ADVISORY COMMITTEE ON APPELLATE RULES

Testimony of William T. Hangley on behalf of the American College of Trial Lawyers With Respect to Proposed Fed. R. App. P. 32.1.

I am a trial and appellate lawyer, and am Chair of Hangley Aronchick Segal & Pudlin, in Philadelphia. I am testifying today on behalf of the American College of Trial Lawyers. The College, founded in 1950, is widely considered to be the premier lawyers' professional organization in America. I am joined today by the President Elect of the College, James W. Morris, III, of Richmond, Virginia.

In 2002, I had the honor of being asked to prepare the College's report and recommendations on the phenomenon known as "unpublished opinions" – opinions that can more accurately be called "non-circuit binding opinions." That report was called *Opinions Hidden, Citations Forbidden: A Report And Recommendations Of the American College of Trial Lawyers On The Publication And Citation Of Nonbinding Federal Circuit Court Opinions ("Opinions Hidden").* It was published by the College and, separately, published at 208 F.R.D 645. Copies have been distributed to the members of this Advisory Committee and the Reporter. In *Opinions Hidden,* the College made the following recommendations:

A. that the rules and procedures governing the publication of and resort to nonbinding opinions should be uniform;

B. that the non-circuit binding opinions should be published; and

C. that litigants must be free to cite nonbinding opinions.

We of the College are delighted that the Advisory Committee has recommended the adoption of proposed Appellate Rule 32.1. We have followed the debates and dialogue within the Advisory Committee and, as you know, we have not hesitated to pester your able Report, Pat Schiltz, as your good work went forward.

In my remarks today, I will concentrate on our third point – that lawyers must be free to cite non-circuit binding opinions when they consider them persuasive, just as they are free to cite fiction, doggerel, beer commercials and stand-up comedians when they consider those "precedents" persuasive. I understand that my friend and colleague, Judah Best (also a Fellow of the College), will discuss the need for publication and the need for uniformity in his separate testimony, offered here on behalf of the Section of Litigation of the American Bar Association.

Before proceeding, I must observe that, like the Advisory Committee, the College does not take any position on the question whether courts can or cannot constitutionally take the position that not all opinions are circuit binding precedent, the debate between *Anastasoff v. United States*, on the one hand, and *Hart v. Massanari*, on the other. We quite agree with the Advisory Committee that the resolution of this debate is best left to judicial decision rather than rulemaking. As a practicing appellate lawyer, too, I cannot help observing that trial and appellate lawyers are not much troubled, very much of the time, by the question whether a particular opinion is or is not circuit binding. What lawyers do find troubling, and what their client-litigants should find troubling and personally threatening, is a universe in which some decisions are off base, taboo, not to be discussed.

There should be no restriction upon litigants' citations to nonbinding opinions for whatever persuasive merit they are thought to have. Assuming that a circuit court can decide that a given holding will not be binding precedent for a future case within that circuit, that court *or* any court can surely decide what weight it wishes to give to the reasoning behind that holding in a particular new factual context, rather than making the a priori judgment that nothing in the holding could possibly be pertinent to any future case. Courts signal a lack of confidence in their own decisions by prohibiting the public's representatives from even discussing them, and the law must inevitably suffer. The limited available information also demonstrates -- not surprisingly -- that appellate judges are quite fallible in their decisions that a given case adds nothing to the body of law and is "not precedent." For some of these cases, indeed, it is impossible to accept the proposition that they were ever thought to be easy, redundant, and unimportant dispositions. Courts are declining to publish opinions that turn out to be the best authority in a given setting, then refusing to talk about them or permit their discussion.

For a court to blind itself, in advance, to the persuasive power of its own reasoning simply makes no sense. Worse yet, such a practice undermines the process of stare decisis and corrodes the crucial public perception that cases are decided by the rule of law, and not arbitrarily.

First, there are grave doubts as to whether a court *can* prohibit lawyers and parties from telling them about the courts' own decisions. As Committee members are all too aware, and as discussed in *Opinions Hidden,* reputable judges and scholars raise serious questions about whether anticitation rules can past muster under the

speech and petition clauses of the First Amendment, whether they violate the separation of powers, whether they are within the scope of an Article III court's powers, and whether they work a denial of equal protection or due process. Stated as an abstract proposition, a rule that lawyers cannot cite judicial statements they consider persuasive or criticize judicial statements they consider erroneous is unthinkable. Imposing prior restraints upon citizen references to the public words or acts of any public official - any judge, any mayor, any crossing guard - seems undeniably contrary to our treasured notions of freedom of speech and of the compact between citizens and their government. More narrowly, the common law and stare decisis are built on the premise that lawyers will use one judge's reasoning to persuade the next judge not that the first case controls the decision in the second case -- that is relatively rare -- but that its reasoning lights the path that the court should follow in addressing the present dispute. To tell lawyers (and therefore the public for whom they speak) that they must foreswear eighty percent of the available reasoning is a remarkably radical step. It becomes even more radical when one considers the fact that these same circuits are willing to consider, as persuasive precedents, other courts' opinions that are just as nonbinding as their own. The thinking cannot be that all less-than-optimally vetted analyses are to be eschewed but, rather, that the rulemaking tribunal does not want to risk being embarrassed by one of its less-than-optimally vetted holdings. That is a paltry excuse for gagging lawyers and their clients.

