HEARING ON

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE
BEFORE THE APPELLATE RULES COMMITTEE,
UNITED STATES JUDICIAL CONFERENCE

APRIL 13, 2004, WASHINGTON, D.C.

STATEMENT OF
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CONCERNING PROPOSED FRAP RULE 32.1

I thank the Committee for allowing me to testify here today on the now-famous proposed Rule, FRAP 32.1. The Committee has been hit by an avalanche of some 500 Public Comments, and I confess to having already contributed my share. Under Comment AP-032, you will find a recent article of mine,"No-Citation Rules Under Siege," from the Journal of Appellate Practice & Process, dated Fall 2003 ("Barnett article"). Also at AP-032, you will find an "addendum," filed February 17, 2004, titled "Further Comments of Stephen R. Barnett . . . in Reply to Judge Kozinski," which is my reply to the extensive Comments of Judge Kozinski (AP-169). [2]

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[2] If that is not enough, see my earlier article in the Journal of Appellate Practice and Process, vol. 4, no. 1, Spring 2002, titled "From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules."

Given the daunting pile of Comments and given my previous submissions, I thought I might be most helpful to the Committee today by offering some analysis of the five hundred Comments filed. I will first do that, then will briefly address and update the matter of state citation practices, and will conclude with an observation or two.

I. THE 500 PUBLIC COMMENTS: DOGS THAT DID NOT BARK

The great legal Realist, Holmes -- Sherlock, not Wendell -- solved a case by pointing to "the dog that did not bark." What I find most significant in the mountain of Public Comments before us are some things that are not there, a whole kennel-full of dogs that did not bark.

The Committee's proposed Rule, FRAP 32.1, would require four federal circuits to do what the other nine federal circuits already do: allow their unpublished dispositions (which I will often call "opinions") to be cited. This is also what 22 states already do. (See AP-032, Appendix.) We thus have actual, contemporaneous experience, in both the federal and state contexts, with what equivalents of Rule 32.1 in fact do. What we have in almost all of the five hundred Comments, however, and especially in the overwhelming majority of them that come from the Ninth Circuit, are fears, concerns, and predictions about adverse consequences that assertedly will follow if Rule 32.1 is adopted.

If those predictions are accurate, we would expect to see some evidence of such adverse consequences from the jurisdictions where equivalents of Rule 32.1 already have been adopted. We would expect judges and lawyers from the nine circuits that allow citation ("citable" circuits) to have filed Comments saying to the Committee: "Don't do it! We did it, and look what happened to us." We would expect those Comments to lay out in painful detail all the adverse consequences that have been suffered in those circuits as a result of making unpublished opinions citable. We would expect to get similar warnings from lawyers and judges in the 22 states where unpublished opinions are now citable. In sum, we would expect the Comments here to give us, not just predictions of dire results that will follow if

unpublished opinions are made citable, but reports of dire results that have occurred as a result of making those opinions citable.

That is the first dog that did not bark. In their silence on this point, the Comments validate what Judge Frank Easterbrook wrote in his Comment (AP-367): "What would matter are adverse effects and adverse reactions from the bar or judges of the 9 circuits (and 21 states) that now allow citation to unpublished orders. And from that quarter no protest has been heard."

Specifically, there are three groups of potential Commenters, from the nine circuits that already allow citation, from whom one would have expected to hear of adverse effects or adverse reactions if such effects or reactions existed. I will consider each group separately: (A) federal circuit judges; (B) lawyers; (C) lawyers in Federal Public Defenders' offices. I will then consider three other categories: (D) additional views from Federal Public Defenders' s offices outside the Ninth Circuit; (E) attorneys within the Ninth Circuit; and (F) federal circuit judges within the Ninth Circuit.

