco, CA (03-AP-055)

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Monica J. Wahl, Esq., CA (03-AP-373)

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Elia Weinbach, Esq., Mitchell, Silberberg & Knupp LLP, Los Angeles, CA (03-AP-023)

Don Willenburg, Esq., Carroll, Burdick & McDonough LLP, San Francisco, CA (03-AP-123)

J. Craig Williams, Esq., The Williams Law Firm, Newport Beach, CA (03-AP-017)

Stephanie Rae Williams, Esq., Sedgwick, Detert, Moran & Arnold LLP, Los Angeles, CA (03-AP-316) (on behalf of herself and 3 colleagues)

Barbara A. Winters, Esq., Howard Rice et al., San Francisco, CA (03-AP-483)

Victor H. Woodworth, Esq., Newport Beach, CA (03-AP-224)

Steven Wyner, Esq., Wyner & Tiffany, Torrance, CA (03-AP-034)

Stephen Yagman, Esq., Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA (03-AP-234)

Michael D. Young, Esq., Weston Benshoof et al., Los Angeles, CA (03-AP-109)

Martin Zankel, Esq., Bartko, Zankel, Tarrant & Miller, San Francisco, CA (03-AP-041)

Tenth Circuit

John A. Darden, Esq., The Darden Law Firm P.A., Las Cruces, NM (03-AP-019)

Eleventh Circuit

Stephen N. Bernstein, Esq., Stephen N. Bernstein, P.A., Gainesville, FL (03-AP-475)

Barry W. Beroset, Esq., Beroset & Keene, Pensacola, FL (03-AP-463)

Michael T. Burns, Esq., Sarasota, FL (03-AP-503)

John P. Cardillo, Esq., Cardillo, Keith & Bonaquist, Naples, FL (03-AP-512)

Barry A. Cohen, Esq., Cohen, Jayson & Foster, P.A., Tampa, FL (03-AP-363)

Bradley A. Conway, Esq., Bradley A. Conway, P.A., Orlando, FL (03-AP-448)

Kevin A. Cranman, Esq., Atlanta, GA (03-AP-299)

Armando Garcia, Esq., Garcia and Seliger, Quincy, FL (03-AP-451)

Mary Eugenia Gates, Esq., Law Clerk, U.S. Court of Appeals for the Eleventh Circuit, Atlanta, GA (03-AP-502)

Walter L. Grantham, Jr., Esq., Clearwater, FL (03-AP-476)

Robert S. Griscti, Esq., Gainesville, FL (03-AP-497)

Joel Hirschhorn, Esq., Hirschhorn & Bieber, P.A., Coral Gables, FL (03-AP-500)

James K. Jenkins, Esq., Maloy & Jenkins, Atlanta, GA (03-AP-275)

Kirk N. Kirkconnell, Esq., Kirkconnell, Lindsey, Snure & Yates, P.A., Winter Park, FL (03-AP-494)

Peter Kontio, Esq., and Todd David, Esq., Alston & Bird LLP, Atlanta, GA (03-AP-470)

Louis Kwall, Esq., Kwall, Showers & Coleman, P.A., Clearwater, FL (03-AP-447)

David R. Parry, Esq., Bauer, Crider, Pellegrino & Parry, Clearwater, FL (03-AP-424)

Christopher P. Saxer, Esq., Fort Walton Beach, FL (03-AP-480)

Wilbur C. Smith III, Esq., The Wilbur Smith Law Firm, PLLC, Fort Myers, FL (03-AP-495)

Mark Snyderman, Esq., Dunwoody, GA (03-AP-472)

Alan R. Soven, Esq., Miami, FL (03-AP-452)

Overseas

John McGuire, Esq., Cleary, Gottlieb, Steen & Hamilton, London, England (03-AP-407)

Igor V. Timofeyev, Esq., Associate Legal Officer, Office of the President, International Criminal Tribunal for the Former Yugoslavia, The Hague, Netherlands (03-AP-411)

Jana L. Torok, Esq., Camp Casey, Korea (03-AP-236)

In-House Attorneys

D.C. Circuit

John P. Frantz, Esq., Verizon Communications, Washington, D.C. (03-AP-261)

Second Circuit

William P. Barr, Esq., Executive Vice President and General Counsel, Verizon, New York, NY (03-AP-272)

Paul T. Cappuccio, Esq., Executive Vice President and General Counsel, Time Warner Inc., New York, NY (03-AP-064)

Ninth Circuit

Marc D. Bond, Esq., Assistant Counsel, Law Department, Union Oil Company of California, Anchorage, AK (03-AP-058)

Jeffrey B. Coyne, Esq., Vice President, General Counsel, and Corporate Secretary, Newport Corporation, Irvine, CA (03-AP-145)

James R. Edwards, Esq., Senior Legal Counsel, Corporate Legal Department, Qualcomm, San Diego, CA (03-AP-120)

