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February 16, 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

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write to add my voice to the chorus of opposition to proposed Federal Rule of Appellate Procedure 32.1. As a former member of the United States Court of Appeals and now a frequent advocate before those courts, I have had extensive experience with non-citation rules from both sides of the bench. In this time, I have come to recognize not only the importance of non-citation rules, but the importance of permitting individual Courts of Appeals to set their own practices on this matter. Proposed Rule 32.1 would seriously burden both litigants and the federal courts. I urge the Standing Committee to reject the proposed rule.

As the Committee is aware, the U.S. Courts of Appeals rely upon unpublished dispositions as a way of expeditiously disposing the many routine cases whose outcome is predetermined by the established circuit law. It is a time-consuming process to write a published opinion. Because the opinion will not only resolve a particular case, but articulate legal principles to bind future panels and future litigants, the circuit judges must spend considerable time puzzling out nuances and debating alternative ways of phrasing a particular holding. In most if not all of the circuits, it would simply not be possible for the judges to devote such time and attention to every decision issued by the court. More to the point, it makes good sense for the judges to focus their limited time upon writing opinions in the truly novel cases and to provide for routine cases a more expeditious way of informing parties interested in the decision.

Up until now, the Courts of Appeals have decided on their own the extent to which litigants may cite unpublished dispositions in the courts of each circuit. This arrangement makes perfect sense because the Courts of Appeals differ considerably in the number of judges, the size of their caseloads, and the content of the cases they hear. The Circuits also differ considerably in the way in which staff attorneys work with the judges in the screening and disposing of routine

cases. Because these differences among the circuits are highly relevant to the weight an unpublished disposition should receive from future panels—and indeed, whether it should be citable at all—there appears to be no reason why a uniform rule should govern this subject.

The Advisory Committee on Appellate Rules has not been particularly clear about why it is necessary, or even advisable, to deprive the Courts of Appeals of this authority. The advisory committee note accompanying the proposed rule spends considerable time explaining what the new rule does not do, but its justifications for the new rule are both rather thin and, it seems to me, manifestly unpersuasive.

The Advisory Note first justifies the rule based on the need to eliminate the "hardship" local noncitation rules impose upon "practitioners, especially those who practice in more than on circuit." Report of Advisory Committee on Appellate Rules at 31. As a practitioner in federal circuit courts throughout the country—and so, I would imagine, one of the burdened parties—I must say that I frankly do not know what the Committee is talking about. When I assist a client in filing an appeal, there are many local rules that must be consulted. The circuits considerably differ in the filings necessary to docket the appeal; the timing, form, and content of the briefs; and the presentation of the excerpts of record. I cannot recall, however, the local noncitation rule ever being an issue, and I find it hard to believe there are many practitioners who have found those rules to cause any serious hardship.

The Advisory Note's second justification for the rule presents itself as a negative one. The Note claims that there can be "no compelling reason" to distinguish between unpublished dispositions and the "infinite variety" of other sources that lawyers may cite for their persuasive value, such as "newspaper columns, Shakespearian sonnets, and advertising jingles." *Id.* at 32. The Committee appears to believe that unpublished dispositions should be treated no differently from sonnets since Rule 32.1 does not require unpublished dispositions to be treated as binding precedent. *See id.* at 33. An attorney will clearly regard an unpublished disposition issued by the court to be a very different form of persuasive authority. An attorney may cite a law review, or a poem, because it has a pithy, or persuasive way, of explaining the point argument that the attorney seek to advance. When an attorney cites an unpublished disposition, however, the attorney is not usually relying upon the case for its reasoning. Rather, the attorney is contending that the Court of Appeals took the very same action in a similar case that came before it, and in the interests of *stare decisis*, the court should once again do the same thing.

Although Rule 32.1 might permit the court to disregard the unpublished disposition as not binding circuit law, litigants will likely view them as a source of highly relevant precedent. Moreover, no matter how the Court of Appeals treats unpublished dispositions, the district courts in a circuit would be extremely reluctant to ignore what three judges of the Court of Appeals appear to have done. If the Court of Appeals wishes an unpublished disposition truly to bind no one other than the parties to the case, then there is no real alternative to prohibiting the litigants

from citing those cases in the courts of the Circuit. The Court of Appeals therefore has a perfectly legitimate reason for distinguishing unpublished dispositions from the other forms of non-precedential authority.

Finally, the Advisory Note claims that the proposed rule "will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public." *Id.* at 35. As a preliminary matter, "unpublished dispositions" are in fact published by online services like Westlaw and LEXIS, as well as printed in the Federal Appendix. Thus, it is difficult to see why permitting their citation in legal briefs would provide any more transparency than currently exists.

Moreover, it seems to me that far from furthering the administration of justice, the proposed rule will inevitably burden the practice of law. Unpublished dispositions may be drafted by staff attorneys with minimal judicial oversight. They may contain sparse description of facts and ambiguous statements of law that, consequently, if taken beyond the present case, are unlikely to provide a reliable guide for future cases. Moreover, the imprecise phrases in one unpublished disposition may well conflict with the equally imprecise statements in another. Far from clarifying the law, or providing new "sources of insight," the citations to unpublished dispositions will make the law of the circuit less coherent.

To the extent that litigants and lower courts rely upon unpublished dispositions, conscientious circuit judges will have no choice but to either devote more time to these routine cases, or to decide more cases by summary affirmance. The former choice would burden already overburdened courts, and the latter choice would be highly unsatisfactory for litigants. Because the new rule will cause many problems, I respectfully urge the Committee not to adopt proposed Rule 32.1.

Sincerely,

Kenneth W. Starr

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