Oral History of
HONORABLE FRANK Q. NEBEKER
Fifth Interview
August 24, 2004

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is the Honorable Frank Q. Nebeker, Senior Judge, District of Columbia Court of Appeals, and the interviewer is David W. Allen. The interview took place on August 24, 2004. This is the fifth interview.

Mr. Allen: Today is August 24, 2004, and this is the continued oral history of Judge Frank Q. Nebeker. Judge Nebeker, last time we were talking about bail reform and some other issues. The move of Mr. Stevas to become Clerk of the Court and today you advised that you would like to talk about some health care issues that you dealt with while you were on the court and they were in the early 1970s.

Judge Nebeker: Yes. One day in about 1971, I stayed down late and I looked up and there was Al Stevas standing in the doorway asking me if I could handle an emergency matter coming up out of the trial court, Judge Sylvia Bacon as a matter of fact, who had been called by a hospital because they had an injured man brought to George Washington University Hospital. He'd been out in Maryland. He was a Jehovah's Witness and had been logging and a tree fell on him and ruptured his spleen. They put him in the hospital and wanted to transfuse him. He and his family – he was conscious – he and his family refused to take a transfusion and so the lawyers for the hospital came to the Superior Court for an order allowing them to transfuse

this man. They got such an order from Judge Bacon. Then they immediately appealed to our court. I recall that —

Mr. Allen: This was the patient, the Jehovah Witness, appealed?

Judge Nebeker: Yes. The family of the patient appealed the order saying that the hospital was authorized to transfuse Mr. Osborne. This was about 6:00 in the evening that I was brought into the case, and it turns out that Judge Gallagher and Judge Yeagley were also there.

Mr. Allen: And you needed three for a panel?

Judge Nebeker: We needed three for a panel. We had the emergency pleadings in front of us, and for the first time to my knowledge, we used a telephone conference oral argument. The doctors and the lawyers for both sides were at the hospital and we got on a speaker phone in one of the chambers and heard from the parties' counsel. I raised a question whether if his religious beliefs would in his view, damn him to perdition, if after he became comatose from the loss of blood, the doctors were then to have transfused him, he not having any part of the judgment, not being able to resist, not being able to do anything, would, in his view, he still be contaminated for the life hereafter by the actions of the doctors. And so we didn't know the answer to that. It was not available to us through what you might call the record, which was nothing more than the recollection of the parties' lawyers. We issued an order orally and then called Judge Bacon and said, "You go back and talk to Osborne to see if his religious views would run contra to an

unwitting and unknowing transfusion once he was comatose." And it was our hope that he would say no I would not be affected by that because I had no part in it. So Judge Bacon did that, but Osborne surprised all of us by saying, and his family backed him up, that in their religious view, such a transfusion was as bad as one that he would undertake while conscious. Well then that left us to – and this was all happening over the telephone – this left us around midnight with what to do. It was obvious. He was perfectly competent and capable. He was not in any way suffering from shock or anything. He was mentally capable of standing on his own religious beliefs. So, we issued an order affirming Judge Bacon and saying that he had a First Amendment right to refuse transfusion. We published an opinion six weeks later, 294 A.2d 372 (1972). Well, it turned out that while the doctors were treating him, they opened his abdominal cavity and evacuated his own blood. His spleen had ruptured and his own blood had invaded the abdominal cavity and they had evacuated his own blood and kept it. Now that was all right according to his religious beliefs. So they transfused him with his own blood and he lived. Well that was my first experience with health care issues, although I had earlier experienced a case involving Georgetown University Hospital out of the D.C. Circuit. Circuit Judge Wright wrote it. I was a bystander. He wrote that the State had an overriding interest in life.

Mr. Allen: And this was?

Judge Nebeker: This was much before.

Mr. Allen: And the judge was who?

