McKenna Long & Aldridge LLP
Attorneys at Law

Atlanta
Denver
Los Angeles
Philadelphia

444 South Flower St. • Los Angeles, CA 90071
Tel: 213.688.1000 • Fax: 213.243.6330
www.mckennalong.com

San Diego
San Francisco
Washington, DC
Brussels

SONDRA K. BARBOUR
(213) 243-6119

EMAIL ADDRESS
sbarbour@mckennalong.com

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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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

As a practicing attorney and former extern with the United States District Court, I am writing to you to oppose proposed new Rule 32.1, which would require Federal courts to permit the citation of unpublished memoranda dispositions. This proposed rule would not only substantially increase the management requirements for the tremendous caseloads in the courts, but it would also impose a significant burden on attorneys and their clients in circuits, such as the Ninth Circuit, that currently prohibit the citation of unpublished dispositions as precedent.

First, legal research will become more burdensome in that practitioners must not only be responsible for researching voluminous published dispositions, but would also be required to research what is anticipated to be voluminous unpublished dispositions as well. As a result, the universe of dispositions to research could increase astronomically and will consequently increase the legal cost to clients, who may already face burdensome and increasing legal costs.

Although the Advisory Committee has stated that the new rule would not dictate the weight that courts afford to unpublished dispositions it is likely that unpublished decisions would nevertheless be treated like any other persuasive authority that is citable to the court. As a result, even if the courts do not regard unpublished dispositions as controlling, practitioners would be obligated, as zealous advocates, to afford these dispositions significant weight when representing their clients before the court in the event the court gives the unpublished disposition significant weight. Otherwise, the failure to address relevant unpublished dispositions would violate professional ethics in the representation of clients, in addition to placing the client's interest at risk.

Second, the proposed rule does not address the potential hardship to practitioners who practice in more than one circuit and/or state court. For example, practitioners would be required to review the rules and law in up to thirteen circuits to determine if precedential weight is given

to unpublished dispositions. Further, there is the risk that the proposed rule would create a conflict between federal circuit courts and the state courts within a given circuit, thereby creating more, not less, hardship on practitioners who practice in both federal and state court.

Third, the proposed rule is problematic in that practitioners may be required to rely upon inconsistent, ambiguous and misleading dispositions. Unpublished dispositions may be inconsistent, ambiguous and misleading because they are often not written to provide a source of new legal authority or interpretation, but are written in imprecise terms to address the narrow issues and limited parties presently before the court. As a result, many of the unpublished dispositions contain unclear facts, limited procedural history and broad propositions of law. Reliance on such dispositions can only further complicate the advocacy process and the resolution of the matters before the court.

Finally, circuit court judges who are aware of the potential problems associated with citing unpublished dispositions would likely place greater attention and time to unremarkable opinions that resolve routine cases that are before the court. As a result, courts that are currently overburdened will become further overburdened in resolving cases before it, likely resulting in delay. As an alternative, courts may avoid the burden of drafting precise language in unpublished dispositions by providing summary dispositions instead. The problem with this, however, is that the parties before the court may be denied an explanation of the rationale underlying the court's decision.

In summary, this proposed rule will increase the burden and time required to bring matters before the courts, delay the resolution of matters before the courts and increase the costs and risks to clients who depend upon judicial resolution. I therefore ask that you reconsider the adoption of proposed new rule 32.1 and leave the matter to the discretion of each circuit. Please be advised that the opinions expressed in this letter do not necessarily reflect the opinions of the law firm with which I am associated.

Sincerely,

Sondra K. Barbour

Sondra K. Barbour, Esq.

cc: Barbara Bacon, Esq.