# Citizens for Voluntary Trade

*Better Living through Rational Thinking*

03-AP-414

February 16, 2004

Peter G. McCabe
Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

*Re: Proposed Amendments to Federal Rules of Appellate Procedure*

Dear Mr. McCabe:

On behalf of Citizens for Voluntary Trade, I submit this letter in support of two of the proposed amendments to the Federal Rules of Appellate Procedure.

*Rule 32.1*

CVT strongly supports adoption of proposed Rule 32.1, which would permit citation of non-precedential opinions in all federal circuits. CVT and its officers regularly file briefs before the federal courts as *amicus curiae*, and we believe the proposed rule will not adversely harm litigants or the overall quality of justice administered by the courts of appeals.

Those circuits which currently limit or forbid the citation of unpublished opinions have the burden of justifying their action. In a common law system, *all* cases must be presumed citable and precedential. A proper common law system is objective; that is, "men must know clearly, and in advance of taking an action, what the law forbids them to do (and why), what constitutes a crime and what penalty they will incur if they commit it".[1] The judicial reliance on precedent and the doctrine of *stare decisis* serve an integral role in preserving objective law. Precedent binds an appellate court—and the lower courts within its jurisdiction—to the principles of law it has previously stated. Any deviation from these practices must be justified as necessary to advancing the underlying principle of objective law.

The appellate court judges opposing the proposed rule present two major justifications for preventing citation of non-precedential opinions: The risk of higher cost to litigants and the burden of additional costs on the judges themselves. Neither of these arguments are convincing. I can speak with direct experience as to the first argument.[2] CVT and its officers regularly file briefs with various courts despite our relative lack of financial and staffing

[1] Ayn Rand, "The Nature of Government" *in* The Virtue of Selfishness at 149.

[2] While many of the comments filed in opposition to the proposed rule, notably those of Ninth Circuit Judge Alex Kozinski, broadly assert the proposed rule will adversely harm "poor and weak litigants", there is no empirical evidence we're aware of that proves this argument. The Yale Law Journal case note that Judge Kozinski cites, for example, offers a number of rhetorical arguments without presenting any supporting data.

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resources. I myself have filed numerous briefs *pro se* although I am not a member of the bar. In all my time preparing briefs, the researching and consideration of unpublished opinions has never proven to be a crippling burden, or even a major inconvenience. Quite the contrary: Given that many of the cases I deal with (mostly antitrust matters) have few published opinions, I take particular care to examine unpublished opinions to ensure I am thoroughly familiar with the historical background of a particular legal issue. At the same time, however, I have never had occasion to cite an unpublished opinion, because I am competent enough to recognize that judges disfavor such citations, and in no case have I found an unpublished opinion necessary in advancing my argument.

This brings me to the argument of judicial economy. Virtually every judge who opposes the proposed rule (including the bulk of the Seventh, Ninth, and Federal circuits) contends that permitting citation of non-precedential opinions will have a draconian effect on the overall caseload of their respective courts. Judges won't be able to manage their dockets efficiently, we're told, and the inevitable result will be a reduced quality of justice across-the-board. This fear may be justified. It's entirely possible, as Judge Alex Kozinski predicted, that permitting citation of all non-published opinions "will create a veritable amusement park for lawyers fond of playing games". To avoid such an outcome, judges will of necessity write less-and-less in their unpublished opinions to the point where most cases will be disposed of with one sentence orders affirming or reversing the lower court.

There are two problems with this argument. First, it constitutes an admission of the very problem the proposed rule's opponents seek to avoid—reducing the quality of justice to less-affluent litigants. And second, the existing non-citation rules serve only to mask the root causes of this lesser quality of justice.

In his comments, Judge Kozinski makes a telling confession: "unpublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys". This means that while judges decide the *results* of all cases, the actual language used to explain the decision are written entirely by individuals who are not Article III judges. This practice is consistent with the view that unpublished dispositions are meant only for the consumption of the parties to the litigation, and the general public should derive no precedential value from the text.

