4987 Shadow Glen Court
Dunwoody, GA 30338
February 8, 2004

03-AP-472

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. The difficulty with the proposed rule stems from one unassailable fact: The volume of mandatory appeals that the federal Courts of Appeals must handle makes it impossible to devote to each case the time and attention necessary for the preparation of a published opinion. Unpublished and uncitable dispositions provide reasoned closure to civil and criminal disputes, while conserving resources for the critical preparation of published opinions. Proposed FRAP 32.1 would mandate a rebalancing of these priorities, resulting in a degradation of the quality of published opinions and a loss of respect for the federal judicial system.

Published opinions are precedent; unpublished opinions are not. Were the distinction that simple, I would not be writing this letter. If unpublished opinions are merely another source for a court to consider, without compulsion, why preclude litigants from bringing them to the court's attention? One might argue that this question should be left to each federal Court of Appeals rather than mandated centrally, but I wouldn't feel strongly enough about it to write.

In reality, the question of precedential authority is more complex. The Advisory Committee Note emphasizes that proposed FRAP 32.1 does not require that every disposition of a Court of Appeals be given precedential weight, only that each be citable. The Note thus contemplates a system in which a Court of Appeals' published opinions receive their full binding effect, while unpublished dispositions will be used for their persuasive authority only, like law review articles and Shakespearian sonnets. The Committee imagines a dichotomy real in theory but false in practice. The lower federal tribunals, the state courts, and the litigants appearing before them, will not make such easy distinctions in their search for guidance on difficult questions of federal law. The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America

has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals will not be treated like that of Art Buchwald, or even Lawrence Tribe.

As a clerk for a federal Court of Appeals judge and a justice of the United States Supreme Court, I saw first hand how much care goes into the preparation of published opinions. But even here, lower courts and litigants often overweight these pronouncements, ascribing significance to each word, phrase and punctuation mark beyond anything contemplated by the original decision makers. This problem will be magnified many fold with unpublished dispositions, which by necessity cannot be prepared with the attention to detail of published opinions. Unpublished dispositions may not be quite so closely analyzed as published opinions, but they will be greatly overvalued.

None of this will be lost on the judges of the Courts of Appeals. Without the assurance that their unpublished opinions will not be distorted beyond their intended purpose, these judges will adopt defensive strategies, each of which is detrimental to the proper administration of justice. Judges may devote more time and effort to the crafting of unpublished opinions, at the expense of published opinions and timely resolution (there are only so many hours, and law clerks, in a day), with a resulting regression of all opinions to a mediocre, and increasingly delayed, mean.

More likely, appellate judges will act to preclude any misuse of unpublished dispositions by issuing one-sentence orders in these cases. Such orders present no danger of overinterpretation—and little necessary information to the litigants. A justice system must be more than a mechanism for the resolution of disputes. A random number generator with the force of law behind it can be rigged to provide a winner to every appellate case. A justice system that will keep the peace and order for which it is intended must engender respect from those who appear before it through an understanding that there is reason behind the resolution. Masses of "The decision of the district court is AFFIRMED" dispositions will undermine that understanding and diminish that respect.

The proposed rule emphasizes difficult questions about the priorities of a judicial system and the appropriate allocation of scarce judicial resources. Each federal Court of Appeals and appellate panel is working through them. Let them continue working. I urge the Committee to reconsider this ill-advised rule.

Sincerely,

Mark Snyderman