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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I am writing to comment on the Committee's proposed new Federal Rule of Appellate Procedure 32.1, regarding the citation of unpublished opinions.

In 1995-1996, I clerked for Judge Kozinski in the Ninth Circuit, which prohibits the citation of unpublished opinions in briefs submitted to the court. I thus have personal experience with both the production of unpublished dispositions and the effect of rules prohibiting their citation.

In thinking about this issue, it is important to focus on two salient characteristics of unpublished dispositions (a) they are the official pronouncements of the United States Courts of Appeals, and (b) they are generally produced without great care for detail in the discussion of either fact or law.

The reason I emphasize these points is because it seems to me that these are the points the Committee may not have given sufficient consideration, judging from its notes to the proposed rule. The Committee repeatedly emphasizes that the rules of every circuit allow parties to freely cite any source they wish *other* than unpublished dispositions. The conclusion the Committee draws from this is that excluding unpublished dispositions is inconsistent and without justification. If lawyers can cite "the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles" to try to persuade appellate judges, the Committee asks, why should they not be allowed to cite unpublished dispositions for whatever persuasive value they have?

It seems to me that this analysis is missing something important: The fact that unpublished dispositions are the only source as to which any federal circuit court substantively limits citation and that many federal circuits and the large majority of state appellate courts do so[1] should give us great pause in concluding that there is nothing

[1] *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001).

special about this source. In other words, I believe it is worth starting with the assumption that the courts' decision to treat unpublished dispositions differently probably means that there is something different about them. That difference may or may not justify a non-citation rule, but it should be isolated before we make that decision.

With this initial caution, I would return to the above two points to examine what is different about the unpublished dispositions of federal circuit courts. Briefly stated, it is that unpublished dispositions, unlike all other persuasive sources, have a systematic and deceptive similarity to binding precedent that makes citing them a unique problem of judicial administration.

The similarity to binding precedent is obvious and comes from the first salient characteristic set forth above – unpublished dispositions are official pronouncements of federal circuit courts. This means that they will never be equivalent to Shakespearean sonnets and other forms of persuasive authority.

To understand why, it is worth considering what is persuasive about "persuasive authority." Clearly, it is not the intellectual force of an argument. A Lawyer who has found a particularly forceful argument can use it without citing its source. Rather, "persuasive authority" is persuasive because it is *authority*. Lawyers want to cite an unpublished disposition, rather than merely cribbing its persuasive arguments, because an argument adopted by a circuit court panel has a weight of authority far beyond its independent persuasive force as an argument. For similar reasons, lawyers regularly crib arguments from briefs in previous similar cases (either their own or those of other lawyers to which they have access), but almost never "cite" such briefs as "persuasive authority" for the cribbed arguments. The argument may be intellectually persuasive or not, but citing the source adds no weight of authority to its persuasiveness. In other words, "persuasive value," to the extent it means abstract intellectual force, is a sideshow. The main act is the weight of authority and any realistic discussion of a circuit court's policy in allowing the citation of its own decisions (either to the court or in the lower courts under it) must focus this characteristic.

That said, all persuasive sources have some weight of authority, ranging from the accepted insight and cultural weight of Shakespeare to the reputational weight of a well-accepted treatise. The initial question in considering whether unpublished circuit court decisions are different in kind from other sources is whether their weight of authority is different in kind from that of other sources. It seems to me clear that it is. After all, they come from a circuit court panel, they usually look exactly like any other circuit court opinion, and circuit court opinions, unlike any other source that can be cited to circuit courts, are binding precedent.

