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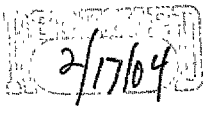

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February 16, 2004

VIA FACSIMILE 202/502-1755

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 would like to take this opportunity to comment against proposed Federal Rule of Appellate Procedure 32.1, which would establish a national rule allowing litigants to cite unpublished dispositions.

The first reason the Advisory Committee cites in support of Proposed Rule 32.1 is the conflicting rules among the circuits, and that such conflict creates a "hardship" for attorneys. That this reason is set forth all, much less as the *primary* reason, is rather startling. The federal circuit courts have promulgated local rules which vary from the Federal Rules of Appellate Procedure and from circuit to circuit in many areas of appellate practice, yet there has been no hue and cry to repeal FRAP 47, which allows for the development of local circuit rules. That a practitioner is unwilling or unable to acquaint himself with the rules of an appellate court in which he practices is a poor reason to usurp the considered judgment of the majority of active judges in each circuit by imposing a national rule that disregards the practical differences found in each circuit—differences to which the local rules respond.

Proposed Rule 32.1 is peculiar because it encourages the circuit courts that disallow citation to unpublished dispositions to do privately what they now acknowledge publicly. The Committee Note to the proposed rule states that the proposed rule "says nothing about what effect a court must give to one of its 'unpublished' opinions or to the 'unpublished' opinions of another court." Currently, the Ninth and Tenth circuits set forth a disclaimer at the outset of their unpublished dispositions informing all who read them that the ruling set forth therein applies to that case only. If Proposed Rule 32.1 is implemented, it is foreseeable that these circuits will maintain their practice of limiting a holding of an unpublished disposition to that case. Litigants

and practitioners, however, will no longer have the benefit of such warning. Woe to the attorney who provides his client with an unbiased analysis of the client's case based in whole or in part on unpublished dispositions without the knowledge that the court may completely disregard those prior cases, or to the *pro se* litigant who may not understand the difference between precedential and non-precedential opinions.

Another troubling aspect of Proposed Rule 32.1 is the ability of an attorney to cite unpublished dispositions of state courts. The Committee Note states, "The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as 'unpublished' or 'non-precedential' by a federal or state court . . . ." Although this Committee regulates the practice of federal courts, it is an affront to federalism to regulate the use of state court opinions when the state courts have clearly indicated the limits of their use.

Although I appreciate the arguments in favor of Proposed Rule 32.1, the Proposed Rule is unnecessary and will create problems that will exponentially outweigh any problems the Committee believes the Proposed Rule will solve.

Sincerely,

S. Ann Salisbury