STATEMENT TO ADVISORY COMMITTEE ON APPELLATE RULES

I. *Introduction*

My name is Edward Becker. I have been a Judge of the United States Court of Appeals for the Third Circuit for over twenty-two years and was Chief Judge for over five years. Prior to that I was a Judge of the United States District Court for the Eastern District of Pennsylvania for eleven years. I appear on my own behalf, though I believe that the views that I express fairly represent the views of the Judges of the United States Court of Appeals for the Third Circuit with respect to our experience with the citation of what we call Not Precedential Opinions ("NPO's") and what we used to call Not For Publication opinions. I do not represent that I speak for the Court with respect to the proposed National Rule.

I support the adoption of New Rule 32.1. I find the arguments set forth in the draft Committee Note persuasive, and I will not repeat them. Rather, I will limit myself to an accounting of Third Circuit experience, to comments on objections raised to the proposed 32.1, and the reasons I favor the proposed rule.

II. The Third Circuit Experience

A.

Citations to NPO's are not frequent. Such citation has never created a problem for us. To the contrary, when NPO's are cited, and they are from time to time, they often have been useful in a number of respects:

- First, they give us the benefit of the thinking of a previous panel and help us to focus on or think through the issues. For busy judges, that is a great boon.

- Second, they identify issues on which we should be writing a precedential

opinion. When an issue has been dealt with in an NPO and comes up again, that is a signal that we need to clarify the law precedentially. There is a suggestion in the Committee Materials that in *United States v. Rivera -Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), the Ninth Circuit admitted that various panels had issued at least 20 unpublished opinions resolving the same unsettled issue of law at least three different ways – all before any published opinion addressed the issue. Judge Kozinski tells me that that is not so, and I accept his explanation. But once or twice is too much, and it is only through citation of NPO's that we can identify the problem.

Third, citations to NPO's also help District Judges in the same way they help us. District Judges know they are not bound by NPO's. They are judges of the Third Article too and exercise independent judgment.

B.

Let me turn to the Third Circuit practice in connection with NPO's. We write on every counseled case. 79% are NPO's. Most are not cursory; in fact they average over seven pages. Because they are primarily written for the parties, they often or usually do not set forth the facts, but some NPO's do and are fairly comprehensive. At all events, they uniformly set forth the ratio decidendi of the decision.

These opinions are prepared in chambers under the close supervision of the judge. They are usually drafted by clerks but, to repeat, carefully reviewed and edited by Judges. In my chambers they are written by me (the law clerks take up too much time on the easy cases), though, when law clerks have done a bench memo, I draw upon it. Our NPO's are sufficiently lucid that their citation can be valuable. All of our NPO's in counseled cases are placed on line and hence are reported in the Federal Appendix. We do not

place our pro se cases on line.

C.

Let me contrast our practice with comments made to Committee about the practice elsewhere. I refer to representations that: (1) unpublished opinions are hurriedly drafted by staff and clerks and are written in loose, sloppy language; (2) because they receive little attention from judges, these opinions often contain statements of law that are imprecise or inaccurate; (3) judges are careful to make sure that the result is correct, but they spend very little time reviewing the opinion itself; (4) citing unpublished opinions might mislead lower courts and others about the views of a circuit's judges; and (5) it will be the rare unpublished opinion that will precisely and comprehensively describe the views of any of the panel's judges. Apparently these comments reflect the views of the Ninth Circuit, which is where the principal complaints about 32.1 come from. These descriptions of NPO's do not reflect practice in the Third Circuit, where, as I have said, the Judges are involved with the drafting of NPO's and they are reviewed with care. Moreover, we often have dissents from NPO's and concurrences as well. The Judges do not consider NPO's a burden. They do not take that much time to prepare. There is no delay in processing them and they are typically filed promptly after the regularly scheduled disposition date. Most are on non-argued cases, but many are on argued cases.

III. Criticisms of the Citation of NPO's

A. Judge's Time

1. NPO's are not burdensome to prepare. Is there a moral obligation to distinguish NPO's in opinions as some have said? I disagree. We do not even have to distinguish

every precedential case in our opinions, and don't do so.

2. Are too many NPO's cited? That's not our experience. Our bar is responsible. It does not want to waste our time or its own. And if a useless case is cited, it does not take long to discover that fact, and the citation is ignored.

B. Undue consumption of lawyer's Time? Same consideration at work. It doesn't take them long to discard an NPO of no utility. But if they find one that is persuasive it is worth the time.

C. Bloating of the corpus juris? – that's beyond our control. The NPO's are on line and in the Federal Appendix. The lawyers want them; the market has spoken. NPO's help lawyers in other ways (e.g., evaluation for settlement).

IV. Rationale of Rule 32.1

The citation issue was not a real one for us until we jettisoned our former practice of deciding about half of our cases with judgment orders (essentially one line dispositions). Moreover, in most of these cases there had not been oral argument. When I became Chief Judge I persuaded my colleagues that we owed a greater duty to our colleagues at the bar and to their clients. I viewed it as a matter of respect. I also viewed it as a matter of responsibility and accountability. My colleagues agreed, and we ceased writing judgment orders and started writing NPO's in every case. I view the proposed non-citation rule in essentially the same way. How can we say to members of our profession – and remember we work for them and their clients and the public, not vice versa – that they cannot cite to us what we have said? We are not bound by an NPO; *Anastoff* is not

the law, but we can at least think about it, and we cannot do that if the cases are not cited to us. The suggestion in the Advisory Committee materials that NPO's be phased out in favor of more precedential opinions and one-line judgment orders should be rejected; one line orders should not be the way Courts of Appeals do business.

V. Why a National Rule?

A. The zeitgeist for last several decades, animated by Congress as well as Judicial Conference, is in favor of national rules. Local rules are for experimentation and innovation that. That principle does not apply here. Neither are we dealing with an exception for local culture, which is a local (not circuit-wide) geographic notion.

B. We are all affected by a national rule. The proposed en banc quorum rules alters the Third Circuit rule. We prefer our rule, but we are prepared to live by new and different National Rule.

C. Law Practice is National – our sittings regularly have attorneys from New York, Chicago, California and elsewhere; procedure is complicated enough – they can look up a local rule but are unsure about its operation. A national rule is better.

D. But the strongest reasons for a national rule are those that I described above – our duty to the bar and the public; respect for the bar and the litigants; responsibility and accountability; and the unreasonableness of our saying to lawyers that you cannot cite what we have written.

That concludes my formal statement. I will be glad to answer any questions the Committee may have.