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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

VIA FACSIMILE and MAIL: (202) 502-1755

Dear Mr. Secretary:

I write to urge against adoption of the proposed Federal Rule of Appellate Procedure 32.1, which would permit the citation of non-published dispositions in the federal courts of appeal. The Proposed Rule does nothing to resolve the ongoing debate about the propriety of non-published decisions. Instead, it serves only to muddy a system that practitioners understand and, largely, accept. Implementing the Proposed Rule would make federal judges' difficult jobs even harder, dilute the quality of litigation, and likely aggravate the perceived "evils" that non-published decisions represent to those few strident critics that oppose them.

I recently completed a two-year clerkship with a judge on the Ninth Circuit Court of Appeals. During my tenure, I read a sizable percentage of the court's unpublished decisions. I also had the opportunity to participate in the court's screening program. As a participant in that program, I presented several cases to a panel of three judges, all of which were resolved in unpublished decisions. Through reading and drafting unpublished decisions, I came to understand their purpose. They are an attempt at transparency – not, as their critics charge, at obfuscation.

The unpublished decision serves as a letter to the parties explaining the reasoning behind a particular decision. The panel explains concisely but clearly exactly why it has reached a particular result. The only reason the

decision is unpublished is because the panel has concluded that the question has already been resolved in settled, published decisions. Therefore, a published decision is not necessary. The only thing that is required is that the parties understand why the dispute has been resolved in the way that is has.

Drafting an unpublished decision is not an easy matter, it is just easier than drafting a published decision. When drafting an opinion, every word must be chosen meticulously to avoid creating confusion among the court's published cases. One misplaced word could lead to an avalanche of new litigation about a non-issue. Deeming a decision non-published eliminates this pressure in the appropriate case, allowing the panel to explain its reasoning through settled law when a published decision is unnecessary.

If the Proposed Rule is adopted, however, the court will have no choice but to eliminate this effort at clarity. The unpublished decision will cease to offer any explanation at all. This is the only way the court will be able to preserve the freedom to decide the appropriate case efficiently. In fact, Judge Reinhardt recently predicted exactly this result should the Proposed Rule pass. See Bashman, Howard, *20 Questions with Judge Stephen Reinhardt* (February 2, 2004), *available at* http://20q-appellateblog.blogspot.com/.

Should this Proposed Rule be adopted, the individual litigants in those cases decided tersely will be the first to suffer, but by no means the last. As a practitioner and as a clerk, I have found unpublished decisions very useful as a tool to root out the best published cases for a particular issue. Of course, I have had the experience of coming across an unpublished case that is precisely on point for a particular issue. There is nothing in the present system that prevents me from adopting the reasoning in that unpublished decision wholesale, and arguing for the same result in a similar case. If the Proposed Rule passes, the likely effect will be that the vast majority of the court's current caseload will be decided without any reasoning at all. This will make divining the court's thinking on a particular issue much harder, robbing practitioners of the convenient research assistance that unpublished decisions currently provide. The momentary efficiency of citing to that unpublished case, rather than adopting its reasoning, is hardly worth the cataclysmic inefficiency that is likely to result in the long run.

Litigants and practitioners are not the only ones who will suffer the aftereffects of this short-sighted Rule. Permitting the citation of unpublished decisions will make federal judges' jobs more difficult in not only deciding cases, but also in preparing cases. Briefing already suffers too often from lack of candor, poor reasoning, and bad writing. As a clerk, I very often had to start from scratch in order to make sense out of a particularly badly-argued case. One thing I was routinely grateful for was that you could usually count on the parties to root out those published cases that best supported each side of the controversy. If unpublished decisions begin making routine appearances in the briefing, I fear that litigants' urgency to uncover the best published cases will wane. As the Committee is aware, it can pass the Proposed Rule – but it cannot change what the judges themselves think about unpublished decisions. Because unpublished decisions will fail to persuade, judges and their clerks will be forced to root even further beneath the surface of the parties' submissions to get to the right answer.

My primary concern is the effect this Proposed Rule will have on the Ninth Circuit. My experience there convinced me that the court cannot function without the screening program and the corresponding freedom to decide the appropriate case in an unpublished decision. The Proposed Rule fails to recognize that different courts have different reasons for resorting to unpublished decisions. The courts of appeal have not taken this issue lightly. The Proposed Rule disregards the years of experience and careful consideration that each court has put into this issue. At the very least, I would urge the Committee to adopt a rule that more honestly reflects the different sizes and corresponding workloads of the federal courts. If the Committee must address this issue, do so in a manner that permits the courts of appeal to preserve local control.

Thank you for considering my comments.

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