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4987 Shadow Glen Court
Dunwoody, GA 30338

03-AP-322

February 8, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. The difficulty with the proposed rule stems from the unassailable fact that the volume of mandatory appeals the federal Courts of Appeals must handle makes it impossible to devote to each case the time and attention necessary for the preparation of a published opinion. Unpublished and uncitable dispositions provide reasoned closure to civil and criminal disputes, while conserving resources for the critical preparation of published opinions. Proposed FRAP 32.1 would mandate a rebalancing of these priorities, a rebalancing that would result in a degradation of the quality of published opinions and a loss of respect for the federal judicial system.

Published opinions are precedent; unpublished opinions are not. If that distinction were simple, I would not write this letter. But, in reality, the question of precedential authority is more complex. The Advisory Committee Note emphasizes that proposed FRAP 32.1 does not require that every disposition of a Court of Appeals be given precedential weight, only that each be citable. The Note thus contemplates a system in which a Court of Appeal's published opinions receive their full binding effect, while unpublished dispositions will be used for their persuasive authority only. The Committee imagines a dichotomy real in theory but impossible in practice. The lower federal courts, the state courts, and the litigants appearing before them will not make such distinctions in their search for guidance on difficult questions of federal law. The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist.

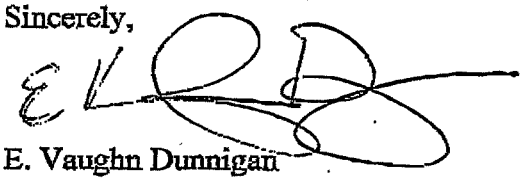
As a clerk for a federal Court of Appeals judge and for a justice of the United States Supreme Court, I saw first hand how much care goes into the preparation of published opinions. But even there, lower courts and litigants often give undue significance to each word, phrase, and punctuation mark beyond anything contemplated by the original decision makers. This problem will be magnified many times with unpublished dispositions, which by necessity cannot be prepared with the attention to detail of published opinions. Unpublished dispositions may not be quite so closely analyzed as published opinions, but they will be greatly overvalued.

This will not be lost on the judges of the Courts of Appeals. Without the assurance that their unpublished opinions will not be distorted beyond their intended purpose, these judges will adopt defensive strategies, each of which is detrimental to the proper administration of justice. Judges may devote more time and effort to the crafting of unpublished opinions, at the expense of published opinions and timely resolution (there are only so many hours, and law clerks, in a day), a result that will degrade and delay all opinions of the court.

More likely, appellate judges will act to prevent the misuse of unpublished opinions by issuing one-sentence orders in these cases. Such orders present no danger of overinterpretation—but also little necessary information to the litigants. A judicial system must be more than a mechanism for the resolution of disputes. A judicial system that keeps the peace and order for which it is intended must engender respect from those who appear before it through an understanding that there is reason behind the resolution. As an assistant U.S. attorney, I see first hand that the defendants most frustrated with their losses in the Court of Appeals are those who receive the disposition "The decision of the district court is AFFIRMED." More of these will result only in more disaffection with our judicial system.

The proposed rule emphasizes difficult questions about the priorities of a judicial system and the appropriate allocation of scarce judicial resources. Each federal Court of Appeals and appellate panel is working through them. Let them continue working. I urge the Committee to reconsider this ill-advised rule.

Sincerely,



E. Vaughn Dunnigan