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July 10, 2009

James C. Duff, Director
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, D.C. 20544

RE: Public Access to Opinions of the U.S. District and Bankruptcy Courts
E-Government Act of 2002 and Reauthorization

Dear Director Duff:

I am disappointed to learn that the federal Judiciary has recently certified to Congress that: (1) all "federal court are in compliance" with the E-Government Act of 2002, and (2) that the courts were indeed exceeding the requirements of the Act. In my correspondence to you and to the Judicial Conference in the last year, it was made abundantly clear that the federal Judiciary was in compliance with neither the spirit nor the letter of the E-Government Act as to the written opinions of the U.S. district and bankruptcy courts.

Indeed the federal judiciary has acknowledged that compliance with the spirit of the Act involves providing free access to the public of the opinions.

> In the spirit of the E-Government Act of 2002, modifications have been made to the District Court CM/ECF system to provide PACER customers with access to written opinions free of charge

We would agree.

Importantly, the 2006 adoption of FRAP Rule 32.1 further assumed widespread access to these opinions. The present incomplete and inconsistent firewalled approach to providing access to the public of law promulgated in the form of judicial opinions is apparent to anyone spending just a little time reviewing various courts sites and systems. It become more apparent when comparing opinions available on Westlaw and Lexis to those on the accessible easily on court sites and systems.

The May 2009 issue of THE THIRD BRANCH, THE NEWSLETTER OF THE FEDERAL COURTS states as follows, in describing an April 16, 2009 letter to the U.S. Senate Committee on Homeland Security:

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Courtwide Compliance with E-Government Act Requirements

The federal Judiciary sent its annual report on compliance with the 2002 E-Government Act to Congress this month. The Act requires all appellate, district and bankruptcy courts to establish and maintain a website with information or links to information on court location and contact information for the courthouse; local rules and standing or general orders of the court; access to docket information for each case; access to the substance of all written opinions issued by the court in a text-searchable format; and any other information, including forms, that the court determines useful to the public. For 2009, all federal courts are in compliance with the Act, with court websites satisfying or exceeding the requirements of the Act.

Without doubt, the foregoing does not provide an accurate impression of the present situation as to access of lower federal court opinions. This stated goal of providing free opinions to comply with the spirit of the E-Government Act has not been reached by any description.

Clearly, all reasonable people would agree that burying the written opinions in millions of documents strains the definition of "making available." It seems only Lexis and Westlaw have the financial resources to sift through the docket sheets of all cases and then extract the over 100,000 district court written opinions a year -- in the process converting the opinions to searchable form.

There are abundant examples of non-compliance with the E-Government Act and the spirit of the Act by the federal Judiciary.

- Few, if any, of the opinions available on CM/ECF for the U.S. District Court for the Southern District of New York are in "text-searchable" format as required by the Act. As you know, this court is one of the busiest district courts in the federal Judiciary, hearing many complex criminal and commercial cases.

- For that same important court for 2008, Lexis has 3339 opinions, but the court's CM/ECF system has only 2282 opinions. This single court represents over 3% of district court opinions rendered in a single year.

- The U.S. District Court for the Northern District of California (and other courts as well) has sown enormous confusion by marking all ordinary procedural orders as "written opinions" on CM/ECF. Thus, that court marks 28,900 documents as written opinions, but Lexis shows only 2,634 opinions.

- We studied the District of Massachusetts and found that for some reasons, opinions to be published were not being marked as written opinions in CM/ECF, but were stored separately in a different web site, and many opinions were neither marked as a written opinion or available on the separate site.

- Following up on our May 7, 2008 letter which identified this issue, Stephen Schultze of the Berkman Center for Internet & Society at Harvard University is analyzing the CM/ECF Written Opinions Reports for the 94 U.S. district courts as to identifying written opinions found on Westlaw but not marked in CM/ECF. The Schultze analysis shows that many district courts are in substantial non-compliance. Attached is a copy of a page from that study which shows the courts with the lowest compliance for published opinions alone. Mr. Schultze will have a more complete analysis available soon. However, we believe the AO should monthly conduct this analysis and see that all opinion documents are marked properly - an proactively monitor compliance.

The ability to cite to all federal court opinions decided after January 1, 2007 makes the judiciary's lack of attention to this issue all the more significant. As you know, Rule 32.1 was added to the Federal Rules of Appellate Procedure effective December 1, 2006 to permit citation to "any federal judicial opinion."

Thus all of the approximately 100,000 written opinions issued each year by the U.S. district courts are citable - yet without meaningful access by the public. The complete sets of opinions are found only on Westlaw or Lexis - or buried in the CM/ECF system, but not identified as such. For sure, there are other "vaporlaw" sites that may claim to have these opinions, but, based on our extensive analysis, do not have anything approaching comprehensive sets of the opinions.

Justice Alito, while still an appellate court judge, chaired the Advisory Committee which prepared the report supporting the new Rule 32.1. Justice Alito wrote in his May 6, 2005 advisory committee report:

> 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 makes unpublished opinions widely available at little or no cost.

See, *Report of Advisory Committee on Appellate Rules, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, May 6, 2005.[1]

[1] http://www.uscourts.gov/rules/Reports/AP5-2005.pdf. *See Also*, Peter W. Martin, *Finding and Citing the "Unimportant" Decisions of the U.S. Courts of Appeals*, April 25, 2008, Cornell Law School Legal Information Report. http://topics.law.cornell.edu/wex/papers/lir2007-1#_edn0.

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We would be surprised were Justice Alito to be aware of the less than efficacious approach of the federal judiciary in complying with the spirit of the E-Government Act and assuring that the public has access to the judicial opinions of the federal courts required to make Rule 32.1 a fair rule. Clearly, the assumption that opinions would be available on CM/ECF was a predicate to the adoption of Rule 32.1. Further, the section just quoted seems to assume that "widely available" would mean full text search and locating opinions readily. That is not the situation either.

No one expects every public access issue to be resolved overnight (although the issue of limited access to federal district court opinions has persisted in my own memory for more than a 15 years) but, no one would expect that the judiciary would claim that it has done what it in fact has not done.

I understand from the letter to me of January 27, 2009 from Judge John R. Tunheim that the Committee on Court Administration and Case Management was reviewing some of the issues raised in my letter of May 7, 2008. Yet, it remains unclear to me that the federal Judiciary is intent on opening up the gates to meaningful access to all of its judicial opinions.

In the meantime, I urge that the federal Judiciary undertake a close self-examination of the situation. For example, detailed comparison of the opinions on Westlaw and Lexis to the opinions marked on CM/ECF is a necessary first step. Outsiders can attempt this analysis: but, this is an analysis that should be undertaken by the federal Judiciary with a published report.

Thank you.

Sincerely,

Alan D. Sugarman

cc: Justice Samuel A. Alito, Jr.
U.S. District Court Judge John R. Tunheim
Senator Joseph I. Lieberman
Senator Susan Collins
Abel Matos, Chief, Court Administration Policy Staff AO

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Attachments:

1. The Third Branch, May 2009, "Courtwide Compliance with E-Government Act Requirements." Link.
2. Sugarman Letter of May 7, 2008 to the Administrative Office. Link.
3. Report of Advisory Committee on Appellate Rules, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, May 6, 2005. Link.
4. Letter of January 27, 2009 Judge John R. Tunheim to Alan D. Sugarman. Link.
5. Preliminary Analysis of U.S. District Court Documents Marked As Written Opinions in CM/ECF, Stephen Schultze, Berkman Center for Internet & Society at Harvard University. Link.
6. Letter of April 16, 2009 from Administrative Office to the U.S. Senate Committee on Homeland Security. Link.
7 Pacer Service Center Notice "Free Written Opinions". Link.
8. The Third Branch, July, 2007 "Access to Information Ever Expanding." Link.

The within letter is available on the Internet at
http://www.hyperlaw.com/topics/2009/july102009aoletter.pdf

THE THIRD BRANCH
Newsletter of the Federal Courts

May 2009 Vol. 41, Number 5

Courtwide Compliance with E-Government Act Requirements

The federal Judiciary sent its annual report on compliance with the 2002 E-Government Act to Congress this month. The Act requires all appellate, district and bankruptcy courts to establish and maintain a website with information or links to information on court location and contact information for the courthouse; local rules and standing or general orders of the court; access to docket information for each case; access to the substance of all written opinions issued by the court in a text-searchable format; and any other information, including forms, that the court determines useful to the public. For 2009, all federal courts are in compliance with the Act, with court websites satisfying or exceeding the requirements of the Act.

The public's ability to retrieve remotely and view electronic records in the federal courts is provided through the Public Access to Court Electronic Records (PACER) system. Since its inception in 1988, PACER has evolved into an easy-to-use, Internet-based service. Over 360 million requests for information were processed by PACER in 2008.

