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February 16, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Opposition to proposed Fed.R.App.P. Rule 32.1

Dear Mr. McCabe:

I write to oppose strongly proposed Rule 32.1, Fed.R.App.P, which would provide for the ability to cite memoranda dispositions of the United States Courts of Appeal as precedent.

The reasons I oppose the Rule, are these:

1. Memoranda dispositions ordinarily do not present full-blown, reasoned analysis of the issues presented, as do opinion dispositions. Thus, their publication may result in less than fully-reasoned discussions of the law ending up being citable law, judges having to do an extraordinary amount of work to get the ususal memoranda up to opinion quality, or dispositions that simply say "affirmed" or "reversed," so that the ability to cite them will be wholly nugatory. If such summary decisions result, the parties and lawyers involved in an appeal would be provided with no hint of the reasons for a disposition.

2. Federal judges are overburdened. Many of them will not want to publish for citation dispositions that will usually not be as polished as opinion dispositions. The proposed change probably will have the unintended effect of forcing conscientious judges to spend considerably more time on memoranda dispositions, which really are only intended to provide counsel and parties to an appeal with some brief explanation of how the court reached its disposition. This likely will cause an enormous burden, slow down the disposition process, and, as noted above, may result in dispositions that simply say "affirmed" or "reversed." This would be a disservice to the parties and counsel.

3. The proposed Rule will created too much law, which concomitantly will put an enormous

burden on appellate judges, district judges, and practicing attorneys to stay current with the law in their (and perhaps other) circuits.

4. The proposed Rule will cause an enormous increase in number of citable opinions. This increase will provide attorneys with the opportunity to provide courts with string citations including citable memoranda dispositions, and will create significantly more work for appellate judges and their law clerks, who will need to read all the cited cases. This duplication is unnecessary: if there is a citable opinion on point, adding memoranda dispositions on the same point will add noting, but may provide an unfair impression as to the number of cases that support a particular position.

Therefore, I strongly oppose the proposed Rule 32.1.

Very truly yours,

Kirk N. Kirkconnell

KNK:wp