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February 13, 2004

By U.P.S. Overnight Delivery

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 Amendment of Federal Rule of Appellate Procedure 32

Dear Mr. McCabe:

We are the Co-Leaders of Alston & Bird LLP's Litigation Practice Area, which consists of more than 250 lawyers. We are writing to oppose the proposed addition of Rule 32.1 to the Federal Rule of Appellate Procedure (the "Proposed Rule"), which would require each circuit court to allow the citation of unpublished opinions. The Advisory Committee should reject the Proposed Rule for at least the following reasons:

- The Proposed Rule creates an inherent inconsistency by allowing circuit courts to decree that unpublished opinions shall have no precedential effect but requiring circuit courts to allow their citation. Allowing the citation of unpublished opinions injects such opinions into the judicial decision-making process and cloaks unpublished opinions with persuasive – if not precedential – authority.
- If the Proposed Rule is adopted and unpublished opinions can be cited, courts will likely be more cautious and deliberative in drafting unpublished opinions. Thus, the drafting of unpublished opinions will consume more of the courts' judicial resources, resulting in substantial delays in the disposition of federal cases.
- The Proposed Rule will increase our client's research costs by vastly expanding the universe of relevant precedent within each circuit. If citation of unpublished opinions is allowed, then before filing an appellate pleading, the skilled practitioner must not only research published

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opinions, he or she must also research unpublished opinions. Because many unpublished opinions are not available on electronic databases like Westlaw and Lexis, lawyers will have to expand their research to encompass unpublished opinions available only on the many various courts' websites or directly from the issuing court.

- The Proposed Rule does not achieve the uniformity cited as one of its justifications. The Advisory Committee Notes justify the Proposed Rule as necessary to achieve uniformity among the various circuit courts, stating that current variations in the ability to cite unpublished opinions "have created a hardship for practitioners, especially those who practice in more than one circuit." *See* Advisory Committee Notes at 31. Yet, the various circuits retain the ability to adopt local rules, and practitioners will still have to review those rules before filing appellate briefs. Accordingly, any increase in uniformity achieved by the Proposed Rule is minimal and will not alleviate the hardship on multi-jurisdiction practitioners perceived by the Advisory Committee.

For these reasons, we ask the Advisory Committee to reject proposed Rule 32.1 and allow each judicial circuit to retain control over its rules regarding the citation of unpublished decisions.

Sincerely,



Peter Kontio  
Todd David

KMB:kmb

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