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Honorable Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to the Federal Rules of Appellate Procedure
Concerning the Citation of Unpublished Opinions

Dear Mr. McCabe:

I write on behalf of The Association of the Bar of the City of New York and its Committee on Federal Courts (the ACommittee≅) to express our support for proposed Rule 32.1 of the Federal Rules of Appellate Procedure that would establish a uniform national standard governing the citation of unpublished opinions of the circuit courts of appeal.

The Committee enthusiastically endorses this proposal. We believe that the proposed rule is narrowly tailored to address an issue of increasing importance to practicing lawyers, who more frequently find themselves practicing in multiple jurisdictions. Ultimately, a uniform rule allowing for the citation to unpublished opinions will benefit both the bar and the bench.[1]

The Association of the Bar of the City of New York is one of the country=s oldest bar associations, having been founded in 1870. Our Committee on Federal Courts studies

1 We do propose one modification in the proposed Rule: we believe the rule should require that copies of all cited unpublished opinions be provided to opposing counsel and the court, even if the opinions could be found on a publicly accessible electronic database (see p. 5, below).

the workings of the federal courts and issues reports and recommendations for improving the administration of justice in those courts. The Committee=s membership is comprised of a broad cross-section of the Bar, including lawyers who represent plaintiffs, defendants, and government agencies, as well as members of the judiciary and academia. Thus, the consensus view that follows covers a broad range of the bar in New York City.

Background

Almost 40 years ago, the Judicial Conference of the United States encouraged federal courts to publish only those opinions of Ageneral precedential value≅ and to limit their length and number. The reasons advanced were to reduce the costs of maintaining accessible libraries and to promote judicial economy. In 1972, a Federal Judiciary Center report prompted the federal courts of appeals to take action, and Aby 1974 the circuits had developed plans for the issuance of unpublished opinions.≅[2] While these plans Aindicated a substantial amount of experimentation across the circuits,≅ the Judicial Conference expressed its hope that Athe circuit plans would eventually become more uniform.≅[3]

Since that time, the number of unpublished opinions has dramatically increased, and in every circuit the percentage of unpublished opinions now far exceeds the percentage of published opinions. For the 12-month period ending September 30, 2002, 80.5 percent of the total number of opinions or orders filed in cases terminated on the merits after oral hearings or submissions on briefs were unpublished.[4] The highest percentage of unpublished opinions was issued in the Fourth Circuit, 91.8 percent, while the lowest percentage of unpublished opinions, 58.1 percent, was issued in the D.C. Circuit.

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2 Bruce M. Wexler & F. Christopher Mizzo, AUnpublished Opinions Rising, But Do They Help?,≅ *New York Law Journal*, Litigation at S8-S9 (February 11, 2002) (AWexler & Mizzo≅) (citing Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals,* Federal Judicial Center Staff Paper, 1985 WL 71560, at *2 (1985) (AStienstra≅); Hon. Boyce F. Martin, Jr., AIn Defense of Unpublished Opinions,≅ 60 Ohio St. L. J. 177, 180 (1999)); *see also Caron v. United States*, 183 F. Supp. 2d 149, 156-57 n.7 (D. Mass. 2001) (citing Hannon, *A Closer Look at Unpublished Opinions in the United States Court of Appeals*, 3 J. App. Prac. & Process 199, 200 (2001) (footnotes omitted)).

3 Stienstra, *supra*, at *4.

4 *See* 2002 Annual Report of the Director, Administrative Office of the Courts, Table S-3 (found at http://www.uscourts.gov/judbususc/judbus.html).

In addition, the Judicial Conference=s aspiration for uniformity remains unrealized. In the last thirty years, each circuit has promulgated its own local rule relating to citation of unpublished opinions. While virtually all of the circuits allow citation of unpublished opinions in related cases for res judicata, collateral estoppel, law of the case and similar purposes, the circuits are hardly uniform otherwise. Some circuits (Second, Seventh, Ninth and Federal) generally prohibit citations to unpublished opinions while others (First, Fourth, Sixth, Eighth, and Tenth) generally allow citations to unpublished opinions for persuasive purposes on a material issue if there are no published opinions that would serve as well. Still other circuits (Third, Fifth, and Eleventh) are the most permissive and allow citations of unpublished opinions without limitation for their persuasive value. The D.C. Circuit appears to be charting a new course in its rule, which permits unpublished opinions (issued after January 1, 2002) to be cited Aas precedent.≅

