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03-AP-357

February 13, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington D.C 20544

Re: Opposition to Proposed Federal Rule of Appellate Procedure 32.1

To the Committee:

I write to urge the committee to reject the proposed new Federal Rule of Appellate Procedure 32.1, which—if approved—will allow citation to unpublished memorandum opinions. My reasons are threefold.

First, no compelling reason exists to force each federal circuit to be a mirror image of the other in this respect. Uniformity for the sake of uniformity alone is never a good idea. The problems of the Tenth Circuit Court of Appeals—which I am familiar with from my days in private practice in Denver, Colorado—are very different than the problems of the Ninth Circuit Court of Appeals—a circuit in which I have practiced exclusively in since 1992. If the judges of one circuit believe they can best keep control over the law of the circuit by prohibiting citation to unpublished decisions, it is not wise or prudent to remove their authority in that regard. A rule to the contrary ignores the simple truth that federal circuits differ considerably in the size and content of their caseloads.

Second, there is a reason why unpublished decisions are not published. Published decisions seek to articulate new legal principles and are written with an eye toward guiding the lawyer in his or her understanding to the law. Unpublished decisions are of interest and significance only to the parties and are written with an eye only toward guiding the lawyer as to the result reached in that case. Permitting citation to unpublished decisions—in my view and experience—muddies the law and provides unnecessary opportunity for injustice.

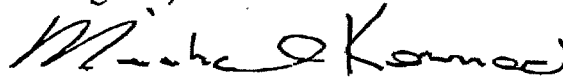
The Committee on Rules of Practice and Procedure

February 13, 2004

Page 2

Finally, the burden and disadvantages of a uniform rule permitting citation to unpublished decisions will place upon appointed counsel, particularly CJA panel attorneys, who are overwhelmingly sole practitioners, outweigh any claimed benefit from a uniform rule. Research of each unpublished decision -which must be done if a lawyer is to provide effective assistance of counsel to his or her client under the Sixth Amendment-will dramatically increase the cost of representation at a time when dollars for indigent defense could be much better spent. In the strongest terms, I urge you to resist the temptation to simply make one-size-fit-all and instead leave the question of whether to permit citation to unpublished opinions to the judges of each Circuit.

Best regards,



Michael J. Kennedy

First Assistant Federal Defender