And the Judiciary continues to improve access to its records. An assessment of the needs of PACER users is under way, which will lead to improvements to and expansion of service. A pilot project is evaluating the expansion of PACER to include access to digital recordings of court proceedings in district and bankruptcy courts.

Following the bankruptcy and district courts, the courts of appeals began to implement CM/ECF in 2006; the Eighth Circuit became the first court of appeals to go live with the case management component of the Case Management/Electronic Case Files (CM/ECF) system in December 2006. As they implement the CM/ECF system, the courts of appeals will make electronic filings available to the public; currently, the 11 courts of appeals that have electronic filings make them accessible to the public.

Nearly every court also uses its website to provide public access beyond the requirements of the Act. The report to Congress notes that courts provide:

- juror access to qualification forms that can be completed on-line and jury service-related information, through the Jury Management System. Eighty courts currently are or will soon implement the E-Juror system on their websites;
- electronic public access to orders issued on judicial misconduct complaints by the Federal, First, Second, Fifth, Seventh, Ninth, and Tenth Circuits;
- access to digital audio recordings of oral arguments in the Federal, First, Fifth, Seventh, and Eighth Circuit Courts of Appeals; and
- information on court history, information needed by members of the bar, job opportunities with the federal government, and links to related government sites.

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May 7, 2008

James C. Duff, Director
Administrative Office of the U.S. Courts
One Columbus Circle NE
Washington, D.C. 20544

RE: Public Access to Opinions of the U.S. District and Bankruptcy Courts
E-Government Act of 2002 and Reauthorization

Dear Director Duff:

I am writing to you in your capacities as Director of the Administrative Office of the U.S. Courts and as Secretary to the Judicial Conference of the U.S. concerning the E-Government Act of 2002 (the "2002 Act") as it pertains to the meaningful access to the judicial opinions of the nearly 200 U.S. district and bankruptcy courts.[1] In this letter, I provide an overview of the Act, the implications of the proposed reauthorization of the 2002 Act, and the accessibility of these opinions. I urge that the federal judiciary take the final small steps needed to permit the public to have unrestricted access through search engines and public access law web site to all lower court federal judicial opinions. I ask that you forward a copy of this letter to the appropriate committees of the Judicial Conference and that you arrange for a meeting to discuss the issues mentioned herein.

I will discuss the barriers that still exist as to the accessibility of opinions of the lower federal court and include with this letter specific steps that could be taken to make these opinions more widely available to the public through free sites operated by public interest groups, private companies, and law schools, and searchable and retrievable by the public through search engines such as Yahoo and Google.

SUMMARY

- The E-Government Act of 2002 required the federal judiciary to make all judicial opinions, published and unpublished, available in searchable format.

[1] As founder of HyperLaw, Inc., I have argued for broader public access to judicial opinions since 1991, when HyperLaw released the first CD of United States Supreme Court opinions and then in 1993 the first CD of opinions of the United States courts of appeals. Subsequently, we were engaged in litigation with West Publishing Co. that established that West could claim copyright neither to its internal page citations nor to the text of court opinions as corrected and enhanced by West. In the 1990s, we were involved in efforts to create a public domain citation and wider dissemination of federal court opinions and met and or provided formal presentations to the Judicial Conference, Congressional committees, the Administrative Office, the American Bar Association, the Department of Justice, the Executive Office of the White House, and the American Association of Law Libraries.

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- Nonetheless, because of the way in which the federal judiciary implements access to judicial opinions, public access law web sites and search engines have been frustrated in accessing and/or collecting the opinions of the nearly 200 U.S. district and bankruptcy courts and making them freely available and searchable in a meaningful manner by members of the public.

- Although no doubt there are many opinions available on the web, it is simply a myth that comprehensive collections of all judicial opinions of the nearly 200 U.S. district and bankruptcy courts are available on the Internet, either through public access law sites or through commercial search engines. Tellingly, even WestLaw and Lexis, which provide free access to Supreme Court and court of appeals opinions of recent years, do not provide open and free access to the district and bankruptcy court opinions.

- Pending E-Government legislation would require that opinions be indexable and searchable by search engines such as Yahoo and Google.

- For over seventeen years, the Administrative Office and the Judicial Conference have been considering creation of a repository of the opinions of the nearly 200 U.S. district and bankruptcy courts, but deferred action because of system limitations.

- In the past, opinions were not in electronic format, uniform naming of opinion files was limited by technology and systems, and the judiciary did not have a document management system to accommodate the requirements for a repository of opinions. These limitation no longer exist. As well, at least at the court of appeals level, there is no longer a distinction between published and unpublished opinions.

- The federal judiciary's Case Management/Electronic Case Files (CM/ECF) and PACER systems now collect and systematically maintain all documents filed in a case, which, necessarily includes all judicial opinions. Thus, the federal judiciary does indeed have a repository of opinions, although obscure and not directly accessible as such.

- Each judicial opinion (and every other case filing) is identifiable within CM/ECF by the name of the court, the docket number of the case, the docket entry number, and the date of the opinion.

- The CM/ECF system easily could, but does not, assign a unique persistent public file name to each judicial opinion. Search engines would require persistent file names. Bulk downloading by public access sites requires uniform persistent file names. Issues of authenticity when citing these opinions could be avoided by assigning unique file names.

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- Users of CM/ECF with passwords have free access to opinions designated by the courts as written opinions, but these opinions are behind fire walls, bulk downloading is not allowed, and not all opinions are in a searchable format. Further, not all opinions are properly designated as written opinions to be made available to the public via this facility.

- Further efforts are required by the judiciary to assure that courts designate in the CM/ECF system, not just some but all judicial opinions, whether or not published, unpublished, precedential or not precedential.

- The federal judiciary budget for technology exceeds $400 million a year.

- Because all case documents and related data are now routinely collected and stored in systematic manner by CM/ECF, only relatively minor technical and administrative issues need to be resolved in order to make all of the opinions of the nearly 200 U.S. district and bankruptcy court available to search engines and available for bulk download by public access law sites and the public.

- The Administrative Office of the United States Courts should implement the minor technical enhancements so that such accessibility is provided.

- The Judicial Conference of the United States should commit to assuring that all U.S. court judicial opinions are appropriately designated and that accessibility of the opinions by search engines and other public access law sites be assured, as quickly as possible.

BACKGROUND AND CURRENT STATUS

Since 1991, the issues of providing public access to the lower federal court opinions has been complicated by the mechanics of dissemination of the opinions and, as well, a lack of uniform methodology for the naming of opinion computer files, often earlier referred to as "electronic citations." Today, the structural framework to allow meaningful access to these opinions is in place, thanks to the CM/ECF (aka PACER) program.[2]

[2] In this letter, I will use CM/ECF to describe the systems, including PACER, used by the judiciary to automate case management, case filing, and public access. Many use the term PACER to apply to all federal judiciary information systems. PACER (Public Access to Court Electronic Records) was the initial system developed by the Administrative Office, which describes PACER as "an electronic public access service that allows users to obtain case information from federal courts." Case Management/Electronic Case Files (CM/ECF) is "an electronic case management system that provides federal courts with enhanced and updated docket management capabilities, including the option of permitting case documents to be filed with the court over the Internet." Almost all district and bankruptcy courts and most courts of appeals have converted to the CM/ECF software system, as the earlier PACER system is being phased out.

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The CM/ECF system now collects and hosts all such opinions. Thanks to CM/ECF, authoritative versions of all federal lower court opinions can be uniquely identified and located using the court name, the docket number of the case, and the docket entry number of the opinion document. This letter will in no way suggest any action as to adoption of a citation format, although it will recommend the inclusion of this relevant identifying information in the opinion document file metadata. Traditional views of citations are being reconsidered.[3] What is important is to have a way to uniquely describe a court opinion, and then to find the authoritative version. CM/ECF is now able to provide that functionality with minor modification.

It is worth noting that seventeen years ago, in July 1991, the Library Program Subcommittee of the United States Judicial Conference Committee on Automation and Technology issued a Draft Report on the establishment of an electronic citation system applicable to federal judicial opinions.[4] It was recognized then that although the courts of appeal published opinions in the form of slip opinions, the lower federal courts did not publish slip opinions. Thus, within the judiciary, there was no official selection process as to opinions. Lexis and Westlaw already by that time were collecting as many lower court opinions (published and unpublished) as they could - basically creating a privately controlled repository of federal law. It was recognized then, as well, that as opinions became available digitally, that some type of citation methodology would be needed to facilitate access, because computer files with meaningless names would only complicate matters. This explains the earlier use of the word "electronic" citation. Indeed much effort was then expended into compressing the citation into the 8 characters available in a DOS file name. With extended file name and the ability to include metadata[5] in files, limitations as to including document identification information within a digital file no longer exist.

