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2356 Parnell Avenue  
Los Angeles, CA 90064  
January 15, 2004

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

03-AP-161

Dear Mr. McCabe:

I oppose proposed Federal Rule of Appellate Procedure 32.1, which would allow the citation of unpublished dispositions. Through my experiences clerking for the federal judiciary and my subsequent experience in private practice<sup>1</sup>, I have become intimately familiar with the issues raised by unpublished dispositions. In my view, proposed Rule 32.1 is misguided, unnecessary and likely to lead to a variety of undesirable consequences. I thus urge the Committee on Rules of Practice and Procedure to abandon this proposal and adhere to the current, perfectly satisfactory, status quo.

As one who has been instructed by senior partners to spend depressingly large amounts of time (translation: billable hours) searching for every single applicable precedent – and every single out-of-circuit authority that might be persuasive – let me assure the Rules Committee of proposed Rule 32.1's consequences. If Rule 32.1 is adopted, every lawyer will search – on the client's dime – for every unpublished disposition that might seemingly have some relevance to the case at hand. Even though the judge or judges who wrote the disposition did not think it merited citation, even though the disposition may not actually reflect the precise views of the court that issued it, even though the disposition itself may fail to mention distinguishing facts, the diligent lawyer – or, more accurately, the lawyer working for the wealthy client – will feel compelled to cite it and gnaw over its meaning with opposing counsel. This expenditure of resources makes no sense and serves merely to increase the cost of litigation, exacerbating the inequalities between rich and poor litigants.

One might expect that a rule of such sweeping breadth – vastly expanding the scope of citable precedent with merely one sentence -- would be supported by well-reasoned and weighty arguments, not to mention thoughtful responses to contrary positions. In this case, one would be disappointed. According to the Committee Note accompanying the proposal, a uniform national rule regarding unpublished dispositions is necessary primarily to avoid "conflicting rules" that create "hardship" for practitioners. Respectfully, this justification is just not persuasive because *there is no conflict*. The fact that different circuits have different rules regarding citation does not mean that the rules conflict; it simply means that practitioners must look up the rules that apply in the

<sup>1</sup> Currently, I am a staff attorney in the enforcement division of a federal agency. In compliance with ethics rules, I write on my personal letterhead. The views expressed in this letter are my own, and do not necessarily reflect the views of my agency.

particular circuit in which they are appearing. Requiring lawyers to consult the applicable local rules is hardly a "hardship" – indeed, failing to read the local rules is likely grounds for malpractice. If the Advisory Committee feels that a uniform rule on this subject is necessary to avoid "hardship," why have local court rules at all?

In my experience, lawyers – especially good lawyers – are quite happy with the current practice regarding unpublished dispositions. As far as I have been able to tell, few lawyers can offer coherent objections to particular circuits' citation rules. Every policy has its detractors. But the existence of a few vocal opponents to the current circuit rules regarding unpublished dispositions does not justify changing the practices that the silent majority of lawyers finds quite satisfactory.

For these reasons and many others, I urge the Rules Committee to reject proposed Rule 32.1 and to continue to allow each circuit to adopt rules suited to that court's circumstances.

Sincerely,

A handwritten signature in cursive script that reads "Leslie A. Hakala".

Leslie A. Hakala  
Attorney