A. Federal Circuit Judges in the Nine Citable Circuits

The Comments received from federal circuit judges in the nine circuits where citation to unpublished opinions is now allowed are striking in two respects: their paucity, and their failure to report any adverse reactions or effects from such citability. If making opinions citable had even a slight fraction of the adverse effects predicted in comments from the four no-citation circuits, one would expect federal circuit judges in the other nine circuits to say so. They would say so for the purpose of inveighing against their existing rule in order to get it changed, and they would say so out of a collegial urge to warn their fellow circuit judges of their impending doom. Nothing of the sort has been heard. Striking in the first place if how few comments there are from circuit judges -- including senior circuit judges -- in the nine circuits where unpublished orders are citable. I count six. This itself testifies to an absence of adverse effects. No less informative is what

the six commenters said. None pointed to adverse effects from the current regimes of citability in their circuits. [3]

B. Lawyers in the Nine Citable Circuits

Almost equally sparse are Comments filed by lawyers based in circuits where citation is allowed. (I set aside lawyers based in Washington, D.C., who speak in national terms and without reference to the citation practice in the D.C. Circuit. [4] I also set aside attorneys in Federal Public Defenders' offices, who are considered below.)

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[3] Judge Ebel of the Tenth Circuit (AP-010) -- which allows citation of its unpublished opinions for "persuasive value" (10th Cir. R. 36.3) -- wrote that he had "no problem with proposed Rule 32.1"; he was writing only to head off any future amendment that "might require unpublished dispositions to carry precedential weight."

Judge Michael of the Fourth Circuit (AP-401) opposed Rule 32.1. In doing so, however, he noted that the Fourth Circuit's rule "allows only limited use of unpublished opinions" -- the rule allows citation, when necessary, for "precedential value" (4th Cir. R. 36(c) -- and Judge Michael feared that adoption of Rule 32.1 "would mean the end of our local rule, which is working very well." Judge Michael thus endorsed a rule allowing citation.

Senior Judges Reavley of the Fifth Circuit (AP-170), Bright of the Eighth Circuit (AP-047), Martin of the Sixth Circuit (AP-269), and Aldisert of the Third Circuit (AP-293) all opposed Rule 32.1. All did so, however, on the assumption (which does not seem correct) that Rule 32.1 would change the citation practice existing in their circuit; none found fault with their existing practice allowing citation. Judges Reavley, Bright, and Aldisert did not mention the existing rules in their circuits; Judge Martin praised the Sixth Circuit's rule -- which he viewed as allowing citation, but not for "precedential value" -- as "the optimum compromise."

[4] A thoughtful exception is Lee A. Casey (AP-478) (who opposed Rule 32.1). Admitted in the Fourth, Ninth, and D.C. Circuits, Mr. Casey notes that some circuits ("including the D.C. Circuit") have switched to "more lenient" citation rules, and he observes that "only time will tell whether the fears expressed above will prove correct."

Given the countless Comments predicting that the sky will fall in the Ninth Circuit if citation is allowed, [5] and given the nine circuits and many states in which citation is allowed, one would have expected, from lawyers as from judges in the jurisdictions allowing citation, Comments that warned: "Look what happened to us; don't let it happen to you." What one finds, from lawyers as from judges, are strikingly few Comments from these jurisdictions at all. And while almost all of these Commenters oppose Rule 32.1, their opposition tends to be based on the same fears and speculations one hears from the Ninth Circuit, and only rarely on harms claimed to result from the citation that is actually allowed in the writer's jurisdiction. Again, the dog does not bark. [6]

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[5] One Comment said so almost literally: "Universal citability could shut the system down" (AP-468).

[6] a) From the Fifth Circuit: Harry Susman of Houston (AP-412) and Robert N. Markle of New Orleans (AP-015) oppose Rule 32.1, but do not mention the Fifth Circuit rule allowing citation (5th Cir. R. 47.5.3, 47.5.4); Stephen Marsh (AP-216) writes: "I practice in Texas where the Courts have allowed citation to unpublished opinions for quite some time now. In actual practice it works quite well."

(b) From the Tenth Circuit, John A. Darden of New Mexico (AP-019) opposes Rule 32.1, but without reference to the Tenth Circuit rule allowing citation (10th Cir. R. 36.3).

