UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
157 CHURCH STREET
NEW HAVEN, CT 06510-2030

RECEIVED 2/11/04

CHAMBERS OF
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CHIEF JUDGE

03-AP-329

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February 11, 2004

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

Re: Comments on Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

As you are aware, the Advisory Committee on Appellate Rules has proposed a new rule to the Federal Rules of Appellate Procedure, Rule 32.1, that would prohibit every court from imposing any restriction on citations to unpublished appellate dispositions that is not also applicable to citations to published opinions.[1] In other words, litigants could cite to and rely upon unpublished appellate decisions in briefs submitted to the court that issued the unpublished decision and to any other

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[1]Proposed Rule 32.1 provides:

Citation to Judicial Dispositions

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) **Copies Required.** A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

court. My understanding is that the proposed rule does not prohibit a court from designating opinions as "unpublished," nor does it impose any limitation on a court's authority to determine that an unpublished opinion shall not be given precedential effect. Nevertheless, I strongly urge that the proposed rule not be adopted. As I will explain, while there may be salutary reasons to encourage the Circuits to revisit their individual rules concerning unpublished opinions in light of technical innovations and their ready availability to litigants, I — and most of my colleagues in the Second Circuit — believe that the matter should be left to the discretion of each appellate court and that it is inappropriate to adopt a uniform national rule on the issue. Moreover, I believe that such a rule will adversely affect the internal operations of the already overburdened courts of appeal while offering little or no offsetting benefit to the litigants or to the development of the law.

1. Background. For many years, the courts of appeals have issued so-called unpublished opinions, which are termed Summary Orders in the Second Circuit. At one time, these unpublished opinions were generally available only to the parties and to those who looked for them in the Clerk's Office, whose files are open to the public. A few years ago, several courts, including the Second Circuit, began to make them available to the public by placing them online or allowing others to do so. More recently, Westlaw and Lexis have included unpublished opinions in their searchable databases, and West Publishing has collated these "unpublished" opinions in a new reporter series called the Federal Appendix, complete with headnotes. Thus, today "unpublished," as comprehended by this letter, means only "not published in the bound volumes of the Federal Reporter."

The Second Circuit's practice of issuing unpublished opinions was initiated more than thirty years ago in response to an ever-increasing caseload and, ironically, a resolution issued by the Judicial Conference asking courts to "authorize the publication of only those opinions which are of precedential value" in order to stem the correspondingly burgeoning body of case law. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1964 ANNUAL REPORT 11 (1965); <u>see also</u> DIRECTOR OF

THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT 33 (1973) (request by Judicial Conference that circuits develop plans for limiting the publication of opinions); see generally Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed. Cir.), cert. denied, 537 U.S. 825 (2002) (reciting history and purposes of appellate court practices with respect to unpublished opinions). At the time the Second Circuit's local rule was promulgated, this circuit, as part of its practice, which continues today, of permitting most litigants an opportunity for oral argument, resolved up to 70% of our cases by way of brief oral dispositions from the bench. This procedure was disfavored because of the embarrassment and annoyance it engendered among counsel, who were often accompanied to court by their clients, and also because the wording of the disposition – which sometimes contained explanations for the holding – could not always be carefully reviewed and agreed upon by the entire panel in advance.

Accordingly, the Second Circuit promulgated Local Rule § 0.23, which permitted the court to issue, in addition to oral dispositions in open court, short written opinions for the benefit of the parties, but prohibited the citation of such opinions except for very limited purposes such as res judicata, collateral estoppel, and law of the case. The purpose of the rule is manifest from its text:

> § 0.23. **Dispositions in Open Court or by Summary Order** The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order. Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this

or any other court.

Because the rationale for issuing such opinions is that the resolution of the case offers no jurisprudential benefits, opinions crafted pursuant to Local Rule § 0.23 typically provide concisely reasoned explanations for the court's disposition as well as direct responses to the litigants' contentions, while omitting much of the factual and procedural elaboration that would be necessary to permit application of the decision to other cases. In short, such opinions are crafted as communications to the parties rather than to the public. As a result, they are considerably less time-consuming to issue than published opinions, which, precisely because they are intended to be relied upon in the future in unrelated cases, are meticulously scrutinized for both present and future ramifications.

