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To: Rules_Comments@ao.uscourts.gov
cc:
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I write to encourage you to reject proposed Federal Rule of Appellate Procedure 32.1, which would make all heretofore unpublished dispositions citeable precedent. The rule would impose significant costs on the judiciary, but my particular concern is with the damage it would do to the coherent development of the law. Most nonprecedential decisions are so designated because the legal issues they raise have been well settled for some time. Publishing these opinions will not, therefore, expand the public's knowledge of the law. Indeed, it will likely have the opposite effect.

Rather than simply quoting prior opinions verbatim, judges writing an opinion -- published or unpublished -- tend to rephrase the legal principles in their own words. Lawyers are skilled at taking those small variations in language and parsing them for hidden meaning. In my own field, patent law, lawyers have created any number of purported conflicts within the jurisprudence of the Federal Circuit by reading language from two different cases to create two different legal standards, even though the judges writing those opinions likely intended no such disagreement. If we make judges publish all their opinions, we will see countless such minor variations on simple, well-settled legal rules. Lawyers will exploit those unintended variations, and the courts will have to deal with a tidal wave of illusory splits in circuit precedent.

There is a way for courts to avoid this problem. If FRAP 32.1 is implemented, judges may well avoid publication by declining to write an opinion at all, affirming without opinion under Rule 36. This would solve the problem of unnecessary variation in opinions, but at great cost to the parties, who would not learn why their case was decided the way it was. It would also be a perverse consequence indeed for a rule change that purports to give the public greater access to judicial decisionmaking.

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Background and publications can be found at
<http://www.law.berkeley.edu/institutes/bclt/pubs/lemley>