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To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Opposition to Proposed Rule 32.1

03-AP-355

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February 12, 2004

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

Re: Comment on Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to express my opposition to Proposed Rule 32.1. I am an assistant federal defender in the Eastern District of California in the habeas and appeals unit, where I have worked since 1995. Prior to that I taught legal research and writing at the Georgetown University Legal Center, and clerked for a federal district court judge and a state supreme court justice. I am thus very familiar with the policy justifications behind "unpublished" decisions and the citation rules concerning them, in both state and federal systems. The views expressed below are mine; I am not speaking for the Office of the Federal Defender.

One of the principal reasons I'm opposed to Proposed Rule 32.1 is that I fear its adoption would lead to further delay in the resolution of cases. Here in the Ninth Circuit, there is already a substantial delay between the filing of a notice of appeal and the issuance of a decision in direct criminal appeals, and an even greater delay in habeas appeals. If unpublished decisions may be cited as authority, even as simply persuasive authority, conscientious judges will inevitably spend more time writing them to set forth sufficient facts and elaborate on the reasoning. A judge's efforts are better spent, in my opinion, on reviewing, researching and writing publishable opinions in difficult and controversial cases than on finely crafting memorandum opinions in routine cases. The Committee Note's observation that the rule does not "require" a court of appeals to increase the length or formality of any "unpublished" opinions that it issues is beside the point -- the committee should not ignore the practical effects the proposed rule would have.

Another reason I'm opposed to the rule is that many litigants in the federal

courts of appeals are prisoners representing themselves who will not be able to access "a publicly accessible electronic database," and who will therefore be at a significant disadvantage in litigating their cases.

I seriously doubt that the absence of a uniform rule poses, as the Committee Note suggests, a "hardship" on lawyers who practice in more than one circuit. Attorneys understand that there's a difference between published and "unpublished" opinions and, at least in the federal courts, there's usually a notation on the face of the "unpublished" opinion itself either citing the applicable rule or quoting it in full. The burden of complying with the rule is minimal and is certainly less than complying with the many variations among the local rules dealing with excerpts of records, lengths of briefs, certifications, etc.

I appreciate the opportunity to comment on this important issue, and I urge the Committee to withdraw Proposed Rule 32.1.

Very truly yours,

David M. Porter

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