April 12, 2004

Statement in Opposition to Proposed Rule 32.1
Honorable John M. Walker, Jr.
Chief Judge, U.S. Court of Appeals for the Second Circuit

- I thank the Committee for permitting me to speak in opposition to Proposed Rule 32.1 of the Federal Rules of Appellate Procedure and to supplement my letter of February 11. Joining in my opposition are 18 other judges of the Second Circuit.

- **The focus of this statement is to highlight the major problems posed by this effort to impose a "One Size Fits All" rule on the appellate courts and, in particular, the way Rule 32.1 will affect the Second Circuit.**

  - First, some background. Pro se appeals constitute about 40% of the Second Circuit's docket, and insubstantial sentencing and immigration appeals comprise a significant portion of the balance. The great majority of these cases are disposed of by what we call summary orders, which are usually a page or two, that provide the litigant with a concise outline of the panel's reasoning in support of the disposition. Permitting citation of summary orders promises to add considerable extra work for judges and lawyers with very limited, if any, benefit to the adjudicatory process.

- **It is inappropriate for the Rules Committee to establish this type of uniform rule.**

  - As I explained in my letter, each circuit has historically been given autonomy in determining how best to conduct its business and allocate its scarce judicial resources.

  - This autonomy is exemplified by the various no-citation rules promulgated by each circuit in response to the Judicial Conference's exhortation in the late 1960s and early 1970s to devise such rules in order to curtail the burgeoning body of case law being created as a result of rapidly expanding caseloads.

  - The proposed mandatory rule would directly interfere with this autonomy.

  - While there may be salutary reasons to encourage the circuits to revisit their rules in light of technical innovations and the ready availability of unpublished decisions to litigants – as several circuits already have – the matter properly should be left to the discretion of each circuit court. In any event, the Judicial Conference should not go beyond requesting courts to consider changes to their internal practices, as the Conference did in 1965 and 1973.

  - Even if there is merit to the contention that citation should be allowed – a view that I disagree with – the impact of adopting such a rule will be different in each circuit. Accordingly, each circuit should be allowed to determine for itself when

and in what manner a rule allowing citations should be adopted. It is not appropriate for the Rules Committee to force each circuit to adhere to a "one size fits all" rule on an arbitrarily determined time schedule.

- Moreover, I believe that the Judicial Conference rule-making process does not apply to a rule that effectively dictates changes to the substance and legal import of a court's decisions and determines how the court will manage its caseload. Such a rule goes beyond establishing a uniform rule of "practice and procedure," as permitted by 28 U.S.C. § 2072, and instead improperly interferes with the circuit courts' prerogative to prescribe "rules for the conduct of their business," as established by § 2071. As § 2077 makes clear, there is no role to be played by the Judicial Conference or any of its committees in promulgating a circuit court's "rules for the conduct of [its] business."

- **The fact that several circuits have successfully allowed citation to unpublished decisions with or without restrictions as to their use does not justify a uniform national rule.**

  - The fact that several circuits at this point have adopted a <u>modified</u> version of Rule 32.1 without problems does not demonstrate that <u>all</u> circuits will be able to do the same.

  - Each circuit faces different workloads, comprising different subjects and issues. The Second Circuit is a high-volume court and a high percentage of its cases – many uncounselled – are suitable for summary disposition.

  - Moreover, each circuit's practice with respect to unpublished dispositions has become firmly entrenched over the past thirty years. Thus, even where no-citation rules may be identical, abandonment of them will have differing impacts on the conduct of a court's business.

  - Furthermore, each circuit has developed its own relationship with the community. In the Second Circuit, for example, we afford oral argument to all parties, including non-incarcerated pro se litigants. In return, we dispose of more than two-thirds of our cases by summary order.

- **The rule will indeed impose substantial burdens on the courts.**

  - Proponents of the rule have argued that there will be no increased burden on the courts because the courts can devise internal rules for treating unpublished orders in a consistent manner. This argument, which focuses primarily on the difficulties a court may encounter when litigants cite unpublished opinions to them, is wrong for at least two reasons:

  - **First**, as the Advisory Committee itself acknowledges, the very reason unpublished opinions will be cited is for their "persuasive value." A future panel confronted with an argument that relies on an unpublished opinion will be

placed in the often difficult position of determining and explaining whether the unpublished opinion is persuasive, including whether it was intended to be persuasive by the issuing panel. While this problem may well necessitate the additional work of searching out and reviewing the briefs and other materials related to the unpublished disposition, the infrequency of such citations makes the addition of such work pale in significance to the burden that will be placed on the panel that must draft the citable disposition in the first place.

- This burden stems from the necessity of trying to forecast precisely how the disposition will be interpreted by a future panel to which it is cited.

- Summary orders in the Second Circuit typically provide concisely reasoned explanations for the court's decision, but spare much of the factual and procedural elaboration that would be necessary to permit application of the decision to other cases. As a result, they take, on average, a matter of hours to prepare, whereas signed published opinions, which must be scrutinized for both present and future ramifications in unrelated cases, take weeks and, in some cases, months, to prepare.