(c) From the Sixth Circuit, Daniel Tokaji of Columbus (AP-045) opposes Rule 32.1 as something new, not something that already exists for him in the Sixth Circuit's rule allowing citation (6th Cir. R. 28(g)); he does not refer to that rule, let alone deplore it as a kudzu that should not be allowed to spread. Joseph R. Dreitler, also of Columbus (AP-309), does oppose Rule 32.1 on the basis of existing citation rules; locating those rules in "several" unnamed circuits, he faults them for spawning inconsistency between panel decisions. The Committee on United States Courts of the Michigan State Bar (AP-394) supports Rule 32.1 as a "step in the right direction," but would go further and assure citation for "precedential value."

(d) Robert E. Toone of the District of Columbia (AP-092), who has experience in the Second, Fourth, and Eleventh Circuits, does complain of one-word dispositions under current law, and laments one that he experienced in the 11th Circuit; he fears that Rule 32.1 will "provid[e] an incentive for other courts

C. Federal Public Defenders in the Nine Citable Circuits

Other watchdogs that one might have expected to bark would be federal public defenders in circuits where citation is allowed -- barking to warn their colleagues in the other four circuits of the dire effects that citability has where it is allowed. There are a great many Comments, all opposing Rule 32.1, from attorneys in federal public defenders' offices in the Ninth Circuit. These Comments only hypothesize the effects that the proposed rule assertedly would have. When one looks for Comments from federal public defenders in the nine circuits that now allow citation, I count only four. And while these Comments oppose Rule 32.1, they do not rely much on the citability rule under which the commenting attorneys practice. [7]

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to resolve appeals this way," but does not claim that the 11th Circuit's use of one-line dispositions results from its citation rule. Also from the 11th Circuit, E.Vaughn Dunnigan, of Dunwoody, Georgia (AP-322), likewise complains of one-word dispositions and fears that Rule 32.1 will increase them; but he does not refer to, or rely on, the 11th Circuit rule allowing citation (11th Cir. R. 36-2). James K. Jenkins of Augusta, Ga. (AP-275), does mention and criticize the 11th Circuit's citation rule, but his objection to citing unpublished opinions is based on their potential for surprise; this problem would seem remediable by requiring (as most courts do) advance notice of the case to be cited. A series of nearly identical letters from Florida (AP-447, 448, 452, 463) oppose Rule 32.1 as an assumed change in citation practice; they do not mention, let alone criticize, the 11th Circuit rule that already allows citation. Peter Kontio and Todd David in Atlanta (AP-470) also oppose Rule 32.1, also without reference to the 11th Circuit rule allowing citation. Finally, Michael N. Loebl of Augusta, Ga. (AP-454), supports Rule 32.1; he reports, inter alia, that "when researching circuit authority, it is hardly unusual to be hit square in the face with on-point unpublished authority"; further, "litigants are already routinely researching unpublished authority, and the proposition that the proposed rule would somehow increase the cost appellate litigants must bear is unsupportable."

[7] The one that comes closest appears to be AP-333, from Alexander Bunin, currently the Federal Public Defender in Northern New York and Vermont (2d Circuit) and previously Federal Public Defender for Southern Alabama (11th Circuit) and Assistant Public Defender in Eastern Texas (5th Circuit). He writes that from his experience, "allowing citation to unpublished dispositions is not a good practice"; his reasons are that such decisions are "typically case-specific and fact-bound" and "tend to be less well written than those reported." This criticism seems not only mild but counter-productive; Judge Kozinski to the contrary

D. Additional Views From Federal Public Defenders

Given the paucity of comments from Federal Public Defenders' offices in states allowing citation, I conducted my own fact-finding inquiry. I interviewed by telephone recently eight randomly selected Federal Public Defenders, or attorneys in Federal Public Defenders' Offices, in the Fourth, Fifth, Eleventh, and D.C. Circuits. [8] I believe I can summarize fairly the consensus of what they said: [9]

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notwithstanding, "case-specific and fact-bound" decisions are the ones most likely to be helpful to clients in subsequent cases. See the comments of additional public defenders, infra. (Mr. Bunin writes further that "[l]egal research will also be more complicated" -- a prediction, not a report.)

