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KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

777 South Figueroa Street
Los Angeles, California 90017

213 680-8400

www.kirkland.com

Eric C. Liebeler
To Call Writer Directly:
213 680-8484
eliebeler@kirkland.com

Facsimile:
213 680-8500

December 2, 2003

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:

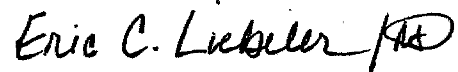
I write to oppose the proposed Federal Rule of Appellate Procedure 32.1, which would prohibit restrictions on citing unpublished dispositions of the Courts of Appeals. As a thirteen-year practitioner who is both a former extern and a former law clerk, I believe the proposed rule is a poor one, for several reasons -- most of which are described on a short summary I have attached to this letter (which I think was drafted by Edward Lazarus).

One additional reason comes to mind. Even as an extern, my judge asked me to draft numerous memorandum dispositions. Although I drafted them with care and with an effort to ensure that the decision was correct and grounded in the law, I knew the opinions I was working on did not and would not have precedential effect -- and I therefore did not have to write with an eye to how clever lawyers could later twist opinions to suit their own ends. In fact, I was unconcerned about establishing rules of law that others could later use, and I believe both of my judges felt the same way. It seems unfair now to change the rules about how counsel can use unpublished dispositions when the authors of those opinions never intended to have them used as the new Rule proposes -- and may well have drafted them differently (or not at all) had they known the rule might change.

The current restrictions on use of unpublished dispositions are appropriate. If the rules are changed (and I believe they should not be), they should be changed to permit use of unpublished dispositions written only after the rule change.

I appreciate your consideration of my views. If you have any questions, please call.

Sincerely,



Eric C. Liebeler

ECL/md

Enclosure

Why Proposed Rule 32.1 Is A Bad Idea

- ☐• Proposed Rule 32.1 would pose a significant burden to practitioners in the many circuits that currently prohibit the citation of unpublished dispositions as precedent. Far from easing practice, the proposed rule would make legal research more burdensome; force lawyers and lower courts to rely upon ambiguous and often misleading dispositions; and delay the disposition of cases.

<u>The Rule Would Inevitably Require Unpublished Dispositions To Be Treated As a Significant Source of Authority.</u>

- ☐• The Advisory Committee has suggested that the new rule is "extremely limited," because it does not dictate the precedential weight courts must afford to unpublished dispositions. The proposed rule allegedly does no more than require that unpublished dispositions be treated like any other source of potentially persuasive authority, such as law review articles, which may be cited, but will be given a weight equal only to their persuasive force.

- ☐• This justification misunderstands the perspective of practitioners. If unpublished dispositions *could* be cited, lawyers would have no choice but to treat them as a significant source of authority. As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating. Even if courts did not regard unpublished dispositions as controlling, lawyers would still be obliged to afford them significant weight in practicing before circuit courts.

- ☐• Moreover, no matter the perspective of the Court of Appeals, district courts, bankruptcy courts, and agencies within the same circuit would likely treat them as controlling. These lower courts will be extremely reluctant to ignore what three judges of the Court of Appeals appear to have done. That's why it makes perfect sense to permit the citation of other precedents, but not unpublished dispositions of the Court of Appeals to the lower courts of that circuit.

<u>Unpublished Dispositions Would Muddy the Law and Burden Its Practice.</u>

- ☐• Therefore, if unpublished dispositions *could* be cited, practitioners would

have to treat them as a significant source of authority. This would pose a significant number of foreseeable problems for practitioners.

- □ Most obviously, expanding the universe of what can be cited will significantly expand the burden and expense of legal research. Rather than limiting research to those published opinions in which the Court of Appeals authoritatively discusses the law, practitioners would be obliged to review the many thousands of unpublished dispositions in search of potentially relevant language.

- □ In truth, little if any of those unpublished cases would provide a relevant source of new authority because courts do not rely upon unpublished opinions to articulate new legal principles. However, as unpublished dispositions are often written in imprecise terms, and there are literally thousands of them, it will be relatively easy for lawyers to discovery apparent support for their position.

- □ Unpublished dispositions will, however, often be misleading as a source of precedent. Because the dispositions are often unclear about the facts and procedural history of the case, it will be harder for practitioners to distinguish the cases in a meaningful way. Therefore, apparently broad propositions of law contained in unpublished dispositions may appear controlling, yet be an inaccurate statement of the law.

- □ In many circuits, unpublished dispositions are written by staff with little editorial control from the judges over the actual wording. Allowing their citation, especially to the lower courts of that circuit, may therefore be highly misleading.

Proposed Rule 32.1 Would Either Delay the Resolution of Cases or Increase the Prevalence of Summary Affirmances.

- □ Of course, circuit court judges -- aware of these problems -- would respond to Proposed Rule 32.1 in one of two ways, neither of which would benefit practitioners.

- □ *First*, conscientious judges would pay greater attention to the precise wording used in opinions resolving routine cases. This increased attention would not alter the disposition of these cases, which have already been resolved unanimously by the panel. However, it would greatly delay their

resolution. Already, overburdened circuits often take well over a year to a resolve a case from the start of briefing to disposition. That time would likely increase substantially, as judges would be required to devote more time in crafting the dispositions for routine cases.

Second, rather than waste judicial resources on routine cases, many judges would likely avoid explaining their decision to the litigants and therefore resolve the case by summary disposition. This would avoid the problems that come from permitting unpublished dispositions to be used as precedent, but it would likely be quite unsatisfactory to the parties before the case who would be denied even a brief explanation of the rationale underlying the court's decision.

<u>This Matter Should Be Decided Locally.</u>

- □ The Advisory Committee also suggests that the absence of a uniform rule poses a burden to lawyers who practice in more than one circuit. But the absence of a uniform rule is not a problem specific to unpublished dispositions. Moreover, the use of local rules -- as is the current practice -- is both less burdensome and more justified in this context.

- □ Figuring out what can and cannot be cited is quite easy; it's written right on the unpublished disposition itself. The burden of knowing the correct citation rule is thus much less in reviewing unpublished disposition, than it is dealing with the many other local rules that commonly govern the content of briefs, excerpts of record, and time limits.

- □ Moreover, there is more justification for having local citation rules than there is for having local rules governing the formats of briefs. The federal circuits differ considerably in the size and content of their caseloads. The problems of the D.C. Circuit are very different from those of the Fifth, Ninth, and Eleventh Circuits. If the judges of those circuits believe they can best keep control over the law of the circuit by prohibiting citation, it is a very bad idea to take away their authority in that regard.