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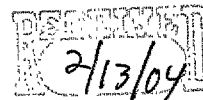
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February 12, 2004

03-AP-352

By Telecopier - 202-502-1755
and By Federal Express

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

RE: Proposed Changes to Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I write to voice my strong opposition to the proposed changes to Rule 32.1 of the Federal Rules of Appellate Procedure and specifically the proposal to allow for the citation of unpublished opinions. This proposal is misguided for a number of reasons, most significantly, because the courts have made a determination that these decisions are not worthy of citation and they therefore should not form the basis for the development of the law.

On a more practical level, allowing the citation of unpublished opinions will likely result in increased costs both to the courts and the litigants and will undoubtedly result in an increased body of opinions comprised of a single word. Given the extent of the caseload that is currently carried by the United States Courts of Appeal, there is simply insufficient time for the courts to fully explicate the legal and factual underpinnings for decisions in all cases presented to them. By implementing a rule that allows for the citation of unpublished decisions, the courts will be confronted with having to either expound more fully on their reasoning or reduce their opinions to the enigmatic words "affirmed" or "reversed."¹

¹ This may also lead to such enigma variations as "vacated" or "remanded" which provide little guidance to the lower courts of the rationale underlying the appellate courts' decision.

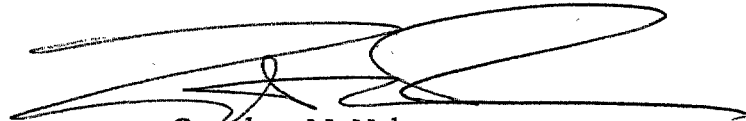
Peter G. McCabe
February 12, 2004
Page 2

And, if the courts determine that the better course is to elaborate on their reasoning, the increased burden that is imposed on them is enormous. Indeed, one of the reasons for the rule providing for the issuance of non-citable opinions is to relieve some of the enormous burdens that already tax our courts. We clearly should be not be increasing those burdens.

Moreover, by imposing upon the courts the obligation to expend more resources and time on decisions that do not warrant publication the courts will be forced to take precious time away from those cases that address novel or significant issues that require considered analysis. The courts should not be placed in the untenable position of having to limit the time necessary to make well-reasoned decisions on cases such as those involving constitutional issues that have broad ranging consequences to the citizens of this country and others. Yet, that is precisely the risk that we run by instituting a rule that will permit the citation of unpublished decisions.

For all of these reasons, I strongly urge that you not implement the proposed changes to Fed.R.App.P.32.1.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Gretchen M. Nelson', with a large, sweeping flourish extending to the right.

Gretchen M. Nelson

GMN:km

FRAP32.1 Letter