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January 26, 2004

Peter G. McCabe
Secretary of the 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 recognize that the arguments for and against proposed Rule 32.1 have all been set forth in exhaustive detail. I make no pretense of having any new substantive slant to offer.

I am writing, however, to address the almost genetic paranoia that an astonishing number of my colleagues have where non-publication is concerned. Since 1967 I have practiced in California and have handled a wide variety of civil matters at both the trial and appellate level. I have been the lead attorney in more than 50 appeals. For 30 years I have been a member, and am a past president, of the California Academy of Appellate Lawyers, as well as a member of the American Academy of Appellate Lawyers.

During that time, I have listened to my colleagues, especially the appellate specialists, rail against the evils that are supposedly done under the sinister cloak of non-publication. For more than three decades I have been asking for specific examples and have yet to be provided with one. I know that while he was a member of the California Appellate Process Task Force, my colleague Peter Davis made a formal solicitation for examples and he too was never provided with one.

I agree with those who think it would be "nice" if all opinions were published and available for citation. The old argument that publishing everything

would render the advance sheets too heavy to pick up, has been undercut by the advent of computers.

However, that "nicety," in the Ninth Circuit at least, can only come in one of three ways, each of which has an enormous downside:

1. Judges will take the time to craft all opinions with the care that they now devote to those which are designated for publication. In that world, we would be besieged with studies about what percentage of litigants die before their cases can be decided.

2. Judges will adopt an egalitarian approach in which all cases receive exactly the same time and attention. That would, of course, mean a world of K-Mart justice with universal mediocrity and endless frustration over both lack of clarity and clear cut development in the law.

3. What will really happen is that Judges will issue the decisions in the cases they formerly designated for non-publication as summary dispositions (i.e., "affirm" or "reverse" without any explanatory rationale) or at least in such a truncated, fact-specific way as to render them worthless as precedent.

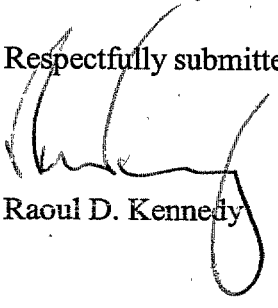
Whatever the situation may have been in John Marshall's time, the press of business in the current judiciary does not permit bespoke tailoring of every appellate opinion. The finite (indeed all too finite) resources have to be rationed in some way. Absent some demonstrably identifiable problem, that rationing should be left to the judges whose time is being rationed. One of the most attractive feature about the present situation is that each Circuit gets to decide which method of rationing is best for its judges and caseload. As things now stand we have a dozen (including the Federal Circuit) laboratories in which to experiment with differing approaches to rationing.

The proposed Rule destroyed that flexibility in favor of a Soviet-style, central planning approach, all for the purpose of solving a problem that does not exist in the first place, other than in the minds of people such as my appellate colleagues.

I urge that the Rule not be adopted.

Finally, I need to emphasize that I am expressing these views solely as one long-time practitioner and they are not a statement of my firm's position.

Respectfully submitted,



Raoul D. Kennedy