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February 2, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544-0001

Re: Proposed Change to the Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I write to urge the Judicial Conference on Rules of Practice and Procedure to reject proposed Rule 32.1 of the Federal Rules of Appellate Procedure. This rule would require federal courts of appeals to allow litigants to cite to unpublished opinions. The proposed rule would prove a tremendous burden to appellate judges who would have to effectively treat all dispositions, whether designated for publication or not, as mini-opinions. In the end, the resulting time drain on judicial resources would be undesirable to litigants as well.

Through barring citation of unpublished opinions, courts of appeals are able to expend their limited resources more efficiently than under the proposed rule. Unpublished summary dispositions currently are drafted in a fraction of the time spent on their carefully-polished, published counterparts. Were litigants allowed to cite unpublished opinions, conscientious judges would be forced to reallocate their time. Such judges would have to shift time currently spent refining their more complicated decisions and sitting en banc to ensure the consistency of the body of case law in the circuit to ironing out minor distinctions in less consequential matters and insulating decisions of limited importance against future misapplication.

The proposed rule would be undesirable for litigants as well. This rule would multiply the myriad demands already attendant on our overworked federal judiciary. If courts are forced to treat every case with the same measure of care, regardless of the novelty and difficulty of the legal questions presented, they will take even longer than they do now to issue their opinions. Nor does fewer written opinions with less reasoning behind them benefit litigants. The primary beneficiary of the proposed rule would be attorneys, and their ability to use the body of quickly drafted unpublished opinions out of context to make tenuous arguments.

At present, the decision to allow litigants to cite unpublished dispositions is left to the individual courts of appeals. This practice allows the courts to adapt to the demands of their caseloads. Differences in caseloads lead circuits to adopt different rules. Maintaining this measure of flexibility is necessary to allow courts of appeals to address issues of both quality and quantity. As such, I encourage the Committee on Rules of Practice and Procedure to reject proposed Rule 32.1.

Sincerely,

Daniel M. Nelson

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