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March 3, 2004

03-AP-512

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

**Re: Opposition to proposed change to F.R. App. P. Rule 32.1**

Dear Mr. McCabe:

I write to oppose strongly the proposed Rule 32.1, F.R. App. P., that would provide for the ability to cite as precedent memoranda dispositions of the United States Courts of Appeals.

The reasons I oppose the Rule are these:

1. Memoranda dispositions ordinarily do not present full-blown, reasoned analysis of the issues presented, as do opinion dispositions, and, thus, their publication will result in either less than fully reasoned discussions of the law ending up being citable law, or judges having to do an extraordinary amount of work to get what would be the usual memoranda up to opinion quality, or, perhaps, resulting in dispositions that simply say "affirmed" or "reversed," so that the ability to cite them will be wholly nugatory, with the concomitant disadvantage of the parties and lawyers involved in such instances having no hint (which they really should have) of the reasons for a disposition.
2. Federal judges are overburdened; many of them will be unable to put out, so they may be cited, dispositions that usually will not be as polished as a memorandum disposition, and the proposed change probably will have the unintended effect of forcing conscientious judges to spend considerably more time on memoranda dispositions, which really only are intended to be "letters" to counsel and parties to an appeal to provide them with some brief explanation of how the court reached its disposition. This likely will cause an enormous burden, slow down the disposition process and, also, as above, may result in dispositions that simply say "affirmed" or "reversed." This would be a disservice to the parties and counsel. Further, it will put an enormous burden on appellate judges.
3. The proposed Rule will create too much law, which concomitantly will put an enormous burden on

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both appellate judges to stay current with the law in their (and perhaps other) circuits and on district judges, many of whom attempt to keep current on the law. Too much law can be a bad thing. Additionally, with respect to lawyers, like me, who try to keep current at least on the law in their own circuits, there will be too much law.

4. It appears to me that the vast majority, or a highly significant number, of currently uncitable memoranda dispositions involve criminal cases that do not make new law but the ability to cite them I suspect will give an unfair and unnecessary perceived and perhaps real advantage to the government, who will use the memoranda, if they become citable, to create an unwarranted impression that there is more law on their side in criminal cases than there actually is. Using string citations, including citable memoranda dispositions in criminal cases, is both unnecessary and will create significantly more work for appellate judges and their law clerks, who obviously will need to read all the cases cited. This make no sense; if there is a citable opinion on point, adding it to the memoranda dispositions on the same point will add nothing but may give an unfair advantage to the Department of Justice, who will want to create an impression that the number of cases that support their positions is far greater than it is in realty. One controlling case on point is sufficient.
5. Unless the Rules also will mandate an increase in the number of hours in a day, which obviously it will not, the proposed change will create an enormous and unnecessary burden for both the judiciary and federal practitioners.

Therefore, I strongly oppose Rule 32.1

Very truly yours,



John P. Cardillo

JPC:sma

cc: Barry A. Cohen, Esq.

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