The Federal Public Defender's office for the Eastern District of North Carolina (AP-375) opposes Rule 32.1 solely on predictions of dire effects; the Comment does not mention, let alone rely on, the Fourth Circuit rule allowing citation. (4th Cir. R. 36(c).) The Federal Public Defender for the Eastern District of Virginia (AP- 439), opposing Rule 32.1, does note the "considerable number" of summary dispositions in the Fourth Circuit; he concludes, however, by approving the rule allowing citation in his circuit: "my lawyers' experience with the Fourth Circuit's local rule on the use of unpublished opinions has been that the rule works quite well." The Federal Public Defender in Iowa (AP-418), while opposing Rule 32.1, likewise refers with apparent approval, or at least ambivalence, to the 8th Circuit's rule that allows citation for "persuasive value." (8th Cir. R. 28(A)(i).) (The letter predicts wasteful effects "[i]f the circuit's unpublished opinions become available for citation," although apparently they already are.)

[8] The interviews were conducted on March 15, 17, and 18, 2004. The attorneys interviewed were A.J. Kramer (District of Columbia); Gary Christopher (4th Circuit, Baltimore); Michael Sokolow (5th Circuit, Houston); Brent Newton (5th Circuit, Houston); Ira Kirkendoll (5th Circuit, Dallas); Paul Kish (11th Cir., Atlanta); Tim Saviello (11th Cir., Atlanta); Jacqueline Shapiro (11th Cir., Miami). My notes of these interviews are available for inspection (barnetts@law.berkeley.edu).

[9] The Federal Public Defender for the District of Columbia proved to be a special case. He said he had seen "no change, almost no effect," from the D.C. Circuit's switch to citability last year, but thought his circuit was not a good test, because its new rule was so recent and because it had enormously fewer criminal cases than the 9th Circuit. He said he would probably oppose Rule 32.1, based on his experience as a law clerk in the 9th Circuit.

More than one attorney expressed surprise -- even derision -- that their colleagues in the 9th Circuit were opposed to a rule allowing use of unpublished opinions. Asked whether they thought citability of unpublished opinions in their circuit added to their research time, the attorneys unanimously said no, "it doesn't add any burden at all," or "perhaps a little bit," such as 2.5 percent. This was because the cases "just come up" in Westlaw searches (or website opinion pages), and because the attorneys probably would research these cases even if they were not citable. In the Fifth Circuit, where the unpublished opinions only recently have been posted on line -- and hence there should not be a substantial factor of custom or habit -- the appellate chief in Houston reported that there was "no added burden." [10]

"This is the kind of research lawyers do," at least one attorney said simply. More than one attorney noted that an unpublished opinion "can be helpful when it's right in point," when there's a "specific factual point" that the case involves -- especially in a circuit regarded as "unfavorable" to criminal defendants, where "anything helps."

The attorneys agreed that citability of unpublished opinions entails no financial burden for Public Defenders' offices; LEXIS is provided to those offices free, and Westlaw at the special rate of $150 per month (the same as for federal judges). It was also agreed, however, that the cost of LEXIS and Westlaw already hurts litigants who are pro se or have no right to counsel, and that increasing the citable cases would increase this disadvantage. Finally, the situation is somewhat different in the 11th Circuit, which is the only circuit that does not post its unpublished opinions on the court's website (an exception that will have to end this year, as the E-Government Act of 2002 takes effect (Pub. L. 107-347, sec. 205(a)(5), 116 Stat. 2899, 291)). Researching unpublished opinions is harder in the 11th Circuit, but is less likely to be done, so the additional burden remains slight, the attorneys report.

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[10] These reports are consistent with Judge Easterbrook's observation (AP-37): "Nor is it possible to justify a non-citation rule by reference to the difficulty in handling the great volume of dispositions; computers build indexes on the fly . . . ."

