

Summary of discussion had by the Judicial Conference Advisory Committee on Appellate Rules on Professor Joseph Weeks' proposal to require written reasoning on all dispositions - May 15, 2003 (Item 03-05. Agenda item V. E. 5.)

In attendance were:

Chair: Judge Samuel A. Alito, Jr. - Third Circuit
Reporter: Professor Patrick J. Schiltz - University of St. Thomas School of Law
Members: Judge Carl E. Stewart - Fifth Circuit
Judge Stanwood R. Duval, Jr. - U.S. Eastern District of Louisiana Court
Douglas Letter - representing Solicitor General Theodore Olson
Sanford Svetcov - Milberg Weiss Bershad Hynes & Lerach
Professor Carol Ann Mooney - University of Notre Dame
Former Chief Justice Richard C. Howe - Utah Supreme Court
W. Thomas McGough, Jr. - Reed Smith
Judge Diana Gribbon Motz - Fourth Circuit
John G. Roberts - Hogan & Hartson, soon to be Judge on Third Circuit
Advisors: Circuit Clerk Marcia M. Waldron - Third Circuit
Marie Leary - Federal Judicial Center
John Rabiej - Administrative Office of the U. S. Courts

At the beginning of the meeting, Judge Alito announced that this was the last session of the committee on which Judge Motz and Professor Mooney will serve.

PLEASE NOTE: THE DIALOG BELOW IS A PARAPHRASE OF THE FLOW OF THE MEETING, NOT A PROFESSIONAL TRANSCRIPT. THE ACTUAL WORDS BELOW ARE NOT QUOTES. THEY ARE THE AUTHOR'S BEST SUMMARY/MEMORY OF THE CONTENT OF WHAT WAS SAID.

Earlier in the meeting, the Committee had finished its final approval for transmittal to the Standing Rules and Practices Committee of the Judicial Conference of a proposal allowing citation of non-precedential (unpublished) opinions. The vote was 8 for, 1 against (Svetcov), and 1 abstaining (the Solicitor General's office) with the comment by the SG's representative that the SG had not reviewed the proposal yet.

The discussion on required written reasoning for all appellate dispositions:

Alito: Do we have statistics on dispositions without reasoning?

Waldron: The Administrative Office of the Courts puts out statistics. We need to do more. The coding of the type of case is in question. It is hard to code whether a decision is reasoned or not. A lot of times, a substitute for lack of reasoning is the one word opinion. We need a bright line to help us code properly.

Someone: I would like to know what is meant by Professor Weeks' proposal. A lot of times an opinion simply says we affirm for the reasons stated in the opinion of the district

court. I get the impression that Professor Weeks wants more than that.

Letter: I think what he wants is reasoning. He is saying that litigants have the right to know why. So if a statement is made that the reasoning is the same as that written by the district court, that would be OK by Professor Weeks.

Hubbub: Not all seem to hear Letter and still seem to think that Weeks wants more.

Stewart: Referring to the district courts opinion for reasons happens more often than not. It happens a *number* of times. We do that for institutional reasons. District judges don't like to be overturned. We in the appellate courts want to show respect for the good work of the district judges. It's a cultural issue. We don't want to have to rehash what has already been said well enough. These kind of opinions are unpublished. This type satisfies three purposes: it's quick, it shows respect for district judges, and it is efficient.

Roberts: I think it is totally quixotic to think we will come close to passing this.

Stewart: I agree. I think there is an unsaid criticism in this letter of staff attorneys. It's not in the letter.

Motz: I think it is in the letter. It says in the letter that we can just quickly post staff attorneys' work.

Schiltz: You know, to get the citation rule we just passed earlier today will be pretty delicate. I think that if the people up the chain in the Judicial Conference think that this is coming right behind the citation rule, I think the citation rule will be in jeopardy.

McGough: Even if this is quixotic, I think we would like to see more explanations. If we don't move forward here, at least we should put in the notes that the Committee agrees that more written reasoning would be desired.

Motz: I'm not sure I agree. If we keep the small number of judges and the same or growing case load, we can only work 12 hours a day. We have to decide where to spend the hours. It is not a bad idea to simply say affirmed in some cases.

Svetcov: I think my clients would like to have reasons stated by appeals. It can be as simple as two sentences.

Motz: In return, do you want your clients to wait three years for a resolution of their case? Or do we want to be like Germany, where we have a whole coterie of appellate judges?

McGough: I don't disagree about structural problems. Writing a rule will not fix that, but I would like to see more explanations.

Alito: How many circuits don't give explanations?

Motz: In the Fourth, we give explanations most of the time. I think the 11th Circuit doesn't give explanations a lot.

Stewart: The Fifth Circuit has a practice of not giving explanations in certain cases. We have Local Rule 47.6 for one word affirmances. When we do it, it is clear to everyone why we did it. The case has been briefed and in oral arguments, the train of thought of the judges has been seen by the participants. A lot of times in diversity cases using state law, we come across cases where the state supreme court has not ruled on an issue yet, and we do not want to get involved in setting state law. Why wax on about unsettled state law? In a lot of these cases, it really just boils down to "You win. You lose." We also have a healthy dose of prisoner cases. There are valid reasons to tell litigants reasons, but there are lots of reasons not to.

Alito: You guys have a big load in the Fifth, right?

Stewart: Yes. We've got a wide variety, too.

Motz: I recognize the frustration of clients when they get no opinion at all. We in the Fourth give very short opinions.

Alito: I think McGough's point is good.

Rabiej: There is a bill (HR700) in Congress on this topic.

Shiltz: Ron Paul's bill.

Rabiej: It is narrower in scope than this proposal.

Question: What does it include?

Shiltz: I think it includes diversity cases, Judge Stewart.

Question: How far has it gotten?

Rabiej: Nowhere, so far.

Alito: I think there is a legitimate desire for reasoning, but I think it is impossible to specify in a meaningful way what is meant. How do you specify?

Svetcov: The California court system has rules like this.

Motz: Judge Alito, will you write a letter back to Professor Weeks on this. We trust your diplomacy skills.

