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February 16, 2004

VIA FACSIMILE
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

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. As a lawyer with a national, commercial litigation practice, I fear that the proposed rule will make the law more unsettled and, as a result, make life more difficult for practitioners and their clients.

Allowing the citation of unpublished opinions poses three major problems for practitioners and their clients. First, allowing citation of unpublished opinions will cause tremendous uncertainty. When my clients come to me for advice or an assessment of a potential claim, I am often forced to read "the teas leaves" in various published opinions. Nevertheless, given the lengthy recitation of the facts and reasoned rationales provided and the certain knowledge that a published case has binding authority, I can usually provide the client with sound guidance.

Unpublished opinions, in contrast, often provide terse background and rationales and, worse, have uncertain precedential value–they are not binding but any lawyer would be a fool to underestimate their "persuasive" power. Under Proposed Rule 32.1, I fear that I will often end up advising clients: "There is a published case that looks good but is not exactly on point. There is an unpublished case that is not good. The unpublished case seems closer to our facts–although I can't tell because

it is very short. And, I can't tell how much weight our judge is going to give to this opinion because it was unpublished." What is my client going to do?

Second, allowing the citations of unpublished opinions will make it impossible for practicing lawyers to stay current on the state of the law. I am often called upon to provide quick answers to my clients on legal questions in order to advise my clients. In order to be a position to provide such answers, I regularly read various publications that report on recent, significant appellate decisions in the areas of law in which I practice. Given the number of published opinions, this is not an easy task.

Proposed Rule 32.1 will make this task impossible. Keeping track of unpublished opinions would be a dizzying job. Under Proposed Rule 32.1, a lawyer such as myself could never have any comfort that he or she has a basic understanding of the state of the law.

Third, proposed Rule 32.1 may cause either long delays in the release of appellate decisions or the release of decisions with zero explanation. I suspect that under the proposed rule, judges will be forced either to take additional time to scrutinize unpublished decisions (in effect, treating unpublished decisions as published decisions) or to eliminate unpublished decisions altogether (instead, providing single sentence decisions stating the result only, "affirmed" or "reversed"). Either result is bad for the customers of the judiciary system.

I hope the Advisory Committee will consider these problems and not adopt proposed Rule 32.1. I appreciate your willingness to consider my comments.

Sincerely,

Harry Susman