This little survey admittedly lacks the personal verification of signed Public Comments, and it depends on my word, memory, and objectivity. This method is also free, however, of the self-selection and possible solicitation that color the Comments received in a notice-and-comment proceeding. The results I have reported cast a different and useful light, I submit, on the impact that the citability of unpublished opinions has on federal public defenders. Among other differences, my results report actual effects, not just predicted ones. And they generally show that the public defender attorneys who were interviewed welcome the opportunity to cite unpublished opinions.

E. Ninth Circuit Lawyers

Another aspect of the Public Comments in this proceeding that merits note, although the point may well be obvious, is the apparently overwhelming attraction of Ninth Circuit lawyers to one side of the Rule 32.1 issue. Judge Tashima reports that there was "a letter-writing campaign . . . mounted among the lawyers in the Ninth Circuit to oppose the new rule" (AP- 288), and the results would seem to bear that out. The results go further, however; they amount to a landslide bigger than any particular campaign could produce. There are literally hundreds of Comments from Ninth Circuit lawyers opposing Rule 32.1, while Comments from Ninth Circuit lawyers supporting Rule 32.1 can be counted on the fingers of one or two hands.

One may wonder how this can be. How is it that Ninth Circuit lawyers, of all people, so famous for their disputatiousness, their independence, their iconoclasm, their readiness to take on motherhood, apple pie, and (literally) God, have suddenly found an important legal issue on which -- although this Committee and many other lawyers have a different view -- virtually all California lawyers apparently can agree? How has this Committee become such a powerful builder of consensus? Is this the Ninth Circuit, or is it Russia?

The answer lies, of course, not in the fairly counted views of Ninth Circuit lawyers, but in a dynamic of self-selection. There may always be an inertia factor; proposed rule changes may always tend to produce more opposing Comments than supportive Comments. In the case of Rule 32.1, however, we have a powerful additional factor: the

Ninth Circuit Court of Appeals is known to strongly oppose the proposed Rule. Ninth Circuit lawyers who oppose the Rule therefore have every reason to say so; "and may it please the court." Lawyers who support Rule 32.1, meanwhile, have no need to disappoint the judges before whom they practice. These lawyers simply submit no Comments.

F. Judges in the Four Affected Circuits: Counting the Votes

Also silent in this proceeding were the federal circuit judges who neither submitted nor signed any comments on proposed Rule 32.1 -- who did not vote. As I have already reported, the Comments submitted by federal circuit judges in the nine circuits that allow citation are strikingly few -- no more than six. This low turnout may well indicate satisfaction in those circuits with their existing circuit rules that allow citation. As Judge Easterbrook puts it (AP-367), "from that quarter no protest has been heard."

But what about the four "affected" circuits -- the Second, Seventh, Ninth, and Federal Circuits, which now have no-citation rules? From all four of these circuits, protests have been heard in Comments filed here. It is worth looking closer at the "vote counts" in these circuits, starting with the Ninth.

1. The Ninth Circuit

The vote of Ninth Circuit judges here seems monolithic: 38 judges (23 active and 15 senior) opposing Rule 32.1, and only Judge Tashima (AP-288) supporting it. But that is not the whole story. Judges Tashima and Thomas (AP-398) both report that the court was "closely split," or "closely divided," on the proposed Rule. While the eventual numbers of Comments certainly do not support that claim, it may be that, just as Judge Thomas receded from his pro-citation position in the interest of compromise (AP-398), other 9th Circuit judges as well may have sacrificed their own views on the altar of circuit solidarity. This seems especially likely in view of the letter-writing campaign among judges that is reported by Judge Tashima (AP-288). See also Judge Reinhardt (AP-402) (has seen "many" of colleagues' letters opposing rule; understands that others plan to write; knows of no

judge other than Judge Tashima who has written or intends to write in support of rule).

