LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000
FAX (202) 434-5029

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

CHRISTIAN A. WEIDEMAN
(202) 434-5649
cweideman@wc.com
NOT ADMITTED IN DC

03-AP-302

February 3, 2004

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, DC 20544

Re: Proposed New Rule 32.1

Dear Secretary McCabe:

I write to comment upon and urge the rejection of the Proposed New Rule 32.1 of the Federal Rules of Appellate Procedure. As a practicing attorney and former law clerk to a judge on the United States Court of Appeals for the Third Circuit, I feel that I possess some insight that may be helpful. The Committee Notes to the Proposed New Rule 32.1 ("Committee Notes") state that there is "no compelling reason" to prohibit the citation of unpublished opinions. I disagree. In my opinion, there are at least four compelling reasons why the citation of unpublished opinions should be prohibited and the Committee's Proposed Rule rejected.

First, the Committee Notes suggest that practitioners should be allowed to cite unpublished decisions for their "persuasive value," much like an "infinite variety" of other sources including "opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles." However, unpublished Court of Appeals decisions, from the same circuit, are unlike any of these other sources. Court of Appeals decisions are written by the same judges that ultimately will decide contested legal issues upon appeal. Lower courts will be extremely reluctant to ignore these decisions, no matter how they are styled. Unlike advertising jingles and other sources of potentially "persuasive" authority, unpublished appellate decisions *from the same circuit* are likely to exert an undue influence on lower courts. Therefore, they should not be cited.

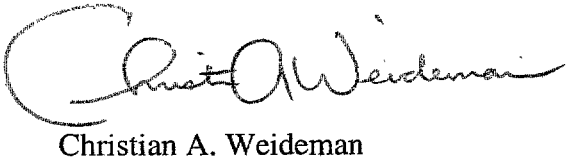
Second, courts devote much less time and resources to drafting unpublished decisions. The reason is practical necessity. With thousands of cases on the federal docket, appellate courts devote the majority of their energy to published opinions, which serve as the binding law of the circuit. In contrast, unpublished decisions are intended primarily for the specific parties. They are drafted with far less attention to precise language and potential nuance, and they are *not* intended to establish or amend broad principles of law. Moreover, due to the vast number of unpublished decisions, practitioners can often find vague language to support almost any proposition. Thus, due to the nature and number of unpublished decisions, their citation is more likely to add confusion rather than clarity to a disputed legal issue.

Third, there is a substantial risk that appellate judges will react to Proposed New Rule 32.1 by issuing summary decisions devoid of any supporting reasoning. This would disserve litigants in at least two important respects: (1) parties would be left with little or no sense of closure, despite their often significant investment in terms of time, money, and emotion in the appellate proceedings, and (2) the lack of explanation by the appellate court could lead parties to pursue additional, unmeritorious positions – which otherwise would be foreclosed – and unnecessarily lengthen the time and cost of litigation. Neither outcome would serve the interests of justice or judicial economy.

Finally, the Committee Notes suggest that one of the motivating rationales for the New Rule is to improve consistency among the various United States Courts of Appeal and alleviate a significant "hardship" to practitioners. This is a red herring. With the growth of large national and international law firms – as well as decreasing transactions costs – many, if not most, practitioners try cases all over the country, in state and federal courts, at both the trial and appellate level. Each court has its own local rules that govern picayune and highly technical details of practice, including the length of briefs, the time for filing motions, and even the proper style of font. In addition, many individual judges impose their own unique rules of practice. As a young lawyer who is often responsible for complying with these myriad requirements, I am wholly in favor of greater standardization. However, the tiny change proposed by New Rule 32.1 would make no more than an imperceptible dent in the vast assemblage of inconsistent local rules. If the Committee seeks to meaningfully lessen the "hardship" of practitioners by imposing greater uniformity, Proposed New Rule 32.1 does little to advance that goal.

For all these reasons, I urge you to reconsider Proposed New Rule 32.1 of the Federal Rules of Appellate Procedure. Thank you very much for your time and consideration.

Respectfully Submitted,



Christian A. Weideman