Now, seventeen years later, structural issues having been resolved, it is time to take the minimal steps required to remove the few remaining barriers to effective access and dissemination of these opinions. The opinions need to be made accessible to Internet search engines, metadata information needs to be included in the opinions for effective searching, bulk downloading needs to be facilitated, and the quality in terms of completeness needs to be monitored and improved.

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[3] Strictly speaking, citation information is any information that uniquely defines a document sought. This is to be distinguished by a citation format which may mean how one abbreviates and orders the citation information, or even a preference as to the location of the document.

[4] "Standard Citation to Electronic Opinions", Revised Draft Report, dated October 17, 1991, prepared by the Library Program Subcommittee of the United States Judicial Conference Committee on Automation and Technology. See also the earlier July 18, 1991, Draft Report. HyperLaw provided comments to the Administrative Office on April 9, 1992.

[5] In an Adobe PDF file (which is the file format used for all files in CM/ECF) the most significant item of metadata is the title field in document properties. Search engines such as Yahoo and Google will search first on this title field and, if one exists, the title field will be displayed first in the search results.

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Although the district and bankruptcy courts do make opinions available on either separate opinion sites or through CM/ECF, many have significant limitations. Sites are not indexable, opinion files are hidden behind firewalls and have no file names or identifying information, and some sites make it difficult to download opinions in bulk. In some situations, documents are not marked as opinions on CM/ECF, but appear on a court's opinion page and vice versa. Opinions appear on Lexis and WestLaw, but are not marked as opinions on court sites.

Because the lack of uniformity and other access issues ultimately create barriers to collection of opinions, demonstrably limited public and free access to lower federal court case law exists today as described below. The problems as to the lower federal court opinions have persisted for nearly 15 years after the U.S. Supreme Court and courts of appeals have made their opinions available on dial up bulletin boards or web sites.

The Report Of The Proceedings Of The Judicial Conference Of The United States of September 23, 1997 included this statement from the Committee On Automation And Technology: [6]

> *The Committee will explore studying the desirability, feasibility, and cost of establishing a centrally maintained, publicly accessible electronic database of all opinions submitted by federal courts for inclusion in the database.*

Since that report, another 11 years have elapsed. Now that all lower court opinions are saved and filed in the Adobe PDF format in CM/ECF, there would appear to be no known barriers to establishing " *a centrally maintained, publicly accessible electronic database of all opinions submitted by federal courts.*"

With the advent of Google and Yahoo type search engines, all that the courts need to do is to provide a central repository of opinion computer files, provided that each file has an appropriate file name and includes necessary identifying metadata as described below. The repository would also need to allow bulk downloading. The federal judiciary need not invest in creating or installing its own search software - rather, first, it should merely act as the

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[6] The Report of the Subcommittee on Policy and Programs Concerning Standard Electronic Citations (1997) of the Judicial Conference Committee on Automation and Technology stated:

> The primary assumption underlying the proposal is that judicial opinions are public documents and that it is in the best interest of the judiciary and the public for such opinions to be made available to judicial officers, litigants, and the public as quickly and inexpensively as possible. While official case reports (United States Reports, for example) have historically seldom been available to the public on a timely basis, the subcommittee sees no reason why this should be so if the opinions were posted electronically. Creation and maintenance of a central database of federal opinions would appear to be a matter undoubtedly within the authority of the judicial conference.

repository of the opinions by storing accessible files on a file server. This would be cost effective.

The Long Range Plan for Information Technology in The Federal Judiciary [7] provides for an IT budget of $411 million for FY 2008: $30.7 million alone is allocated to the Electronic Public Access Program portion of the overall CM/ECF budget. An Objective of the Long Range Plan is:

> Provide the public and the bar with easy access
> to appropriate court and case information.

As to the district and bankruptcy court opinions, access is not easy.

The programming required to implement the changes indicated herein are, in relation to that size budget, insubstantial if not insignificant.

CM/ECF software needs to provide the accountability and reporting tools to ascertain how judicial opinions are being identified and made available to the public, to provide bulk download capabilities, to appropriately identify opinion files with proper file names and metadata, and to make the files available for indexing by search engines.

The E-Government Act of 2002

Sec. 205(a) of the E-Government Act of 2002 (Public Law 107-347)[8] mandated all federal courts to maintain websites with "access to the substance of all written opinions issued by

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[7] Long Range Plan for Information Technology In The Federal Judiciary, Fiscal Year 2008 Update, http://www.uscourts.gov/itplan/2008/2008report.pdf

[8] E-Government Act of 2002 ,Public Law 107-347, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ347.107.pdf

SEC. 205. FEDERAL COURTS.

> (a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following ...
>
> * * *
>
> (5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format."[9]

The E-Government Act of 2002 allowed individual courts to operate web sites for court opinions or to link to other sites with the opinions. Although it appears that the 2002 Act provided discretion to the clerks and judges of the separate district and federal courts as to how CM/ECF is implemented, there was no suggestion that there be 200 approaches to hosting these opinions. Some district and bankruptcy courts rely upon the facilities provide by the CM/ECF system. Because written opinions, whether published or unpublished, are supposed to be designated as such in the CM/ECF system, the better approach to supporting separate web sites, if that is believed necessary, is to synchronize sites with the same data in the CM/ECF system.

Minor enhancements to CM/ECF would permit all of the district and bankruptcy courts to provide uniform and complete access to their judicial opinions, which would have the result of simplifying public access.

The development of the software for CM/ECF is provided by the Administrative Office, and accordingly, the Administrative Office bears responsibility for software and systems to make uniform access of lower court opinions a reality. The Administrative Office should develop and provide a standard interface for individual court opinion web sites so that the opinion files are synchronized with the files designated as written opinions in CM/ECF using a uniform file naming convention. The Administrative Office should then maintain a central repository of all such files. No changes at all in the underlying CM/ECF system would be required - this is merely a task of creating a user interface.

By and large, the Administrative Office and individual courts have made good faith efforts to implement the 2002 Act requirement, but that does not mean the Act has been fully implemented by the federal judiciary. The federal judiciary has not been in compliance, nor, would it be in compliance were the reauthorization discussed below enacted.

The E-Government Act Reauthorization Act of 2007

Senators Lieberman and Collins have introduced the E-Government Reauthorization Act of 2007 as S. 2321, reauthorizing and amending the E-Government Act of 2002. On December 11, 2007, the Senate Committee on Homeland Security and Governmental Affairs held a hearing titled "E-Government 2.0: Improving Innovation, Collaboration and Access" and representatives from the Office of Management and Budget, Google,

[9] Among the organizations that worked with Congress to assure that the judiciary was included in the Act were the American Association of Law Libraries, the American Library Association, and the Special Libraries Association.

Wikipedia, and the Center for Democracy and Technology provided testimony. The testimony focused on agencies and not the judicial branch.

The witnesses pointed to aspects of government databases and information that diminish the ability of citizens to access government information, including dynamic databases and inaccessible links. A Google witness stated that it was not possible for Google and other search engines to access such data for the public.

The deficiencies identified by Google and the other witnesses do exist as to the opinions of the lower federal courts.

The bill requires agencies to make their information accessible for searching on the Internet and provides a two year goal for compliance.[10]

The legislation has yet to be enacted - but, it is believed that these requirements are an expression of the public's expectations and that provisions of this type of requirements ultimately will be included in legislation.

Finally, even as to the E-Government Act of 2002, the requirement for the judiciary was to make the opinions "in a text searchable format." What would be the purpose of having the opinions "text searchable" if the opinions were then protected by a firewall from search engines and if bulk downloading was not possible?

Judicial Access to Opinions Prior to E-Government Act of 2002

Even prior to enactment of the E-Government Act of 2002, the federal judiciary had recognized its responsibilities to the public to make judicial opinions available in electronic form to the government, starting with the Supreme Court's pioneering Hermes program in the early 1990s. Subsequently, in the early 1990s some U. S. courts of appeals made their

[10] The bill adds the following to the existing E-Government Act of 2002.

- A finding that " members of the public and governments commonly rely on commercial search engines to locate relevant information on the worldwide web, including information made available by government agencies."

- A finding that "some Federal agencies have not taken actions to make all of the information available through their websites readily accessible to commercial search engines."