Even so, the Ninth Circuit's "vote" was far from unanimous. Six active judges (including the Chief Judge) did not vote. [11] If nonvotes are considered votes against the majority -- as seems fair here, given the reported campaign -- then the vote among active judges was 23 to 7 (six nonvotes plus Judge Tashima). This is a one-sided margin, but not an overwhelming one. [12] It is only when senior judges are added --with 15 senior judges opposing the rule and three not "voting" [13] -- that the vote comes to appear monolithic. [14]

(Even more than with Ninth Circuit attorneys, one may wonder how it is that Ninth Circuit judges, so famously contentious, ornery, fractious, and individualistic, so habitually ready to dissent, in this case produced only one voiced dissent from 48 judges. Is this really the Ninth Circuit?)

2. The Federal Circuit

The Federal Circuit outdoes the Ninth, producing unanimity against the proposed Rule. See Chief Judge Mayer's letter, AP-086. The Seventh and Second Circuits, however, are deeply split.

3. The Seventh Circuit

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[11] The nonvoters were Chief Judge Schroeder and Judges Pregerson, Kleinfeld, Gould, Rawlinson, and Clifton. It is possible that Chief Judge Schroeder abstained because she sits on the Judicial Conference.

[12] In addition there is Judge Thomas's acceptance of compromise and there is Judge Berzon (AP-134), who would have been "comfortable" with citability for non-"screening" cases and who opposed Rule 32.1 because it would not allow such a distinction.

[13] Judges Choy (dec. March 10, 2004), Betty Fletcher, and Brunetti.

[14] Perhaps the votes of the senior judges should be discounted, in accord with Judge Reinhardt's observation that "some of the seniors are not as interested in this type of issue before us as others" (AP-402).

In the Seventh Circuit, the "vote" among all judges was a rather close nine to six: Eight active judges and one senior judge signed a letter opposing the proposed Rule (AP-396), while three active and three senior judges did not. Among those who did not, Judges Easterbrook (AP-367) and Ripple (AP-335) each wrote thoughtful and forceful letters supporting the proposed Rule -- letters that this Committee no doubt will carefully consider.

Perhaps in recognition of the minority's strength, the majority judges of the Seventh Circuit suggest a compromise. This "would simply be to liberalize the provisions for later publication (and thus full citability) of a decision originally issued in unpublished form." AP-396. If such motions for publication are "routinely granted," as the majority's letter states, the result of citability could be achieved through granting publication of any opinion that a party (or judge) wished to cite. This approach would not necessarily be the pure pretext that it may seem; the need to make the motion for publication (or a court's need to announce that it is publishing the opinion sua sponte) would tend to assure that "unpublished" opinions are not cited gratuitously, but only when they truly contribute to the court's decision. Combined with the relatively close vote and the strong dissents, this suggestion may indicate that the Seventh Circuit could live comfortably with Rule 32.1

4. The Second Circuit

In the Second Circuit, the "vote" among active judges was 8 to 4. Chief Judge Walker's letter (AP-329) opposing Rule 32.1 speaks for eight active judges (himself included), while four active judges did not sign. [15] As in the Ninth Circuit, however, the senior judges overwhelmingly went along, with all eleven of the Second Circuit's senior judges signing Chief Judge Walker's letter, for a total vote of 19 to 4. Unfortunately there has been, apparently, no Comment filed or other statement made on the record by any of the four active judges who did not sign the Walker letter.

As in the Seventh Circuit, however, the Second Circuit majority made a significant compromise suggestion. Chief Judge Walker's

[15] Judges Jacobs, Straub, Sack, and Raggi.

letter suggested that if Rule 32.1 did go forward, it should be drafted "to explicitly operate only prospectively, thus restricting citation to unpublished decisions that issue after the effective date of the rule." AP- 329. As the letter notes, "this is the approach that has been taken by those circuits that have revised their local rules" to allow citability. It is a desirable approach and should be embraced, I believe, by this Committee.