Judge Nebeker: Skelly Wright. That the State had an interest in preserving life against the wishes of the patient. I can recall taking a contrary view with *Osborne* because here we had a case in which, if we followed the Circuit's decision, we would say that the State had an interest that overrode First Amendment rights, an interest in preserving life. But that rang a bit to me like the communist philosophy that the individual exists for the State, rather than the State existing for the individual. So, I took the view that Osborne being as competent as he was, having children but the family, his brothers were there, and those children would be taken care of, so the State in my view did not have an interest sufficient to override Osborne's First Amendment rights given that his family would be well cared for. His children would not become wards of the State, would be reared by their father's brother, and I persuaded our panel to take the view that we took which was he had a perfect right to refuse the transfusion. Well, as I say, it all worked out in the end. But this was the first exposure that I had really had to health care issues. And one of the issues that always bothers me, and I have discussed it with the appellate judges throughout the country through this Appellate Judges Seminar Series that I work with, is really what business is it of the courts to get into these questions. And a fairly good argument can be made that really the courts don't belong in the business. As a matter of fact, as the

law had evolved throughout the country, you have hospitals now that have ethics committees and we don't get these kind of cases brought in court so much anymore. One of the main reasons is because of a Jesuit priest out of Boston College who became a fabulous teacher in this area throughout not only the nation, but the world as well. His name was Father Paris, John Paris. With my interest wetted in these health, preserve life cases, I became acquainted with him and we had him lecture at many of the appellate judges seminars on these various topics. But let me move along again.

Mr. Allen: Let me back up and ask a question. In the *Osborne* case, what was the hospital's cause of action if you recall? What did they say was the interest that the hospital had in providing treatment to Mr. Osborne?

Judge Nebeker: Avoiding tort liability if he died. Then they were afraid the estate would sue and they —

Mr. Allen: And the release from Osborne himself and his family wouldn't suffice?

Judge Nebeker: They didn't want that.

Mr. Allen: And their theory was essentially the kind of an inverse tort theory. We want to be protected from being a tortfeasor.

Judge Nebeker: And that is exactly why the view was adopted that said it's not the business of the courts. Because they were coming in asking for immunity.

Mr. Allen: So that must be a common law theory?

Judge Nebeker: Yes. I guess it is.

Mr. Allen: Plaintiff asserts a right to provide a service?

Judge Nebeker: I guess you have prohibitory injunctions to prevent a tort. You don't enjoin, prevent, a crime. We know that.

Mr. Allen: But they weren't seeking restraint on Osborne and his family suing, they wanted an order essentially to restrain Osborne from interfering with their providing him a medical service.

Judge Nebeker: Yes. They wanted a mandatory injunction that gave them the authority to transfuse. It was solely based upon – well, I don't want to say solely because in the main it was based upon an effort by the hospital to insulate itself from tort liability. Now I'm sure they were also motivated by a general moral virtue of wanting to preserve life when they know they can do it. The transfusion of the blood is not something that is extreme at all anymore. It is as routine as it can be, so there was just this collision between ordinary regular medical practice and First Amendment religious beliefs.

Mr. Allen: You had John Paris the Jesuit who is now lecturing at Boston College. Where do we go from that?

Judge Nebeker: Well, as a result of the *Osborne* case and as a result of my acquaintance with John Paris, I found these health care issues, these preserving life issues, to be quite important and quite interesting. Years later while still on the court, we had the Angela Carter case, then known only as *In re A.C.* and again it was one of these "we've got to act immediately" situations. She was a cancer victim, was dying of cancer. She had a fetus that was about

five months I think. The chances of the fetus surviving if taken by cesarean were about 51 to 49 percent. But she had been on a great deal of chemotherapy and the doctors – she was at the threshold of death – and the doctors wanted to take that baby by cesarean section. Again we had telephone oral argument and we learned that the odds were very slim, but favored the survival of the fetus. They would try to communicate with her, and at one time she said yes, it was all right to take the baby by cesarean section, but then she apparently was whispered to by someone else. It is my recollection it was somebody from the ACLU was in the hospital conference, too, representing her I suppose, or the family, and there was some evidence that she had changed her mind and didn't want it done. So our panel was stuck with, What do we do now? Do we override her wishes, the record being very ambiguous on this subject. We just didn't know for sure whether she had changed her mind or not. We ultimately decided that the State had an interest in preserving the life of the fetus and if the odds at all favored success, we would permit the hospital to perform the cesarean section. We were interrupted during the argument by the doctor who just simply spoke up and said you are going to have to decide it right now, because this woman is on her way out. So we did it, orally permitted it to be done and then an order to follow. Well, in the weeks that followed, I wrote an opinion justifying or attempting to justify what we had decided to do. Incidentally, she had – the mother rallied after the fetus was taken, but for

just a very short period of time, just a day or so I think it was and then she died. And the fetus died as well. In any event, I wrote this opinion because I could see that judges throughout the country were going to be confronted with this sort of a situation, and for no other reason than just to show precedent was there to help if it would help, I drafted this opinion recognizing that the entire matter was totally moot. I think I mentioned earlier that when I came on the court after court reorganization I had written the decision that said we, like the Article III courts, will live by the case or controversy jurisdictional holdings of the Supreme Court.

