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December 19, 2003

Mr. Peter G. McCabe  
Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington, D.C. 20544

Re: Proposed New Rule 32.1 (Citation of Judicial Dispositions)

Dear Mr. McCabe:

I write to express my concern and opposition with respect to proposed new rule 32.1, which would require that federal courts permit citation to unpublished opinions. As both a recent clerk and a current practitioner, I believe the proposed rule is ill-advised.

The practice of issuing unpublished opinions, so long as it is not abused, is a valuable and legitimate one; it substantially contributes to the orderly and expeditious adjudication of cases, furthers judicial economy, and helps control the ever-mounting body of caselaw that fills the federal reports. That salutary practice is obviously undermined by a rule that categorically permits citation to unpublished opinions. After all, the whole point of an "unpublished" opinion is that it does not serve as precedent. If an unpublished opinion may nonetheless be cited as an authority (especially under the auspices of a federal rule expressly sanctioning such) the reality is that it thereby constitutes meaningful precedent, or at the very least quasi-precedent. Although some circuits that issue unpublished opinions understandably strike a compromise whereby they simultaneously permit citation to those opinions, other circuits, because of their particular circumstances and experiences, quite properly do not. The decision, in my view, should be left to individual courts as a matter of local rule.

Because proposed rule 32.1 would adversely impinge upon the practice and purpose of issuing unpublished opinions, and unnecessarily preclude individual courts

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from adjusting their relevant local rules as may suit their needs, I urge the Committee to reconsider it.

Sincerely,

A handwritten signature in black ink, appearing to read "Derek L. Shaffer". The signature is fluid and cursive, with a large initial "D" and "S".

Derek L. Shaffer