But this completely subverts the fundamental premise of *objective law*. The Article III courts are not a mere private arbitration forum; they are a place where the people of the Nation come together to enforce a common standard of conduct consistent with the principles of reason and constitutional law. By segregating the overwhelming majority of cases—more than 85% of Ninth Circuit cases alone, according to Judge Kozinski—into a judicial ghetto of unpublished memoranda, the courts are *already* denying fair and equal justice to those litigants, the same "poor and weak" persons adoption of the proposed rule would allegedly harm.

If the result of adopting the proposed rule is to force judicial *staff* to write less in unpublished orders, then so be it. It is better to have a one-sentence disposition written by an actual judge then three pages written by a recent law school graduate masquerading as a judge. There is no point, in our view, for offering an explanation of the court's reasoning to litigants when the court itself is unwilling to be bound by that reasoning.

None of this suggests there isn't a real problem managing the caseload in the courts of appeals. But efficient docket management does not, by itself, justify the wholesale *fraud* inherent in labeling seven out of eight dispositions the work of bona fide Article III judges. At a minimum, courts that employ such an approach should clearly disclose the precise character of non-judge-written memoranda. For example, such dispositions could contain the following header: "This memorandum was prepared by the court's staff for the convenience of the parties. Nothing in this disposition, except for the judgment, should be deemed precedential or binding on any court in this circuit". This warning would make it abundantly clear that certain unpublished memoranda in no way reflect the writing of any circuit judge.

But the larger problem reflected in the current debate over non-precedential opinions is the ever-expanding caseload of the appellate courts. There are a number of areas that Congress must address: Splitting the Ninth Circuit into two or more circuits, creating additional judgeships throughout the system, ending the standing impasse between the White House and the Senate over how best to confirm judicial nominees, and ultimately, reducing the scope of the Article III courts' jurisdiction. Until these issues are addressed, however, the judiciary itself should not try to mask these problems by resorting to such crude fixes as *arbitrarily* banning the citation of unpublished opinions. If adopting the proposed rule inconveniences circuit judges in the short term, perhaps policymakers will be spurred to take the necessary action to fix the underlying flaws in the judicial system. But the status quo will never be challenged so long as judges sweep the system's flaws under the proverbial rug.

*Rule 35(a)*

CVT supports the proposed amendment to Rule 35(a). This amendment qualifies the existing requirement for hearing an appeal *en banc* by including only non-disqualified judges in the base number of judges voting. As the Advisory Committee has explained, there are currently three separate methods of calculating the necessary majority for an *en banc* determination. The proposed amendment properly creates a uniform national standard.

The Federal Circuit, in its comments, opposed the proposed amendment because it could lead to a circumstance where an absolute minority of circuit judges could set policy for an entire circuit. The Federal Circuit alluded to a case before that court where three of the twelve active judges were recused, meaning had the proposed amendment been in place, an *absolute minority*—five of twelve—could vote to grant rehearing *en banc* and issue binding precedent.

The Federal Circuit's argument is unconvincing. First, absolute minority control already exists in the Ninth Circuit, where only 11 out of 28 active judges sit during *en banc* determinations. This means six justices out of 28—less than 22%—can set policy for that entire circuit (although a majority of the full 28 must still vote to hear a case *en banc*). Clearly Congress was not fundamentally opposed to the idea of minority control when it enacted the provisions governing the Ninth Circuit's size and *en banc* determinations. And the fact several other circuits already employ the "case majority" approach proposed in the amended Rule 35(a) only further undermines the Federal Circuit's position.

Additionally, general principles of parliamentary law caution against including recused members from a base-majority calculation. Aside from issues of quorum, where a majority of

active members should always be required, a body must be able to act regardless of the number of members recused. Counting recused judges as part of the base unduly prejudices the litigant seeking *en banc* determination, since the recused judges are effectively automatic "no" votes. This hardly serves the general interests of justice.

As to the Federal Circuit's view that each circuit should decide for itself the proper base-majority, the fact Congress itself set the majority requirement for *en banc* determination strongly suggests the legislature intended there be a single national standard. It is unreasonable to read Congress's mandate differently based on the views of a particular circuit's judges. A national rule is appropriate, and in this case, the proposed rule establishes a fair and just standard for computing a majority.

Thank you for your consideration of these comments, and our thanks to the Committee for their work on these important matters.

Sincerely,

S.M. Oliva
President, Citizens for Voluntary Trade