Before leaving the Second Circuit, a telling point should be noted. Although we apparently have no statement from the judges of that court who did not sign Chief Judge Walker's letter, there is in the Second Circuit a mutiny among district judges. As related in my "Further Comments" filed Feb. 17, 2004 (AP-032), at pages 13-15, three district judges in the Second Circuit, within the past two years, have cited and relied on summary orders of the Second Circuit Court of Appeals, in defiance of that court's no-citation rule. Other district judges in turn have cited those Court of Appeals opinions, while a visiting district judge from another circuit has cited two other unpublished opinions of the Second Circuit. (See the Comments of Ira Brad Matetsky, AP-434.)

One of the district judges has explained his disobedience. Judge Lynch wrote that the Second Circuit had decided a previously open question, and had done so in an opinion "which of course is published to the world on both the LEXIS and Westlaw services." Id. at 14. The judge continued:

> [T]he Second Circuit continues to adhere to its technological[ly] outdated rule prohibiting parties from citing such decisions, . . . thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive . . . .

Harris v. United Federation of Teachers, 2002 U.S.Dist. LEXIS 15024, *2 n.2 (S.D.N.Y. 2002) (Lynch, J.).

This is truly a dissenting view in the Second Circuit, perhaps all the more forceful for being expressed by a district judge -- a distinguished district judge -- in defiance of the usual judicial obligation to follow a circuit rule. Judge Lynch's opinion perhaps suggests the depth of the disagreement on this issue in the Second Circuit.

The bottom line, then, is that two or three of the four "affected" circuits -- the 2d and 7th, and arguably the 9th -- are sharply split on the proposed rule to allow citation. In contrast, the nine circuits that now allow citation appear to be quite satisfied with the rules they have. Moreover, both the 7th and 2nd circuits have suggested possible compromises. Futher, Rule 32.1 would allow circuits to permit citation limited to "persuasive value," thus effectively providing another compromise that exists now in several circuits and that many consider essential (see Judge Ebel's Comment, AP-010). Given what Judge Easterbrook calls "the benefits of accountability and uniform national practice," there is nothing in the Comments filed in this proceeding that should deter this Committee from following through on its conclusion that no-citation rules are "wrong as a policy matter." (Committee Memorandum, p. 27)

II. THE ROLE OF STATE LAW

I would like here to bring the Committee up to date on state citation rules and their relevance to this proceeding. The topic has new pertinence because of arguments against Rule 32.1 based on its inconsistency with California's existing no-citation rule. See, e.g., Judge Kozinski's Comments (AP-169), at 16-17. I addressed state citation rules in my "No-Citation Rules Under Siege" article, AP-032 (pp. 477-487), but not in my "Further Comments" in reply to Judge Kozinski (AP-032).

A. Developments in the States

The story begins with a pathbreaking study of state citation rules done by Serfass and Cranford and published in 2001 in the Journal of Appellate Practice and Procedure (vol. 3, p. 251). Next, Judge Kozinski, testifying before a House Judiciary subcommittee in June

2002, relied on that study, summarizing its results in a table appended to his testimony. See p. 9, Tab 2 to his Comments here (AP-169). On the basis of the Serfass-Cranford study, Judge Kozinski asserted to Congress that the "overwhelming majority of states have adopted a prohibition" against citing or relying on unpublished opinions (p. 13), and stated specifically that 35 states "have a mandatory prohibition phrased much like the Ninth Circuit's rule."

Last year, I reviewed the citation rules of the states, added state case law and interviews with court personnel, and came up with quite a different picture. I found that since 2001, six states had switched from not allowing citation to allowing it. (These were Texas, Utah, West Virginia, Alaska, Iowa, and Kansas; see the table appended to my article (AP-032, addendum).) One bit of news that I want to report today is that I missed a state -- a seventh state, North Carolina, also has recently switched to allowing citation (for "precedential value," essentially adopting the Fourth Circuit's rule). See N.C. Rule 30 (e), Jan. 1, 2002; 4th Cir. R. 36(c). Thus, the line-up of states now shows 22 that allow citation and 24 that do not -- virtually a tie. And the trend is even more pronounced than I had thought, with seven states having switched to citability in the past three years, and no states (so far as I am aware) having moved in the other direction.

