CRAVATH, SWAINE & MOORE LLP

WORLDWIDE PLAZA
825 EIGHTH AVENUE
NEW YORK, NY 10019-7475

TELEPHONE: (212) 474-1000
FACSIMILE: (212) 474-3700

CITYPOINT
ONE ROPEMAKER STREET
LONDON EC2Y 9HR
TELEPHONE: 44-207-453-1000
FACSIMILE: 44-207-860-1150

WRITER'S DIRECT DIAL NUMBER

(212) 474-1348

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Proposed Fed. R. App. Pro. 32.1

03-AP-466

Dear Mr. McCabe:

I write to submit comments in opposition to proposed Fed. R. Civ. Pro. 32.1, which would eliminate the ability of the Courts of Appeals to issue reasoned opinions without precedential value. My perspective is based on my experience as a federal judicial clerk and as a civil practitioner.

Before the innovation of non-precedential reasoned opinions, appellate courts disposed of many cases by unreasoned order or by an opinion merely affirming on the basis of the district court's opinion. Non-precedential reasoned opinions provide a way for judges faced with an ever-increasing workload to offer litigants and practitioners a far superior option. Were that option eliminated, many decisions now resolved by a reasoned unpublished opinion would be disposed of by unreasoned order or by an opinion adopting the district court's decision.

Unreasoned orders tell the litigants nothing about the reasons why their appeal was denied (or granted), and leave many litigants with the impression that the court gave little or no consideration to their appeal. The ability of the judiciary to fulfill its constitutional role "ultimately rests" on "public confidence in it." United States v. Johnson, 323 U.S. 273, 276 (1944). Disposition of cases by unreasoned order would leave many litigants dissatisfied with and suspicious of the judicial system. Likewise, affirmance by an opinion adopting the decision of the district court would give litigants the impression that the appellate court has not given meaningful consideration to the appeal, and creates a further difficulty for others: district courts frequently issue opinions containing multiple justifications for the result, and it is difficult for practitioners to

interpret the precedential effect of affirmances merely adopting the reasoning of the district court.[1]

The Committee Note to the proposed Rule states that nearly 80% of federal appellate decisions are now disposed of by unpublished opinion, implying that the federal appellate courts are engaged in creating a rogue body of non-precedential law.[2] Instead, the proper way to interpret that statistic is to recognize that it is the function of the automatic right to appeal and the growing litigiousness of our society. The growth in the number of federal appeals has grossly outstripped the growth in the number of federal appellate judgeships over the last 50 years; based on my years of clerking, it was painfully obvious that the majority of a federal appellate court's docket consisted of appeals that ranged from simple to frivolous. Even those litigants, however, deserve to know a court's reasoning for rejecting their appeal, and should not have that right turn on whether the opinion may have precedential value to others.

The Committee makes two basic points in support of the proposed Rule: first, that the existing circuit rules are not uniform, and second, that allowing a court to issue non-precedential opinions is bad as a policy matter, for various reasons. The first point does not support the adoption of Rule 32.1, but instead suggests that Federal Rules should contain some uniform rule regarding unpublished opinions. The adoption of any uniform rule -- for example, one stating that opinions designated by any Court of Appeals

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[1] A further concern I have, as a practitioner, is that permitting citation to cases that are currently not for publication will quintuple the number of cases I (or those working for me) will have to sift through to find or rebut a legal proposition. The Committee does not take issue with the idea that unpublished decisions generally contain no novel legal propositions; permitting citation to them would drastically increase the size of the haystacks I have to look through, without meaningfully increasing the number of needles. A different, related difficulty is that, because non-precedential opinions are generally short on a recitation of the facts, distinguishing those cases on factual grounds would be much more difficult, requiring a search of the district court file and briefs and record on appeal, if possible at all. The "unequal impact" on different classes of litigants mentioned in the Committee Note would not arise from differences in the ability of poor and rich parties to obtain copies of the unpublished opinions, but in differences in their abilities to ferret our information permitting them to distinguish or draw analogies to those cases. For my (large corporate) clients, this would be merely a financial headache; poorer litigants would lack the resources necessary to engage in that kind of records search.

[2] Several Courts of Appeals have explicit procedures by which any person may request that an unpublished opinion be designated as "for publication". See, e.g., First Circuit Local Rule 36(b)(2)(D); Fourth Cir. Local Rule 36(b); Ninth Cir. Local Rule 36-4. In addition, in my experience as a judicial clerk, clerks and judges read slip opinions and contact the author's chambers when they believe an unpublished opinion should be redesignated as for publication.

as non-precedential cannot be cited in any federal court as precedent -- would eliminate the problems perceived by the Committee concerning lack of uniformity.

As to the Committee's various policy issues advanced in favor of proposed Rule 32.1, several merely support the idea that some uniform rule should be adopted, and would be equally met by a uniform rule prohibiting citation to unpublished opinions. Others are mistaken or inconsequential. For example, I have handled appeals in several different circuits; reading, understanding and following each circuit's rules on citation to unpublished opinions is far simpler than figuring out the myriad rules on formatting conventions for briefs and appendices. (I recently accidentally violated a circuit rule by using "Hon." instead of "Judge" on the cover page of an appellate brief.) Likewise, the suggestion that an attorney might be sanctioned for violating a Federal Rule is not itself a reason to eliminate the Rule; the courts have great discretion to treat Rule violations appropriately. (I was not sanctioned for using "Hon." instead of "Judge", and my brief was not rejected -- I merely was advised that I had not complied, so that I would not repeat the error.)

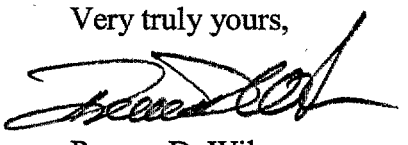
The Committee admits that "[t]he process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision." Committee Note at 33. Indeed, the Committee concludes that if the proposed Rule required appellate courts to treat unpublished opinions as binding precedent, the argument against the proposed Rule "would have great force." Id. The Committee's defense of the proposed Rule turns on its view that because the Rule does not require any court to treat its own opinions as binding precedent, courts will continue to issue short unpublished memoranda and simply treat those as persuasive, not binding. That assumption is in error.

The entire system of Anglo-American jurisprudence is based on the concept of binding precedent, of courts following the rule of law, and of lower courts following decisions of higher courts. Permitting practitioners to sift through opinions not carefully and narrowly written with the precedential impact in mind, and encouraging them to argue to district and appellate courts that the words contained therein should be persuasive or ignored, is a very different exercise from citing a sonnet or treatise in a brief: neither of those was authored by the court. Again, the issue is one of the perceived legitimacy of the judicial system. Surely, the best system would be one in which there were sufficient numbers of judges to write careful, considered precedential opinions in every case, but we do not have that luxury today. Proposed Rule 32.1 would likely cause Courts of Appeals to dispose of huge numbers of cases by unreasoned orders, undermining the legitimacy of the system. The Committee has a different vision -- that the number of reasoned opinions would remain constant, that 80% of the opinions would be written without the care required for a precedential opinion, but parties would cite to those opinions, written "only to provide the parties with a basic explanation of the reasons for the decision", and then argue about whether district courts should follow appellate courts and whether panels of an appellate court should follow the prior decision of another panel of that court. Arguing about whether a court should disregard Shakespeare in favor of Milton has no consequence for the foundations of the judicial

system; persuading a district court that it should refuse to follow a decision of the Court of Appeals does.

Thank you for your consideration of my views on this matter.

Very truly yours,



Rowan D. Wilson

Peter G. McCabe, Esq.
Secretary, Committee on Rules of
Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington DC 20544