- Guidelines : "Not later than 1 year after the date of enactment of the E -Government Reauthorization Act of 2007, the Director shall promulgate guidance and best practices to ensure that publicly available online Federal Government information and services are made more accessible to external search capabilities, including commercial and governmental search capabilities. The guidance and best practices shall include guidelines for each agency to test the accessibility of the websites of that agency to external search capabilities."

opinions available by dial-up bulletin boards. The courts of appeals, some in collaboration with law schools,[11] then made their opinions available on the Internet. By the time the 2002 Act was enacted, the courts of appeals were already making their judicial opinions available to the public. Not the same could be said for most district and bankruptcy courts - opinion availability was sporadic and inconsistent.

After the 2002 Act was passed, the lower courts were able to use some of the capabilities of the CM/ECF system to provide access to their written opinions or utilized separate web sites. As discussed below, the opinions are then presented in such an inconsistent manner as to make collection and access difficult.

Lower Federal Court Opinions Not Available on Public Access Sites

As a result of the inconsistent, incomplete, and indirect access, non-judicial web sites devoted to free and public access to court opinions have been frustrated, and either are unable to provide opinions from these lower federal courts, or provide them inconsistently and incompletely.

Thus, sites that provides free public access such as Cornell Law School's Legal Information Institute, Columbia Law School's AltLaw, Justia, Public Resource and Precydent offer access to U.S. courts of appeals and U.S. Supreme Court opinions, but not in any comprehensive manner, if at all, to opinions of those lower federal courts. Moreover, indexing by Yahoo and Google is not possible for all opinions.

The inability of free public access sites to provide the complete district court and bankruptcy opinions, explains the following: both LexisOne and West's FindLaw provide free limited searching of the U.S. court of appeals and Supreme Court decisions for recent years, but *LexisOne and West's FindLaw do not provide free access to opinions of the U.S. district and bankruptcy courts.*

I would submit that this lack of access is directly attributable to the inconsistent attention provided to this issue by the Administrative Office and the federal judiciary.

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[11] The law school programs hosting federal court opinions on law school web sites were intended to be demonstration programs only, as stated by Professor Robert Oakley of the American Association of Law Libraries in his 1998 presentation to the Senate Committee on Rules and Administration concerning S. 2288, copy at http://www.aall.org/aallwash/tm0729a2.html :

> The purpose behind this voluntary project was to demonstrate to the courts that the use of electronic communications networks can facilitate the timely and low cost dissemination of court opinions. The project was not intended to relieve the courts of their own dissemination responsibilities, but rather to encourage them to follow the model of electronic public dissemination.

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Should the Federal Judiciary Provide Better Access to Lower Court Opinions?

In 1997, the Subcommittee on Policy and Programs Concerning Standard Electronic Citations of the Judicial Conference's Committee on Automation and Technology in its report stated:

> While official case reports (United States Reports, for example) have historically seldom been available to the public on a timely basis, the subcommittee sees no reason why this should be so if the opinions were posted electronically. Creation and maintenance of a central database of federal opinions would appear to be a matter undoubtedly within the authority of the judicial conference.[12]

Eleven years later, though, availability of lower federal court decisions is still not adequate - effectively, access to all published and unpublished opinions of all district and bankruptcy courts is available only through WestLaw and Lexis. This situation was not deemed appropriate in 1997 - that it remains so today in the face of nearly a half-billion dollar a year court technology budget cannot be rationalized, especially when the technical and financial requirements to remedy the situation are trivial.

Barriers To Access Easily Resolved Within CM/ECF

With very minor enhancements to the CM/ECF program, the federal judiciary would be able very quickly to provide a substantial payback to the public which has invested heavily in the federal judiciary's technology.

Decisions of some courts are hidden by firewalls making them not available to search engines such as Google and Yahoo. Metadata in the CM/ECF database files providing information about the opinions are not necessarily included within the opinion files, making it difficult for search engines to locate particular opinions and for others to have associated information about the opinions. There also are issues of completeness.

This situation presents barriers to anyone who wishes to search among all district Court and bankruptcy decisions and presents barriers to any web site wishing to collect and compile all of the decisions in any methodical manner. Westlaw and Lexis, due to their size and financial resources, obviously are able to pay the costs to overcome these barriers, and do make these decisions available to their subscribers. Not even all lawyers are able to bear the costs of subscriptions to these services and the public has little access. Now that unpublished opinions are citable, the barrier of access to opinions not in print has become more significant.

[12] See footnote 6, *infra*.

The CM/ECF system includes PDF images of all documents filed on the docket and has been implemented in all United States district and bankruptcy courts.[13] Accordingly, all decisions of all judges in Adobe PDF format are available on CM/ECF and managed by a database system which stores the docketing information about each opinion. Thus, the data now exists electronically and exists in a methodical manner. This circumstance did not exist in 1997.

CM/ECF provides an standard report, the "Written Opinions" report, to make court opinions available to the public with a PACER ID and Password, for free. Although there is a charge to download other CM/ECF documents, there is no charge for CM/ECF opinions when accessed from the Written Opinions report.

On the surface, this sounds like a very good solution: all opinions are available for free from the CM/ECF system. But, if court documents are not completely and appropriately designated as "opinions," then access to all opinions cannot occur. If a case document is marked as a Written Opinion, then it will be listed in this report. That having been said, it is necessary for someone to consistently designate which documents are deemed "written opinions." Some district and bankruptcy courts appear to pay close attention to the designation of opinions for the Written Opinions report; others do not.

Because these opinions are behind a firewall and have no persistent name or location, they are not available to search engine indexing or bulk downloading.

The electronic opinion PDF files lack necessary metadata to absolutely and uniquely identify the opinion. All opinions on CM/ECF have a unique identifier within a case - the Docket Entry (DE)[14] number on the docket sheet. Together with the court, date, and docket number, the DE provides a ready citation for the opinion. This information should be included in PDF metadata.

The foregoing will now be explained in more detail.

Completeness and Suitability of Opinions Selected

Not All Judicial Opinions are Identified and Included in Written Opinions

Not all decisions have been designated as a "written opinions" and thus do not appear in the CM/ECF Written Opinions report. It is not clear who is responsible

[13] An exception are in pro se cases, where all case documents frequently are not filed electronically, but, even there, the court's opinions and orders are filed in image format.

[14] Many district and bankruptcy courts routinely use the term "DE" number to refer to the Docket Entry of documents in a case.

for designating documents as written opinions (judge, clerk, assistant), but suffice it to say that in some courts, few if any documents are marked as written opinions (I know of one court with no opinions marked -- but have not advised the court, since I do not wish to chance upsetting a judge hearing a case in which I am involved.)

There are opinions, published and unpublished, available on Westlaw and Lexis but not marked as written opinions. Some district and bankruptcy courts have ignored the clear requirement of the E-Government Act and elected to include only so-called published opinions on their web sites and do not even mark so-called "unpublished" opinions in the CM/ECF system. The distinction of published versus unpublished opinions has never been honored by Westlaw and Lexis, as they collect everything.

Routine Orders Inappropriately Identified as Written Opinions and Included in the Written Opinions Reports

As opposed to not marking documents as opinions, some courts/judges/clerks go the other way and mark every single order and stipulation as a Written Opinion - including adjournment orders etc. This then makes it difficult to identify the actual real opinions buried in hundreds of one and two page orders. We assume that some courts do this to make all orders available for free to pro se litigants, or perhaps the courts do not wish to attempt to decide the status of a court order/memorandum/judgment. Judges need an alternative for these opinions, such as a Written Orders report.

In General, No Focused Responsibility for Completeness of the Written Opinions Report

There is no reporting methodology or administrator or clerk identified to whom to report documents missing from CM/ECF or other anomalies. I have found missing opinions, advised judges and clerks, but nothing is fixed. There should be a discrepancy reporting function in CM/ECF. The discrepancies should be monitored by the AO officials responsible for assuring and reporting on compliance with the E-Government Act - it is assumed that discrepancies will diminish once there is monitoring of any type.

Not All Opinions are Searchable

A small but important number of opinions are not searchable in that they are scanned image files without a text layer created by optical character recognition (OCR). Thus, the files are not searchable. Perhaps, the reason for the practice is that some courts wish to post files with the original clerk's stamp and the judge's signature. All image Adobe PDF files need to be processed by an OCR program. The courts that post image only Adobe PDF files without text are not complying with the E-Government requirement of "searchable."

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Accessibility by Search Engines

The Opinions Designated in the Written Opinions and Some Court Web Site Opinions Are Hidden Behind Firewalls

The CM/ECF written opinions are not accessible by search engines such as Google and Yahoo. I.e., the opinions are hidden by a firewall. Thus, they are not indexable and not searchable.

No Public File Name Assigned To the Opinion Files

CM/ECF is most frustrating in this regard: an opinion (or any other document) accessed to be downloaded has no file name associated with the file which will be used if the file is saved. The default file name would be something like:

"show_case_doc.pdf"

or

" https---ecf.akd.uscourts.gov-cgi-bin-show_temp.pl?file=pdf39570003651490&type=application-pdf."

