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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

Mr. McCabe:

Verizon opposes the proposed addition of Rule 32.1 to the Federal Rules of Appellate Procedure.

The proposed rule is a solution in search of a problem, and a costly solution at that. By multiplying the volume of decisions available for citation, the proposed rule complicates the task—and increases the costs—of diversified companies like Verizon that are obligated to comply with a host of different laws. By injecting into the stream of citable authority a large body of new decisions—often drafted with little supervision by overburdened appellate judges—the proposed rule creates an opportunity for mischief by lawyers seeking to capitalize on ambiguously or inartfully worded opinions. And by forcing conscientious appellate judges to devote extra time and attention to routine cases, the proposed rule will prejudice the administration of justice—delaying key decisions and diverting judicial resources from important, novel, and complex questions of law.

In return, the proposed rule promises no meaningful benefits, easing the "hardship" faced by sophisticated attorneys who participate in cases in multiple circuits by promising a single and insignificant axis of uniformity in a world of rules otherwise characterized by wide divergence. In fact, the proposed rule will complicate the task of appellate lawyers, forcing them to search through a much larger heap of chafe to find the kernels of wheat.

In the notes accompanying the proposed rule, the Advisory Committee on Appellate Rules ("Advisory Committee") raises and rejects the argument that "without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize 'unpublished opinions' would have an unfair institutional advantage." Report of Advisory Committee on Appellate Rules at 34. Whatever the impact of Rule 32.1 on small litigants—and it seems plain that the proposed rule will increase research and litigation costs for everyone—Verizon writes to inform the Committee of the opposite problem. It is large institutional litigants, like Verizon and the federal government, upon whom the burdens of the proposed rule will fall hardest, because it is these regular litigants that have the greatest interest

in the clarity and uniformity of the law in each circuit, and in the expeditious administration of justice.

The Advisory Committee should not press forward with a national rule authorizing the citation of unpublished opinions. Rather, it should allow individual circuits to continue enforcing their own rules on the subject—rules that are tailored appropriately to the circumstances prevailing in each court.

1. By Making Circuit Law Less Coherent, the Proposed Rule Will Make It More Difficult for National, Diversified Companies to Comply With the Law.

As a national company, Verizon's lawyers must spend a great deal of their time keeping up with the differences in local law, which vary not only from jurisdiction to jurisdiction, but from circuit to circuit in the federal system. Verizon's burden in complying with these divergent legal standards is heavy enough under the existing scheme. The new rule, however, will make that job even harder by vastly expanding the universe of relevant precedent that must be consulted within each circuit. According to the drafters of the new rule, unpublished dispositions constitute 80 percent of the opinions issued by the courts of appeals. *Id.* at 30. In one stroke, the proposed rule will increase by five times the volume of authority that Verizon must track in the federal circuit courts throughout the country. This burden will only continue to grow. From 1960 to 2002, the number of filed appeals increased from roughly 3,900 to more than 57,000—an increase of almost fifteen fold. *See* Administrative Office of the U.S. Courts, Judicial Facts and Figures, Table 1.3 (Feb. 2003). The burden of keeping up with *published* authority has already multiplied significantly over the last four decades, and continuation of the near-exponential growth in appeals will make the costs of the proposed rule unmanageable.

The nature of this expanding body of law guarantees a proliferation of ambiguity, if not outright conflict, within the law of each circuit. As the Committee is aware, unpublished dispositions are often drafted by staff members of the court, with little judicial supervision. Although the members of the court have no doubt deliberated upon and approved the result in each case, they generally do not devote their time to parsing each word carefully and ensuring that the dispositions articulate clear principles to govern future cases. These unpublished dispositions therefore often include imprecise phrases that, while appearing to state broad rules of law, are not, in fact, a reliable guide beyond the case at hand. Indeed, an imprecise phrase in one disposition might well conflict with the equally broad and imprecise language of another case. Because there are literally thousands of unpublished decisions issued each year, these conflicts are inevitable.

Thus, while the drafters of proposed Rule 32.1 claim that the rule will create uniformity among the circuits within one narrow axis, the proposed rule will inevitably create much greater disuniformity within the substantive law of a particular circuit, not to mention among different circuits. Circuit court judges already find it hard enough to prevent differences from emerging within the published authority of the circuit, and it is not uncommon to discover decisions from two panels within a circuit that are difficult to reconcile. That job will become impossible under

the proposed rule, because no judge has the time to read every disposition issued by his or her circuit. As the law of each circuit becomes less coherent, some lawyers may seek to exploit these ambiguities in order to do mischief, with these efforts aimed disproportionately at large companies like Verizon. This problem will be compounded by the fact that unpublished dispositions typically lack a full statement of the relevant facts, making it difficult or impossible to distinguish them from a case in litigation. Verizon is thus particularly concerned that proposed Rule 32.1 will make it impossible to state with clarity the law of a particular circuit, or to determine with confidence that a particular corporate decision is unambiguously permissible under existing circuit law.

The drafters of the proposed rule suggest that unpublished dispositions need not muddy the waters of circuit law, because each circuit could decide for itself the precedential weight to afford unpublished dispositions. That option, however, is illusory. Even if unpublished dispositions are not binding authority, they remain the signed statement of three members of the circuit. So long as unpublished dispositions *can* be cited, they *will* be cited, and litigants will have no choice but to regard them as a significant source of authority.