Some other circuits have rules similar to Local Rule § 0.23, while others permit citation of unpublished opinions when no published opinion is on point, and still others have no restrictions on citation at all. From time to time, various lawyers and law professors have urged that all unpublished opinions should be available for citation as precedents, or should at least be citable, even if not precedential. Three years ago, a panel of the Eighth Circuit ruled that it is unconstitutional for a court of appeals to deny precedential effect to an unpublished opinion. Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000). That opinion, however, was subsequently vacated as moot on rehearing in banc, Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (in banc), and no other court that I am aware of has adopted the views expressed in Anastasoff. See, e.g., Symbol Techs., Inc., 277 F.3d at 1366-68 (rejecting analysis in Anastasoff); Hart v. Massanari, 266 F.3d 1155, 1159-80 (9th Cir. 2001) (same); cf. Weatherford v. Arkansas, 101 S.W.3d 227 (Ark. 2003) (state case also rejecting analysis in Anastasoff).

Toward the end of 2000, the then-Solicitor General, Seth Waxman, on behalf of the United States, submitted to the Advisory Committee on Appellate Rules a proposal for a national rule permitting citation to unpublished opinions. A revised version

of that proposal has now been approved by the Advisory Committee as proposed Rule 32.1, which mandates that courts permit litigants to cite unpublished opinions for their "persuasive value." Report of Advisory Committee on Appellate Rules (May 22, 2003), at 31, 32 [hereinafter *Report*].

2. Authority to issue Rule 32.1. Before I turn to the reasons I believe the proposed national rule should not be adopted, I note that it is not clear to me that proposed Rule 32.1 falls within the rule-making authority created by Congress in 28 U.S.C. § 2072. That provision authorizes the Supreme Court "to prescribe general rules of practice and procedure and rules of evidence" for cases in district and appellate courts. Rules are proposed to the Supreme Court by the Judicial Conference, acting through its committee structure. See 28 U.S.C. § 2073. Although the issue is not discussed by the Advisory Committee, the committee appears to assume that the proposed rule is a normal exercise of the authority to promulgate "general rules of practice and procedure" for appellate courts. However, unlike the usual rules of appellate procedure that govern such issues as the timeliness of appeals, the size of briefs, judgments, rehearings, and the like, I believe this proposal will likely have a direct effect on the way appellate judges prepare their opinions: If an unpublished opinion is citable, some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material, perhaps by omitting the facts and leaving only the barest of reasoning or by omitting all content save the word "Affirmed." In addition, courts that are later presented with arguments based upon unpublished decisions will have to determine what weight, if any, is to be given to the decision, even if it is, by local rule, not precedential. I submit that it is beyond the scope of the rule-making authority of 28 U.S.C. § 2072 to establish rules that will affect the construction and import of opinions.

Even if authority exists for promulgating such a rule, I believe it is highly inappropriate to establish a national rule requiring uniformity among the circuits as to the citation of opinions. The circuits have traditionally been afforded a great

deal of independence in establishing rules concerning their internal practices and procedures pursuant to Federal Rule of Appellate Procedure 47 and 28 U.S.C. § 2071. The Judicial Conference resolutions referenced above demonstrate this deference. For example, in Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1, 4 (1963), the Supreme Court ruled that 28 U.S.C. § 46(c) vested each appellate court with the power to decide for itself how it would interpret the language of requiring a majority vote of the active judges to order an in banc. This administrative independence is necessary to permit the courts to tailor practices and procedures to fit their unique caseloads and their perceived responsibilities to the communities they serve. Because of these differences, as well as the courts' varying conceptions of the appropriate way to communicate their judgments to litigants and the public, the imposition of a uniform national rule concerning citation to unpublished opinions will have a disparate, non-uniform effect on the different courts.

3. Impact of the Proposed Rule on the Circuits. The basic argument put forth by the Advisory Committee in favor of Rule 32.1 is that lawyers should be able to cite to a court any decision that any court has made. *Report* at 32. The Advisory Committee points out that lawyers may now cite all manner of writings not contained in formally designated "published" opinions, including law review articles, treatises, and newspaper articles. Id. The only writing precluded from citation in courts with restrictive citation rules is an unpublished opinion. Id. However, unlike all other writings, the uses to which unpublished opinions may be put have important consequences upon the functioning of the court that issues them, as explained more fully in this letter.

