FROM THE EDITOR

An Open Secret

The path to a magazine article is sometimes a long one. And so it was this month.

Thom Hudson and **Judge Donn Kessler** first proposed stories on **the citation of unpublished memorandum decisions** last summer. Their drafts arrived, and we went back and forth over approach and timing.

More recently, I spoke with **Dick Coffinger,** who felt he had something important to add to the dialogue.

The result, I hope you agree, is exemplary writing and a great service to readers who want to be informed on a vital topic: namely, What should comprise the common law?

The dialogue this month centers on whether there should be a large and growing body of decisions that are off limits except in rare and isolated circumstances.

Opponents of citation and access dislike the use of the word "secret" when discussing unpublished memorandum decisions. And literally, of course, they are correct. Lawyers and judges all know that they exist and where they are. They often can print them, photocopy them, ruminate on them, enjoy them over coffee or a glass of wine.

But in the Ninth Circuit and in Arizona courts, lawyers dare not do more than that. The **citation prohibition** ensures that lawyers look but don't touch. Those in practice are all in on the open secret, and they tread carefully around the issue.

When we decided that the June issue would be the home for this important topic, we knew that the **U.S. Supreme Court** could weigh in on the subject at any time. But our timing was fortunate: On April 12, the Court adopted a historic rule change that allows lawyers to cite unpublished opinions in federal court beginning next January 1—unless Congress legislates otherwise this year.

If the path toward openness continues, perhaps we will need another three-judge panel (or two) of appellate judges, as Judge Kessler suggests. After all, more citable opinions may mean more work for the bench.

Let me know what you think. Contact me at Tim.Eigo@staff.azbar.org.

For more information on article submission, see page 21.

For author guidelines, go to www.myazbar.org/AZAttorney.

To pitch a story idea, contact the Editor or any Editorial Board member.

While we're on the subject of secret-ive opinions, be sure you look at the cloak-and-dagger approach of the judge assigned to the copyright infringement trial of the novel ***The Da Vinci Code.***

News reports indicate that three weeks after the British court issued its ruling, a lawyer discerned what may be a secret message in the 71-page opinion. The seemingly random use of italicized letters masks the judge's own code, perhaps his own secret message. Italicized letters in the first seven paragraphs spell out "Smithy Code" (named for the judge, Peter Smith), but the remaining 25 or so letters are jumbled. Lawyer–sleuths around the world are now engaged in unraveling the mystery. Try it yourself at www.hmcourts-service.gov.uk/images/judgment-files/baigent_v_rhg_0406.pdf

Now that's a secret history we would enjoy more of. Perhaps one of our own Court of Appeals judges will try his or her hand at a little mysterious drafting. Keep your eyes open for the hidden cipher!

Tim Eigo

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