- Most of the efficiencies garnered in preparing summary orders will be lost if they will become susceptible to citation in the future because the authoring judge will no longer be assured that short-hand statements of fact and law, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand.

- **Second**, the argument that courts will be able to modify the way they prepare unpublished dispositions as needed to accommodate the rule – like the concomitant argument that courts can devise internal rules for treating unpublished orders in a consistent manner – rests on the unrealistic assumption that there is homogeneity among judges in any given circuit. That is plainly <u>not</u> the case.

- Thus, while some judges will shoulder the burden of drafting more elaborate unpublished opinions to ensure they contain all of the relevant facts and circumstances required to provide a context for the holding, others will resort to one-line dispositions, and still other judges will change nothing in the manner they prepare unpublished decisions. The result will be a panoply of decisions of varying thoroughness and detail vulnerable to misinterpretation and misapplication by future panels.

- **By contrast, there is no compelling reason for permitting citations that justifies implementing such a sea change.**

  - The primary argument advanced in favor of the rule is that it will eliminate the hardships imposed on lawyers of having to "pick through the conflicting no-citation rules of the circuits" at the risk of being sanctioned. This is a red herring, given the fact that all unpublished decisions feature the issuing court's

limitations on citations on the front page. Moreover, lawyers are required to "pick through" local rules on several matters, including filing and brief requirements. Any minor inconvenience to lawyers cannot justify forcing courts to make such a pronounced change in the manner in which they conduct their business.

- Moreover, can there be any serious contention that there is a dearth of case law for lawyers to review in preparing their cases. The current body of case law is simply staggering. And, notwithstanding the implementation of no-citation rules some thirty years ago, it continues to grow exponentially.

- Some 360 volumes of the 3d Federal Reporter Series have been published in its first ten years of existence. The entire 2d Series covers approximately 70 years' worth of case law, from 1924 to 1994, and volume 360 of the 2d Federal Reporter was not published until 1966, some 42 years after that series came into existence. At the present rate, therefore, we can reasonably expect to reach the 4th Series sometime within the next seventeen years, even without Rule 32.1

- While it is true that lawyers will no longer be plagued by the herculean task of "pick[ing] through the conflicting no-citation rules of the circuits," they will be able to impose increased litigation costs on their clients by "picking through" the greatly expanded base of citable opinions and examining the relevant ones with greater care in preparing briefs.

- Proponents asserting that lawyers are unlikely to feel compelled to search unpublished decisions for cases that support their positions have ignored the fact that lawyers will nevertheless feel compelled to waste valuable time researching and devote scarce page briefs responding to unpublished decisions that contradict their position, in anticipation that such decisions will be cited by their adversaries or even the court.

- **From the perspective of the Second Circuit, the consequences of the rule will disserve the appellate process and hurt litigants.**

  - If, in response to rule 32.1, judges spend more time elaborating unpublished decisions, the entire appellate process will be significantly delayed. In my court, where about two-thirds of cases are decided by summary order, this can be expected to delay our disposition rate significantly, to the detriment of the litigants and the bar.

  - Moreover, because the bulk of our caseload comprises pro se appeals unsupported by any legal basis and routine sentencing and immigration appeals, the considerable amount of extra work imposed on judges and lawyers will result in few if any valuable additions to citable case law while generating a glut of redundant and insignificant decisions to be waded through for possible nuggets of value.

- In addition, as pointed out by New York Federal Defenders Barry Leiwant and Leonard Joy, who strongly oppose Proposed Rule 32.1, the rule will reinstate many of the inequities that prompted some no-citation rules in the first place and that have been ameliorated by the advent of Westlaw and Lexis. Large firms and government offices will be able to devote their considerable resources to ferreting out briefs and other court materials pertaining to sparse unpublished dispositions in order to provide greater context and, thereby, bolster their persuasiveness. Those litigants will have a distinct and unfair advantage over litigants with fewer resources — and, in particular, the many indigent litigants that file actions against government entities.

- Finally, while many proponents of Rule 32.1 have argued that citability will result in greater transparency of appellate proceedings, the exact opposite is more likely in the Second Circuit. Faced with the choice of either providing sufficiently detailed explanations of its decisions to prevent distorted applications in future cases or issuing one-word dispositions, more panels — facing an ever increasing federal caseload — will, out of sheer necessity, choose the latter.

- Thus, the most poignant hardship that will result from Rule 32.1 is that it will deprive many litigants – and primarily the most vulnerable – of the explanation for the court's disposition and, with it, the assurance that the court understood and actually reckoned with the contentions that were raised on appeal.

- Thus, whether the rule forces us to issue longer, more elaborate unpublished decisions, with consequent delay and misallocation of judicial resources, or to do away with giving explanations altogether, leaving parties feeling bewildered and short-changed, the appellate process will be the worse for it.

- **In conclusion, I ask the Committee to reject Proposed Rule 32.1 and to adhere to the principle of local autonomy in matters affecting how a court conducts its own business.**