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Comments:

I am writing to comment on the new proposed Federal Rule of Appellate Procedure 32.1. I believe that this new rule is very ill-considered and will undermine the value of precedent in all federal circuits. The very existence of unpublished opinions in an era of electronic publishing serves to undermine precedent already. However, at present, in a circuit such as the Eighth Circuit in which I practice, at least the Court has made clear through its local rules that unpublished opinions do not have precedential value (except in subsequent history of the same exact case) and are not to be cited. If Circuit Courts are required to now allow citation to unpublished opinions, and the precedential value of those opinions is left to be determined on an ad hoc basis, how can any attorney possibly advise her client as to what "the law" is on any particular issue? It will be impossible. With the internet and Lexis and Westlaw, the law is already becoming a "tower of bable." This effect will be increased 100-fold with the adoption of proposed Rule 32.1. It would be vastly preferable to adopt a rule forbidding circuit courts of appeal from issuing unpublished opinions rather than to allow such opinions, require that parties be allowed to cite to such opinions, and leave the bar "hanging" as to the precedential value of such opinions. I urge you not to adopt the rule.

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