If saved with these names, there would be no uniformity as to the name of the accessed files. In order to make the files searchable by third party search engines, such as Google or Yahoo, there needs to be a consistent file name and a convention to include the basic metadata discussed elsewhere. The absence of a uniform file name for each opinion is extremely important not only for search engines, but to permit synchronization with other internal and external web sites offering access to the opinions. Bulk downloading would require unique file names. It bears repeating that this uniform file name must include the abbreviated name of the court to meet the purposes described.

Metadata in Header Not Used Uniformly

Fortunately, CM/ECF permits courts as an option to include a header in all filings (including opinions) such as the following:

Case 1:01-cv-00400-T-DLM Document 94 Filed 09/14/2007 Page 1 of 1

Not all courts use the option to include this header on each page. Oddly, when opinions appear on a separate court web site frequently the header with the docket entry number is not included. Thus key metadata in lost. [15]

[15] Strictly speaking, one could in an Adobe Acrobat file create a special field or tag for each of the data items. Another approach is to include an XML type file within the Adobe file: Adobe describes this a XMP (Extensible Metadata Platform) The XMP information could be easily exported from the CM/ECF database and inserted into the Adobe file, and is arguably the more "proper" solution and could include all information on the docket sheet for the document. Others might argue for a separate XML file - but, it is simpler conceptually to encapsulate the metadata information.

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Header Metadata Does Not Include the Name of the Court

An interesting observation is that frequently, federal, state, and local courts and agencies leave out the court name/jurisdiction in file names and html and Adobe PDF metadata, on the assumption that anyone searching the opinions knows that information already.[16] This suggest a distinct court-centric quality of many court operated web sites - and, it would appear that some sites are intended primarily to accommodate internal court users (there are 8000 federal judges, clerks, and related support professionals!) One possibly could identify the originating court by the web site address, but, once a document is copied from the web site, this information is no longer available in the file name or title metadata.

The CM/ECF document header does not include the name of the court issuing the opinion. Were the name of the court included, then the header would provide adequate metadata to identify uniquely the opinion for search engines. Thus, it would be recommended to include in the header the abbreviation for the court.

Case 1:01-cv-00400-T-DLM Document 94 Filed 09/14/2007 Page 1 of 1 NYSD Opinion

The Header Does Not Identify the Documents As An Opinion

Frequently, users of search engines such as Google and Yahoo wish to locate a specific opinion document and thus the search would need to know that the file being searched for is an opinion.

By including the word "Opinion" in the header and/or metadata, the document identifies itself as an opinion which can be used for effective retrieval by search engines if what is sought is the opinion identified by citation information.

Failure to Use the Title Metadata Field in the Opinion Adobe PDF Files

Most search engines will look to the Title field (under the File-Properties item) in a Adobe PDF file first in indexing a document and displaying a search result. The CM/ECF system has all such information in its database and can quite simply load the case name and the header information into the Adobe PDF title property. Since

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[16] Resolution of Citation Issue - By including the name of the court, the header contains all information needed to provide a precise citation to the opinion. This is a natural citation requiring no effort at all by judges or clerks, that is indeed used routinely by the lower courts when referring to documents by the DE or DE number which together with court and docket number identify any hundred of thousands federal court opinion, and is locatable quickly in CM/ECF. Any other form of citation, such as a West Federal Supplement, Lexis Cite, WestLaw citation would have a one to one relationship with this unique citation for searching, retrieval, and authentication.

as currently presented, there is neither file name nor information in the title field, the opinions as presented are not adequate either for search engines or public access publishers.

Eliminate Requirement for a PACER/ECF ID to Access Free Opinions

Access to CM/ECF is available only if one obtains a Pacer user name and password. If the court opinions are being made available in this manner so as to comply with 2002 Act, then access should not only be free, but should not require a Pacer ID.

CONCLUSION

In 1991 when I first became involved in this issue, the technology and resources did not exist to make available to the public searchable digital versions of all district Court and bankruptcy opinions. Thanks to the hard work of the judiciary and the Administrative Office, and the successful implementation of CM/ECF, this long standing problem may now be resolved.

As Ari Schwartz of the Center for Democracy & Technology stated at the December 11, 2007 E-Government Reauthorization Act hearings:[17]

> [C]ommercial search engines have simply become the most efficient and effective route to find information online. Government agencies must recognize that taxpayers will not find the information that is made available unless this information can be found on commercial search engines. Some agencies have public information resources that are not immediately accessible via search engines due to relatively minor technical problems that the agencies should quickly remedy.

It is my view that the issues of uniform and meaningful access to the opinions of the district and bankruptcy courts are due to " relatively minor technical problems that the agencies should quickly remedy."

I and public access legal publishers and other interested parties would ask to meet with you and your staff to discuss how these issues in CM/ECF could be so remedied at minimal cost to the judiciary.

[17] Statement of Ari Schwartz Deputy Director Center for Democracy & Technology before the Committee on Homeland Security and Governmental Affairs on E-Government December 11, 2007.

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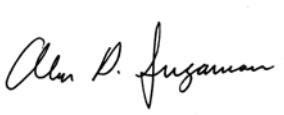
Sincerely,



Alan D. Sugarman

cc: Senator Joseph I. Lieberman
Senator Susan M. Collins

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Specific Technical Suggestions

(In No Particular Order and Not All Inclusive):

A. Add a new report similar to the "Written Opinions" report named the "Written Orders" report.[18] The purpose would be to encourage judges and clerks not to load up the Written Opinions report with thousands of documents lacking substantive law content: one and two page orders and pre-trial conferences orders etc. If the judge or clerk wishes to mark these, they can mark these as "Written Orders." In the situation where a "judgment call' has to be made as to whether an order is in the nature of an opinion, then the judge or clerk has an option other than non-inclusion.

B. "Encourage" the district courts and bankruptcy courts to be sure that all opinions in the separate opinion web sites are synchronized with the opinions selected in Written Opinions in the CM/ECF database.

C. "Encourage" the district and bankruptcy courts to provide users an e-mail address to report the following discrepancies in the written reports and opinions / or include a reporting form within CM/ECF, or both. This function could be overseen by the E-Government Act official at the Administrative Office.

1. Opinions/Decisions on Westlaw or Lexis, but not included in the "Written Opinion" reports
2. Any other opinions that should be included in "Written Opinions."
3. Opinions that are not OCR'd (some courts use image on pages for the first and last pages of opinions and some judges include only image versions.)

D Include a "job" ticket approach to the resolution of discrepancies referred to above in C. A ticketing system provides a reporting mechanism used routinely for these types of issues.

E. Modify the standard header form applied to Acrobat PDF Files to include the abbreviation of the court.

F. Include in the "title" property of all Adobe PDF files for "Written Opinions" the following identification information: the court, docket number, docket entry number, and the date (i.e., all of the information in the "header" that most courts include PLUS the court name). Include the word "opinion" to assist search engines in distinguishing documents that are opinions. Embed information from the docket sheet for the document in the XML/XMP metadata for the Adobe PDF file.

[18] There are no charges for documents accessed from the Written Opinions report, assuming the user has a Pacer of CM/ECF Account.

G. Modify the show case/goDLS CM/ECF Perl procedure so that the default file name by which a document is saved will include this same information: court, docket number, docket entry number, and date. (This enhancement would help anyone saving any Adobe PDF document from CM/ECF/Pacer!)

H. "Encourage" the district and bankruptcy courts to use the same "header" and metadata and file name in their separate opinions web sites.

I. Include additional fields in new database implementations and modifications for the inclusion of parallel citation information from WestLaw, Lexis, and others. How to populate these fields would be a separate issue to be perhaps considered at some future time, but, at least major modifications would not be required.

J. Provide access to Written Reports and basic case information without requiring a PACER or CM/ECF account.

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

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MEMORANDUM

DATE: May 6, 2005

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 18, 2005, in Washington, D.C. The Committee gave final approval to two amendments, approved another amendment for publication, and removed two items from its study agenda. The Committee also approved a letter to the chief judges and others regarding the proliferation of local rules on briefing, and the Committee took a first look at problems caused by the Justice for All Act of 2004.

Detailed information about the Committee's activities can be found in the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Advisory Committee is seeking final approval of two items and approval for publication of one item.

A. Items for Final Approval

1. New Rule 32.1

a. Introduction

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

b. Text of Proposed Amendment and Committee Note

Rule 32.1. Citing Judicial Dispositions

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

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

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions. 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. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts 2004, tbl. S-3 (2004). 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.