Second, contrary to the rationale of the anticitation rules, the record demonstrates compellingly that the nonbinding opinions are not uniformly redundant. Sometimes

they are important building blocks of the corpus juris. In *Opinions Hidden*, we discuss "A" pile and "B" pile decisions. The "A" pile gets the cases that are marked as circuit binding precedent; the "B" piles gets those cases that are deemed "easy," "redundant," "automatic," "nothing new." Yet we know that many such opinions have been reviewed and reversed by the Supreme Court . That just doesn't happen to a "redundant" or "automatic" decision. Nor would we expect to see dissents to redundant or automatic decisions, but dissents are not uncommon in non-circuit binding dispositions.

The sensible way to decide the persuasive value of a decision is not to label it in advance but instead – and this is the genius of stare decisis – to see how persuasive judges find it in posterity. Anticitation rules stifle that process with *a priori* judgments.

Third, with all respect to the good faith of the appellate bench, and its attempt to follow its own rules, it is well nigh impossible to avoid concluding that the consigning a difficult opinion to the "non-binding, uncitable" pile is a far too convenient way of achieving dispositional consensus within a panel, even if there is not agreement on the basis for the decision. In *Opinions Hidden*, we discuss several instances where it should have been obvious, from the start, that a particular decision (whether it was circuit binding or not) should never have gone on the uncitable "B" pile, because – right or wrong – it was an important point in the development of the law. The "B" pile opinion discussed by Judge Arnold in *Anastasoff v. United States,* [1]

[1] 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

Christie v. United States,[2] was a case of first impression in the Eighth Circuit. Even the anticitation circuits agree that cases of first impression do not belong on the "B" pile. The Fifth Circuit's nonbinding (and literally unpublished) decision in *Anderson v. Dallas Area Rapid Transit*,[3] in the Fifth Circuit, was another case of first impression; it addressed the Eleventh Amendment immunity of a metropolitan transit authority. *Berry Sterling v. Pescor Plastics*[4] attempted to resolve an obvious internal conflict of cases within a circuit – another characteristic thought to require publication and therefore to permit citation. And The Ninth Circuit's decision in *Kish v. City of Santa Monica*[5] was squarely at odds with a decision of another circuit – another characteristic generally thought to require publication and citability – but a California lawyer was subjected to sanctions proceedings in *Sorchini v. City of Covina*[6] because she had dared to mention *Kish* to the court that had decided *Kish*. The decisions in *Bott v. Four-Star Corp.*[7]and *Ricoh Co. v. Nashua Corp.*[8] – cases involving the arcane doctrine of "prosecution laches" in patent law, were certainly not unremarkable, redundant or automatic. *Bott* announced that earlier decisions of the United States Supreme Court no longer applied, owing to an amendment of the Patent Act, and that defenses bottomed in concepts of fairness had been eliminated – not by legislation but by Congressional silence. As discussed in *Opinions Hidden, Bott* and *Ricoh* were thought to be the law for some fourteen years – and they were the only law; there was no "published" law except in the hornbooks and law review articles,

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2 No. 01-1564, 1992 U.S. App. LEXIS 38446 (8th Cir. March 20, 1992).

3 180 F.3d 265 (5th Cir. May 6, 1999) (table).

4 *Berry Sterling Corp. v. Pescor Plastics, Inc.*, 215 F.3d 1351 (Table) (No. 98-1381), 1999 WL 674514 (Fed. Cir. August 30, 1999).

5 216 F.3d 1083 (table), No. 98-56297, 2000 WL 377771 (9th Cir. April 13, 2000).

6 250 F.3d 706 (9th Cir. 2001).

7 848 F.2d 1245 (Table), No. 97-04424, 1988 WL 54107 (Fed. Cir. May 26, 1988).

where *Bott* and *Ricoh* were discussed exhaustively -- until the Federal Circuit reached the precisely opposite conclusion in *Symbol Techs., Inc. v. Lemelson Med. Foundation.*[9] *A*nd in doing so, the court refused even to consider or permit argument of the earlier *Bott* and *Ricoh* opinions. That is not *stare decisis;* that is denial.

Finally, the anticitation rules do not help the courts. So far as one can tell from reading the cases, it cannot fairly be said that the non-circuit binding opinions of circuits that allow their citation are more thoroughly researched or more carefully written than non-binding opinions in anticitation circuits. Conversely, there is no evidence to suggest that the anticitation rules have led to a quality of circuit binding case law in, say, the Ninth or Seventh Circuit that is markedly superior to the circuit binding case law in circuits that allow citation of the "B" pile cases.

Parties and the lawyers they hire must be allowed to pursue justice by every ethical means, and that includes citing Lawyers must be allowed to talk about opinions they find persuasive, or that they hope the tribunal will find persuasive.

The American College of Trial Lawyers supports the proposed new rule and urges its adoption.

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[8] 185 F.3d 884 (Table), No. 97- 1344, 1999 WL 88969 (Fed. Cir. Feb. 18, 1999).

[9] 277 F.3d 1361 (Fed. Cir. 2002).