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

Re: Opposition to Proposed Federal Rule of Appellate Procedure 32.1.

Dear Mr. McCabe:

I am writing this letter to voice my opposition to proposed Federal Rule of Appellate Procedure 32.1. In my judgment, proposed Rule 32.1 would have a significant adverse effect on federal courts and those attorneys who practice before federal courts. Just a few of those adverse effects are discussed below.

First, the simple reality is that if litigants are allowed to cite any and all Court of Appeals' opinions, they will feel compelled to do so. This will increase the time and expense of drafting briefs and preparing for oral arguments, as litigants read and incorporate into their arguments both published and unpublished opinions (the later of which constitute – as the Committee recognizes – "about 80% of the opinions issued by the courts of appeals in recent years"). The Committee suggests that, since its proposed Rule would not make unpublished opinions controlling precedent, attorneys will not rely heavily on these opinions, but I believe that suggestion is unduly optimistic. At least during the time that an attorney is drafting his or her brief for a Court of Appeals, and sometimes even while she is preparing for oral argument, the attorney does not know which Judges will be on the panel deciding her appeal. If an earlier panel issued an unpublished opinion addressing one of the issues the attorney now has on appeal, she would be foolish not to discuss the opinion in her briefs – just in case her panel includes one of the Judges from that earlier panel.

Second, while the Committee treats all non-controlling sources brought to a court's attention – whether they be opinions of the Courts of Appeals, "Shakespearian sonnets, [or] advertising jingles" – as equivalent to justify its proposed Rule 32.1, attorneys understand that there are levels of "persuasive" authority, driven primarily by the relevant knowledge, experience and judgment of the authority's author. That is why Professor Loss' books and articles are widely cited in briefs addressing securities law issues and why Professor Areeda's books and articles are

widely cited in briefs addressing antitrust law. The purported authors of unpublished Court of Appeals decisions, by the grace of Article III, are necessarily deemed to have the relevant knowledge, experience and judgment to decide at least whatever federal issues are presented to them. Rule 32.1 will therefore lead to unpublished Courts of Appeals opinions being cited with great frequency, even if only for (in the Committee's words) "their persuasive value." This, however, is inconsistent with the manner in which unpublished opinions are written: As summary explanations of the Court's decision intended only for those who already know the facts and procedural history (*i.e.*, the parties), with Judges focused on ensuring accurate *results*, not enduring legal reasoning. *See* (Circuit Judges) Kozinski & Reinhardt, *Please Don't Cite This!*, California Lawyer 43 (June 2000).

Third, Judges are human; they undoubtedly will not want to be repeatedly confronted with – and required repeatedly to disavow – the legal reasoning of prior unpublished opinions issued by panels on which they sat where that reasoning was not as rigorous or carefully structured as it could have been. That means that either Judges will have to spend more time making sure that the legal reasoning contained within unpublished opinions bearing their names is sound or they will issue more and more one-line (or even just one-word) dispositions. The former outcome would slow down the speed at which the Courts of Appeals resolve appeals, which is already too slow for litigants and their attorneys. The latter outcome would deprive litigants and their attorneys of receiving at least some insight into why they won or lost their appeals – insight both that reveals to litigants that the Court of Appeals' decision was not simply random and that informs an attorney's decision whether to seek a rehearing or a rehearing en banc.

Fourth, the Rule 32.1 Committee Notes also contend that proposed Rule 32.1 is needed because of the difficulties some attorneys have in understanding the different Circuit rules on citing unpublished opinions. I have litigated appellate matters in at least five Courts of Appeals, and I have never found any difficulty in locating, understanding and applying each Circuit's rule on citing unpublished opinions. Indeed, attorneys already have to cope with the reality that the law is not perfectly uniform across all Courts of Appeals, with differences in substantive law, interpretations of federal rules, and standards of review. The additional burden of mastering varying rules on citing unpublished opinions is far too insignificant to warrant the adoption of Rule 32.1, which carries with it far too many adverse collateral consequences.

Finally, the Committee Notes state that the Rule is needed so that litigants can take advantage of the persuasive arguments contained in some unpublished opinions. If an unpublished opinion contains a persuasive argument, however, no current federal appellate rule prohibits litigants from incorporating that argument into their briefs; litigants are only barred in some Circuits from citing the unpublished opinion as the source of the argument. In fact, a litigant can commit employ the very words of the unpublished opinion to capture the full persuasive effect of the argument, free from fear of either copyright infringement or ethical violation. Rule 32.1, therefore, will not open a single new argument or idea to the marketplace of legal thought; if

anything, it will deprive the public of arguments and ideas to the extent that it encourages Judges to issue one-line dispositions instead of substantive unpublished opinions.

The above negative effects are only the tip of the iceberg. Proposed Rule 32.1 would damage courts, lawyers and litigants were it to become the law. I oppose the proposed Rule.

Respectfully,

Stephen C. Neal

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