The diversity in the rules makes for some anomalous results. For example, it is possible to cite an unpublished First Circuit decision to the Second Circuit but it is not possible to cite an unpublished Second Circuit decision to the Second Circuit. It is also possible that in some jurisdictions a litigant, while not able to inform an appellate court of its own history by citing its unpublished opinions, can nonetheless cite to other sources, such as legal treatises, which have no such constraints and may well include references to unpublished decisions that could not otherwise be cited. Most fundamentally, in many jurisdictions a rigid Ano citation≅ rule eliminates the very possibility that a litigant can cite to an appellate court today what it decided yesterday B if what it decided yesterday is embodied in an unpublished opinion. Thus, this makes it possible for an appellate court to render one decision in an unpublished opinion on one day, and the opposite decision on the same or similar issue on the next. But as Justice Cardozo once observed,A[i]t will not do to decide the same question one way between one set of litigants and the opposite way between another.≅ Cardozo, *The Nature of the Judicial Process*, 33 (1921).[5]

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5 There is also the possibility, although presumably a rare one, that litigants might not be allowed to cite to the very decisions (because they are unpublished) that an appellate court will rely on in rendering decision. *See* Carpenter, AThe No-Citation Rule for Unpublished Opinions: Do The Ends Of Expediency For Overloaded Appellate Courts Justify The Means Of Secrecy?,≅ 50 S.C. L. Rev. 235, 251 nn. 38, 39 (1998) (citing *Peters v. United States*, 9 F.3d 344, 346 (5th Cir. 1993) (per curiam) (citing to unpublished opinion as support for law of the circuit); *United States v. Ellis*, 547 F.2d 863, 868 (5th Cir. 1977) (considering an unpublished opinion to be binding); *see also Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993) (AThis Circuit has considered its unpublished opinions to be binding precedent, although we discourage their citation.≅), *reh=g granted en banc*, 12 F.3d 426 (5th Cir.), *rev=d*, 44 F.3d 334 (5th Cir. 1994)).

While appellate judges favor the use of unpublished opinions for those circumstances in which they believe they are not making Anew law,≅[6] unpublished opinions can sometimes result in changes in the law and thus can be significant.[7] Indeed, in a recent term, the Supreme Court reviewed two unpublished opinions B one from the Second Circuit and one from the Federal Circuit B and reversed them both.[8]

Finally, when appellate courts first began issuing unpublished opinions, many members of the bar had little, if any, access to them. Now, circuit courts have their own websites on which unpublished opinions are readily available.[9] Moreover, with the advent of Westlaw and Lexis, and most recently with the publication of West=s Federal

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6 *See Hart v. Massanari*, 266 F.3d 1155, 1177-78 (9th Cir. 2001) (AThat a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented. What it does mean is that the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases.≅); Salem M. Katsh & Alex V. Chachkes, AExamining the Constitutionality of No-Citation Rules,≅ *New York Law Journal* at 1 (April 2, 2001) (AKatsh & Chachkes≅) (ANo-citation rules were originally justified on the assumption that the appellate courts would only designate as unpublished those cases in which no new law is established and no existing law is modified or criticized.≅).

7 There are many unpublished opinions that address cases of first impression, or are of constitutional dimension; appellate courts have also issued unpublished reversals. *See, e.g.,* Katsh & Chachkes, *supra*, citing *United States v. English*, 173 F.3d 852 (table, text in Westlaw), 1999 WL 123556 (4th Cir. March 9, 1999) (addressing as matter of first impression B indeed, a matter on which the circuits are split B the circumstances under which sentencing under a Ayouthful offender≅ statute is an Aadult conviction≅ under the Sentencing Guidelines); *O=Connell v. Secretary of Health & Human Serv.*, 1999 WL 1039699 (Fed. Cir. Nov. 1, 1999) (Plager, J., dissenting) (certain sections of the Vaccine Act violate the Presentment Clause of the Constitution); *Quilichini-Paz v. Ramirez-Soto*, 187 F.3d 622 (1st Cir. Dec. 4, 1998) (per curiam) (district court erred in finding that appellant was not an arm of Puerto Rico for the purpose of Eleventh Amendment immunity).

