Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Appellate Rules Committee

Testimony on Proposed Federal Rule of Appellate Procedure 32.1
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Good morning. Let me begin by thanking the Committee for this opportunity to offer my thoughts on Proposed Rule 32.1, which would abolish the current practice in most circuits of restricting, to one degree or another, the citation of certain memoranda and orders. Both for the reasons explained in the letter submitted by a majority of judges on the Seventh Circuit, and for the additional reasons I would like to highlight this morning, I and most of my colleagues oppose the proposed rule. Moreover, its flaws are deep enough that I doubt they would be cured by further study over the next year or so. I therefore urge the Committee to table this proposal indefinitely and to continue to entrust the manner in which legally binding precedent is developed to the discretion of each Circuit.

While it is an undeniable fact that thousands of dispositions in the federal courts of appeals fall under the non-citation rules of the several circuits – some 80% nationwide of all matters terminated on the merits – it is far less clear that this constitutes a problem, or that it cries out for a solution. The Committee Note offers several reasons for taking this action, but none of them withstands close scrutiny. Those reasons can be summarized as follows:

1. There is a need for national uniformity with respect to citation practices, and that uniformity should be achieved by a rule banning restrictions on citation, rather than by a rule

calling for every circuit to follow similar restrictive citability criteria.

2. Some version of truth-in-labeling ought to be followed: the present orders, memoranda, and summary dispositions that fall under the non-citation rules represent real decisions of real courts, and it is disingenuous to pretend otherwise.

3. We should prefer a more open system in which there are no limits on the materials counsel or the parties can call to the court's attention, at least when (as is asserted to be the case here) the change can be accomplished at little or no cost.

4. The rule change will lighten the burden on attorneys, who now must decipher the citation rules of each circuit and who now must restrain themselves from citing relevant dispositions in those circuits with restrictive rules.

I will begin with the question of burdens on parties and courts, then move to what I am calling the "labeling" question, and conclude with the uniformity point. I will refer to the non-citable materials in each circuit as "orders," because that is what we call them in the Seventh Circuit, even though I realize that terminology varies around the country.

First, however, it is worth noting one dog that is not barking. No one is seriously arguing that proposed Rule 32.1 is necessary to counter an impression that there is "secret" law of the circuit, hidden away in so-called unpublished orders. This story simply cannot hold in the 21st century court system. As the Committee Note itself acknowledges, the E-Government Act of 2002 [Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913] assures that every court of appeals is posting all of its decisions on its website. This practice, I might add, has been standard in the Seventh Circuit now for several years. This means that there is free Internet access to every last word coming out of the courts to anyone with the skill (and the access) to navigate the free websites both inside and outside

the Judiciary. For those with the resources to subscribe to Westlaw or Lexis, access is even easier. Whether or not there was ever a time when courts could sweep controversial issues under the rug through the vehicle of an "unpublished" opinion is beside the point, because that is surely not the case now. The discussion we are having today deals solely with the question whether each and every publicly available decision of the courts of appeals may be raised in submissions to the courts in support of the litigant's position.

Turning then to the arguments advanced in support of the rule, let me begin with the Committee's assertion that it will "relieve attorneys of several hardships." Distinguished members of the bar with extensive nationwide appellate practices have flatly disagreed with that prediction. The circuit rules are not hard to find (they too are on every court's free website). More importantly, just as the Seventh Circuit comments suggested, attorneys from private firms, public interest groups, and industry alike predict that the true hardship will come from the need to deal with the enormous body of decisions that are presently designated for non-citation. Recall that 80% number I mentioned a moment ago. It is just a national average that conceals important differences among the circuits – a point to which I will return in a moment for a different reason. By adding the non-citable dispositions to the body of law a competent attorney must research, the rule will increase the lawyer's workload (and for clients who pay by the hour, the client's bill for this service) by four-fold overnight. It will hit the poor and the middle class, whose access to the courts is already problematic, especially hard. It is hardly the direction we should take, when the true problem facing us is that of the spiraling costs of litigation.