Mr. Allen: What was the name of that case?

Judge Nebeker: I would have to dig it out. I don't recall it right now. I guess I'm digressing here to say that we recognized that the *A.C.* case was moot because she was dead, but wanted to do what we could to help jurisprudence in this area because it was going to happen, we knew it would happen throughout the country. I wrote the decision for the panel and it was published. Then there was a very vitriolic petition for a rehearing *en banc* filed by, I can't remember whether it was the ACLU or some other interested organization having to do with women's rights but it was a very vitriolic petition for rehearing *en banc* and that was about the time I retired from the court, so this was 1987, and I left the court. It was about two years later that this court issued its *en banc* opinion agreeing with the petitioners on the

rehearing petition and taking the view that it wasn't moot because it evaded review —

Mr. Allen: It was capable of repetition.

Judge Nebeker: Capable of repetition and evaded review.

Mr. Allen: Yes. That is the doctrine for deciding cases that are moot.

Judge Nebeker: That's exactly right. Deciding cases when you have an opinion and you need the case.

Mr. Allen: I think that was generated by the Supreme Court's *"Shuffling Sam"* case in the 1960s. It was a vagrancy law in some southern state where they kept putting him in jail for too short a time for an appeal to be mounted and by the time he was released, they'd say well it's moot. He's served his time. And the Supreme Court developed a doctrine of capable of repetition.

Judge Nebeker: And they have used it many, many times. Well, in any event, that was the saga —

Mr. Allen: And they took the case and ultimately reversed the ruling of the panel?

Judge Nebeker: Yes. They vacated the decision of the panel and then ultimately came down with substantive law contrary to the panel's holding.

Mr. Allen: So that the substantive, ultimate holding was that in facts of the *A.C.* case, if there's evidence that the mother had expressed a desire not to have the cesarean, that her wishes would prevail.

Judge Nebeker: Yes, her wishes would prevail over the possibility that the child could survive.

Mr. Allen: I should disclose that my wife was General Counsel of the American Council of Obstetricians and Gynecologists at the time and they had some role in that litigation. I don't recall what it was.

Judge Nebeker: I bet they did, that's right.

Mr. Allen: It may very well be that they would have sided with the mother. I don't recall the facts of that case other than she was involved.

Judge Nebeker: Well, they are tough cases to decide and you have to decide them almost immediately. You don't have the luxury of research, of briefing, of contemplative thought with respect to it. You just have to shoot. I don't see anything wrong with somebody opting on the side of as much caution as is available to you. If you can preserve the life of the child you do it. But that's where there are legitimate legal and moral differences of opinion.

Mr. Allen: Yes indeed. The laws are full of them around those subjects and obviously we would go on debating them and debate them forever.

Judge Nebeker: That's why I think that the courts are not the place to have that resolved, and I'm very glad that in most instances now you have ethics panels within the hospitals that have all disciplines represented, and it's through Father Paris that these things I believe got started way back, many years ago because he recognized that – incidentally, Father Paris is not one who comes down on the side of preserving life. You'd think as a Catholic priest he would, but as a matter of fact, he is exactly the opposite. He's a very interesting man to talk to and he will not, for instance, attempt to use what are called heroic

measures to preserve the life of somebody who has said he doesn't want any heroic measures to preserve his life.

Mr. Allen: It may be that the development of living wills has cut down on the number of these cases, because it's possible for a person who is incapacitated to let family know and record their wishes.

Judge Nebeker: Well, and see that was J. Skelly Wright's view in that other hospital case I mentioned. His view was, Well, all right, as long as the individual is competent and conscious to say what he wants to do, we'll go along with it. But the minute he becomes comatose, then the law will presume he's changed his mind.