A court can attach as many disclaimers and warnings as it wants; none of them will erase this similarity. It is for precisely this reason that lawyers want to cite unpublished dispositions, rather than simply mining them for arguments, and courts do not want to see citations. Lower courts, in particular, will be unlikely to take seriously any such caution

if they know that these dispositions will be cited to the appellate court that rendered them in appealing the lower courts' rulings. But the problem does not end with lower courts. As a practical matter, panels of a given circuit court will naturally tend to treat unpublished dispositions of that circuit as precedent (and give a weight of authority to the dispositions of other circuits similar to that accorded to published dispositions), even if the court's official policy is to consider them for their intellectual persuasive force only. That is not to say that circuit judges will follow unpublished circuit court dispositions that seem facially wrong. Rather, they will be much more likely to assume that a circuit court disposition states circuit law than they would in considering truly "persuasive" authority. Unpublished opinions simply appear so similar to published precedent that the force of habit, the inclination to follow a beaten path, and the desire to appear consistent will naturally channel appellate panels into following them. None of this is true of Shakespearean sonnets, respected treatises, or even the published opinions of lower courts. Therefore, realistically considered, the weight of authority attached to circuit court dispositions is different in kind from that of any other source that might be cited to a federal court and may, therefore, warrant special consideration.

If all of this is true, however, why is it a problem? Even if we grant that circuit courts and the lower courts under them are likely to give the weight of authority to unpublished circuit court dispositions, is there any reason they should not? This brings up the second salient characteristic of unpublished dispositions – they are not carefully vetted, either by the panel issuing them or by the rest of the circuit. That is not to say that they are generally incorrect dispositions of the particular case. In my experience, circuit judges give the same attention to the briefs and record in cases decided by published and unpublished disposition, and the panel's decision to use an unpublished disposition usually comes after its decision on the merits of the case. Rather, the problem with an unpublished disposition is that it is an unreliable record of the governing facts and law of the case.

That makes little difference to the parties to the case, since they are able to discern who won and why. Likewise, it makes little difference to an en banc court or the Supreme Court asked to review the case, since these courts have access to the parties' briefs (including arguments against the panel's disposition) and the entire record. Where it makes a big difference is to a later court considering what a prior disposition, with nearly the weight of authority of a circuit court decision, means for the disposition of a later case. A court making this decision is in a very different position and doing something very different with the panel's disposition than either the parties to the original case or the courts reviewing it. The parties and the reviewing courts are trying to determine whether the panel correctly disposed of the case, given the full record and the parties' arguments. A court considering the precedential significance of the decision in a previous case generally starts with the assumption that the decision correctly disposed of the prior case and is trying to decide one of two things: (1) whether the facts in that prior case are sufficiently and relevantly similar or different from the facts before the court to suggest that the court should apply a common rule of law similarly or differently in

disposing of the case before it, or (2) whether a rule of law pronounced by the court in its decision of the prior case, by its terms, disposes of the case before the court. The problem with using unpublished dispositions for either of these purposes is that it is impossible to discern whether important aspects of the facts before the prior court were not clearly stated (if at all) in the unpublished disposition and whether the legal pronouncements or the prior court were carefully considered for their broader effect. In other words, not only are citations to unpublished circuit court dispositions likely to have a unique weight of authority, but they are also often unable to bear that weight in ways that are very difficult from a subsequent court to discern.

All of this merely establishes that there is something very different about unpublished dispositions. As stated initially, it is a separate question whether this difference justifies a rule against citation.

Before reaching this question, however, it is worth reviewing whether there are any good reasons for circuit courts to render reasoned but non-precedential decisions. If not, the easy answer to the above arguments is that the circuit courts should "clean up their act" and make sure that all of their decisions are either unreasoned (i.e., "AFFIRMED" or "REVERSED AND REMANDED") or worthy of citation as precedent. This is a topic which many minds wiser than mine have discussed at length and I presume that the Committee is familiar with their arguments. Two arguments, however, are particularly persuasive for me.

First, unreasoned decisions are often unsatisfactory for the parties and the court system. In many cases, though certainly not all, the issues on appeal are not "yes/no" questions. In these cases, a reasoned disposition guides the parties in deciding whether and on what bases to petition for reconsideration by the panel, en banc review or a writ of certiorari and helps all concerned in considering such petitions. Moreover, in remanded cases, a reasoned decision may be necessary to guide the lower court and prevent needless repetition of errors and needless relitigation if the case comes back on appeal.