And yet all the evidence suggests that this enormous extra work will yield very little marginal benefit. If you are having trouble sleeping some night, I invite you to sit down and read

a week or two's worth of the non-citable orders issued by the Seventh Circuit -- every one of which, I might add, I read. You will find prisoner cases where the prisoner failed to allege that a prison official acted with the necessary malice to make out an Eighth Amendment violation; Social Security cases where the administrative law judge's decision was supported by substantial evidence; immigration cases where the same is true of the immigration judge's decision; employment discrimination cases where the plaintiff failed to satisfy the well-worn *prima facie* case under *McDonnell Douglas*; and *Anders* brief after *Anders* brief in criminal cases where the order rehearses why counsel has correctly concluded that a criminal appeal would be utterly without merit. Yet each of these orders typically includes a brief discussion of the standard of review on appeal, or of basic principles of administrative law, or of the way in which one goes about proving employment discrimination. To say that they would clutter up the research of someone faced with a genuine issue in one of those areas is an understatement. Even if we assume that there is some hardship to lawyers under the present system, therefore, the proposed new system would be far worse.

It is also a fallacy to think that the proposed rule would be cost-free from the standpoint of the courts. Many commentators have pointed out that it is fanciful to think that a line can be drawn between the ability to *cite* an opinion and the *precedential value* of that opinion. If the cited order is the work product of our court, if we must study the facts to see if they are distinguishable from the case presently before us, if we must either follow the precise legal formulation found in the order or explain why we are not doing so -- in short, if (as is inevitable) we must treat it as a full-fledged precedential opinion of the court, then it *is* a full-fledged precedential opinion of the court. As the old saying goes, if it walks like a duck, quacks like a duck . . . You know the rest. With a vastly increased pool of cases, the chances of intra-circuit conflicts are magnified and there will be

a consequent need to invoke *en banc* procedures more often. The same is true of inter-circuit conflicts, but there the burden will fall on the Supreme Court's *certiorari* docket.

And there can be no denying the fact that the workload on already-burdened judges will increase, as they strive to avoid the inadvertent discrepancies among opinions that today do not matter. This is work that, in a time of shrinking resources for the Judiciary as a whole, we can ill afford to take on. Remember that the no-citation rules evolved under the leadership of people like Judge Griffin Bell of the old Fifth Circuit, just when caseloads were starting to explode in federal courts of appeals around the country. The last I checked, things have only gotten worse since Judge Bell's day: more than ever, courts desperately need effective docket management tools that will keep the law of the circuit coherent, that will nonetheless give the parties in every case a full explanation of the result, and that will accomplish both of those goals without undue cost or delay.

Truth-in-labeling sounds like a good idea, but it becomes less compelling when we think about the nature of these non-citable orders. Any lawyer who wants to use the legal underpinnings of a non-citable order has only to borrow the analysis from that order and refer the court to the precedential opinions on which the order relied. If the lawyer – or for that matter, in the Seventh Circuit, if any person whatsoever – thinks that the order truly broke new ground, he or she need only file a motion with the court requesting publication. It is our practice to look favorably on such motions; I personally cannot remember the last time a panel on which I sat denied one.

Finally, let me spend a moment or two on the uniformity point. Sometimes uniformity is a good thing, but sometimes it can be used to stifle local experimentation (think, for example, of the Supreme Court's constant praise of the states as laboratories for innovation) or essential tailoring to local circumstances. A superficially uniform rule superimposed on dissimilar actors will lead to

was 1,404 cases. 581 were published, written, and signed; zero were unpublished, written, and signed; in the unsigned opinion group, 22 were published written explanations, while 765 were unpublished. Thirty-six unpublished, unsigned orders without comment were issued. The Tenth Circuit issued 328 published, written and signed opinions, and 1,010 unpublished, written, and signed opinions

The same differences show up when one consults the total percentage of unpublished opinions by circuit. In 2003, the Fourth Circuit had the highest percentage, at 91%; the lowest percentage was in the First Circuit, at 39% – a difference exceeding 100%. The Seventh and DC Circuits both had 57% of their opinions "unpublished" (in the limited sense of this term I noted earlier), while the Eleventh and Fifth Circuits had 87%.