Mr. Allen: Well, that certainly is a leap.

Judge Nebeker: It's a leap that is, to me, a very difficult thing to do. And it's allied with the idea that the individual exists for the State, which is anathema to me. I can't buy that one.

Mr. Allen: Okay. Judge Nebeker, you have said that what you would like to talk about next is the no-cite rule and how it began to be an issue with the D.C. Court of Appeals and how the issue was continued in some activities you have had with respect to the rule, even quite recently.

Judge Nebeker: Yes. I'll go back to when I was first on the court and became interested in the ABA's Appellate Judges Seminar Series. I attended many of them before I finally became a member of its governing committee. Judge Kern and I attended one of the first seminars in Reno, Nevada, and we came back

having been exposed by the program to the idea of having both a regular calendar and a summary calendar of cases. That had been something that was experimented with in a few courts and it was an innovation that the planners of the seminar thought other judges should learn about. We did learn about it and were very impressed with it, both of us. So we came back and made a recommendation to Chief Judge Hood that we start doing that. He brought it up with the full court and we ultimately decided that we would do that. That required a screening of the cases before they were put on the calendar to see if each case warrants an opinion, or if it's one that is frivolous or near-frivolous, *i.e.*, controlled by clear precedent or statute. So we began, as other courts had done, including the D.C. Circuit a number of years before, to issue unpublished decisions and then the problem became what to do with the institutional practitioners such as the Public Defender Service, the United States Attorney's Office, who were involved in all of these cases whether they are published opinions or not. A vast majority of the summary calendar cases were criminal cases because defendants can appeal just as a matter of right. Now, without any demonstration of apparent merit to the appeal, the calendars of the various courts of appeal were beginning to get clogged with these kinds of appeals and so the pressure to do something about this grew and thus the unpublished decisions came about. And we began by having a judge screen the cases. You didn't want to have clerical people screening the cases for obvious reasons. There

might be disagreement, then the judge has got to say you were wrong having put it on the summary calendar. Well, to this day, we have the judges, now it's the senior judges, who do the screening of these cases. And once in a while, we'll make a mistake and put a case on summary that the panel that is ultimately assigned to the case decides warrants an opinion. So then you have the case scheduled for argument, even though it's on summary calendar.

Mr. Allen: Summary calendar cases don't get argument either?

Judge Nebeker: They get argued if either side requests an argument now, but it's limited to 15 minutes a side. And, of course, with the court being a hot court, a hot court means one in which the judges come in prepared – I don't know of any cold courts anymore, but historically there used to be courts that the judges would come out, sit on the court and didn't know the first thing about the case except the Chief Judge knew the name of the case. So the lawyers had the obligation of educating the judges about the case because they knew nothing before – a "cold court." Well, I've not met an appellate court, and I have certainly met a whole lot of them in the years through the seminar series, that is a cold court. They are either lukewarm or tepid courts, or hot. I must say that most of the judges on this court go in there knowing more about the case, I think sometimes, than the lawyers do. We are a very hot court and, as a result, you will have an oral argument, though by rule limited to 15 minutes in summary cases. Some of these summary calendar cases

will go on for an hour and some of the regular calendar cases which are limited to half an hour a side, can go on for double that time because of questions and activity of the court, all of which I think is a good thing.

Mr. Allen: I think most lawyers would agree.

Judge Nebeker: Yes.

Mr. Allen: Although not necessarily.

Judge Nebeker: Well, you know, the question has been raised why do we have oral arguments in the first place. And I think there's a couple of answers to that one. One, of course, is that it gives both sides an opportunity to orally present in an encapsulated fashion or form, what the case is all about. And it does help. Sometimes it changes minds, but at least it changes focus. It makes the focus better. But there's yet another reason and it's a public relations reason. There are many, many times when the parties will be present for oral argument. There are many times when others just curious will come listen to oral argument. It makes for a demonstration that the court is not a faceless bureaucracy. That it is out there to be seen, to be heard, and so it benefits the third branch of government to have oral argument so that we don't become the faceless bureaucracy that so much of our administrative and executive branch agencies are.

Mr. Allen: So that you are out there in public, where one can come and sit and hear, and there's a demonstration of fairness?