Second, it is simply unrealistic, under current circumstances, to demand that courts give enough attention to all reasoned dispositions to allow for their safe use as precedent. Judges' case loads are currently too large to give enough attention to each disposition. Even if Congress were willing to fund a significant increase in the number of circuit judges or to put up with much longer delays in the disposition of cases on appeal, the volume of potentially precedential decisions would be too large for the current circuits to effectively police their own precedent. This argument would lose some of its force if the Committee's proposal was conditioned on a significant increase in the number of circuit judges and the number of circuit courts, but that does not appear to be the plan.

This brings us to the ultimate question: whether a ban on citation is a good response to the unique problems raised by unpublished circuit court dispositions.

I believe that it is because banning citations is carefully tailored to the specific problem posed by unpublished dispositions – their unique weight of authority, particularly when unpublished circuit court opinions are relied upon in lower courts. Banning citation does not prevent diligent lawyers from reviewing unpublished dispositions and mining them for good arguments. Lawyers are thus free to advocate vigorously for their clients using arguments derived from unpublished dispositions and the courts will therefore benefit from any such arguments the lawyers can find. The rule only prevents lawyers from augmenting the intellectual force of these arguments with an undue weight of authority. Doing this comes with a cost; there are unpublished dispositions that are well-reasoned and worthy of the weight of authority and two cases are sometimes so obviously alike as to allay any concerns over the quality of an unpublished disposition. It seems to me, however, that this cost is minor and that there is no practical way to deal with the problems of unpublished dispositions without incurring it.

Before closing, it is worth addressing what appears to be a major concern of the Committee in proposing the new rule – the value of uniformity. Ultimately, the value of uniformity and the cost of variation is a somewhat imponderable judgment call that only the Committee can make. To make these comments useful, however, I will add my thoughts on the issue.

There are really two parts to the question of uniformity: The concern that variance among the circuits imposes a significant compliance burden on lawyers, and the concern that there is no good reason for the courts to vary in their approach.

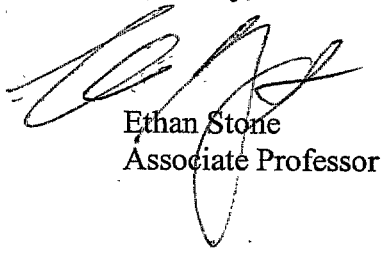
It seems to me that the concern with compliance costs is largely a red herring. Most of the compliance costs come from knowing that each circuit has its own rules and that a lawyer practicing in that circuit needs to review them. Given that we already accept a high degree of variance between local rules in different circuits, we already seem to have made the policy decision that we are willing to impose this basic cost on lawyers and litigants. Another rule, more or less, should not raise a serious issue unless it is either unusually difficult to comply with or wholly arbitrary. I hope that the discussion above is sufficiently persuasive to establish that court rules banning citations to unpublished dispositions are not wholly arbitrary. I am not persuaded that knowing not to cite unpublished dispositions is any harder that knowing to comply with any other circuit court rule.

The second question is more serious and seems to me to boil down to whether the Committee is convinced that the substantive merits of the arguments for and against a citation ban unequivocally favor one side and do so uniformly across the circuits. This is obviously a difficult judgment call. It seems to me that the merits weigh heavily in favor of banning citation of unpublished dispositions and, thus, at a minimum allowing circuits to do so if they wish. Even if the Committee thinks the merits are closer (which it apparently does), however, it seems to me that there are two good reasons to allow variance among the circuits in this case. The first is empirical and admittedly weak – if

the case on the merits is equivocal, the benefits of uniformity are weak, and the judges of the various circuits have, in fact, reached different conclusions on the matter, the best approach might be to be cautious and leave the decision to the individual circuit courts. Second, there is reason to think that there might be good reasons for different circuits to choose different rules. For better or worse, the circuit courts are not uniform in ways that bear directly on the effect of this rule. There are, of course, arguments that this lack of uniformity is a bad thing and that we should combine or split circuits in the name of a more uniform and better administration of justice. Those basic questions, however, are not before the Committee. So long as the administrative problems and solutions of the various circuits are different, it seems to me that this is a rule the circuits should be allowed to decide on their own.

I hope these comments are helpful to the Committee's deliberations.

Sincerely,



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