Gregory T.H. Lee, Esq., President, Eureka Casinos, Las Vegas, NV (03-AP-157)

John M. Nettleton, Esq., Corporate Counsel, Starbucks Coffee Company, Seattle, WA (03-AP-226)

Adam J. Pliska, Esq., Director of Business & Legal Affairs, World Poker Tour, West Hollywood, CA (03-AP-440)

Sheldon W. Presser, Esq., Senior Vice President & Deputy General Counsel, Warner Bros. Entertainment Inc., Burbank, CA (03-AP-346)

Jerri L. Solomon, Esq., Senior Corporate Counsel, Farmers Group, Inc., Los Angeles, CA (03-AP-417)

Thomas F. Tait, Esq., President, Tait & Associates, Inc., Santa Ana, CA (03-AP-140)

John Vaughan, Esq., President and CEO, T and T Industries, Inc., Fullerton, CA (03-AP-108)

Eleventh Circuit

Michael Bishop, Esq., Chief Intellectual Property Counsel, BellSouth Corporation, Atlanta, GA (03-AP-315)

Deval L. Patrick, Esq., Executive Vice President, General Counsel, and Corporate Secretary, The Coca-Cola Company, Atlanta, GA (03-AP-027)

Non-Attorneys or Status Not Clear

Fifth Circuit

Roberta Gonzalez, Pflugerville, TX (03-AP-118)

Seventh Circuit

Carole Tkacz, Gary, IN (03-AP-163)

Ninth Circuit

Dr. Philip K. Anthony, CEO, Bowne DecisionQuest, Torrance, CA (03-AP-206)

Chris L. Britt, President, Marwit Capital, Newport Beach, CA (03-AP-147)

Hartwell Harris, Law Student, Boalt Hall School of Law, Berkeley, CA (03-AP-205)

Mark Kerslake, Province Group, Newport Beach, CA (03-AP-143)

Farahnaz Nourmand, Los Angeles, CA (03-AP-089)

Bethany L. O'Neill, San Diego, CA (03-AP-189)

John A. Sandberg, President, Sandberg Furniture, Los Angeles, CA (03-AP-148)

Homan Taghdiri, Los Angeles, CA (03-AP-088)

Wayne Willis, Los Altos, CA (03-AP-300)

Unknown

Katherine Kimball Windsor (03-AP-241)

Organizations

ACLU Foundation of Southern California, Los Angeles, CA (03-AP-235)

Advisory Council of the United States Court of Appeals for the Federal Circuit, Washington, DC (03-AP-410) (Carter G. Phillips, Esq., testified at 4/13 hearing)

Appellate Courts Committee, Los Angeles County Bar Association, Los Angeles, CA (03-AP-201)

Attorney General's Office, State of California, Sacramento, CA (03-AP-395)

Attorney General's Office, State of Washington, Olympia, WA (03-AP-382)

California La Raza Lawyers Association, Los Angeles, CA (03-AP-268)

Committee on Appellate Courts, State Bar of California, San Francisco, CA (03-AP-319) (John A. Taylor, Jr., Esq., testified at 4/13 hearing)

Committee on Federal Courts, State Bar of California, San Francisco, CA (03-AP-393)

Federal Circuit Bar Association, Washington, DC (03-AP-409)

Hispanic National Bar Association, Washington, DC (03-AP-415)

Litigation Section, Los Angeles County Bar Association, Los Angeles, CA (03-AP-347)

Northern District of California Chapter, Federal Bar Association, San Francisco, CA (03-AP-374)

Orange County Chapter, Federal Bar Association, Irvine, CA (03-AP-429)

ii. Commentators Who Favor Proposed Rule

Federal Circuit Court Judges

Judge Edward R. Becker (CA3) (Judge Becker testified at 4/13 hearing)

Judge Frank H. Easterbrook (CA7) (03-AP-367)

Judge David M. Ebel (CA10) (03-AP-010)

Judge Kenneth F. Ripple (CA7) (03-AP-335)

Judge A. Wallace Tashima (CA9) (03-AP-288)

Law Professors

Prof. Stephen R. Barnett, Boalt Hall School of Law (03-AP-032) (Prof. Barnett testified at 4/13 hearing)

Prof. Richard B. Cappalli, Temple University, James E. Beasley School of Law (03-AP-435)

Prof. Andrew M. Siegel, University of South Carolina School of Law (03-AP-219)

Prof. Michael B.W. Sinclair, New York Law School (03-AP-283)

Attorneys in Private or Government Practice

D.C. Circuit

Ashley Doherty, Esq., Washington, DC (03-AP-225)

Elizabeth J. Pawlak, Esq., Pawlak & Associates, Washington, DC (03-AP-449)

Second Circuit

Philip Allen Lacovara, Esq., Mayer, Brown, Rowe & Maw LLP, New York, NY (03-AP-016)