Judge Nebeker: Correct. And a demonstration of openness. We aren't back there concealing ourselves and having law clerks do the work. We demonstrate that we are familiar with the record; we have read it; we know what's going on in the case; we know the law basically around it; and we are in a position to have a dialog, and a dialog is, in my way of thinking, the ultimate end of the advocacy process. You begin with a conflict. Sometimes it's a street conflict in a criminal case. Sometimes it's a private conflict between individuals. All right, now you have facts. Those are what I call street facts. Then when the dispute ripens, you get lawyers involved. And now you get lawyer facts. Did he do this, did the lawyer do this, did the lawyer do the other thing? He asked to take a deposition, et cetera, you get to all these procedural steps, and they are either procedural facts or I call them lawyer facts. Now you finally get the case before a single judge or jury and it gets decided. Then it comes to the Court of Appeals. Now you are in, from a big record, you begin the funnel process, taking the case down to the picture at the end. You do that through briefing – you select the record. You don't necessarily have to have all the record in every case, so you select the record of the material parts. Then you brief it. Now, in your brief you state the facts, but what are you doing? You're truncating the facts; you're leaving out the trash, and you are narrowing the factual focus. You are also narrowing the legal focus and that's why briefs call for not only an argument section in the brief, but a summary of argument. And it also calls

for a statement of questions presented. All this is aimed at distilling the case down to its absolute essentials. I know I used to say to my assistants when I was running the Appellate Division, and I often asked lawyers when I talked to them, "What is the last thing in the brief you write?" And some will say the conclusion. And I say, "Wrong. The last thing you should write is your questions presented, because if they won't write, you've got something wrong somewhere else in your brief and you have to go back to your argument section and find out what it is." So this whole process is to bring the case to the narrowest focus possible, and oral argument is the last opportunity of the parties to do that and that's why there are time limits. You don't want them – in Canada, they go on for days arguing a case. And the judges are just sitting up there. There's no discipline; there's no, "Let's get to the point." They'll ask questions, but to me our system is so much better. Make the lawyers focus on exactly what it is and give them a time limit in which to do it, and you get the case down to a distillate that is manageable. Well, in any event, going back to the idea of having unpublished decisions —

Mr. Allen: A judge screens the cases.

Judge Nebeker: A judge will screen the case and then it goes to a panel and we do that to this day. We have summary calendar cases in which there are six cases put on for a panel of three. When we have regular calendar cases, we only have three cases on at a time for the panel of three.

Mr. Allen: That would be for say a morning sitting or an afternoon sitting?

Judge Nebeker: Yes. We generally have the summary calendar arguments, if there are any, in the afternoon because the regular calendar occupies most of the morning and often into one or two o'clock.

Why do we put a case on summary calendar. Let me jump forward to 1990, when I was Chief Judge of the brand new U.S. Court of Appeals for Veterans Claims. Having experienced summary calendars on this court for almost 18 years, and I recognized that we were getting over there on that Veterans Court appeals by veterans pro se. They were appeals as a matter of right and so we were getting all these cases. Well, all right. I wrote for the court in a case called *Frankel v. Derwinski*. He was the Secretary of VA when the court was created, and he was the appellee in every case that was brought before the court. I had to articulate why we would put cases on the summary calendar. The cite to this decision is Volume I of Vet. App. at p. 23. At page 25 and 26, I wrote this formula, which the court adopted: "If the court determines that the case on appeal is relatively simple and (1) does not establish a new rule of law, (2) does not alter, modify, criticize or clarify an existing rule of law, (3) does not apply an established rule of law to a novel factual situation, (4) does not constitute the only recent binding precedent on a particular point of law within the power of the court to decide, (5) does not involve a legal issue of continuing public interest, and now these are not in a disjunctive; these are in the conjunctive, and (6) the

outcome is not reasonably debatable." That's the criteria I think that we apply here and I know formalistically the Veterans Court continues to apply to this day. As you can see, if the case merits summary disposition, in theory it's going to establish nothing because it's already governed completely by precedent or clear law and there's no fuzzing the facts and bending the law.

