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Reply to:
Michael K. Powell, AAFP

February 12, 2004

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:

This letter is a comment to the Committee registering my opposition to the adoption of the proposed new Rule to the Federal Rules of Appellate Procedure, Rule 32.1, which – if approved – will allow citation to unpublished opinions.

Unpublished opinions contain little precedential value and are generally of interest only to the litigants. Most consist of a bare bones report of the facts – if any – and no legal analysis beyond a cursory citation to a case. It is obvious from these factors that reasoned reflection – which is the hallmark of a published decision and a necessity for the rational development of the law – is absent from unpublished opinions.

The lack of a full report of the facts and sketchy legal analysis renders unpublished opinions virtually worthless for any subsequent appellate litigation. It is my belief that many unpublished decisions are a result of mundane and poorly litigated cases that are undeveloped factually or legally – leaving a Court of Appeals unable to engage in any meaningful legal or factual analysis worthy of precedent.

2/13/04

03-AP-354

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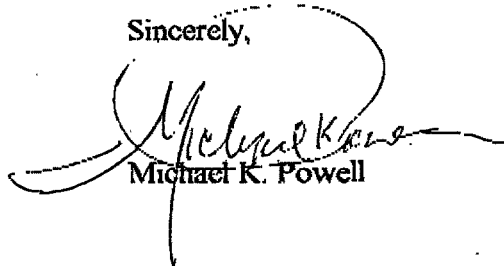
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One must remember that in our explosively litigious society the case load in the federal courts of appeal is massive – as is the body of law resulting just from the published cases.¹ Adding unpublished cases to the appellate corpus would only serve to add another layer of undigested complexity to a system that is already choking.

An alternative to the wholesale use of unpublished opinions is already in place -- a motion by a party to publish the opinion. If the issue is significant and advances the development of the law -- then the panel or panel member that authored the opinion then may have the opportunity to improve the quality of the opinion prior to publication.

Thank you for the opportunity to provide comments on a subject that is so important to maintaining the quality of federal jurisprudence.

Sincerely,



Michael K. Powell

¹The current limitation on citation to unpublished cases originally was enacted in response to the increase in cases and the limited judicial resources available. In 1964, the U.S. Judicial Conference recommended limiting publication to those opinions containing precedential value. *Judicial Conference of the United States*, Report 11 (1964). The recommendation was adopted by the Judicial Conference in 1973. *Judicial Conference of the United States*, Report 12 (1973). Since the inception of this decision, the problem of increased case loads and limited judicial resources has not been remedied.