Steven I. Wallach, Morrison Cohen Singer & Weinstein, LLP, New York, NY (Mr. Wallach testified at 4/13 hearing)

Third Circuit

David R. Fine, Esq., Kirkpatrick & Lockhart LLP, Harrisburg, PA (03-AP-223)

James L. Martin, Esq., Wilmington, DE (03-AP-513)

Fourth Circuit

Dr. Mark S. Bellamy, Esq., Virginia Beach, VA (03-AP-324)

Kerry Hubers, Esq., Alexandria, VA (03-AP-209)

Roy M. Jessee, Esq., Mullins, Harris & Jessee, P.C., Norton, VA (03-AP-230)

Steven R. Minor, Esq., Elliott Lawson & Minor, Bristol, VA (03-AP-210)

Fifth Circuit

Stephen R. Marsh, Esq., Wichita Falls, TX (03-AP-216)

Sixth Circuit

Kurt L. Grossman, Wood, Herron & Evans LLP, Cincinnati, OH (03-AP-426)

Charles E. Young, Jr., Esq., Knoxville, TN (03-AP-214)

Seventh Circuit

Beverly B. Mann, Esq., Chicago, IL (03-AP-408)

Eighth Circuit

Mark G. Arnold, Esq., Husch & Eppenberger, LLC, St. Louis, MO (03-AP-002)

Hugh R. Law, Esq., Lowenhaupt & Chasnoff, LLC, St. Louis, MO (03-AP-212)

David J. Weimer, Esq., Kramer & Frank, P.C., Kansas City, MO (03-AP-005)

Ninth Circuit

Anonymous (03-AP-238)

Gary Michael Coutin, Esq., San Francisco, CA (03-AP-465)

David W. Floren, Esq., Santa Rosa, CA (03-AP-227)

James B. Friderici, Esq., Delaney, Wiles, et al., Anchorage, AK (03-AP-006)

Robert Don Grifford, Esq., Reno, NV (03-AP-213)

Robert L. Jovick, Esq., Livingston, MT (03-AP-508)

James B. Morse, Jr., Esq., Tempe, AZ (03-AP-222)

Kenneth J. Schmier, Esq., Committee for the Rule of Law, Emeryville, CA (03-AP-239)

Jonathan M. Shaw, Esq., Susman Godfrey LLP, Seattle, WA (03-AP-208)

Leslie R. Weatherhead, Esq., Witherspoon, Kelley, Davenport & Toole, Spokane, WA (03-AP-473)

Tenth Circuit

Daniel E. Monnat, Esq., Monnat & Spurrier, Wichita, KS (03-AP-271)

Samuel M. Ventola, Esq., Rothgerber, Johnson & Lyons, Denver, CO (03-AP-217)

Eleventh Circuit

J. Christopher Desmond, Esq., Law Clerk, U.S. District Court for the Southern District of Georgia, Savannah, GA (03-AP-211)

Michael N. Loebl, Esq., Fulcher, Hagler, et al., Augusta, GA (03-AP-454)

Craig N. Rosler, Esq., Birmingham, AL (03-AP-149)

In-House Attorneys

Ira Brad Matetsky, General Counsel, Goya Foods, Inc., Secaucus, NJ (03-AP-434)

Non-Attorneys or Status Not Clear

Jacob Aftergood, Santa Cruz, CA (03-AP-265)

Steven A. Aftergood, Washington, DC (03-AP-286)

Debra D. Coplan, Los Angeles, CA (03-AP-323)

Paul Freda, Los Gatos, CA (03-AP-284)

Laurence Neuton, Los Angeles, CA (03-AP-317)

Organizations

American Bar Association, Chicago, IL (Judah Best, Esq., testified at 4/13 hearing)

American College of Trial Layers, Irvine, CA (William T. Hangley, Esq., and James W. Morris III, Esq., testified at 4/13 hearing)

Association of the Bar of the City of New York and the Association's Committee on Federal Courts, New York, NY (03-AP-464)
Brennan Center for Justice, New York University School of Law, New York, NY (Jessie Allen, Esq., testified at 4/13 hearing)

Citizens for Voluntary Trade, Arlington, VA (03-AP-414; 03-AP-456)

Committee on Courts of Appellate Jurisdiction, New York State Bar Association, Albany, NY (03-AP-097)

Committee on U.S. Courts, State Bar of Michigan, Lansing, MI (03-AP-394)

Public Citizen Litigation Group, Washington, DC (03-AP-008; 03-AP-487) (Brian Wolfman, Esq., testified at 4/13 hearing)

Social Security Administration, Baltimore, MD (03-AP-491)

Trial Lawyers for Public Justice and the TLPJ Foundation, Washington, DC (03-AP-406) (Richard Frankel, Esq., testified at 4/13 hearing)