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

Dear Mr. McCabe:

I am writing to offer a brief comment on Proposed Federal Rule of Appellate Procedure 32.1. The proposed rule would forbid the circuits from adopting "no citation" rules for unpublished opinions.

I understand the appeal of the proposal, but I fear that it will actually make things worse, not better. So I urge that it not be adopted.

My practice includes a substantial amount of appellate work, including work in the Supreme Court, which appointed me to argue in support of the judgment in *Becker v. Montgomery*, 532 U.S. 757 (2001). I clerked for Judges Hufstedler and Coffin as well as Justice Stevens, so I have some idea of how things work in chambers as well as on the advocates' side of the bench.

In principle, any decision has some value as precedent or at least as an illustration of how the law applies to particular facts. For that reason, the results courts reach in one case are of value to lawyers and judges considering the next case. That is why I have some sympathy for proponents of the amendment.

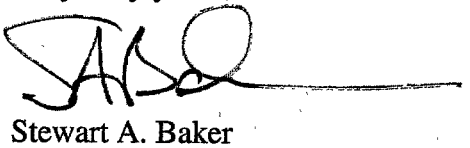
But in the real world, given the flood of cases that cross appellate judges' desks, we cannot expect circuit court judges to labor over every opinion. In the great bulk of cases, the real choice is between a quick, short statement of the court's thinking and no opinion at all. Many circuits simply say "affirmed" in the easy cases today. And more would follow that practice if the new rule were adopted. Rather than say something that might later be misunderstood, they will say less.

In my view, that is a sacrifice we cannot afford. It is crucial that the parties to a hard-fought litigation realize that the court understood and considered gravely the arguments that they raised, and unpublished opinions serve that vital purpose.

There are reasons other than this to encourage the issuing of opinions rather than one-word affirmances. In the most recent Supreme Court case in which I was counsel of record, the Ninth Circuit's decision was unpublished. *Dastar v. Twentieth Century Fox*, 123 S.Ct. 2041 (2003). It was my job to seek *certiorari* from the decision, and I read it with enormous care – and with the losing party's traditional hostility. Even so, I found that it was not a bad or slippery opinion, as some suggest unpublished opinions may be. On the contrary, it was a short, sharp, incisive rejection of many of my client's claims. While we didn't like it, we certainly felt that the court had understood our arguments. That was important to us. It was also important to the Supreme Court, which ultimately granted *certiorari* and reversed. Because the decision came with reasons, it was also possible for the Supreme Court to see exactly how the Ninth Circuit had evaluated our claims and how it had applied circuit law. On the basis of that reasoning, we persuaded the Supreme Court that settled Ninth Circuit law deserved reconsideration. Had the Ninth Circuit simply issued two sentences announcing the result, the Supreme Court would have lacked vital data about exactly how the circuit was applying its past precedents; indeed, it might never have understood the far-reaching implications of those precedents.

In short, the proposed FRAP 32.1 runs the risk of causing great harm to the cause of reasoned decisionmaking, and the casualties will range from appealing parties, who will end up feeling disregarded and disrespected, to the Supreme Court, which will lack a vital source of information as it makes *certiorari* decisions. Ultimately it will undermine the principle that the courts should not simply take care to do justice but should take care to be seen doing justice.

Very truly yours,



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