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February 13, 2004

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

We are writing to oppose proposed FRAP 32.1. We believe that the judges of each Circuit should retain the authority to decide whether unpublished opinions can be cited as precedent in their Court.

As the committee is aware unpublished opinions are, in the main, brief summary decisions that are intended to communicate to the parties the outcome of their case, not to establish precedent. In the Second Circuit, where we practice, the vast majority of appeals are decided by summary order, and those orders may not be cited.

Because the parties are already familiar with their case, a summary order does not need to contain the detailed statement of the facts or the painstaking review of the law that is included in published opinions. If the proposed rule is adopted and unpublished opinions can be cited as authority, the Court would have two choices. The Court could write the equivalent of a published opinion in every case, or it could revert to the prior practice of deciding cases either without opinion or in a few sentences. Writing full opinions in every case would, we suspect, prove to be impossible, as Judges Kozinski and Reinhardt confirmed in their excellent article in the California Lawyer. This means that a return to the practice of deciding cases without opinion would again take hold. In our experience the change to summary orders had been extremely beneficial to the public perception of the courts, since litigants receive a reasoned explanation of the decision, not just an impenetrable order. It would certainly be an unintended consequence of the proposed rule to deprive litigants of the reasons for the

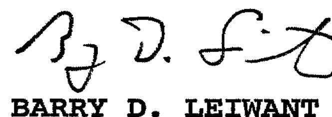
decision in their case just because lawyers want more verbiage to cite in future cases. In light of these possible effects, the judges of each circuit should be left free to decide for themselves the local rules of citation.

The proposed rule would also have an adverse effect on the ability of many lawyers to properly represent their clients. Unlike other forms of persuasive authority, such as law review articles, every unpublished opinion on the subject will have to be accounted for in the brief. Since these opinions contain an abbreviated statement of the facts, lawyers who wish to distinguish the cases will have to obtain the briefs. This clearly favors institutional and wealthy litigants who can spend the time and money necessary to retrieve briefs. The unconscious favoritism of large litigants over single practitioners is also apparent in the advisory committee's decision not to require that copies of unpublished decisions be served with the brief. Not all lawyers have broadband internet access or easy access to databases that are either expensive, such as Westlaw, or are regularly inaccessible, such as the web site for our circuit. Poor clients and lawyers in small practices will be placed at a further disadvantage if this rule is adopted.

Finally, there is no reason why there must be a uniform, national rule regarding citation of cases. The only reason given by the advisory committee is the unsupported claim that having different local rules has "created a hardship for practitioners, especially those who practice in more than one circuit." This seems vastly overstated. No competent lawyer would prepare a brief in an unfamiliar jurisdiction without first consulting the local rules. Unless every aspect of practice is made uniform, lawyers will still have to read the local rules. Nor has a lawyer ever been exposed to the risk of sanctions in this circuit for mistakenly citing an unpublished opinion.

In sum, we oppose proposed rule 32.1 because there is no need for a uniform rule, because the judges of each circuit should continue to be permitted to decide this issue for themselves, and because there is likely to be a pernicious effect on the public perception of the administration of justice. Thank you for giving us this opportunity to comment.

Very truly yours,



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