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February 13, 2004

VIA FACSIMILE AND FIRST CLASS MAIL

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Re: Proposed Federal Rule of Appellate Procedure 32.1, permitting citation of unpublished decisions

Dear Mr. McCabe:

I am writing to express my opposition to Proposed Federal Rule of Appellate Procedure 32.1, which would permit the citation of unpublished appellate decisions. As a litigator with more than eighteen years of experience, I am concerned that the proposed rule would have numerous detrimental impacts. In this letter, I would like to point out two potential problems that could result from the proposed rule: a decline in the quality of federal appellate decisions and increased delay in the issuance of such decisions.

As a former Ninth Circuit clerk, I am aware that unpublished decisions are usually rendered much more quickly than published decisions and lack the thoroughness of reasoning and exposition that characterizes published decisions. If the proposed rule takes effect, I believe that one of two results will be inevitable. First, the federal appellate courts may eliminate much or all of the reasoning and exposition from their decisions that would otherwise be designated as unpublished, for example by affirming the decision below "for the reasons stated by the district court." This would certainly detract from the quality of the decisions, from their usefulness, and most importantly from their reviewability either by an *en banc* panel or by the Supreme Court. Second, if the federal appellate courts do not react in this manner, they will likely react in the opposite manner, i.e., by setting forth the facts of the case and the court's reasoning in much greater detail than they would had the decision been able to remain unpublished. While thoroughness of treatment may be thought to be an advantage, it will necessarily come at a substantial price – it will vastly increase the time that the court will need to take to render its decisions. In my opinion, this would be too high a price to pay.

I recently received a "for publication" decision from a federal court of appeals that was issued more than seven months after oral argument was held. From my prior experience, I know that it is not unusual to wait for six or more months – sometimes even more than a year – after oral argument for a published appellate decision to be issued. The waiting time for unpublished decisions is usually much shorter, since the decisions themselves are usually much shorter and more cursory. If all appellate decisions are to be citable, as the proposed rule contemplates, and if the courts of appeals respond by setting forth the facts of each case and the court's reasoning in much greater detail than they would have done under the present rule, I fear that the result will be a substantial increase in the delay in the issuance of decisions. Although it would not take any additional effort for the courts to prepare the decisions that would have been designated "for publication" under the present rule, they will have less time over all to devote to those decisions due to the increase in effort that will be necessary to prepare the decisions that previously would have taken the form of shorter, unpublished decisions. Thus, the delay in the issuance of *all* decisions will increase and, I suspect, will increase substantially. Since, in many cases, justice delayed is justice denied, I am convinced that the likely result of greater delay in issuing decisions will not be worth whatever benefit might result from the proposed rule.

Thank you for your consideration.

Sincerely,

Jeffrey B. Demain