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February 12, 2004

03-AP-382

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Mr. Peter G. McCabe  
Secretary, Committee on Rules of Practice and Procedure  
Administrative Office of the U.S. Courts  
Washington, D.C. 20544

Re: Comments In Opposition To Proposed Federal Rule Of Appellate Procedure 32.1

Dear Mr. McCabe:

The Attorney General's Office of the State of Washington appreciates the opportunity to comment on proposed Federal Rule of Appellate Procedure 32.1 which would authorize citation to judicial opinions and other written dispositions that the issuing appellate court has designated as unpublished or non-precedential. We also appreciate the work of the advisory committee that generated this proposal. However, this office opposes the proposed rule. Our principal reasons for opposition are set forth below.

We understand the designation unpublished or non-precedential to reflect the considered judgment of the decision-making court that, based on the issues in a particular case, its fact-specific nature, the quality of the argument presented, the thoroughness of the court's written analysis relating to its disposition, or some other good reason, it is inappropriate to rely on the decision beyond the specific case in which it is issued. In our view, the decision-issuing court is ideally situated to make such a determination, and its judgment should be respected. For essentially the same reason, we also believe that the quality of appellate decision-making will not be well-served by treating such dispositions as something they never were intended to be. In addition, although this office recognizes that the proposed rule would not require these dispositions to be treated as precedential, we struggle to understand the purpose for allowing such dispositions to be cited if they are not to be given weight in subsequent cases. At the same time, under the current rules, parties are free to use unpublished determinations by transforming persuasive analysis from such decisions into arguments on appeal.

We also are concerned with the accessibility of the broad categories of dispositions to which the rule would apply. We understand that the rule would require a party who cites an unpublished or non-precedential disposition to provide a copy of the disposition to the opposing party. But providing a copy of a cited disposition when other dispositions in similar matters are not readily available, fails to provide full or equal access to decisions that could influence the resolution of an appeal.



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Finally, we seriously question whether the extensive resources that litigants would have to devote to locating and evaluating decisions of this sort would be justified by their uncertain role and value in the appellate decision-making process. At the same time, the uncertain value of such dispositions will make it increasingly difficult to advise clients with respect to the current state of the law.

Thank you for your consideration.

Sincerely,

*Maureen Hart* by *Wendy Schamber*  
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