Placing much stock in its assertion that Proposed Rule 32.1 "is extremely limited" because it does not require that unpublished opinions be given precedential effect or dictate when or how such opinions may be issued, id. at 30, the Advisory Committee contends that "[i]t is difficult to justify prohibiting or restricting the citation of 'unpublished' opinions" because "[t]here is no compelling reason to treat 'unpublished' opinions differently," id. at 32. By contrast, allowing citation to

unpublished opinions, the Committee asserts, will eliminate two hardships for lawyers. One is that lawyers will no longer have to "pick through the conflicting no-citation rules of the circuits." Id. at 38. Another is that they will be able to avoid the risk of sanctions for violating the limitations of some circuits' no-citation rules. Id.

This threadbare rationale, which exaggerates the "hardships" imposed on lawyers while disregarding the adverse consequences the proposed rule will impose on the courts of appeal as well as other substantial costs, is insufficient to justify the inevitable sea change in court practices that the rule will effect. As an initial matter, there are several quite compelling justifications for according circuits the discretion to decide that certain non-precedential dispositions may not be cited. As explained above, the practice of issuing unpublished or non-precedential dispositions developed in response to the exponential increases in appellate caseloads and the fact that the corpus juris was becoming dangerously bloated, difficult to navigate, and unnecessarily confusing as a result of the regular accretion of redundant and insignificant decisions. The enormous efficiencies derived from the ability to dispose of the legal issues in a case succinctly without engaging in the painstaking work of ensuring that all of the relevant facts and analyses are sufficiently fleshed out to effectuate the decision's proper precedential effect cannot be gainsaid. But this efficiency is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand. If litigants are permitted to cite to all unpublished opinions, this confidence will be eradicated and, with it, the efficiency gains that prompted the use of unpublished opinions in the first instance.

From a practical standpoint, the proposed rule will alter the way judges prepare unpublished opinions, making them either shorter or longer. If citation is permitted, some judges will prepare elaborate unpublished opinions to be sure that an opinion that can be cited contains all of the relevant facts and circumstances to provide a context for the holding and also more

elaborate reasoning to ensure that the intended boundaries of the holding will be respected by later panels. The Advisory Committee dismisses this concern on the ground that Proposed Rule 32.1 does not require courts to give unpublished opinions precedential effect or to alter the length or formality of such opinions. *Report* at 33. This response, however, overlooks the fact that, as the Advisory Committee itself acknowledges, the very reason unpublished opinions will be cited is for their "persuasive value." Id. at 31, 32. A future panel confronted with an argument that relies on an unpublished opinion will be placed in the difficult position of determining – as well as explaining – whether the unpublished opinion was in fact intended by the original – and probably different – panel to be "persuasive." And it is precisely to forestall such circumstances that authoring judges and fellow panel members will go to greater lengths to clarify the basis for their holding.

Other judges will likely shorten their summary orders to deliberately reduce their applicability to future cases and to avoid later being confronted with language that did not receive the attention given to published opinions. Indeed, it can be expected that some judges will resort to the practice of stating only "Affirmed."

Both consequences will disserve the appellate process. More elaborate opinions will significantly delay the appellate process as the writing judge takes additional time to prepare a citable opinion and two colleagues take additional time to scrutinize and assist in refining it. In a court like the Second Circuit, where about two-thirds of cases are decided by summary order, this can be expected to delay our disposition rate significantly, to the detriment of the litigants and the bar. Moreover, while lawyers will no longer have to "pick through the conflicting no-citation rules of the circuits," litigation costs will mount as a result of the need to pick through the greatly expanded base of citable opinions and to examine relevant opinions with greater care in preparing briefs.

In those instances where judges choose to issue very short or even one-word opinions, the costs will be borne by the

litigants, who will be deprived of opinions that explain the court's reasoning in reaching its disposition and that assure the litigants that the court understood and actually reckoned with the contentions that were raised on appeal. Moreover, in the event the Supreme Court chooses to grant or simply consider a case disposed of by unpublished opinion — a not unprecedented occurrence, see, e.g., Swierkowicz v. Sorema, 5 Fed. Appx. 63, 2001 WL 246077 (2nd Cir. Mar. 12, 2001), rev'd, 534 U.S. 506 (2002), the circuit panel's reasoning will be obscure to the Court.