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. In particular, it takes no position on whether refusing to treat an unpublished opinion of a federal court 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). Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as "unpublished" or "non-precedential" — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion, claim 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 contentions 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 court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is 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. Moreover, 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 Committee 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 addition, every court of appeals is now 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. No. 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 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 on 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). An exhaustive study conducted by the Federal Judicial Center ("FJC") at the request of the Advisory Committee found that over a third of the attorneys who had appeared in a random sample of fully-briefed federal appellate cases had discovered in their research at least one unpublished opinion of the forum circuit that they wanted to cite but could not. *See* FEDERAL JUDICIAL CENTER, CITATIONS TO

UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 15, 70 (2005) [hereinafter FJC REPORT]. Unpublished opinions are often read and cited by both judges and attorneys precisely because they do 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 the unpublished opinions that both are reading.

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 opinions (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. To the contrary, a study of the federal appellate courts conducted by the Administrative Office of the United States Courts at the request of the Advisory Committee found "little or no evidence that the adoption of a permissive citation policy impacts the median disposition time" — that is, the time it takes appellate courts to dispose of cases — and "little or no evidence that the adoption of a permissive citation policy impacts the number of summary dispositions." Memorandum from John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts, to Advisory Committee on Appellate Rules 1, 2 (Feb. 24, 2005). The FJC, as part of its study, asked the judges of the First and D.C. Circuits — both of which have recently liberalized their citation rules — what impact, if any, the rule change had on the time needed to draft unpublished opinions and on their overall workload. All of the judges who responded — save one — reported that the time they devoted to preparing unpublished opinions had "remained unchanged" and that liberalizing their citation rule had caused "no appreciable change" in the difficulty of their work. *See* FJC REPORT at 12-13, 67-68. In addition, when the FJC asked the judges of the nine circuits that permit citation of unpublished opinions for their persuasive value in at least some circumstances how much additional work is created by such citation, a large majority replied that it creates only "a very small amount" or "a small amount" of additional work. Id. at 10, 63. It is, of course, true that every court is different. But the federal courts of appeals are enough alike that there should be *some* evidence that permitting citation of unpublished

opinions causes the harms predicted by defenders of no-citation rules. 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 judicial workloads: Over the past few years, numerous federal and state courts have abolished or liberalized no-citation rules, and there is simply no evidence that attorneys and litigants have experienced these consequences. Attorneys surveyed as part of the FJC study reported that Rule 32.1 would not have an "appreciable impact" on their workloads. Id. at 17, 74. Moreover, the attorneys who expressed positive views about Rule 32.1 substantially outnumbered those who expressed negative views — by margins exceeding 4-to-1 in some circuits. *See* id. at 17-18, 75.

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 makes 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, and because the justifications for those rules are unsupported or refuted by the available evidence, Rule 32.1(a) abolishes those rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals and to the other parties, unless that opinion is available in a publicly accessible electronic database — such as 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 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).

c. Changes Made After Publication and Comment

The changes made by the Advisory Committee after publication are described in my May 14, 2004 report to the Standing Committee. At its April 2005 meeting, the Advisory Committee directed that two additional changes be made.

First, the Committee decided to add "federal" before "judicial opinions" in subdivision (a) and before "judicial opinion" in subdivision (b) to make clear that Rule 32.1 applies only to the unpublished opinions of federal courts. Conforming changes were made to the Committee Note. These changes address the concern of some state court judges — conveyed by Chief Justice Wells at the June 2004 Standing Committee meeting — that Rule 32.1 might have an impact on state law.

Second, the Committee decided to insert into the Committee Note references to the studies conducted by the Federal Judicial Center ("FJC") and the Administrative Office ("AO"). (The studies are described below.) These references make clear that the arguments of Rule 32.1's opponents were taken seriously and studied carefully, but ultimately rejected because they were unsupported by or, in some instances, actually refuted by the best available empirical evidence.

d. Summary of Public Comments

The 500-plus comments that were submitted regarding Rule 32.1 were summarized in my May 14, 2004 report to the Standing Committee. I will not again describe those comments. Rather, I will describe the empirical work that has been done at the request of the Advisory Committee.

You no doubt recall that, at its June 2004 meeting, the Standing Committee returned Rule 32.1 to the Advisory Committee with the request that the proposed rule be given further study. The Standing Committee was clear that its decision did not signal a lack of support for Rule 32.1. Rather, given the strong opposition to the proposed rule expressed by many commentators, and given that some of the arguments of those commentators could be tested empirically, the Standing Committee wanted to ensure that every reasonable step was taken to gather information before Rule 32.1 was considered for final approval.

Over the past year, Dr. Timothy Reagan and several of his colleagues at the FJC have conducted an exhaustive — and, I am sure, exhausting — study of the citation of unpublished opinions. A copy of the FJC's lengthy report has been distributed under separate cover. Before I summarize that report, I again want to thank Dr. Reagan and his colleagues at the FJC for their extraordinarily thorough and helpful research.

The FJC's study involved three components: (1) a survey of all 257 circuit judges (active and senior); (2) a survey of the attorneys who had appeared in a random sample of fully briefed federal appellate cases; and (3) a study of the briefs filed and opinions issued in that random sample of cases. I will focus on the results of the two surveys, for those are the components of the research that are most relevant to the question of whether Rule 32.1 should be approved.

The attorneys received identical surveys. The judges did not. Rather, the questions asked of a judge depended on whether the judge was in a *restrictive circuit* (that is, the Second, Seventh, Ninth, and Federal Circuits, which altogether forbid citation to unpublished opinions in unrelated cases), a *discouraging circuit* (that is, the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which discourage citation to unpublished opinions in unrelated cases, but permit it when there is no published opinion on point), or a *permissive circuit* (that is, the Third, Fifth, and D.C. Circuits, which permit citation to unpublished opinions in unrelated cases, whether or not there is a published opinion on point). Moreover, special questions were asked of judges in the First and D.C. Circuits, which recently liberalized their no-citation rules. The response rate for both judges and attorneys was very high.

The FJC's survey of judges revealed the following, among other things:

1. The FJC asked the judges in the nine circuits that now permit the citation of unpublished opinions — that is, the discouraging and permissive circuits — whether changing their rules to *bar* the citation of unpublished opinions would affect the length of those opinions or the time that judges devote

to preparing those opinions. A large majority of judges said that neither would change. Similarly, the FJC asked the judges in the three permissive circuits whether changing their rules to *discourage* the citation of unpublished opinions would have an impact on either the length of the opinions or the time spent drafting them. Again, a large majority said "no." Opponents of Rule 32.1 have argued that, the more freely unpublished opinions can be cited, the more time judges will have to spend drafting them. Opponents of Rule 32.1 have also predicted that, if the rule is approved, unpublished opinions will either increase in length (as judges make them "citable") or decrease in length (as judges make them "uncitable"). The responses of the judges in the circuits that now permit citation provide no support for these contentions.

2. The FJC asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 (a "permissive" rule) would result in changes to the length of unpublished opinions. A substantial majority of the judges in the six discouraging circuits — that is, judges who have some experience with the citation of unpublished opinions — replied that it would not. A large majority of the judges in the four restrictive circuits — that is, judges who do not have experience with the citation of unpublished opinions — predicted a change, but, interestingly, they did not agree about the likely direction of the change. For example, in the Second Circuit, ten judges said the length of opinions would decrease, two judges said it would stay the same, and eight judges said it would increase. In the Seventh Circuit, three judges predicted shorter opinions, five no change, and four longer opinions.

3. The FJC also asked the judges in the four restrictive circuits and in the six discouraging circuits whether approval of Rule 32.1 would result in judges having to spend more time preparing unpublished opinions — a key claim of those who oppose Rule 32.1. Again, the responses varied, depending on whether the circuit had any experience with permitting the citation of unpublished opinions in unrelated cases.

A majority of the judges in the six discouraging circuits said that there would be no change, and, among the minority of judges who predicted an increase, most predicted a "very small," "small," or "moderate" increase. Only a small minority agreed with the argument of Rule 32.1's opponents that the proposed rule would result in a "great" or "very great" increase in the time devoted to preparing unpublished opinions.

The responses from the judges in the four restrictive circuits were more mixed, but, on the whole, less gloomy than opponents of Rule 32.1 might have predicted. In the Seventh Circuit, a majority of judges — 8 of 13 — predicted that the time devoted to unpublished opinions would either stay the same or decrease. Only four Seventh Circuit judges predicted a "great" or "very great" increase. Likewise, half of the judges in the Federal Circuit — 7 of 14 — predicted that the time devoted to unpublished opinions would not increase, and four other judges predicted only a "moderate" increase. Only three Federal Circuit judges predicted a "great" or "very great" increase. The Second Circuit was split almost in thirds: seven judges predicted no impact or a decrease, six judges predicted

a "very small," "small," or "moderate" increase, and six judges predicted a "great" or "very great" increase. Even in the Ninth Circuit, 17 of 43 judges predicted no impact or a decrease — almost as many as predicted a "great" or "very great" increase (20).