Further, the movement appears to continue. At least two states, Illinois and Hawaii, currently have before their supreme courts proposals to amend their rules to allow at least some citation of unpublished orders. In Illinois, the Supreme Court's Rules Committee will consider the proposal this month, at the end of April, and may set public hearings for early fall. [16]

In addition, although Judge Kozinski takes comfort that California "is firmly committed to its noncitation rule" (AP-169, p. 17), that is not so clear. There is another bill in the California Legislature this year (SB 1655 Kuehl) that would require the California courts to allow citation of their opinions. And the many comments filed in this proceeding by California court of appeal justices suggest that they do not regard the issue as settled.

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[16] Telephone interview with Martin J. Healy, Jr., Chair, Rules Committee, Illinois Supreme Court, March 22, 2004.

B. Federal-State Consistency

Judge Kozinski's Comment relies on federal-state consistency as a ground for opposing Rule 32.1 (AP-169, pp. 16-17). Federal-state consistency, however, is a two-edged sword. If California were to change its rule to allow citation of unpublished opinions, consistency would argue in favor of Rule 32.1 so far as the Ninth Circuit was concerned. Likewise, if Illinois changes its rule -- as it soon may -- consistency will support Rule 32.1 with respect to the Seventh Circuit as well.

Then there is the present position of the Second Circuit. The Second Circuit has a no-citation rule, but the states within the Second Circuit do not. In New York and Connecticut, all opinions are freely citable, while in Vermont, opinions are citable for persuasive value. See my article, AP-032, Appendix. If consistency should prevail in the Ninth Circuit, contrary to Rule 32.1, why should it not prevail in the Second Circuit, in favor of Rule 32.1? Why shouldn't the Second Circuit allow citation of its appellate dispositions, as the New York courts do? This question perhaps is reflected in the Comment filed here by the Federal Courts Committee of the Association of the Bar of the City of New York (AP- 464), which "enthusiastically endorses" Rule 32.1. Perhaps it is also reflected in the mutiny by district judges in the Second Circuit against that circuit's rule.

The argument for federal-state consistency thus presently supports Rule 32.1 in the Second Circuit while rejecting it in the Ninth Circuit. Given the impossibility of pleasing every circuit and every state, this Committee of the Federal Judiciary would do well to opt for national consistency, and choose the rule that is best for the Nation.

4. CONCLUSION

In closing, the major lesson to be drawn from the 500-or-so Comments filed in this proceeding is, I submit, the lesson noted by both Judge Easterbrook and Sherlock Holmes: from the nine circuits and 22 states that allow citation to their unpublished opinions, "no protest has been heard." This record is extraordinary; while it does not bark, it speaks volumes.

What it says, moreover, brings us back to the heart of the matter, the basic considerations of law and justice that are at stake here. The Advisory Committee, in concluding that no-citation rules "are wrong as a policy matter," may not have been entirely felicitous, but the Committee was right. As Judge Ripple points out (AP-335), "The simple fact of the matter is that unpublished orders do exist and are decisions of the courts that issue them. . . . Allowing counsel to cite this material will go a long way toward ensuring that unpublished orders meet at least minimal standards of completeness and frankness. . . ." As Judge Easterbrook concludes (AP-367), "the benefits of accountability and uniform national practice carry the day." As a Federal Public Defender's attorney in the Fourth Circuit put it, this is "research of the sort that lawyers do."

This Committee accordingly should recommend adoption of the proposed Rule 32.1. Failing that, however, I would renew my alternative proposal (AP-032) that the Committee hold the issue in abeyance for two years. Developments are moving rapidly in this area, both in rule-making by states (and federal circuits) and in the technology, delivery, and practice of legal research. The picture could look different, and clearer, two years from now. There is, however, no need to wait, and I urge the Committee to recommend adoption of the proposed Rule. Thank you very much.

Respectfully submitted,

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cc:

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