United States Court of Appeals
for the Federal Circuit
Washington, D.C. 20439

Chambers of
Haldane Robert Mayer
Chief Judge

January 6, 2004

Dear Mr. McCabe:

Re: Proposed Changes to the Federal Rules of Appellate Procedure

This letter represents the unanimous opposition of the judges of the United States Court of Appeals for the Federal Circuit to three of the proposed amendments to the Federal Rules of Appellate Procedure.

Rule 32.1 - Citation of Nonprecedential Dispositions

The Federal Circuit strongly opposes adoption of proposed Rule 32.1 and believes that the decision whether nonprecedential opinions may be cited should be entrusted to the discretion of each circuit as provided by local rule. The proposed rule provides that a court may not prohibit the citation of nonprecedential opinions or orders. In contrast, Federal Circuit Rule 47.6(b), with exceptions not relevant here, provides that nonprecedential opinions and orders "must not be employed or cited as precedent." In the view of the judges of the Federal Circuit, the adoption of Rule 32.1, which will override our local rule, may adversely affect the administration of justice by skewing the allocation of judicial resources, delaying issuance of precedential opinions, increasing the issuance of judgments without an accompanying opinion, and harming litigants.

The proposed rule may skew the allocation of judicial resources. As the Committee is aware, the decision to designate certain opinions as nonprecedential stemmed from the ever-increasing appellate caseload of the last few decades and the impossibility of providing a precedential opinion in every case. The adoption of the practice allows the judges to concentrate their efforts on opinion writing in cases involving important and precedent-setting issues. Opinions issued as nonprecedential do not require the same amount of time or effort. The Advisory Committee opines that this allocation of judicial resources will not be affected by the proposed rule because a court, although barred from prohibiting the citation of nonprecedential dispositions, may nonetheless decide by local rule that it will not treat its nonprecedential opinions as binding precedent. We fear that this finely-drawn distinction will not forestall the need to allocate judicial resources differently. Judges will certainly feel compelled to devote more time and resources to nonprecedential opinions if counsel cite and rely on them.

Indeed, having a rule that allows a party to cite a nonprecedential opinion and a second rule that would mandate that a court ignore such citation does not seem workable. Further, if a circuit maintains a rule barring the court from treating a nonprecedential opinion as binding, there seems little point in allowing a litigant to cite such nonprecedential opinions.

It is also likely that the issuance of nonprecedential opinions in any number of routine cases will be delayed as judges devote more time to writing them. That, in turn, will either delay issuance of precedential opinions or result in less time being devoted to preparing them. On the other end of the spectrum, it is likely that there will be an increase in Federal Circuit Rule 36 judgments without opinion. In our view, both of these developments would be detrimental to the administration of justice.

Finally, although the proposed rule is intended to benefit litigants, the effect may be the opposite. First, many litigants may feel compelled to significantly expand the breadth and depth of their legal research because of the existence of the rule. However, this expanded time, effort, and cost will yield commensurately little in return. Nonprecedential opinions with abbreviated fact patterns and without new legal principles will in nearly all instances lend little clarity to the law.

Rule 35(a) - Determination of a Majority in En Banc Cases.

The Federal Circuit opposes the adoption of proposed Rule 35(a) and believes that the determination of what constitutes a majority in en banc cases should be entrusted to the discretion of each circuit court as provided by local rule. The proposed amendment adopts the case majority approach, where disqualified judges do not count in the base in considering whether a majority of judges have voted for hearing or rehearing en banc. Federal Circuit Rule 35(a)(1) embodies the absolute majority approach, where disqualified judges do count in the base. The Advisory Committee Comments indicate that a majority of circuit courts of appeal have adopted the absolute majority approach. Nonetheless, out of a concern for uniformity, the proposed rule imposes the approach presently used by a "substantial minority" of circuit courts of appeal, rather than the approach adopted by a majority of the circuits. This decision, made by a majority of the participant committee members imposes the case majority approach on all circuits, the majority of whom have not adopted that approach.

Presently, the Federal Circuit has twelve judges in active service. Thus, under our local rule a majority of seven judges is needed to grant a petition for hearing or rehearing en banc. Under the proposed rule, if five judges were disqualified, as recently occurred in our court, only four judges would be needed to grant en banc review and decide the case en banc. In our view, four of twelve is not a majority and four judges should not be permitted to decide the law of the circuit on an en banc basis.

Pursuant to Fed. R. App. P. 35(a)(1), (a)(2), en banc review is reserved for cases in which such review is "necessary to secure or maintain uniformity of the court's decisions" or if "the proceeding involves a question of exceptional importance." We

submit that, in either circumstance, for our circuit only an absolute majority of the court should determine such important questions.

The committee states that national uniformity is the desired goal, but it does not give reasons why that goal should override the desires of the individual and diverse circuits to determine this important issue for themselves. National uniformity would seem to be a more important consideration for rules governing the submission of documents or the conduct of parties that appear before the circuits. However, this en banc matter involves the internal procedures of each court.

Rule 28.1 - Cross-Appeals.

The Federal Circuit opposes the adoption of proposed Rule 28.1 and believes that each circuit should be allowed to establish procedures governing cross-appeals by local rule or, at a minimum, suggests that the proposed rule be modified.

The Federal Circuit's local rules provide that the word limitations for each of the four briefs filed in a case involving a cross-appeal are not to exceed 14,000, 14,000, 7,000, and 7,000 words, respectively. The rules governing monospaced type, line counting, and page counting are correspondingly limited. Our comments here, directed to word count, also apply to the corresponding monospaced, line count, and page count rules. The proposed rule allows the briefs in a case involving a cross-appeal not to exceed 14,000, 16,500, 14,000, and 7,000 words. This proposal represents an 18 percent increase in the size of the second brief and a 100 percent increase in the size of the third brief. Our court finds that cross-appeals are often filed improperly in order to secure an additional brief and the last word. The proposed increase in word count for cross appeals will, in our view, greatly exacerbate this problem by encouraging even more improper cross-appeals where the cross-appellant is merely arguing additional grounds for affirmance. It is the measured judgment of the judges of this court that in most cases, whether or not cross-appeals are involved, counsel can adequately address the issues within the current word limitations, if not in fewer words.

A variant of Parkinson's Law - work expands to fit the time available - will come into play. We have observed that counsel frequently file briefs that reach the word limitations regardless of the number or complexity of issues involved. The second brief filed by a party is often repetitious. In many of our appeals, patent and otherwise, multiple issues are presented. A cross-appeal may involve only one or two issues more than those involved in the main appeal. In those rare cases in which further words may be warranted due to the nature of the cross-appeal, counsel may, under our present rules, request an enlargement of the word limitation. For these reasons, circuits should be permitted to maintain their local rules and the proposed rule should not be adopted.

In the alternative, if a new rule governing cross-appeals is adopted, the Federal Circuit recommends that the increased word count be limited to the subject matter of the cross-appeal, not the response to the main appeal. Many cross-appeals are comparatively insubstantial, involve only a peripheral issue, or are filed as a

"conditional" cross-appeal. Under the proposed rule, a cross-appellant could expend nearly 16,500 words regarding the appellant's issues on appeal and devote little if any words to its own appeal. Similarly, an appellant could in the third brief include nearly 14,000 words on its appeal issues and include few words regarding the cross-appeal. Thus, we recommend that the second brief contain no more than 14,000 words regarding the issues raised by the first-filed appeal and that the third brief contain no more than 7,000 words regarding those issues.

We appreciate the opportunity to respond to the proposed rules.

Sincerely,

cc: Judges of the Court

Peter G. McCabe, Secretary
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