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To: <Rules_Comments@ao.uscourts.gov>
cc:
Subject: Proposed Fed. R. App. P. 32.1

03-AP-490

The Honorable Samuel A. Alito, Jr.

United States Court of Appeals for the Third Circuit

Room 357, 50 Walnut Street

Newark, NJ 07101-0999

In re: Proposed Fed. R. App. P. 32.1

Dear Judge Alito:

As a former federal law clerk and current associate in a D.C.-based appellate boutique, I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. I agree with many of the comments criticizing this proposed rule - most notably, the positions taken by a majority of judges on the Seventh Circuit and Ninth Circuit Judge Alex Kozinski - but I will not substantively repeat those arguments here. Instead, I will highlight two points I find particularly troublesome.

1. *LOCAL RULES FOR LOCAL SITUATIONS.*

The proposed rule would force all circuits - even those where the majority of judges strongly oppose it - to allow citation to unpublished dispositions. There is certainly a time and place for national rules, but this is not it.

It may be true that *some* circuits have the staff and resources to spend time crafting and reviewing the language in unpublished dispositions. But this is not true of all circuits. And we know this because the judges of these circuits *have said exactly that* in submissions to this Committee. Who better knows the dockets of these circuits - and the anticipated effect of the proposed rule - than the very judges producing the work to which the rule would apply?

These judges have made clear that there is barely time to review *published opinions*, let alone police unpublished dispositions. Circuits with lighter caseloads may be able to follow the rule and still handle their dockets - and that's why some of these circuits already allow citation to unpublished

dispositions. But larger circuits would find it effectively impossible to maintain a consistent body of circuit precedent without sacrificing the quality of the circuit's published work - the work that *should* consume the vast majority of judicial time.

Whether or not one agrees with these judges' arguments, no one could reasonably disagree that the differences between the circuits are real - they *do* come in varying sizes and dockets. If the Committee wishes to impose a uniform requirement on disuniform courts, it seems reasonable to place the burden on the Committee to offer concrete evidence to prove the rule is necessary. The Committee has instead offered only weak answers and, in some cases, failed even to address the opposition's main points.

If the Committee's unsupported speculation were true, every circuit would come to the same conclusion and adopt the same rule on its own. The very fact that different circuits have reached different conclusions - unsurprisingly, those with lighter dockets generally allowing the citation of unpublished dispositions and those with heavier dockets prohibiting it - suggests that a national rule will not fit the local circumstances faced by different circuits.

2. *UNPUBLISHED DISPOSITIONS WILL BE CITED AS PRECEDENT.*

The Committee has expended great effort clarifying that its proposed rule only allows the *citation* of unpublished dispositions; it does not require courts to treat these dispositions as precedent. But the Committee has not provided a satisfactory response to this simple question: If every circuit in the country currently allows litigants to copy the *substance* of an unpublished disposition - its reasoning and the cases found therein - what is added by the actual citation *if that citation is irrelevant*?

The reason - looking to the real world - that a litigant would cite an unpublished disposition is to show that some court has reached a certain conclusion on a certain issue in the past - in other words, to cite it *as precedent*. It is *not* to offer that court's reasoning - the reasoning could be copied without attribution. Nor is it to offer the cases that court relied upon to reach its conclusion - those cases could be cited directly. The only point is to bind the court. Whether that "bind" is through official rules - as in "law of the circuit" - or simple persuasive value - as with dicta - does not matter. The difference in "precedential value" is one of degree, not kind.

The proposed rule thus quite clearly takes unpublished dispositions - meant for the parties in a case *and only those parties* - and elevates it to some level of precedent. And it does this even though (a) the deciding panel did not intend to bind later courts (they could have published); and (b) circuit

courts will be forced to adjust their practices (negatively) to account for an unpublished disposition's new precedential effect.

I have seen two primary responses to this point, neither of which is persuasive.

a. *Response One*: "Judges know to ignore unpublished dispositions."

If the answer is that judges will ignore the citations, *then why allow them in the first place*? It is most curious to advance a rule on the ground that what it allows - citations - will and should be readily ignored. There is nothing to gain from letting litigants waste their time, resources, and page limitations on citations that no court can entertain.

More troubling, however, is the result the Committee must actually imagine - that these citations will *not* be ignored. And the Committee - if that is the Committee's true understanding - is likely correct. It is the rare district court that will feel free to ignore the so-called "opinion" of three circuit judges when deciding an analogous issue on analogous facts. And this means that dispositions expressly and explicitly labeled as nonbinding will soon affect the course of litigation in all circuits. The circuit courts issuing these opinions will have no choice but to (1) begin wasting time policing these dispositions; or (2) simply replace a disposition's short-yet-satisfactory explanation with a one-word answer: "AFFIRMED."

Not only would this latter result make these dispositions less useful to the litigants who receive them, but it would also cause the public to lose faith in the court system - litigants would have no way to know why they lost or whether the judges even listened to or understood their arguments.

b. *Response Two*: "Judges can explain that unpublished dispositions are not binding precedent and ignore them where appropriate."

This second response is really just a variant of the first. On this logic, a panel can always explain to litigants that unpublished dispositions are not binding on the panel and thus will be ignored.

There is no obvious comfort in telling a litigant that an unpublished disposition is on-point yet incorrect, and will not be followed because it did not undergo the appropriate level of attention and scrutiny. If that's the system, then again why would anyone allow their citation in the first place? If the *reasoning* that led to the disposition's result is persuasive, it will be just as persuasive without the citation. If it is not, then that reasoning will not (and should not) be followed. There's no clear benefit to a system

that forces judges to acknowledge lapses in language in past dispositions, or distinguish imperfectly recounted facts, where the disposition was never intended for later citation in the first place.

* * *

To put it simply, unpublished dispositions will either go unnoticed (to the confusion and frustration of those who cite them), or they will go noticed to the extent of wasting judicial time and resources without adding value. There is no reason to impose these costs on the system where each circuit can currently impose a proper rule, gauged to address the circuit's particular problems, on its own.

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There are many ways to deal with the perceived problems of noncitation rules. Among others, the Committee could liberalize publication standards; require clear and precise labeling on every disposition to explain its scope and applicability; *disallow* citation – as a uniform, national matter – on the logic that each circuit could always *publish* opinions it wants later courts to consider. But the current "fix" promises little more – and offers absolutely no evidence of anything more – than greater problems. The carefully considered opinions of those most directly affected by this rule – the judges of our nation's larger circuits – should be respected and, absent clear evidence to the contrary, directly followed.

For these reasons, and those expressed in the submitted comments of the judges noted above, I urge the committee not to recommend the proposed rule to the Judicial Conference.

Sincerely,

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