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VIA FIRST CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Peter:

As you are aware, I have practiced law for over 25 years, almost exclusively in the federal courts. In the course of my career, I have taken appeals to the 2nd, 7th, 9th, 11th, and D.C. Circuits and filed several briefs as an amicus with the federal courts including the United States Supreme Court. Recently, in my capacity as a lawyer representative to the 9th Circuit Judicial Conference, I voiced opposition to a resolution that would have permitted the citation of unpublished opinions. In a similar vein, I write now to oppose the proposed amendment to Federal Rule of Appellate Procedure 32.1(Citation of Judicial Dispositions). Proposed Rule 32.1 would require courts to permit the citation of opinions, orders, judgments, or other judicial dispositions that have been designated as "not for publication," "non-precedential" or the like. For the reasons set forth below, adoption of this rule would be detrimental to federal appellate practice and I urge the Advisory Committee on Appellate Rules and the Judicial Conference Committee on Rules of Practice and Procedure to reject this proposal. Indeed, if the Supreme Court were to recommend adoption of this rule, I would not be surprised to see Congress convene a hearing on the rule and ultimately block it's implementation.

I am opposed to the adoption of proposed Rule 32.1 for three principal reasons. First, there is no compelling reason to have a uniform national rule. Second, the rule would change for the worse the way courts decide cases and publish opinions. Third, the rule gives an unfair advantage to litigants who engage large law firms.

The proponents of this rule have not made the case for adoption of a uniform federal rule of appellate procedure on the citation of judicial dispositions. Currently, an appellate lawyer or litigant reads the rules of the circuit in which the appeal is filed to determine whether citations may be made to opinions designated as "not for publication," "non-precedential" or the like. There is no confusion or lack of transparency in the process. There are a multiplicity of factors that could lead a circuit to adopt a rule either permitting or forbidding the citation of unpublished decisions. This is a topic on which reasonable minds can differ and on which regional variation is appropriate based on the size of the circuit and relative case load per judge.

As a practical matter, in large circuits with high volumes of appeals and numerous judicial vacancies, many appeals are decided on a not for publication basis. This is true where the panel wants to do justice in the particular case but is concerned about setting a precedent in other cases. It is also true where the matter is of insufficient judicial importance or recurrence to justify having a published opinion. In these circumstances, often the panel will instruct its staff to prepare a "not for publication" opinion that will explain to the litigants the panel's reasoning for deciding the appeal. The panel members do not edit the opinion but remain confident, however, that the opinion cannot be cited. This frees the panel to devote little or no attention to the content of the not for publication dispositions.

If proposed Rule 32.1 were adopted, circumstances would change significantly. Under the new regime, panel members would know that even their unpublished dispositions could be cited. This would put tremendous pressure on the panel to devote significant time to unpublished decisions. In those circuits where appellate judges have a surplus of time and a low case load per judge, this could actually improve the administration of justice. On the other hand, in large circuits where judges are overburdened and vacancies are numerous, judges could be pushed to the breaking point if they undertake the increased burden of monitoring the "not for publication" decisions. Such a development would obviously be detrimental to the administration of appellate justice. By the same token, an overburdened panel could choose to ease its burden by issuing a one-word order affirming or denying the appeal instead of allowing the staff to prepare a not for publication disposition. This result also ill-serves the administration of appellate justice because litigants will be denied the opportunity to learn of the appellate panel's reasons for its disposition. On balance, for these reasons alone, proposed Rule 32.1 should be rejected.

If proposed Rule 32.1 is adopted, the Administration of Justice will further tilt in favor of those litigants who retain large law firms. In my experience, large law firms such as Skadden, Arps, Slate, Meagher & Flom; Jones, Day, Reavis & Pogue; and Weil, Gotshal & Manges maintain banks of unpublished opinions that are available to their lawyers. Smaller law firms and pro se litigants simply do not have access to this database. The proposed rule ameliorates this injustice in part by requiring a party who cites an unpublished disposition that is not available in a publicly accessible electronic database to file a copy of the disposition. It does not, however, require the party to file

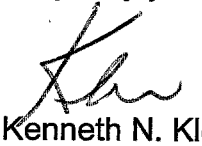
those unpublished dispositions that cut against that litigant's position. Thus appellate lawyers from firms with these databases will be able to pick and choose those unpublished decisions that favor their client's position. Smaller law firms or poor litigants will be disadvantaged. This inequality could be attenuated somewhat if proposed Rule 32.1 is made effective prospectively to allow citations of unpublished decisions rendered from and after the effective date of the rule. Even then, pro se litigants and smaller firms would be at a disadvantage unless they wanted to undertake the significant costs of establishing and maintaining a database of unpublished decisions.

In conclusion, I urge the Judicial Conference's Advisory Committee on Appellate Rules and the Judicial Conference Committee on Rules of Practice and Procedure to reject proposed Rule 32.1. The case for uniformity has not been met. Indeed, if there is to be a uniform rule, the rule should prohibit the citation of unpublished decisions, not permit it.

Thank you for the consideration of my views. In order to conserve federal resources, I ask the Secretary not to send a letter acknowledging receipt of these comments.

My very best wishes for a healthy, happy, and prosperous 2004.

Very truly yours,



Kenneth N. Klee

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