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January 26, 2004

Mr. 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: Federal Rule of Appellate Procedure 32.1.

Dear Mr. McCabe:

I am writing to state my opposition to proposed Federal Rule of Appellate Procedure 32.1.

I am a partner at Bartlit Beck Herman Palenchar & Scott, where I maintain a national litigation practice that brings me to federal courts around the country. I have appeared in district court cases in most of the Federal Circuits, and have argued appeals to both the Seventh Circuit and the Federal Circuit Courts of Appeal. I previously served as a law clerk in the Ninth Circuit and at the Supreme Court of the United States, and am familiar with the benefit to those courts of the rule forbidding citation of unpublished decisions.

There are a host of reasons why the proposed rule is a bad idea. I will direct my comments to what I expect will be the primary negative effect of requiring all the courts of appeal to allow litigants to cite to their unpublished decisions as persuasive authority.

As things currently stand, judges can write short, unpublished and uncitable explanations of their decisions in the large number of cases that are not precedent-setting, leaving time to devote greater attention to opinions that they expect to set new precedent or to provide a needed explanation or expansion on existing law. This system serves both the public and private function of the judicial system well: It allows judges to produce high-quality opinions for the public at large that provide important guidance and development of the law, while still providing most private parties that appear before the court with a meaningful (albeit not precedential) statement of the Court's decision.

Faced with a rule that allows litigants to cite to any written opinion that they prepare, judges can be expected to have one of two reactions. Knowing that their unpublished work can (and likely *will*) be cited and followed as precedent, judges might take greater time to prepare and edit their unpublished decisions, including decisions that are nothing more than a rote application of well-settled law. Or judges might take the approach predicted by Judge Posner and produce simple statements of decision ("Affirmed") in lieu of a more complete explanation for the parties of the basis for the courts' decision.

Either result will be worse than the current system. If judges spend more time writing and editing unpublished decisions, they will in all likelihood have less time to spend crafting the published decisions that tackle difficult or precedent-setting issues of law. But if judges take the opposite tack and issue "opinions" that simply state the result in the case and nothing more, they will be depriving the parties of the closure that comes from even a hastily drafted statement of the basis for the court's decision.

I recognize that the Courts of Appeal each face different challenges, both in terms of the shear volume of cases they are asked to consider and the distribution of subject matters that they are expected to address. The judges of some circuits might feel that they have the time to devote to crafting precedential opinions in every cases, or that they could limit the number of summary decisions that they issue because of the peculiar mix of cases that they face. Other circuits, however, face insurmountable case loads that they could not be expected to handle if they are asked to issue precedential decisions in every case. For that reason, the treatment that will be given to unpublished decisions is an issue that each circuit should be allowed to determine on its own, without the constraint of a uniform rule requiring them to permit citation of unpublished opinions.

Sincerely,

Sean W. Gallagher

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