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VIA FEDERAL EXPRESS

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

Re: *Proposed Federal Rule of Appellate Procedure 32.1*

Dear Mr. McCabe:

I write to register my opposition to Proposed Federal Rule of Appellate Procedure 32.1, to the extent that it would override individual Circuit rules regarding the citation of unpublished opinions. I come to the issue from the perspective of a lawyer who practices before the Ninth Circuit (and the District Courts of that Circuit), and as a former clerk to a Judge of the Circuit and a Judge of the Northern District of California. Proposed Rule 32.1 strikes me as an unwarranted and unwise rule that is likely to create substantial difficulty in the practice of law before our federal courts.

The Ninth Circuit's rule forbidding the citation of unpublished opinions is clear and well-known to those who practice in the courts within the Circuit. If the Circuit deems an opinion worthy of publication, we know that we can cite to it, to the extent that the opinion continues to have precedential authority. If the Circuit designates an opinion as unpublished, we are free to read the opinion and use it as a potential resource for finding relevant authority, but we know it may not be cited to the courts within this Circuit.

The Ninth Circuit's practice of limiting the number of decisions that may be cited has many salutary effects. Most notably, it enables practicing lawyers (not to mention the Judges in the Circuit) to keep abreast of Circuit law. This is a value that has particular salience for me, since I try to read (or at least peruse) each published opinion from the Circuit on the day it is filed and posted on the Court's very helpful website. I also make it my practice to forward

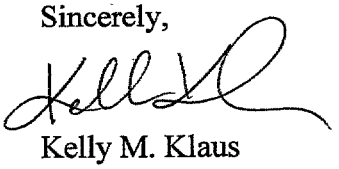
potentially relevant opinions to my colleagues who are handling matters that involve issues similar to those the Circuit is resolving. If unpublished opinions may be cited to courts (and thus be within the relevant universe of authority that may bear on the resolution of cases), the ability to keep up with the Court's work will almost certainly become impossible. Rather than having to review the current output of approximately 700 decisions per year, I would have to review *thousands* of unpublished dispositions just to stay current with what the Circuit is deciding and how its decisions may impact cases that I and my colleagues are handling in one of the Courts of this Circuit.

Proposed Rule 32.1 would do far more, however, than simply complicate the practice of staying informed generally about Circuit law. The Rule would impose substantial burdens on lawyers and clients in individual cases, whether at the District Court or Circuit level. Practitioners will have to devote considerable additional time to researching the Westlaw and LEXIS databases to locate potentially relevant decisions, a task that is complicated by the fact that unpublished decisions often provide little in the way of factual background or context. Even after locating potentially relevant opinions, counsel will have to spend substantial time investigating (or, in some cases, surmising) what arguments were or were not presented, whether the decision correctly states the law, and other factors that bear on whether the decision should be cited or distinguished. None of this, of course, will be undertaken for free. The burden of paying for this additional work will be borne by parties with matters pending in the Courts of this Circuit, and likely will give rise to even greater client dissatisfaction with the cost of justice.

It is no answer to say that the Proposed Rule affects only whether an unpublished decision may be cited, and not whether it has the force of precedent. From the perspective of the practicing lawyer, this truly is a distinction without a difference. If unpublished opinions may be relied on as authority to support a client's arguments, practitioners will undoubtedly have to research those opinions thoroughly for whatever support they might provide, particularly since one has to assume that their adversary is doing the same thing. Diligent and responsible lawyers cannot ignore 80 percent (or more) of a Circuit's decided case law while trying to zealously represent their clients' interests.

I recognize that not all of these factors apply equally to the practices within each of the Circuits, and that the some Circuits have caseloads that would allow them to minimize these costs. But that just argues for allowing the Circuits to retain the discretion they already have to decide which opinions will be precedential and which will not. I find nothing to commend the foisting of a uniform standard on every federal court in the country – especially in comparison to the demonstrably high costs of adopting such a rule in the Ninth Circuit. I thank the Committee for allowing me the opportunity to express my views.

Sincerely,



Kelly M. Klaus