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Via Fax 202-502-1755

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

Dear Mr. McCabe:

I am writing to express my strong opposition to proposed FRAP 32.1. As I understand the proposed rule, it would require courts of appeals to allow the citation of so-called "unpublished" memorandum opinions. This is a very bad idea, as it would make law practice in the federal courts more difficult and expensive, and place particularly heavy burdens on small law firms like my own.

I have been a lawyer for over 25 years, and have practiced in state and federal courts across the United States. For the past seven years, my practice has focused on special education law, representing disabled children and their families in actions to obtain a free, appropriate public education as guaranteed by the Individuals with Disabilities Education Act (IDEA). I recently joined with another attorney to form a two-person firm, specializing in this area. Most of our practice at this time is in the courts of the Ninth Circuit.

Our clients are individuals and families to whom the cost of legal services is a serious burden. We try very hard not to refuse clients with viable claims even when they are short on funds. To that end, keeping the cost of legal services affordable is a constant struggle. I am firmly convinced that repealing the Ninth Circuit rule that prohibits the citation to unpublished opinions will significantly increase the cost of legal services, and may price some of our neediest clients out of the market.

The increased cost would come in two significant ways. At this time, we can limit our legal research to the relatively few IDEA decisions published by the Ninth Circuit every year. However, if it were permissible to cite unpublished memorandum opinions, we

would have a professional obligation to research those as well, to determine whether they might contain something useful. Although not much may be found, the cost of looking will add significantly to the burden and cost of litigation.

More serious, is the likely increase in litigation cost in disputing the meaning and significance of unpublished opinions cited by opposing counsel, who are often members of large firms with substantially greater personnel and resources. My experience over the years has been that where the judges have not seen fit to certify an opinion for publication, they have had good reason for doing so. Usually, the discussion of the facts is so cursory it is hard to figure out what's going on, and the discussion of the law is often imprecise and sometimes misleading, so they are not very useful as precedent. Yet, if opposing counsel were to cite such dispositions in their briefs, we would have no choice but to discuss them all. Valuable time and client money would be spent arguing about whether some stray statement in an unpublished opinion that probably was written by a law clerk or staff attorney without much judicial supervision really reflects the law of the Ninth Circuit. I can see no justification for imposing this additional burden on the parties, especially parties like our clients to whom a few hundred dollars in legal fees may make the difference between maintaining their case and giving up.

I am aware, of course, that the term "unpublished" is no longer quite accurate because unpublished opinions are widely available on Westlaw and Lexis, and one some free websites as well. Perhaps the term should be changed to "un-citeable" instead. But the very fact that they are widely available is what makes them so likely to be abused. We need the non-citation rule to keep the parties from escalating the cost of law practice by delving into the morass of these essentially useless materials to find some ambiguity they can exploit.

I urge the committee not to go forward with the adoption of a national rule on this issue. However, if the committee believes that a national rules is necessary, it should adopt a rule like that in the Ninth Circuit, which prohibits citation of unpublished opinions except in certain very limited circumstances, such as to such res judicata.

Sincerely,

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