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February 9, 2004

VIA FACSIMILE AND U. S. MAIL

03-AP-312

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 Rule of Appellate Procedure 32.1

Dear Mr. McCabe,

I am writing to oppose the proposed Rule 32.1. I have been the Federal Defender for the Eastern District of California since 1996. Prior to that, I was a Criminal Justice Act panel attorney here in Sacramento. I am the Chair of the Ninth Circuit Advisory Rules Committee. I write from these various perspectives, but solely in my personal capacity.

First, I do not think that the citation or non-citation of unpublished decisions is a proper subject for a national Federal Rule of Appellate Procedure. It is my understanding that at least five circuits place restrictions on the citation of unpublished decisions. I know that in the Ninth Circuit, the subject of citation to such opinions has been the subject of considerable study and debate, which has resulted in our present rule, generally restricting the use of these dispositions. The present rule was first proposed as an experiment, with a sunset clause, and then after some experience with the rule, was made a permanent rule. I know that the members of the Ninth Circuit, their Advisory Committee, and many attorneys throughout the circuit have given great thought to this matter, and we are convinced that our present rule is the one that we would like to govern our practice. If other circuits feel differently, they obviously have the ability to tailor their local rule to fit their local situation. There seems to be no compelling reason for a national rule on this subject, which would overrule existing circuit rules.

Second, I am concerned that the proposed rule will place an undue burden on federal defenders and CJA panel attorneys. As it is, under Strickland v. Washington, we have an obligation to stay

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abreast of the published decisions of not only the Ninth Circuit, but also all the other circuits. If the proposed rule is adopted, we would then have to also research the unpublished decisions, not only of the Ninth Circuit, but of the other circuits throughout the country. This appears to be an unnecessary burden which will likely produce little for the benefit of our clients, but which will reduce our ability to work on other matters and other cases.

Third, the very nature of the Ninth Circuit unpublished dispositions argues against their being cited to any court. They are summary dispositions, with little factual background and limited legal discussion, intended merely to resolve the case before the Court. As such, they provide little reasoned guidance to judges or lawyers. Furthermore, legal errors in these memoranda are seldom corrected by en banc review, because of their case-specific nature.

Fourth, the Advisory Committee note speaks of the difficulty for attorneys in picking through the conflicting circuit rules on citation of unpublished decisions and concerns about being cited for unethical conduct for improperly citing one. With all due respect to the Committee, that hardly seems a solid basis for enacting a national rule. Lawyers often have to pick their way through the law, and they always have to worry about unethical conduct if they purposely violate the law. There is nothing about the unpublished decision rules that is particularly difficult to understand or abide by.

Finally, the proponents of the rule argue that they merely want to cite non-published decisions for their persuasive value. Obviously, they can do so, without citing to the opinion itself, by merely incorporating the reasoning of the opinion in their argument. What they apparently want to do is to use the sanction of three-judges' approval of the opinion to add to its persuasive value. The judges of the Ninth Circuit have made clear that their memorandum decisions are not meant to be used in that way.

For the foregoing reasons, I urge that the Committee withdraw the proposed Rule of Appellate Procedure 32.1.

Very truly yours,



Quin Denvir

QD:jk