Under either scenario, i.e., longer opinions that usurp valuable judicial resources or shorter opinions that leave parties feeling bewildered and short-changed, the appellate process will be detrimentally affected. In contrast to these costs, the benefits to be gained by litigants under the proposed rule are trivial at best. Under the Second Circuit's present practice, properly employed, unpublished opinions are issued only when an existing precedent covers the claim at issue. If there is such a precedent, an additional published opinion serves no useful purpose.

In those extremely rare instances where it turns out that a summary order addresses a novel legal issue or where the court's pronouncement might have utility beyond the bounds of the case at hand, a litigant is free to make a motion to publish. Such motions, while infrequent, are routinely granted; but they allow the panel the opportunity to revise the opinion with a view towards publication, fleshing out the facts and analysis to more readily permit its use as precedential authority.

The Advisory Committee's assertion that the proposed rule will spare lawyers from having to "pick through conflicting no-citation rules" is overstated. My understanding is that up until last year, the only true "conflict" created by the circuits' varying no-citation rules arose because the Fourth Circuit's rule purported to permit citation to the unpublished opinions of any court under some circumstances, irrespective of the issuing court's local rules, thereby conflicting with rules, like the Second Circuit's, that prohibit citation of unpublished decisions

in any court. However, the Fourth Circuit has since changed its rule, and it now permits unrestricted citation only to Fourth Circuit unpublished opinions. Thus, there is no conflict among the circuits' rules. There are differences among the rules, but it is no more difficult for lawyers to have to check a circuit's local rule regarding citation to unpublished opinions than to check its local rules regarding other matters, such as the form of motions or the formatting of briefs.

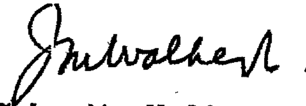
In short, in an era when pro se appeals constitute about 40% of appellate dockets, and insubstantial sentencing and immigration appeals comprise a significant portion of the balance, permitting citation of every written opinion promises to add considerable extra work for judges and lawyers with very limited, if any, benefit to the adjudicatory process.

4. **Any Rule Should Operate Prospectively Only.** As I have tried to make plain, I and many of my colleagues strongly oppose adoption of Proposed Rule 32.1. But in the event the Advisory Committee chooses to submit the proposed rule to the Standing Committee, I urge that the rule be drafted to explicitly operate only prospectively, thus restricting citation to unpublished decisions that issue after the effective date of the rule. This is the approach that has been taken by those circuits that have revised their local rules. See, e.g. D.C. Cir. Local Rule 28(c) (permitting citation only to unpublished decisions issued by it after January 1, 2002). As is likely true in most circuits, the Second Circuit has accumulated several decades worth of unpublished opinions that were never drafted with a view to publication. Were this body of work to be suddenly citable, confusion would be all but certain. Limiting the Rule's applicability to future opinions will at least permit the circuits to revise their drafting practices in anticipation of the rule, while obviating the unforeseeable and unintended consequences of unpublished opinions issued long ago.

I thank you for considering the views expressed in this letter, as to which I am joined by the following colleagues on the Second Circuit Court of Appeals: Wilfred Feinberg, James L. Oakes, Ellsworth Van Graafeiland, Thomas J. Meskill, Jon O.

Newman, Amalya L. Kearse, Richard J. Cardamone, Ralph K. Winter, Roger J. Miner, Joseph M. McLaughlin, Pierre N. Leval, Guido Calabresi, José A. Cabranes, Rosemary S. Pooler, Sonia Sotomayor, Robert A. Katzmann, Barrington D. Parker, and Richard C. Wesley.

Sincerely,



John M. Walker, Jr.,
Chief Judge

cc: Members of the Advisory Committee on Appellate Rules
Members of the Standing Committee on Rules of Practice and Procedure
Chief Judges of the United States Courts of Appeals
Judges of the Second Circuit Court of Appeals