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Via Facsimile and U.S. Mail:
202-502-1755

Mr. Peter McCabe
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20455

Dear Mr. McCabe:

I am a federal practitioner with over twenty years of experience in both the district court and the court of appeals. I am writing this letter to oppose proposed Federal Rule of Appellate Procedure 32.1 allowing the citation of unpublished opinions for precedential value. I do so on several separate grounds.

First, there is no guidance on how these memorandums are to be considered by the courts. We are guided by a legal system that depends on sound precedential analysis to argue our positions. This stare decisis is either followed by the court or distinguished in some meaningful way. This, in turn, depends on the soundness of the underlying opinions and their value to the issue being decided. Unpublished opinions simply do not have any precedential value and allowing them to be used for any reason with any value undermines the doctrine of precedent and the quality of the opinion in which they are being cited.

Second, these memorandums are written so as not to be useful as any authority. They are designated as unpublishable because the merits of the case is being decided did not warrant an in depth analysis for some reason. Therefore, these memorandums are written with scarce factual background and superficial legal reasoning. The reasons for this are many, but one thing is certain and that is they are not the quality of opinion that anyone would want an important legal decision to rely on or come from. Many cases are useful because of the facts that underlie them. Without this detailed factual outline, the memorandum opinion gives no guidance on how the decision was achieved and is not useful as a citation because the facts cannot be argued either as supporting one position or rejecting another. Many opinions rely on the underlying facts to come to a result, particularly in the area of the Fourth Amendment and reasonable suspicion. E.g., *United State v. Christian*, No. 02-30185 (9th Cir. Jan. 28, 2004). Without this important factual recitation, this opinion and countless others would have very little value and make very little sense as citable authority.

Third, there is a reason that these cases were designated as unpublishable in the first place. This is because the judges that were writing them did not want them to be used for any precedential value. They uniquely understood that the legal value of these memorandums should not be accorded any weight by anyone because of the way they were written and the scant persuasive authority they included.

Finally, citation to unpublished opinions would open up an another body of law for the attorneys and the judges to deal with. If one were to ask any appellate judge to gauge the quality of the research and the writing of the briefs they receive, the answer would not be a very positive one. Adding on this other area of superficially decided law would not enhance the quality of anyone's research, writing or reasoning. There is an ample body of published works that currently guide the decisions of the appellate courts. I doubt that any appellate judge is crying out for more case law to read and interpret.

Unpublished opinions should be confined to their own terms and remain as uncitable authority. They are the skeletons in our vast legal closet and the door to them should remain firmly shut.

Very Truly Yours,

MARIO G. CONTE
Executive Director

MGC/mlk