4. The FJC asked the judges in the four restrictive circuits whether Rule 32.1 would be uniquely problematic for them because of any "special characteristics" of their particular circuits. A majority of Seventh Circuit judges said "no." A majority of Second, Ninth, and Federal Circuit judges said "yes." In response to a request that they describe those "special circumstances," most respondents cited arguments that would seem to apply to all circuits, such as the argument that, if unpublished opinions could be cited, judges would spend more time drafting them. Only a few described anything that was unique to their particular circuit.

5. The FJC asked judges in the nine circuits that permit citation of unpublished opinions how much additional work is created when a brief cites unpublished opinions. A large plurality (57) — including half of the judges in the permissive circuits — said that the citation of unpublished opinions in a brief creates only "a very small amount" of additional work. A large majority said that it creates either "a very small amount" (57) or "a small amount" (28). Only two judges — both in discouraging circuits — said that the citation of unpublished opinions creates "a great amount" or "a very great amount" of additional work. (That, of course, is what opponents of Rule 32.1 contend.)

6. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often such citations are helpful. A majority (68) said "never" or "seldom," but quite a large minority (55) said "occasionally," "often," or "very often." Only a small minority (14) agreed with the contention of some of Rule 32.1's opponents that unpublished opinions are "never" helpful.

7. The FJC asked judges in the nine circuits that permit the citation of unpublished opinions how often parties cite unpublished opinions that are inconsistent with the circuit's published opinions. According to opponents of Rule 32.1, unpublished opinions should almost never be inconsistent with published circuit precedent. The FJC survey provided support for that view, as a majority of judges responded that unpublished opinions are "never" (19) or "seldom" (67) inconsistent with published opinions. Somewhat surprisingly, though, a not insignificant minority (36) said that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.

8. The FJC directed a couple of questions just to the judges in the First and D.C. Circuits. Both courts have recently liberalized their citation rules, the First Circuit changing from restrictive to discouraging, and the D.C. Circuit from restrictive to permissive (although the D.C. Circuit is permissive only with respect to unpublished opinions issued on or after January 1, 2002). The FJC asked the judges in those circuits how much more often parties cite unpublished opinions after the change. A majority of the judges — 7 of 11 — said "somewhat" more often. (Three said "as often as before" and one said "much more often.") The judges were also asked what impact the rule change had on the time needed to draft unpublished opinions and on their overall workload. Again, opponents of Rule 32.1

have consistently claimed that, if citing unpublished opinions becomes easier, judges will have to spend more time drafting them, and that, in general, the workload of judges will increase. The responses of the judges in the First and D.C. Circuits did not support those claims. All of the judges — save one — said that the time they devote to preparing unpublished opinions had "remained unchanged." Only one reported a "small increase" in work. And all of the judges — save one — said that liberalizing their rule had caused "no appreciable change" in the difficulty of their work. Only one reported that the work had become more difficult, but even that judge said that the change had been "very small."

As noted, the FJC also surveyed the attorneys that had appeared in a random sample of fully briefed federal appellate cases. The first few questions that the FJC posed to those attorneys related to the particular appeal in which they had appeared.

1. The FJC first asked attorneys whether, in doing legal research for the particular appeal, they had encountered at least one unpublished opinion *of the forum circuit* that they wanted to cite but could not, because of a no-citation rule. Just over a third of attorneys (39%) said "yes." It was not surprising that the percentage of attorneys who said "yes" was highest in the restrictive circuits (50%) and lowest in the permissive circuits (32%). What was surprising was that almost a third of the attorneys in the *permissive* circuits responded "yes." Given that the Third and Fifth Circuits impose no restriction on the citation of unpublished opinions — and given that the D.C. Circuit restricts the citation only of unpublished opinions issued before January 1, 2002 — the number of attorneys in those circuits who found themselves barred from citing an unpublished opinion should have been considerably less than 32%. When pressed by the Advisory Committee to explain this anomaly, Dr. Reagan responded that the FJC found that, to a surprising extent, judges and lawyers were unaware of the terms of their own citation rules. He speculated that some attorneys in permissive circuits may be more influenced by the general culture of hostility to unpublished opinions than by the specific terms of their circuit's local rules.

2. The FJC asked attorneys, with respect to the particular appeal, whether they had come across an unpublished opinion of *another circuit* that they wanted to cite but could not, because of a no-citation rule. Not quite a third of attorneys (29%) said "yes." Again, the affirmative responses were highest in the restrictive circuits (39%).

3. The FJC asked attorneys, with respect to the particular appeal, whether they *would* have cited an unpublished opinion if the citation rules of the circuit had been more lenient. Nearly half of the attorneys (47%) said that they would have cited at least one unpublished opinion of *that circuit*, and about a third (34%) said that they would have cited at least one unpublished opinion of *another circuit*. Again, affirmative responses were highest in the restrictive circuits (56% and 36%, respectively), second highest in the discouraging circuits (45% and 34%), and lowest in the permissive circuits (40% and 30%).

4. The FJC asked attorneys to predict what impact the enactment of Rule 32.1 would have on their overall appellate workload. Their choices were "substantially less burdensome" (1 point), "a little less burdensome" (2 points), "no appreciable impact" (3 points), "a little bit more burdensome" (4 points), and "substantially more burdensome" (5 points). The average "score" was 3.1. In other words, attorneys as a group reported that a rule freely permitting the citation of unpublished opinions would *not* have an "appreciable impact" on their workloads — contradicting the predictions of opponents of Rule 32.1.

5. Finally, the FJC asked attorneys to provide a narrative response to an open-ended question asking them to predict the likely impact of Rule 32.1. If one assumes that an attorney who predicted a negative impact opposes Rule 32.1 and that an attorney who predicted a positive impact supports Rule 32.1, then 55% of attorneys favored the rule, 24% were neutral, and only 21% opposed it. In every circuit — save the Ninth — the number of attorneys who predicted that Rule 32.1 would have a positive impact outnumbered the number of attorneys who predicted that Rule 32.1 would have a negative impact. The difference was almost always at least 2 to 1, often at least 3 to 1, and, in a few circuits, over 4 to 1. Only in the Ninth Circuit — the epicenter of opposition to Rule 32.1 — did opponents outnumber supporters, and that was by only 46% to 38%.

The AO also did research for us — research for which we are also very grateful. The AO identified, with respect to the nine circuits that do not forbid the citation of unpublished opinions, the year that each circuit liberalized or abolished its no-citation rule. The AO examined data for that base year, as well as for the two years preceding and (where possible) the two years following that base year. The AO focused on median case disposition times and on the number of cases disposed of by one-line judgment orders (referred to by the AO as "summary dispositions"). The AO's report is attached. As you will see, the AO found little or no evidence that liberalizing a citation rule affects median case disposition times or the frequency of summary dispositions. The AO's study thus failed to support two of the key arguments made by opponents of Rule 32.1: that permitting citation of unpublished opinions results in longer case disposition times and in more cases being disposed of by one-line orders.

The Advisory Committee discussed the FJC and AO studies at great length at our April meeting. All members of the Committee — both supporters and opponents of Rule 32.1 — agreed that the studies were well done and, at the very least, fail to support the main arguments against Rule 32.1. Some Committee members — including one of the two opponents of Rule 32.1 — went further and contented that the studies in some respects actually refute those arguments. Needless to say, for the seven members of the Advisory Committee who have supported Rule 32.1, the studies confirmed their views. But I should note that, even for the two members of the Advisory Committee who have opposed Rule 32.1, the studies were influential. Both announced that, in light of the studies, they were now prepared to support a national rule on citing unpublished opinions. Those two members still do not support Rule 32.1 — they prefer a discouraging citation rule to a permissive citation rule — but it is

worth emphasizing that, in the wake of the FJC and AO studies, not a single member of the Advisory Committee now believes that the no-citation rules of the four restrictive circuits should be left in place.

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

a. Introduction

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

b. Text of Proposed Amendment and Committee Note

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

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

* * * * *

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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January 27, 2009

Alan D. Sugarman
Hyperlaw, Inc.
17 W. 70th Street
New York, NY 10023

Dear Mr. Sugarman:

At its meeting in December, members of the Court Administration and Case Management (CACM) Committee received copies of your letters. The Committee discussed your concerns that courts were not appropriately designating documents as written opinions, as well as your request that the Judiciary provide more consistent, complete, and direct access to opinions in district and bankruptcy courts. As part of its discussion, the Committee was informed that the Administrative Office's Electronic Public Access Working Group has requested further analysis of courts' designation of filings as "written opinions." The Committee also plans to review this analysis when it is finished, and, if appropriate, may consider suggestions to ensure that courts appropriately designate written opinions.

