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Via Facsimile Transmission
and First Class Mail

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
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:

White O'Connor Curry & Avanzado LLP ("White O'Connor") is a business and entertainment litigation firm, with a substantial federal district and appeals court practice. We write to comment on the proposed addition of new Rule 32.1 to the Federal Rules of Appellate Procedure by the Advisory Committee on Appellate Rules (the "Advisory Committee").

According to the Advisory Committee, proposed Rule 32.1 would "require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'non-precedential,' or the like." (Prop. Am. to Fed. R. App. P. at 27.) The Advisory Committee proposed the rule because (1) the local rules of the circuit courts differ as to the treatment of unpublished opinions, a situation which the Committee believes creates a hardship for attorneys who practice in more than one circuit; and (2) the Committee believes that restrictions on the citation of unpublished opinions are wrong as a policy matter. (Id.) White O'Connor's comment addresses these and other issues raised by proposed Rule 32.1

Hardship to Practitioners

The Advisory Committee identifies the hardship to practitioners from the differential treatment of unpublished opinions as "hav[ing] to pick through the conflicting no-citation rules of the circuits in which they practice . . . worr[ied] about being sanctioned or accused of unethical conduct for citing an 'unpublished' opinion." (Id. at 35 (citations omitted).) On the contrary, it is a routine part of any practice that spans both state and federal court (as well as multiple federal judicial districts and appellate circuits), to research the local rules governing practice before the various courts at issue in order to ensure that local practice is observed in all regards, whether it concerns the format of documents to be filed, or the precedential value of opinions issued by the relevant court. We know of no instance where we (or opposing counsel) were hamstrung by the inability to cite unpublished opinions on points briefed before a court that was bound by local rule not to consider them in forming its opinion.

Retroactivity

The Advisory Committee acknowledges that the thirteen Courts of Appeals have collectively issued tens of thousands of unpublished opinions, with about 80% of the opinions in recent years being designated as unpublished. (Comm. Note at 30.) The existence of so many unpublished opinions begs the question as to whether Rule 32.1 should be (as it appears to be) retroactive. Indeed, Rule 32.1 would effectively publish for citation the same tens of thousands of opinions which were not deemed worthy of citation by the courts which originally issued them. At the very least, the rule should apply only to newly issued opinions so that courts subject to the new rule may adjust their drafting and publication practices accordingly.

Judicial Practice and Efficiency

Although the Advisory Committee concludes that courts will not alter their practices if all of their opinions are now subject to citation, it has been our experience that the unpublished opinions issued in our cases (particularly at the district court level) are far less formal and less exhaustive as to the relevant legal and factual issues than published opinions. Indeed, it has become common for even routine decisions to take weeks, if not months, to be decided by many of the district courts in which we practice. If the same courts were also tasked with issuing opinions which might be cited in future cases, there is little doubt that already overtaxed federal judges would fall further behind in their ability to effectively process their cases.

In a similar vein, the Advisory Committee notes that an element of "game playing" has crept into those circuits with no-citation rules, such that practitioners hint at the existence of unpublished decisions in support of their positions, without full citations to the cases at issue. (Id. at 35.) In our experience, it is far more likely that the permission to cite unpublished opinions will increase game-playing by opportunistic litigants who will now have a plethora of opinions at their disposal which, because they are typically more fact-specific and less extensively drafted, are more easily twisted to support their positions.[1]

In the same regard, attorneys will suddenly be required to review and evaluate far more cases on any given issue, where we would previously have relied on a handful of seminal published opinions on the same issue. Although we occasionally research unpublished opinions – in order to identify judicial trends on particular issues, to serve as sources which might lead to relevant published opinions, or to crystallize the discussion of an issue in language which has not appeared in recently published opinions – the ability to cite such opinions would not enhance their value in these regards. Indeed, many of these opinions are simply redundant statements of existing law, with an occasional twist relevant to the particular circumstances of each case. As such, it is typically obvious from the face of such opinions that they were not intended to be complete and/or authoritative statements of the law for all purposes – a distinction which suggests that Rule 32.1 will suddenly render the forest of judicial opinions overgrown, where the trees were once easily recognized.

In short, neither a perceived hardship to attorneys with multi-district practices, nor the likely decrease in judicial efficiency, justify the implementation of a rule which effectively publishes tens of thousands of previously unpublished opinions, and otherwise requires courts to refine and sanitize the reasoning in newly published opinions in an already overburdened federal judicial system.

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[1] The Advisory Committee similarly concludes that unpublished opinions are no different than other sources (such as newspaper columns or advertising jingles) that may be cited in legal briefs but are of questionable precedential value. (Id. at 32.) The reality is that such sources are easily differentiated on their face from true legal authority. By contrast, unpublished legal opinions, particularly when they are cited later in briefs in short form, or simply as "id.," can easily be confused with legitimate authority which the relevant circuit court has purposefully deemed controlling on an issue.

WHITE O'CONNOR CURRY & AVANZADO LLP

For the reasons set forth herein, White O'Connor recommends against the adoption of new Rule 32.1 by the Advisory Committee.

Respectfully yours,

Michael J. O'Connor
of WHITE O'CONNOR CURRY & AVANZADO LLP