I learned while I was Chief of the Appellate Division that the idea of unpublished decisions, particularly but not exclusively in criminal cases, has a very interesting and insidious effect and that's why I wrote this *Frankel* case the way I did, to try to ensure that we don't put a little english on the ball and shove it through as a summary calendar case when really it warrants a precedential opinion and here's why. I experienced years over that in all the criminal cases that were easy of disposition by applying regular established law were being decided by unreported decisions which were not citable. Well what happens then. The decision cites a ten-year-old case for this proposition. But what was happening during this same period is that the published opinions of the court were modifying the old precedent. They were not just putting gloss on it, or they were outright overruling old precedent. Now this goes back to the *Durham* decision. We all know that there was a grand sea change in criminal jurisprudence during that period of time. There were a lot of rules of law that were old and were ripe for challenge, and if a case was deemed not to be the case to challenge that rule

of law, what did they do with it? They decided it by an unreported decision citing the old law. So, as a result the opinions of the court over a period of time really had the effect of eroding the old precedent. Now you can argue over whether that's good or bad, but some precedent was not being perpetuated because it was only being cited in unpublished decisions. And so you didn't have it, if you will, brought up-to-date by the Shepard's Citations. And as a result, some of these old cases were just sitting there. And if the institutional practitioner knew them and could rely on them and the court was not willing to say this is a case to challenge that precedent, it could be decided by an unreported decision and as a result you had this sea change of law without an anchor. You didn't have some tie to precedent. It was all open season on changing the law any old time the court wanted to and apply the old law any time the court wanted to in an unreported decision. It's for that reason that I felt that the Veterans Court, and I think this court basically follows the same thing, reserves summary calendar for cases that add nothing to the subtotal of human knowledge. The knowledge is out there anyway.

Mr. Allen: That seems to be a reasonable split. Is there concern on your part that if a court is going to decide a case and not report it, that it might decide the case differently from the way it would if you would have had to write an opinion and publish it? Is there a process where the judges might say, Well, I'll go

along with this so long as it doesn't have any precedential value. It's sort of a give and take, a compromise where —

Judge Nebeker: I've heard that happen with my own ears. I won't say who did it, but it happened to me once, and I thought it was an abomination.

Mr. Allen: So there is a certain risk that not only will some of the court's activity not see the light of day and therefore contribute to the overall process of the public and the Bar understanding what the court's thinking is, there's a risk that some cases will be decided actually differently?

Judge Nebeker: There is that risk. It's a slim risk, and that's why I know either the D.C. Bar had a committee or it was this thing that Sam Harahan used to be involved in for a long time. What is it called? The Council for Court Excellence; one of them, I know years ago – and I think they continue to do it – reviewed all unpublished decisions to find out, in their view, whether we are burying some of these issues. I think we've come out fairly clean on it. At least that's the way I understood it. I've not read any of their reports. But there's a watchdog and legitimately there ought to be a watchdog to make sure whether we are doing this. But why are we doing it? We are doing it because if you write an opinion in every case, all you are going to do is get so far behind that you'll never catch up and so we've got to take care of these simple cases immediately while they are fresh in the mind and you just kick them out. The Second Circuit used to do it by one-liners. There would be no rationale at all expressed. Maybe there would be it's affirmed;

see such-and-such, another case that they deemed was controlling. No discussion.

Mr. Allen: That seems to me just a one-line opinion is preferable to no report it at all.

Judge Nebeker: Absolutely. Absolutely. And that's why we were persuaded by the Appellate Judges Seminar Series that you have to have some principles in deciding what cases go on summary and what don't. And you have to write. You don't have to write as though you're writing for a published opinion and sometimes they are not very well composed, but again it's because you haven't got time. But these cases that don't add anything to the sum total human knowledge shouldn't occupy the time of judges when they've got a backlog. Now years ago when the appellate courts got started, the judges didn't have enough to do to start with; they could sit and play with any case all they wanted to, as long as they wanted to, and they often did. But not anymore. We are too litigious to indulge in that sort of thing. But then, what do you do when lawyers can obviously disagree with the court. This should have been a published decision. So you've got lawyers saying, Hell, we want to know what's going on. What are we doing about that now? At least the Veterans Court and I think our court, the D.C. Court, now are putting them all on the internet or the computer. So they are retrievable. Before that, of course, the institutional practitioners, the Public Defender, the U.S. Attorney's Office, they'd have copies of all these unpublished decisions and they keep them, categorize them and want to be