Moreover, most of Verizon's litigation efforts take place, not in the appellate courts, but in the district courts of each circuit. Whatever the position taken by each circuit, district courts within that circuit will surely regard an unpublished disposition as highly persuasive—not just for its reasoning—but because it purports to reflect the views of three members of the higher court. Unpublished dispositions therefore will inevitably have a force disproportionate to other sources of persuasive authority, such as the decisions of other circuits or state courts, or articles in law reviews. The drafters of the proposed rule observe that litigants remain free to cite "Shakespearian sonnets," Report of Advisory Committee on Appellate Rules at 32, but circuit judges do not write Shakespeare. Verizon and other litigants will have no choice but to regard unpublished dispositions as a significant source of circuit law, regardless of the particular and varying weight afforded those decisions by individual district and appellate court judges.

2. The Proposed Rule Will Impose Real Costs on Verizon by Delaying the Resolution of Legal Disputes.

Verizon objects to the proposed rule, not only because it will make circuit law less coherent, but also because it will cause a significant delay in the disposition of federal cases. As a large company with significant financial interests, Verizon often has hundreds of millions of dollars on the line in contract, antitrust, regulatory, and other cases heard in the federal courts. For Verizon, as well as other litigants, time literally is money. A case may take several years to move from the complaint to a judgment upheld on appeal, and that time can be a substantial factor in the costs of litigation. Already, in many circuits, it can take eighteen or more months from the filing of the notice of appeal to the issuance of a final mandate. Proposed Rule 32.1, by requiring courts to spend more time in deciding small, routine cases, will inevitably increase the time it takes to resolve the large and novel cases in which Verizon is a regular participant.

Even the proponents of the new rule cannot deny its potential to delay the administration of justice. The drafters of the rule note that the potential for delay is a common complaint, and they concede that this argument would have "great force" if proposed Rule 32.1 required judges to treat unpublished dispositions as precedential. *Id.* at 33. Their only response, therefore, is to return to their claim that the new rule will have little impact, because the circuits may continue to regard unpublished dispositions as non-precedential. As discussed above, however, the premise of this argument is mistaken. Conscientious circuit judges will inevitably spend more time on unpublished dispositions, knowing that the decisions issued on behalf of the court will be regarded as a highly significant source of authority. Therefore, whether this potential for delay has "great force," as Verizon expects, or perhaps only "some force," as the drafters of the rule effectively concede, it is clear that circuit judges will respond to proposed Rule 32.1 by spending more of their limited time drafting dispositions in routine cases. This will have the inevitable effect of delaying the resolution of published dispositions.

Finally, some federal judges, instead of devoting more time to the resolution of unpublished dispositions, will respond to the proposed rule by resorting to summary dispositions. Although Verizon devotes the lion's share of its litigation resources to large cases involving unsettled areas of law, it is also a participant in many smaller cases typically resolved by unpublished dispositions. Like any other litigant, Verizon has an interest in having the court provide a clear explanation for its reasons in unpublished dispositions. Therefore, to the extent the time pressures imposed by Rule 32.1 lead federal judges to decide routine cases with less explanation, Verizon—while perhaps preferring this result to the alternative—does not consider this an improvement over the current regime.

3. The Reasons Offered for the Change are Insubstantial.

As a regular litigant in the federal courts, Verizon is unable to understand the problem that the drafters of Rule 32.1 are intending to solve. The notes accompanying the proposed rule tout the benefits of uniformity, but the burden of knowing the local citation rule for unpublished dispositions is considerably less than the burden of knowing the content of the thousands of unpublished dispositions, of varying quality, that are published within each circuit each year. Moreover, given the wide variety in the caseloads among the federal circuits, there is a much greater justification for local citation rules than there is for the numerous other local rules that govern mundane procedural matters such as the deadlines for filing briefs; the procedures for docketing appeals; the contents of each brief; the length of the briefs; and the content of excerpts of record. In short, the local variations among citation rules pose little problem for Verizon—or, for that matter, any other litigant—and the alternative offered by proposed Rule 32.1 is unquestionably much worse.

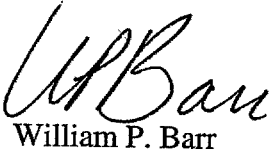
The Advisory Committee cannot justify this cost by suggesting that Rule 32.1 "will make[] the entire process more transparent to attorneys, parties, and the general public." *Id.* at 35. Just the opposite is true. Transparency exists when judges give reasons for their decisions, and when those reasons can be reviewed and criticized by the parties and the public. The current process is transparent because appellate judges are free to state the reasons for their

unpublished decisions without concern that those statements will be cited as precedent, and because, as the Advisory Committee itself observes, these unpublished opinions are already "readily available" for review and criticism by the public and practitioners. *Id.* at 34. The proposed rule can only diminish transparency by encouraging judges to resort to summary dispositions.

Finally, the Advisory Committee cannot maintain that Rule 32.1 will "further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges." *Id.* at 35. The judges in each circuit have already established their own local rules on this subject, and in the circuits whose rules the Advisory Committee seeks to nullify, the judges have already confirmed that the citation of unpublished dispositions will impair, not enhance the administration of justice. As a national body, isolated from the specific circumstances confronting the judges in each circuit, the Advisory Committee is in no position to second-guess these determinations.

Verizon therefore asks the Advisory Committee to permit each circuit to retain control over its citation rules and to reject proposed Rule 32.1 as an ill-advised and unnecessary measure.

Sincerely,



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