8 See Holmes Group, Inc. v. Vornado Aircirculation Systems, Inc., 535 U.S. 826 (2002), vacating and remanding 13 Fed. Appx. 961 (Fed. Cir. 2001); Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002), reversing and remanding 5 Fed. Appx. 63 (2d Cir. 2001).

9 *See* http://www.ca[fill in circuit number].uscourts.gov

Appendix, which publishes the unpublished opinions of virtually every circuit, it is fair to say that an Aunpublished≅ opinion is now a misnomer.

The Proposed Rule

Given this background, the Committee believes that the proposed amendment to the Federal Rules of Appellate Procedure is a rule whose time has come. The rule is narrowly framed, and under its terms circuit courts retain their authority to disregard entirely any unpublished opinion. The rule also does not infringe on an individual circuit=s abilities to designate its opinions as precedential or non-precedential, published or unpublished. The rule merely affords litigants the opportunity to inform appellate courts of unpublished decisions; it is for the courts themselves, of course, to determine what weight should be given to those opinions. While the appellate courts in their own research may discover the relevance of unpublished decisions to a pending case, it surely can only aid the judicial process if litigants are permitted to provide this information as well.

The proposed text of Rule 32.1(a) is an improvement over earlier draft versions. It no longer provides that citation to an unpublished or non-precedential opinion is Adisfavored,≅ as an earlier version had suggested. Earlier versions also imposed requirements that had to be met in order for a litigant to cite an unpublished or non-precedential decision, including that a party must believe that the unpublished or non-precedential decision Apersuasively addresses a material issue in the appeal;≅ and that there was Ano published opinion of the forum court [which] adequately addresses the issue.≅ We had some concern that these (or any) requirements might lead to satellite litigation regarding compliance. We believe that the proposed rule as revised without any of these conditions will enhance the decision-making process for the bar and the bench.

With respect to Rule 32.1(b), while the advent of on line opinions and the publication of the Federal Appendix make opinions more readily available to litigants than ever before, the Committee favors the requirement that a copy of any decision that is not available in a publicly accessible electronic database, such as in Lexis or Westlaw or on a court=s website, must be provided to counsel and the court. But we do not think this proposal goes far enough. Rather, we believe that litigants of limited means, or counsel with minimal access to the Internet or to an extensive law library, should not be burdened with the task of finding an unpublished opinion that their more affluent adversary has identified and submitted to the court. Therefore, we would not limit the requirement that copies be provided only in cases where the decision is not available in a publicly

accessible database, but require all unpublished opinions that are cited to be served and filed.[10]

Conclusion

Our Committee believes that the proposed rule is a modest attempt at uniformity in the citation of unpublished or non-precedential decisions at a time when lawyers have greater access than ever to judicial opinions of all kinds, and practice increasingly in multiple jurisdictions. Some courts will issue opinions that they think are unimportant, but turn out not to be so, and litigants should have the opportunity to cite to these decisions.[11] An amendment to the Federal Rules of Appellate Procedure that will enable litigants to do so will enhance the administration of justice.[12]

We thank the Committee for its attention to this issue and for its consideration of this letter.

Very truly yours,

/S/
Thomas H. Moreland

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10 Rule 32.1(b) would therefore be revised to provide: ANotwithstanding the provisions of Rule 32.1(a), a party who cites a judicial opinion, order, judgment, or other written disposition that has been designated as Aunpublished,≅ Anot for publication,≅ Anon-precedential,≅ Anot precedent,≅ or the like 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.≅ We otherwise agree with the principle, embodied in Rule 32.1(a), that published and unpublished opinions should be subject to the same rules in all respects.

11 As Justice Stevens once observed, in making a similar point: AI refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.≅ Katsh & Chachkes, *supra*, citing Justice Stevens= Address to Illinois State Bar Association=s Centennial Dinner (Jan. 22, 1977).

12 The proposed amendment does not implicate the constitutionality of rules concerning unpublished opinions, nor do we take any position on that subject in this letter.

Chair, Committee on Federal Courts

bcc: Alan Rothstein, Esq. (via email)