able to cite them. And I know when I was Chief of the Appellate Division I wanted to be able to cite an unpublished decision because that brought up to date an old precedent that in another case now is being attacked and I was the advocate for the government in wanting to say, Well now wait a minute. You got a rule in the court that one panel is bound by the earlier decisions of another and it must follow them unless it can legitimately be distinguished or the case has got to go *en banc*. Well, a way to avoid that is to unpublish the opinion and then who can say this opinion is contrary to this one within the last six-to-eight months – that one doesn't count because it's a no-cite decision. I think a lawyer has got not only a right, but an obligation as an advocate to bring that decision to the attention of the court. Hence, my dissent from that part of our internal operating procedures which adopted a no-cite rule back in 1978.

Mr. Allen: Your dissent was an opinion that you just circulated to your colleagues. This wasn't in a litigated case?

Judge Nebeker: No. This was in connection with the order adopting the internal operating procedures in January of 1978. I just took the view that a lawyer had a professional obligation to invite any dispositional document of the court to its attention and he has an obligation to his client as an advocate to make that argument. I suppose I could say he even has a First Amendment right to say to the court, here's a decision you didn't publish but you should know about it. We think you should be bound by it because it should be given

precedential weight. Now, that's if it was a case that arguably could have had an opinion. Obviously, if it's a pure summary calendar case adding nothing to the sum total of human knowledge, fine. It isn't worth anything to say. But why not --

Mr. Allen: This is the beginning of Side B. We were talking about whether cases are worthy of citation and your view that if they don't add anything to the sum total of human knowledge, then they really aren't worth citing, but otherwise they should be available.

Judge Nebeker: Yes, and the argument in favor of the no-cite rule is this and I think there's an answer to it. If you have, for instance, the United States Attorney's Office having access to all these unpublished decisions in criminal cases and they are able to cite them in their brief, the court-appointed lawyer really, except by reply brief, has no ability to know of the decision until he reads the government's brief. And so the government in this situation has a distinct advantage over the private lawyer who is appointed to represent a defendant. The playing field is more balanced when you have the Public Defender Service on one side because – I guess they have access now to all unpublished dispositions in criminal cases. At least I know everybody on the Internet if the lawyer knows enough to start looking for that kind of decision, but unless they are keynoted as West Publishing Company does or in some way there's a synopsis of the case, they are awfully hard to recover or retrieve electronically.

Mr. Allen: Well it depends on the key word search engines that you can use, I suppose, and whether the decisions are available to be searched by those kind of devices.

Judge Nebeker: I am pretty sure that at least most of the court decisions wind up going on some sort of computer service that probably with full text retrieval might be pulled out. Isn't the answer to this unlevel playing field between the uninformed lawyer and the institutional practitioner that when the unpublished decision is cited, a copy of it should be furnished to opposing counsel. Then opposing counsel has an opportunity to address it in a reply brief and in oral argument so that the disadvantaged lawyer is really put back on an even keel. Now that basically is what I believe the Appellate Rules Committee of the Judicial Conference of the United States is wrestling with right now and my guess is that having published proposed amendment to the federal no-cite rule, they are now going to permit citation of unreported decisions provided that a copy of it and notice are furnished to opposing counsel, and I suppose to the court because our unpublished decisions, while they may be in a file drawer somewhere, are not at fingertip reach in the judges' chambers, and so it would behoove the lawyer to supply copies to the court as well if they are going to rely on these.

Mr. Allen: I think you'd be foolish not to.

Judge Nebeker: You would be. In any event, it is an interesting thing that all goes back to probably 1950 when unpublished decisions started or at least 1955 when

unpublished decisions started in the D.C. Circuit in criminal cases. At the present time where the no-cite rule is about to do a complete circle and citations will be allowed by the lawyers. I don't know that there's anything else on that topic that I could add.

Mr. Allen: Well, it is an interesting one. I think your continued interest in the fairness of the process is a theme you have developed and you seem always to come down on the side of making the process open and complete. Do you want to start another topic today or shall we wait until next time.

Judge Nebeker: I think I would prefer a little more preparation investment before we do it.

Mr. Allen: Good. That's the end of Side B on August 24, 2004.