Thus, while on the one hand, the Seventh Circuit has one of the most restrictive rules governing citation of its orders, on the other hand a far smaller percentage of its docket is being placed in the "order" and thus non-citable category. Even though we are a small circuit, by number of states and number of judges, in absolute numbers we had the third-largest number of written, signed and published opinions: the 9th Circuit, not surprisingly given its size, led the pack with 777 such opinions; the 8th Circuit had 648, and the 7th Circuit had 581. No one else exceeded 500.

Anyone who wants to look at the way that so-called "unpublished" (or more accurately, non-citable) opinions are treated needs to take the other half of the equation into account as well: how many dispositions does the circuit designate for full precedential value? My point here is not to say that there is any magic percentage that every circuit should meet. It is the more modest point that here, as elsewhere, local variations matter a lot. Many Seventh Circuit judges were frankly baffled when the Committee first started discussing proposed Rule 32.1, because it was hard to see what

non-uniform results.

In the comments filed with the Committee, many people adverted to the undeniable fact that the thirteen circuits vary in geography, caseload, case mix, and in myriad other ways. That is certainly true, and those variations alone are enough to make one hesitate before assuming that something that works for the First Circuit will also work for the Ninth. In other ways intimately related to the non-citation rules, however, the circuits also vary dramatically: allocation of cases to the oral argument docket versus the non-argued docket; percentage of cases resolved by a full-blown published, precedential opinion; and use of different summary disposition techniques. When one takes these differences into account, it becomes clear that citation practices should not be approached with a one-size-fits-all mentality.

Let us begin by looking behind that 80% number to which I have referred twice. The statistics collected by the Administrative Office of the U.S. Courts for the 12-month period ending September 30, 2003, show that out of a total of 27,009 opinions or orders filed in cases terminated on the merits after either oral hearings or submissions on the briefs, 79.9% were unpublished. The statistics divide that 27,000-some number into three groups: written, signed dispositions; written, reasoned, but unsigned; and written, unsigned, and without comment. Each of those three categories then shows how many dispositions were published and how many unpublished.

The variations among the circuits are enormous. The Second Circuit, for example, had a total of 1,934 opinions or orders of all kinds. Of that, 438 were published, written, and signed; 1,451 were unpublished, written, and signed; and 45 were published, written, and unsigned. That court does not use the written, unsigned, and without comment method at all. In the Seventh Circuit, as any judge could have told you, a written, signed opinion is *always* published. The Seventh Circuit's 2003 total

the problem was.

In conclusion, let me suggest a different area for the Committee's attention that would address the rare situation in which a panel errs in designating an order for non-precedential status. I refer to the targeted rules found in each circuit for changing the designation of a particular order from "unpublished/uncitable" to "published" and hence citable. While (by my quick count) most circuits have such rules, they vary in their scope and emphasis. In the Seventh Circuit, Local Rule 53(d)(3) provides that any *person* may request by motion that a decision by unpublished order be issued as a published opinion. First Circuit Local Rule 36(b)(2)(D) is similar, although it refers to "any party or other interested person" rather than the unqualified "any person," and it specifies that "good cause" must be shown. The Fourth Circuit's Rule 36(b) gives the right to make such a motion to "counsel" only, the Fifth Circuit's Rule 47.5.2 allows any judge of the court or any party to make such a request.

If there is serious concern that the occasional non-citable order was misclassified as something that merely applies existing law, and instead it advances the law somehow, then the Committee could find ways to encourage the courts of appeals to put into place effective mechanisms for reconsideration of the initial classification. That would be far better than unleashing a torrent of routine orders that are drafted with the sole purpose of explaining the outcome of the case to the litigants themselves on an already overburdened court system and legal profession. As I said at the outset, I urge the Committee to reject proposed Rule 32.1 and thereby to leave undisturbed the prerogative of each circuit to tailor its citation rules to its own circumstances.

Thank you.