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VIA FACSIMILE (202) 502-1755
AND FIRST CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I write this letter to oppose the adoption of Proposed Rule 32.1 of the Federal Rules of Appellate Procedure.

By way of background, I have been practicing law for almost 30 years. I began my career as a law clerk to the Honorable Ben C. Duniway, now deceased, Judge of the United States Court of Appeals for the Ninth Circuit. In my career as a lawyer, which began in 1976, I have had the good fortune to practice in both State and Federal Courts throughout the United States. While I certainly have disagreed with decisions that courts have reached, I found judges, in general, to be honest, hardworking and unbiased. My comments proceed from that perspective.

The preceding notwithstanding, I will not dispute the apparent perception (about which several commentators have written and even more have spoken) that unpublished dispositions are used to bury decisions that are inconsistent with precedent. As Michael Dorf summarizes "[o]ne suspects, therefore, that courts have been abusing the unpublished opinion . . . [and] that appellate courts frequently designate an opinion as unpublished (and thus non-precedential) because a case is difficult, not because it is easy. Rather than wrestle with hard questions, courts produce conclusory opinions that purport to treat unresolved issues as though they were well settled." FindLaw's Legal Commentary, September 2, 2003 (http://writ.findlaw.com/dorf/20030902.html) (emphasis in original)

In effect, critics contend that because "hard cases make bad law," judges choose to bury some of that bad law by deciding certain cases in favor of sympathetic parties, the law notwithstanding. Even if that is so, and even if it occurs more frequently than any but the harshest critics contend, I believe that Proposed Rule 32.1 is a cure worse than the disease.

Notably, the Advisory Committee's Note to Proposed Rule 32.1 does not take on this criticism directly. Instead it offers two justifications: the need for national uniformity, and the incongruity of having lawful opinions of federal courts being uncitable. I will address the unstated reason for the proposed rule and the stated reasons in turn.

As to the unstated reason, it assumes a remarkable degree of bad faith by judges. That three judges who could be making anywhere from a few times their judicial salary to several dozen times it would descend to such dishonesty in the discharge of their duty is never explained. Why take the job in the first place or why not leave it if the task of implementing the law has turned so distasteful? Moreover, if a particular panel wanted to bury a decision, wouldn't it be easier to do it with a single word disposition, generally "affirmed"? And, indeed, if one does assume base motives, isn't the system far better served, and more easily corrected, if the panel is forced to articulate even a brief reason for a disposition, thus enabling the Court as a whole to take action if action is needed?

As to the stated reasons, the notion that one size fits all is just wrong. The entire basis for our federal form of government is the shared belief that the people of California and Illinois may not want to do things the same way, and shouldn't have to. Should we all have to put snow tires on our cars in the winter whether we live in Florida or Alaska? Should snow chains be prohibited in rural Montana as they are in New York City? I respectfully submit that having exactly the same procedures in the First Circuit with 6 active judges as in the Sixth Circuit with 12 active judges as in the Ninth Circuit with 25 active judges is not sensible. Similarly, courts have different types of cases and case loads, *e.g.*, more admiralty cases in courts having coastlines; more capital murder cases in circuits with states that have and apply the death penalty with greater frequency. Each circuit's rule relating to unpublished dispositions is but one of many local variations. There is simply no crying need for uniformity when so much variation naturally exists. To paraphrase the late Judge Friendly's concurrence in *Chemical Bank v. Kheel*, 369 F.2d 845, 848 (2d Cir. 1966), dealing the same with different situations "is not equity but its opposite."

As to the public policy anomaly of preventing lawyers from citing lawfully decided federal cases, the rule is as salutary as enjoining lawyers from quoting misleading snippets from published decisions. Unpublished dispositions are designed for the parties. They are intended to be incomplete. Citing them as if they were written for the ages is no different from misquoting decisions that are so written.

Finally, what will be the result if Proposed Rule 32.1 is adopted? There are two possible reactions. First, rather than unpublished decisions, we could see more one-word

dispositions. Everyone loses in that event. And as to burying bad decisions, a panel that would bury, as unpublished, a difficult disposition in a memorandum of a few pages, could even more easily bury such a disposition by simply affirming (the usual case) or reversing (in the rare case). Or courts could write every decision with comparable care with the result that either judges will be absurdly overworked or will simply take longer to decide cases. The current regime is better than the alternatives.

The end result is that Proposed Rule 32.1, while well-intentioned, does more harm than good. While I recognize that the current situation is not ideal, and that unpublished dispositions can be misused, I would prefer to trust the judges of the Courts of Appeals to continue to police themselves – after all we entrust to them some of the most important decisions in modern society – rather than to change the law for the worse.

Very sincerely yours,

David M. Stern

DMS/jcn