Additionally, the Electronic Public Access Working Group requested that the Administrative Office explore methods to provide easier access to district and bankruptcy court opinions, as part of an assessment of Electronic Public Access services, which is

scheduled to commence in January 2009. The Committee expects to receive an update on this issue, and possible recommendations, at its December 2009 meeting.

I appreciate your patience as the Judiciary considers these issues.

Sincerely,

John R. Tunheim

cc: Honorable Joseph I. Lieberman
Honorable Susan M. Collins
Mr. James C. Duff

Source: Selling the Law: The Business of Public Access to Court Records
Stephen Schultze and Shubham Mukherjee, Berkman Center of Harvard University.
Presented to the Center for Information Technology Policy at Princeton University,
Feb. 5, 2009. Published opinions only. Comparison of opinions on Westlaw versus
opinions identified on CM/ECF Written Opinions Report. 24 least compliant courts.
Unpublished opinions not yet analyzed and expected to have even lower compliance.

ECF Opinion Report Audit*

alnd	0.00%
iasd	0.00%
nmd	0.00%
nmid	0.00%
mdd	7.41%
mad	8.70%
prd	16.95%
txwd	19.23%
vid	34.48%
gand	43.08%
mtd	45.45%
tnwd	45.83%

akd	50.00%
wyd	50.00%
flsd	50.55%
flmd	53.50%
nysd	60.58%
scd	63.46%
ctd	65.56%
nced	66.07%
mowd	67.65%
vaed	70.49%
wvsd	71.88%
nynd	74.04%

* preliminary numbers, subject to minor corrections

JUDICIAL CONFERENCE OF THE UNITED STATES

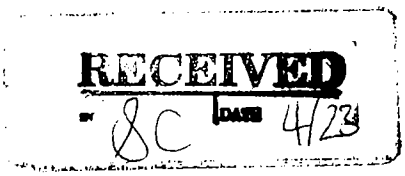
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

April 16, 2009

Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, DC 20510



Dear Mr. Chairman:

Pursuant to Section 205(g) of the E-Government Act of 2002 (Pub. L. No. 107-347) (the Act), the Judicial Conference of the United States presents to your Committee this report regarding the federal courts' compliance with the Act's requirements.

Section 205(a) of the Act required the chief judges of all appellate, district, and bankruptcy courts to establish and maintain a website that contains specific information, or links to websites with such information, by April 16, 2005. In its report on that date, the Judicial Conference was pleased to state that each of the federal courts had established complying websites. Additionally, those sites satisfied and continue to satisfy or exceed the requirements of the Act.

Two decades ago, the Judiciary began the development of a system to provide electronic public access to court records. First established in 1988 as a dial-up service, the Public Access to Court Electronic Records (PACER) system provides users with access to electronic case information. In the last decade, through the implementation of the Case Management/Electronic Case Files (CM/ECF) system, PACER has evolved into an easy-to-use, Internet-based service providing public access to electronic versions of documents filed with the courts through the CM/ECF system. PACER has established nearly one million user accounts, adding approximately 10,000 new accounts each month. In 2008 alone, PACER processed over 360 million requests for information.

The Judiciary continues to seek to improve electronic public access to its records. A pilot project is currently underway to evaluate the expansion of PACER to include access to digital recordings of court proceedings in district and bankruptcy courts. Additionally, because CM/ECF has served many district and bankruptcy courts well for nearly a decade, many in the court community have begun to discuss planning for a successor system. An assessment of the needs of PACER users is also underway and will lead to improvements and expansion of the Judiciary's public access services.

In addition to PACER, however, nearly every court has used their individual websites to provide electronic public access that goes beyond the requirements of the Act. For example, district courts are in the process of implementing a Jury Management System, which will allow jurors to complete qualification forms and obtain jury service-related information through the courts' websites. The Federal, First, Second, Fifth, Seventh, Ninth and Tenth Circuit Courts of Appeals provide electronic public access through their websites to orders issued on judicial misconduct complaints. The United States Courts of Appeals for the Federal, First, Fifth, Seventh and Eighth Circuits use their websites to provide the public with access to digital audio recordings of oral arguments heard by the court. Additionally, many courts provide information on the history of the court and information needed by members of the bar. The Seventh Circuit has also established a "wiki," a site that contains the court's Practitioner's Handbook, and allows users to provide comments on court procedures. The courts are also using their websites to allow greater public access to more general information, including job opportunities with the federal government, links to other relevant government Internet sites and general information about the federal government.

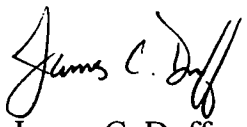
For 2009, the Judicial Conference is pleased to report that no court has deferred compliance with the requirements of the Act. In the past, courts have sought deferrals while implementing CM/ECF, and one district court repeatedly deferred compliance with the requirement that it provide access to its opinions in a text-searchable format. That court has resolved its issues, however, and earlier this year began providing that access. Additionally, the Judiciary has implemented a policy to make transcripts of court proceedings available to the public through PACER. The policy, which was adopted by the Judicial Conference in September 2007, required software changes and new court procedures, which have now been implemented in both district and bankruptcy courts.

Finally, the courts of appeals and the bankruptcy appellate panels are in the process of implementing CM/ECF, the Judiciary's electronic case management system. To date, 11 courts of appeals are making electronic filings available to the public.

Because of the lack of deferrals or pending issues, and because the Judiciary has complied with all the requirements of the Act, there appears to be little reason to submit future reports. This will, therefore, be the final Judiciary report under Section 205(g) of the Act. If, however, there are substantial changes in the provision of Internet-based access to court information, we would be happy to provide the Committee with an update.

If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,



James C. Duff
Secretary

Identical letter sent to: Honorable Susan M. Collins

Administrative Office of the U.S. Courts
PACER Service Center

Free Written Opinions

In the spirit of the E-Government Act of 2002, modifications have been made to the District Court CM/ECF system to provide PACER customers with access to written opinions free of charge. The modifications also allow PACER customers to search for written opinions using a new report that is free of charge. Written opinions have been defined by the Judicial Conference as "any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court's decision." The responsibility for determining which documents meet this definition rests with the authoring judge.

This functionality will only be available in courts that have installed District Court CM/ECF version 2.4 or higher, and will only provide free access to opinions filed after the court is actively using version 2.4. There may still be a charge to access opinions that pre-date the court's use of version 2.4. The new report is available under the Reports menu. PACER customers can also access opinions via existing reports and queries, such as the docket report, and will not be billed for accessing the written opinion document itself, but will be billed for the report or query used to identify the document. For example, if a PACER customer runs a docket report, the customer will be charged for the docket report. If the customer then clicks on the document number hyperlink for a written opinion document, the customer will not be charged for viewing the document. Future versions of Bankruptcy CM/ECF will have similar functionality.

If you have any questions, please contact the PACER Service Center at pacer@psc.uscourts.gov.

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For information or comments, please contact:

The PACER Service Center

Newsletter of the Federal Courts

THE THIRD BRANCH

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Masthead

Vol. 39, Number 7 — July 2007

Access to Court Information Ever Expanding

Customers of the federal court's Public Access to Court Electronic Records (PACER) system now have access, without charge, to district court written opinions. Written opinions have been defined by the Judicial Conference as "any document issued by a judge or judges of the court sitting in that capacity, that sets forth a reasoned explanation for a court's decision." The authoring judge determines which documents meet this definition. Only district courts using version 2.4 or higher of the Case Management/Electronic Case Files system will offer this access, but PACER customers also can access opinions via existing reports and queries, such as the docket report. Users will not be billed for accessing the written opinion document itself, but will be billed for the report or query used to identify the document.

In 2006 alone, over 200 million requests for information were processed by PACER. Users can retrieve, among other items, a listing of parties and participants in a case, a compilation of case-related information, such as cause of action, nature of suit and dollar demand, judgments or case status, and appellate court opinions. Many courts also offer imaged copies of documents.

The E-Government Act of 2002 set requirements for providing public access to government information over the Internet, but even prior to the Act federal courts were building websites and the federal Judiciary was implementing the web PACER to provide access to case information. All federal circuit, district and bankruptcy courts have websites and the vast majority of those sites satisfy or exceed the requirements of the E-Government Act with information on court locations, contact and docket information, local rules, and any document filed electronically or filed on paper and later converted to electronic format. The Judiciary remains committed to providing electronic public access to court information.

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